




MEMORANDUM

To: Duane Williams, Administrator MCS
Dave Ohler, Chief Legal
From: Valerie D. Wilson, Staff Attorney 
Date: January 9, 2012
Re: Special Fees on Certain Permits for Oversize Loads

QUESTION PRESENTED

Does MDT have statutory authority to implement administrative rules allowing a special fee on carriers transporting oversize loads on specific routes in order to finance utility relocations that will accommodate oversize loads on those specific routes?

SHORT ANSWER

MDT has no statutory or other authority to implement an administrative rule imposing a special fee on oversize loads on specific routes to fund permanent relocation of utilities without legislative action.

AUTHORITIES

- Mont. Code Ann. § 2-4-305
- Mont. Code Ann. § 60-2-201
- Mont. Code Ann. § 60-4-402
- Mont. Code Ann. § 61-10-124 through §61-10-126
- Mont. Code Ann. § 61-10-129
- Mont. Code Ann. § 61-10-155

DISCUSSION

A. Background Information

Montana Department of Transportation (MDT) Motor Carrier Services Division (MCS) administers the State of Montana's oversize permit program. Under current statutes, carriers transporting equipment that exceeds legal dimensions are required to obtain oversize permits for width, length or height or any combination of width, length and height. In addition to regular registration and gross vehicle weight fees, MCS charges a fee of \$10.00 for each trip permit and fee of \$75 for each term permit issued for oversize loads.

The Governor's Office of Economic Development has inquired whether MCS has the authority to adopt rules that would allow MCS to collect additional fees on over height loads on particular routes to fund, in full or in part, permanent relocation of utilities that would allow the route to accommodate over-height vehicles without temporary utility moves.

B. Rule Making Authority Generally

Administrative agencies enjoy only those powers specifically conferred upon them by the legislature. *Bell v. Department of Licensing* (1979), 182 Mont. 21, 22, 594 P.2d 331, 332. Administrative rules must be strictly confined within the applicable legislative guidelines. *McPhail v. Montana Board of Psychologists* (1982), 196 Mont. 514, 516, 640 P.2d 906, 907 Section 2-4-305(3), MCA, provides in part:

A substantive rule may not be proposed or adopted unless:

- a) a statute granting the agency authority to adopt rules clearly and specifically lists the subject matter of the rule as a subject upon which the agency shall or may adopt rules; or
- b) the rule implements and relates to a subject matter or an agency function that is clearly and specifically included in a statute to which the grant of rulemaking authority extends.

Thus, MDT can only adopt a rule imposing a fee on oversize loads, if its authorizing statutes *clearly and specifically* list the subject matter of the rule or the rule relates to a subject matter or agency function that is *clearly and specifically* included in a statute to which its rulemaking authority extends.

In addition, § 2-4-305(6), MCA provides in part “a rule is not valid or effective unless it is: a) consistent and not in conflict with the statute; and b) reasonably necessary to effectuate the purpose of the statute.” Thus, a rule imposing fees on oversize vehicles must be consistent with the enabling legislation or other provisions of law, and reasonably necessary to effectuate its purpose. *Bick v. Department of Justice*, 224 Mont. 455, 730 P.2d 418 (1986) (Court summarizing § 2-4-306(5) and (6), MCA).

A valid rule must meet both prongs of a two-prong test to determine whether or not it harmonizes with its enabling legislation. It must not engraft additional and contradictory requirements on the statute, and it must not engraft additional non-contradictory requirements on the statute which were not contemplated by the legislature. The rule also must be reasonably necessary to effectuate the purpose of the statute.

Bick, 224 Mont. at 458-59, 730 P.2d at 421 (citations omitted), see also *State Dept. of Social and Rehabilitation Services v. Shodair Hosp.*, 273 Mont. 155, 902 P.2d 21 (1995).

C. MDT Rule-Making Authority

MDT's rulemaking authority is found in the following statutes:

- Rules for construction, repair, maintenance and marking of the state highways and bridges. § 60-2-201(4), MCA.
- Rules for the reimbursing utilities for the costs of installation, construction, maintenance, repair, renewal or relocation of facilities resulting from highway construction projects. §60-4-402, MCA.
- Rules for implementing special permits and fees for oversize loads. § 61-10-129, MCA.
- Rules to implement dimension and weight standards as set forth in Mont. Code Ann. Title 61, Chapter 10. § 61-10-155, MCA.

MDT's authority for setting fees is set forth in the following statutes:

- Section 61-10-124, MCA provides that in addition to regular registration and gross vehicle weight fees, applicants must pay a fee of \$10.00 for each trip permit and fee of \$75 for each term permit issued for oversize loads.
- Section 61-10-125, MCA sets fees for overweight loads based on axle weight and distance.
- Section 61-10-126, MCA requires that all fees collected for over dimension and overweight loads be forwarded to the department of revenue for deposit in the highway nonrestricted account in the state special revenue fund.

In analyzing these codes, the legislature has limited MDT's rulemaking authority, established certain parameters on fees, and directed that all fees for oversize loads be deposited in a special revenue account.

Given the foregoing, MDT has no rulemaking authority to adopt rules implementing a special fee on oversize loads, and no authority to divert said fees to an account to fund utility relocations. The proposed fees would contradict the provisions of § 61-10-124, MCA. Neither the fees nor the proposed action of implementing fees to fund utility relocations was contemplated by the legislature. Thus, the proposed rules would violate § 2-4-305, MCA, *Bick* and *Shodair Hosp.*

CONCLUSION:

MDT has no statutory or other authority to adopt administrative rules to implement a special fee on oversize loads to fund permanent relocation of utilities without legislative action.