

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES,  
AFL-CIO,

Complainant,

- vs -

CITY OF LIVINGSTON, MAYOR AND  
ALL AUTHORIZED REPRESENTATIVES  
OF THE CITY OF LIVINGSTON,

Defendant.

ORDER

\*\*\*\*\*

The Board of Personnel Appeals, having considered the parties' June 18th request and good cause appearing therefor;

ORDERS that the matter of Unfair Labor Practice No. 33-80 be dismissed.

DATED this 18 day of July, 1984.

BOARD OF PERSONNEL APPEALS

By Robert R. Jensen  
Robert R. Jensen  
Administrator

\*\*\*\*\*

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do certify that a true and correct copy of this document was mailed to the following on the 18<sup>th</sup> day of July, 1984:

George Hagerman  
Montana Council No. 9  
AFSCME, AFL-CIO  
P.O. Box 5356  
Helena, MT 59604

Robert L. Jovick  
City Attorney  
Livingstin City Hall  
414 East Callender Street  
Livingston, MT 59047

STATE OF MONTANA  
BEFORE THE BOARD OF PERSONNEL APPEALS

\*\*\*\*\*

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 33-80

AMERICAN FEDERATION OF STATE,  
COUNTY AND MUNICIPAL EMPLOYEES,  
AFL-CIO,

Complainant,

-v-

CITY OF LIVINGSTON, MAYOR AND  
ALL AUTHORIZED REPRESENTATIVES  
OF THE CITY OF LIVINGSTON,

Defendant.

ORDER

\*\*\*\*\*

In a Motion to Stay Proceedings Pending Determination of Arbitrability, Defendant brings to the attention of this Board the issue of whether the contract dispute in this matter is actually arbitrable.

The matter brought before the Board by Complainant, American Federation of State, County and Municipal Employees, is the question of whether a refusal to arbitrate is an unfair labor practice. That is, is the alleged contract violation in this matter an unfair labor practice?

In this motion, it appears that Defendant is attempting to appeal a possible adverse order before determination is made or before there is evidence to determine the very "facts" upon which the motion is based. Should this Board find in Complainant's favor and order the parties to arbitration, it would then be proper for Defendant to raise the issue of arbitrability in the arbitration forum itself. If the Board finds in Defendant's favor, the issue of arbitrability is moot.

Defendant's motion is denied.

Dated this 3rd day of June, 1981.

BOARD OF PERSONNEL APPEALS

BY: Linda Skaar  
Linda Skaar  
Hearing Examiner

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of  
this document was sent to the following on the 3rd day of

June, 1981:

Donald C. Robinson  
Poore, Roth, Robischon, & Robinson, P.C.  
1341 Harrison Ave.  
Butte, MT 59701

Edmond Carroll, Mayor  
City of Livingston  
414 E. Callender  
Livingston, MT 59047

Robert Jovick, Attorney  
227 South 2nd  
Livingston, MT 59407

George Hagerman  
AFSCME  
600 N. Cooke  
Helena, MT 59601

*Linda Shear*

PAD3:J

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT

OF THE STATE OF MONTANA

IN AND FOR THE COUNTY OF PARK

Filed this 9th day  
July A. D. 1981  
at 9:35 o'clock A.M.  
EMMA BOWERS

Clerk of District Court  
Park County, Montana

By \_\_\_\_\_  
Deputy

THE CITY OF LIVINGSTON,  
a municipal corporation,

Plaintiff,

-vs-

No. 81-159

BOARD OF PERSONNEL APPEALS  
of the MONTANA STATE DEPART-  
MENT OF LABOR AND INDUSTRY,  
an agency of the State of Montana,  
and AMERICAN FEDERATION OF  
STATE, COUNTY & MUNICIPAL  
EMPLOYEES, AFL-CIO, a labor  
organization,

Defendants.

RECEIVED  
JUL 13 1981  
BOARD OF PERSONNEL APPEALS

ORDER

The above-entitled matter came on for hearing on Monday, June 21, 1981, at 1:30 o'clock p.m., pursuant to a Temporary Restraining Order and Order to Show Cause heretofore issued by District Judge Jack D. Shanstrom.

The Plaintiff City of Livingston was represented by Donald C. Robinson, Esq., of Butte, Montana, and Robert L. Jovick, City Attorney, City of Livingston; James E. Gardner, Esq., of Helena, Montana, represented the Defendant Board of Personnel Appeals; George F. Hagerman, Field Representative, AFSCME, acting pro se, appeared on behalf of the Defendant American Federation of State, County & Municipal Employees.

Counsel for Defendant Board of Personnel Appeals entered herein a Motion for Substitution of Judge Jack D. Shanstrom, and the undersigned Judge assumed jurisdiction herein.

The Court having received certain documentary exhibits introduced by the Plaintiff, and having heard oral argument on the Plaintiff's motion to continue the Temporary Restraining Order in effect pending a determination on the merits, and further arguments having been had on the Motion to Dismiss

and Motion to Quash filed by the Defendant Board of Personnel Appeals, and the Court being fully advised in the premises, it is hereby

ORDERED, and this does order, that the parties submit legal memorandums in support of their respective positions, to be filed according to the following schedule:

1. Plaintiff's memorandum to be filed July 10, 1981;
2. The Defendants' memorandums to be filed by August 1, 1981;
3. Plaintiff's reply memorandum to be filed by August 7, 1981; and it

is

FURTHER ORDERED, and this does order, that the Temporary Restraining Order heretofore entered herein be, and the same hereby is, continued in full force and effect, pending the submission of all briefs and until further order of this Court.

DATED this 6<sup>th</sup> day of June, 1981.

ORIGINAL SIGNED BY  
*Joseph B. Gary*  
\_\_\_\_\_  
District Judge

4DOC46/W

RECEIVED

Filed this 21st day of February A. 19 84 at 10:04 o'clock A.M.

FEB 22 1984

JUNE LITTLE

BOARD OF PERSONNEL APPEALS

Clerk of District Court  
Park County, Montana

By TERRY SARRAZIN

Deputy

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

IN THE DISTRICT COURT

OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF MONTANA

IN AND FOR THE COUNTY OF PARK

\*\*\*\*\*

THE CITY OF LIVINGSTON,  
a municipal corporation,  
  
Plaintiff,  
  
-vs-  
  
BOARD OF PERSONNEL APPEALS  
of the MONTANA STATE DEPART-  
MENT OF LABOR AND INDUSTRY,  
an agency of the State of  
Montana, and AMERICAN  
FEDERATION OF STATE, COUNTY  
& MUNICIPAL EMPLOYEES, AFL-CIO,  
a labor organization,  
  
Defendants.

ULP-33-1980

No. 81-159

FINDINGS OF FACT and  
CONCLUSIONS OF LAW and  
MEMORANDUM

This case was submitted to this Court on briefs by each of the attorneys for their respective parties. The Plaintiff, CITY OF LIVINGSTON, is represented by Donald C. Robinson of Butte and Defendant BOARD OF PERSONNEL APPEALS, is represented by James E. Gardner of Helena. The Court having examined the file in this matter, and from an examination of the records, the oral arguments presented, and from an examination of the briefs of the parties, and the law applicable, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That on July 1, 1979, the Plaintiff CITY OF LIVINGSTON entered into a labor agreement with Local No. 2711 of Montana State Council No. 9 of the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME).

2. That the Union represents all employees of the City of Livingston Police Department, with the exception of the Chief and Assistant Chief.

3. That the collective bargaining agreement contains a

1 standard non-discrimination clause, viz: "The Employer agrees  
2 not to discriminate against any employee for his activity on be-  
3 half of, or membership in, the Union."

4 4. That the collective bargaining agreement provides  
5 that officers will be guaranteed a rotation of shifts every  
6 twenty (20) working days, but that there is no reference in the  
7 agreement regarding days or hours in which shifts will be  
8 scheduled.

9 5. That in the spring of 1980, the Chief of Police of  
10 the City made a reassignment of manpower on the Police force,  
11 creating a new shift for peak crime periods.

12 6. That certain employees were assigned to that shift.

13 7. That on May 10, 1980, the Union filed a grievance  
14 with the Chief of Police protesting his action.

15 8. That the Mayor of the City then took the position  
16 that creation of a new shift does not constitute a matter that  
17 is subject to the grievance and arbitration procedures of the  
18 contract.

19 9. That on August 14, 1980, the Defendant Union filed  
20 an unfair labor practice charge with the Board of Personnel  
21 Appeals charging the City with refusing to process a grievance  
22 through the contractually agreed upon grievance procedure, alleg-  
23 ing that the City violated its duty to bargain in good faith as  
24 required by 39-31-401(5), MCA.

25 10. That on September 2, 1980, the City filed an  
26 Answer denying the charge.

27 11. That on April 16, 1981, the Board sent each party  
28 a Notice of Pre-Hearing Conference.

29 12. That on May 27, 1981, the City filed a Motion to  
30 Stay Proceedings pending a judicial determination of arbitration  
31 of the underlying dispute.

32 13. That the Board refused to stay proceedings and

1 issued an order denying the Motion.

2 14. That on June 11, 1981, the City obtained a Tempor-  
3 ary Restraining Order and filed a complaint and petition for  
4 declaratory and injunctive relief.

5 CONCLUSIONS OF LAW

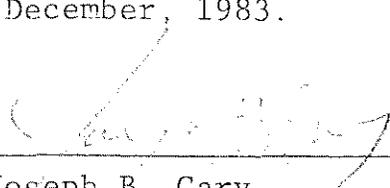
6 1. That the central issue of this case is: when a  
7 Union files an unfair labor practice charge with the Board of  
8 Personnel Appeals, must that administrative process be allowed to  
9 proceed to its final conclusion, or, should a District Court  
10 determination on the issue of arbitrability be allowed to take  
11 precedence.

12 2. That in view of the charge made by the Union, the  
13 administrative remedy should proceed prior to District Court re-  
14 view.

15 3. That the temporary restraining order issued by this  
16 Court is hereby quashed.

17 4. That AFCSME and the City of Livingston shall pro-  
18 ceed with the pending administrative hearing in this matter.

19 DATED this 22nd day of December, 1983.

20  
21   
22 \_\_\_\_\_  
23 Joseph B. Gary  
24 District Judge

24 MEMORANDUM

25 The problem in this case arises out of a conflict be-  
26 tween the section of the statute dealing with management rights  
27 (39-31-303, MCA) and the section dealing with the duty to bargain  
28 regarding conditions of employment (39-31-305, MCA). The Plain-  
29 tiff City wants the Court to determine whether the City must sub-  
30 mit the contract dispute to arbitration. The City does not refute  
31 the claim that the Board hears and remedies unfair labor practices.  
32 It simply disagrees that its action was an unfair labor practice.

1 believing instead that the action was a management prerogative.

2           On the other hand, the Board argues that the hearing  
3 examiner should decide whether the City's refusal to arbitrate a  
4 grievance is an unfair labor practice. The Board insists that a  
5 District Court cannot accept jurisdiction for a declaratory  
6 judgment action when an administrative proceeding is already in  
7 process.

8           The procedure that the Plaintiff City proposes is a  
9 preliminary injunction pendente lite by the District Court pend-  
10 ing resolution of the declaratory judgment action. The Court  
11 would then decide the issue in the declaratory judgment action--  
12 that is, whether the present issue is arbitrable. The Board  
13 could then proceed upon the conclusion of the declaratory judg-  
14 ment action. The City agrees that a Board hearing is acceptable,  
15 but only at the appropriate stage. For the Board to decide this  
16 issue now would mean the Board was undermining jurisdiction of  
17 the District Court to render a declaratory judgment on the issue  
18 of arbitrability.

19           The Board argues for a reversed procedure. First, the  
20 Board should rule on the matter of an unfair labor practice.  
21 This order could in turn be appealed to the District Court. The  
22 Board argues that a District Court ruling would be appropriate,  
23 but only on appeal after Board action. If the Court acted at  
24 this stage of the proceedings, it would be usurping the function  
25 of the administrative agency.

26           The question of whether the underlying issue -- the  
27 City's action in establishing a new shift -- is arbitrable or not  
28 is indeed an interesting question to this Court. However, that  
29 is not the issue before the Court. The single issue is who has  
30 the right to rule first in view of the Union's charge regarding  
31 an unfair labor practice -- the District Court or the Board of  
32 Personnel Appeals?

1 Case law indicates that one remedy the Union could have  
2 pursued would have been a suit to compel arbitration. Suits to  
3 compel arbitration were cited by the City, and include Butte  
4 Teachers' Union v. Board of Education, 173 Mont. 215, 567 P.2d  
5 51 (1977), and Wibaux Education Ass'n. v. Wibaux County High  
6 School, 175 Mont. 331, 573 P.2d 1162 (1978). However, the Union  
7 chose a different avenue. It filed an unfair labor practice  
8 charge with the Board of Personnel Appeals. There is nothing  
9 which denies a Union this avenue to seek its remedy. Statutory  
10 law is very clear on this point. Section 39-31-401(5), MCA,  
11 states that it is an unfair labor practice for a public employer  
12 to:

- 13 (5) refuse to bargain collectively in good  
14 faith with an exclusive representative.

15 Section 39-31-403 states the remedies for unfair labor  
16 practices.

17 Violations of the provisions of 39-31-401. . .  
18 are unfair labor practices remediable by the  
19 Board pursuant to this part.

20 The statutes are also very clear on Court review and  
21 enforcement. Section 39-31-409 states:

- 22 (1) The Board or the complaining party may  
23 petition for the enforcement of the order  
24 of the Board and for appropriate tempor-  
25 ary relief or a restraining order and  
26 shall file in the District Court at its  
27 own expense the record and the proceedings.

- 28 (2) Upon the filing of the Petition, the  
29 District Court shall have jurisdiction  
30 of the proceeding. Thereafter, the  
31 District Court shall set the matter for  
32 hearing and shall order the party charged  
to be served with notice of hearing at  
least twenty days before the date set  
for hearing.

- (6) After the hearing, the District Court shall  
issue its order granting such temporary  
or permanent relief or a restraining order  
as it considers just and proper, enforcing  
as so modified or setting aside, in whole

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

or in part, the order of the Board. Any order of the District Court shall be subject to review by the Supreme Court in accordance with rules of Civil Procedure.

The Court therefore agrees with the Defendant Board, that, in view of the action taken by the Union, a declaratory judgment action is improper and untimely since the established administrative remedies have been initiated but not yet exhausted. The case of In the Matter of Dewar, 169 Mont. 437, 548 P.2d 149 (1976), is a case in point, with a variation in facts since the charge was pending before the Police Commission rather than the Board of Personnel Appeals. A question of law arose regarding certain authority of the Police Commission, and the advise of a District Court was sought by a Writ of Certiorari. The Court deemed declaratory judgment a more appropriate action, and made a ruling which was then appealed. On the issue of the propriety of a District Court rendering a declaratory judgment during the pendency of the commission proceedings, the Montana Supreme Court held:

(7) There is no Montana law on this particular situation because it is generally conceded in the law that this is not the office of a declaratory judgment. Declaratory judgment is a remedy that declares the rights and duties of the parties.

(8) The purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation and to adjudicate rights of parties who have not otherwise been given an opportunity to have those rights determined. However, it is not the true purpose of the declaratory judgment to be provided a substitute for other regular actions. 22 An. Jur. 2d. Declaratory Judgment Sections 1, 2, and 6.

Other jurisdictions have denied the remedy of declaratory judgment where appeal by statute or otherwise from the actions of administrative bodies exists. (cite)

Similarly in Florida it is well established (cite) that the declaratory judgment statute: " . . . is no substitute for an established pro-

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

cedure for appeal or review of decisions of judicial tribunals, or of Boards or administrative officials exercising judicial or quasi-judicial powers."

No jurisdictions that could be found considered, much less approved the declaratory judgment as a vehicle to obtain relief from rulings within the jurisdiction of administrative bodies or commissions in the process of exercising their quasi-judicial functions and/or powers.

(9) The declaratory judgment in this matter was improperly issued and is hereby vacated and of no effect. Dewar, supra at 154.

The Plaintiff City did not present an altogether compelling argument against the exhaustion of administrative remedies doctrine. The City argued that:

In the instant case, if the Union believed that the grievance was arbitrable, and the City intended to the contrary, then the Union should have, and could have, brought suit to compel arbitration. Plaintiff's Memorandum in Support of Motion for Preliminary Injunction, at 8.

The Court agrees with the City that the Union "could have" brought suit to compel arbitration, but does not agree that such action was the Union's only alternative. Since the Union chose to pursue an unfair labor practice charge, it would be inappropriate for the Court to rule on the arbitration issue while that charge is pending. Since the administrative machinery is already in gear, it should be concluded, at which time the Court has jurisdiction for review and enforcement.

Closely related to the issue of exhaustion of administrative remedies is the issue of the appropriateness of a declaratory judgment action. An applicable precedent is found in the case of Jeffries Coal Co. v. Industrial Accident Board, 126 Mont. 411, 252 P.2d 1046 (1952). In this case, the Coal Co. filed an action to enjoin enforcement of the Board's order to provide a washroom in accordance with a Montana Statute. The District Court ruled in favor of the Coal Co., but on appeal the

1 Montana Supreme Court ruled:

2 It is well settled that the equity power  
3 of the Court may not be invoked by a  
4 litigant who has a plain, speedy and  
5 adequate remedy at law. (cite)

6 The facts relied on by Plaintiff as the  
7 basis for the relief sought could be  
8 asserted as a defense to any proceedings  
9 brought by the Board to enforce compliance  
10 with its order.

11 When matters relied on in the complaint in  
12 an injunction action constitute a defense  
13 to an action at law, it is held to con-  
14 stitute an adequate remedy at law pre-  
15 cluding injunctive relief. (cites)  
16 Jeffries, supra at 1047.

17 The Coal Co. then moved for Rehearing, asking that the  
18 complaint be viewed as a declaratory judgment action. The  
19 Supreme Court denied the motion, stating that the Coal Co.'s  
20 grounds for challenging the Board's order could be raised in  
21 enforcement proceedings or proceedings questioning the validity  
22 of the statute.

23 Another applicable case is Intermountain Deaconess Home  
24 for Children v. Montana Department of Labor and Industry, Labor  
25 Standards Division, 623 P.2d 1384 (1981). In this case, the  
26 Division sent a Notice of Hearing informing the Home of a pending  
27 charge of back wages. The Home petitioned the District Court for  
28 a Temporary Restraining Order and Declaratory Judgment, request-  
29 ing a determination of the applicable statute of limitations,  
30 arguing that the wage claims should be barred. The District Court  
31 accepted jurisdiction and ruled on the question. On appeal, the  
32 Supreme Court held that the District Court erred in granting the  
restraining order, and that the Department possessed only invest-  
igatory powers in the enforcement of minimum statutes. The Court  
said that the errors,

...only complicated the administrative  
process of determining the validity of the  
claimant's wage claims and the inexpensive  
processing of these claims. Plaintiff re-  
quested and received a restraining order

1 by alleging that the Department's action  
2 impaired its right to be free from the  
3 defense of stale wage claims. This  
4 alleged but unproven harm alone does not  
5 sufficiently threaten plaintiff's in-  
6 dividual rights to justify Court-ordered  
7 restraint of the Department. The statute  
8 of limitations defense could be inexpen-  
9 sively and easily asserted at the Depart-  
10 ment's administrative hearing. (cite)  
11 Intermountain, supra at 1387.

12 In summary, the doctrine of exhaustion of administra-  
13 tive remedies, and the impropriety of a declaratory judgment  
14 action during administrative proceedings, argue strongly against  
15 this Court accepting jurisdiction of the arbitrability issue at  
16 the time.

17 Both the Plaintiff City and the Defendant Board bolster  
18 their arguments on the basis of judicial efficiency. (A conten-  
19 tion sorely miscalculated in this case.) The Court finds equal  
20 merit on both sides. While it is true that a District Court de-  
21 cision on the arbitrability question may eliminate the need for  
22 Board action, the reverse is also true. An administrative hear-  
23 ing on the issue may well eliminate the need for an appeal to  
24 the District Court. In any case, the point of this decision is  
25 that administrative machinery has been established by statute to  
26 resolve the very question raised in this case. Unfair labor  
27 practices are remediable by the Board of Personnel Appeals. It  
28 is the Board who determines whether the charge has merit. There-  
29 after, the District Court has jurisdiction.

30 The Plaintiff City cited several cases illustrating its  
31 argument that the Court can order arbitration, and most probably  
32 decide the enforceability of an agreement to arbitrate an issue  
arising under a collective bargaining agreement. (See Butte  
Teachers' Union v. Board of Education, 173 Mont. 215, 567 P.2d  
51 (1977), and Wibaux Education Ass'n. v. Wibaux County High  
School, 175 Mont. 331, 573 P.2d 1162 (1978). Butte Teachers in-  
volved a suit to compel arbitration. The District Court ordered

1 arbitration and the Supreme Court agreed. While this case  
2 illustrates the Plaintiff City's argument, it fails to refute the  
3 Defendant Board's argument -- that the Union still has the option  
4 of going the route of an unfair labor practice charge through the  
5 Board. Similarly in Wibaux, the education association sued to  
6 compel arbitration by the school board; the District Court denied  
7 the complaint, and the Supreme Court held that in the circum-  
8 stances the school board's action was not a "grievance" under the  
9 contract and was thus not subject to binding arbitration, and  
10 arbitration of the issue was not allowed by the laws then in  
11 effect. Again, the case is distinguished from the present action  
12 since the association sued to compel arbitration.

13           The Plaintiff City accuses the Union of having "con-  
14 jured up a grievance for the purpose of overriding a policy with  
15 which the Union does not agree." Plaintiff's Memorandum, supra  
16 at 8. Even if such a claim was valid it would nevertheless be no  
17 justification for the Court to pluck an issue out of an ongoing  
18 administrative proceedings. The Board is fully equipped to re-  
19 solve the issue. It appears to this Court that the allegedly  
20 aggrieved Union had two (2) options. It could sue to enforce  
21 arbitration, in a District Court or file an unfair labor practice  
22 charge before the Board of Personnel Appeals. Each approach  
23 would have its own advantages and its own risks. But since the  
24 Union took the grievance route, that route must be brought to its  
25 conclusion before this Court has a role.

26           In conclusion, it is almost axiomatic and hornbook law  
27 that administrative procedures should be exhausted before re-  
28 course to the Courts except under very limited circumstances. In  
29 support of this view, this decision follows this basic fundamen-  
30 tal law to exhaust the administrative remedies and the following that  
31 a recourse can be had to the Courts if necessary.

32 ////

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

Therefore, the petition by the Plaintiff is denied, and the appropriate forum is held to be the Board of Personnel Appeals.

DATED this 22nd day of December, 1983.

Joseph B. Gary  
District Judge

cc: Robert Jovick, Esq.  
Mr. George Hagerman  
Poore, Roth, Robischon & Robinson

STATE OF MONTANA  
COUNTY OF \_\_\_\_\_  
DISTRICT COURT

I hereby certify that the foregoing is a true and correct copy of the original as filed in my office.

Civil  
81-159

Witness my hand and seal this  
21st day of February, 1984.

\_\_\_\_\_  
District Court for  
the State of Montana

By Jerry Darrin  
Clerk