

**Court Decisions on the Treatment of Intangible Property**  
Prepared for the Revenue and Transportation Interim Committee  
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March 2016

In the fall of 1998, the Revenue Oversight Committee requested legislation to exempt intangible personal property from taxation. The legislation was introduced as [Senate Bill No. 111 \(1999\)](#) and was signed into law on May 10, 1999. In the end, the Legislature enacted an exemption statute that has only been amended once. The present version of the statute provides as follows:

- 15-6-218. Intangible personal property exemption.** (1) Intangible personal property is exempt from taxation.
- (2) For the purposes of this section, "intangible personal property" means personal property that is not tangible personal property and that:
- (a) has no intrinsic value but is the representative or evidence of value, including but not limited to certificates of stock, bonds, promissory notes, licenses, copyrights, patents, trademarks, contracts, software, and franchises; or
  - (b) lacks physical existence, including but not limited to goodwill.
- (3) To the extent that the unit value of centrally assessed property includes intangible personal property, that value must be removed from the unit value.

There are a few Montana Supreme Court cases that touch on the concept of intangible personal property, and one reported Montana Supreme Court case entitled *Gold Creek Cellular of Mont. L.P. v. Dept. of Revenue*, that discusses section [15-6-218](#), MCA, in great detail. There are also a few Montana Tax Appeal Board and Montana District Court opinions that were not appealed to the Montana Supreme Court.<sup>1</sup>

***Gold Creek Cellular of Mont. L.P. v. Dept. of Revenue***

In *Gold Creek Cellular of Mont. L.P. v. Dept. of Revenue*, 2013 MT 273, ¶ 1, 372 Mont. 71, 310 P.3d 533, Gold Creek Cellular (d/b/a Verizon) and AT&T Mobility brought a declaratory judgment action in the First Judicial District (*i.e.*, Lewis and Clark County) against the Department of Revenue (Department) alleging that certain administrative rules regarding intangible property were invalid. The District Court granted summary judgment to the Plaintiffs, and the Department appealed the decision to the Montana Supreme Court. *Id.* The issues before the Montana Supreme Court pertained to whether the Department's administrative rules defining

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<sup>1</sup> District Court opinions are not reported in a readily available format like Montana Supreme Court cases. As such, this paper may not contain relevant District Court opinions that were not provided to the public through LexisNexis.

"goodwill" and "intangible personal property" conflicted with section [15-6-218](#), MCA. *Id.* ¶¶ 2-3. The rules at issue were amended in 2010, and the Court described the amendments as "substantial changes". *Id.* ¶ 7. The amendments provided as follows:

42.22.101 DEFINITIONS The following definitions apply to this chapter:

(1) through (9) remain the same.

(10) "Goodwill" means booked or accounting goodwill. The booked goodwill must be present on the subject properties' financial statements, and must have been created through the purchase price accounting process as defined by GAAP or other accounting authority.

(10) remains the same but is renumbered (11).

(12) "Intangible personal property" has the following attributes:

(a) Intangible personal property must be separable from the other assets in the unit and capable of being held under separate title or ownership.

(b) Intangible personal property must be able to be bought and sold, separate from the unit of operating assets, without causing harm, destroying, or otherwise impairing the value of the unit of assets being valued through the appraisal process.

(c) Intangible personal property must have value as a result of its ability to create earnings that exceeds their contributory value to the unit; or, it must be capable of earning an income as a standalone entity or apart from the other assets of the unit.

(d) Intangible personal property is not the same as intangible value.

Intangible value is the value of an entity as a going concern - its ability to make excess revenues over the normal rate of return. Intangible value is part of the overall value of assets. Intangible value is not exempt from property taxation in Montana.

(11) through (32) remain the same but are renumbered (13) through (34).<sup>2</sup>

The Department contended that the definitions of "goodwill" and "intangible personal property" were compatible with the statute and that the Department was entitled to receive administrative deference under the federal standard (referred to as *Chevron* deference). *Gold Creek Cellular*, ¶ 10. However, the Court determined the Montana deference standard was the correct standard, and not *Chevron* deference. *Id.* ¶ 11. Under this standard, administrative rules are invalid when they:

- (1) engraft additional and contradictory requirements on the statute; or
- (2) if they engraft additional, noncontradictory requirements on the statute which

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<sup>2</sup> [Montana Administrative Register Notice 42-2-846](#), Notice of Public Hearing on Proposed Adoption and Amendment - Centrally Assessed Property (Sept. 9, 2010).

were not envisioned by the legislature.<sup>3</sup>

Using the Montana deference standard, the Court upheld the District Court's conclusions that the administrative rule definitions of "goodwill" and "intangible personal property" were in conflict with section [15-6-218](#), MCA." *Id.* ¶¶ 18-19, 25.

The Court reasoned that section [15-6-218](#), MCA, broadly exempts goodwill as a subclass of intangible personal property. *Id.* ¶¶ 15-16, 18. The Department's regulation requiring "booked goodwill" that can only be valued using the purchase price accounting method was a restriction on a broad statutory exemption, and thus an additional requirement that was not contemplated by the Legislature. *Id.* ¶ 18.

The Court further determined that the administrative rules imposed four additional requirements that were in direct contradiction of the statute's nonexhaustive list of intangible personal property. *Id.* ¶ 21. These requirements included that the personal property:

- (1) be separable from other assets;
- (2) be able to be bought and sold without impairing value of assets;
- (3) create earnings that exceed their contributory value to the unit; and
- (4) not have intangible value, which is the value of an entity to make excess revenue over the normal rate of return.

In analyzing the Legislature's usages of the statutory list of property that is considered intangible personal property in section [15-6-218\(2\)\(a\)](#), MCA, (*i.e.*, "including but not limited to certificates of stock, bonds, promissory notes, licenses, copyrights, patents, trademarks, contracts, software, and franchises"), the Court determined that the list illustrates applicable examples of the Legislature's chosen definition. *Id.* ¶ 23. The list does not merely designate those few items that must be exempted. The term "including" is not one of all-embracing definition, but connotes an illustrative application of the general principal. *Id.*

Based on the Court's ruling, the Department is not required to use all available methods to value goodwill, but it may not define goodwill in a way that precludes a taxpayer from proposing alternative methodology or information relating to the valuation goodwill. *Id.* ¶ 19. Additionally, the Department must go beyond the statutory list of property that is considered intangible personal property in section [15-6-218\(2\)\(a\)](#), MCA, when determining whether property is considered intangible. *Id.* ¶ 23.

### ***Pacificorp v. Dept. of Revenue***

In *Pacificorp v. Dept. of Revenue*, 2011 MT 93, ¶ 16, 360 Mont. 259, an issue on appeal in front of the Montana Supreme Court pertained to the Department's usage of a direct capitalization

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<sup>3</sup> *Gold Creek Cellular*, ¶ 12.

method that derives earnings-to-price ratios from an industrywide analysis. The parties did not dispute the default reduction of 10% for intangible property under the administrative rules. *Pacificorp*, ¶ 10; ARM 42.22.110 (contained in Appendix). However, the concept of intangible personal property was brought up in the context of whether it was proper to use earnings-to-price ratios, based on the assumption that nontaxable intangible property is captured under this method. *Id.* ¶ 33. Ultimately, the Court reasoned that Montana's statutory scheme is different from other states, and it upheld the usage of earnings-to-price ratios on the grounds that Montana appraisers must assess a business's entire operating system at 100% market value under section [15-8-111](#), MCA, before excluding intangible value under section [15-6-218](#), MCA. *Id.* ¶¶ 34-36.

#### ***Dept. of Revenue v. PPL Montana, LLC***

In *Dept. of Revenue v. PPL Montana, LLC*, 2007 MT 310, ¶ 3, 340 Mont. 124, an issue on appeal in front of the Montana Supreme Court pertained to whether the Department of Revenue deprived a utility of constitutional equal protection by using the unit valuation method and using the utility's recent purchase price as an indicator of value. As part of the unit valuation method, the Department valued the entity as an entire unit and then deducted the intangible personal property. *PPL Montana*, ¶ 34. Ultimately, the Court did not analyze the utility's allegation that the Department of Revenue failed to exempt the proper amount of intangible personal property, and the usage of the unit valuation method was upheld. *Id.* ¶¶ 14, 34-35, 41.

#### ***Bresnan Communications, LLC v. Dept. of Revenue***

The Thirteenth Judicial District Court of Montana, in Yellowstone County, was confronted with an issue regarding whether customer relations qualified as goodwill or a piece of intangible personal property similar to goodwill. *See Bresnan Communications, LLC v. Dept. of Revenue*, 2011 Mont. Dist. LEXIS 88 (2011), *reversed on other grounds*, 2013 MT 357, 373 Mont. 29. Ultimately, the District Court determined there was a genuine issue of material fact as to whether a cable company's customer relationships were a benefit or advantage that created an ability to earn income in excess of that which would be expected if the company was composed of a mere collection of assets. The issue was not tried on appeal at the Supreme Court.

#### ***Northwestern Corp. v. Dept. of Revenue***

The First Judicial District Court of Montana, in Lewis and Clark County, was confronted with multiple issues, including an issue regarding whether intangible personal property was properly removed from a utility's tax assessment. *Northwestern Corp. v. Dept. of Revenue*, 2008 Mont. Dist. LEXIS 360, ¶ 12 (2008). In considering the utility's value, the Department deviated from ARM 42.22.110 (contained in Appendix) and removed 21% (as opposed to the default 10%) for intangible personal property under the cost valuation approach, but it followed ARM 42.22.110 by removing only 10% for the remaining approaches. The Montana Tax Appeal Board determined the Department's valuation was appropriate, but the utility argued that further reductions for intangible personal property were required. *Id.* ¶ 21. On appeal, the First Judicial

District upheld the Montana Tax Appeal Board, reasoning that the Department "did the best that it could with the information it was provided and properly determined the [intangible personal property] allowance". *Id.* ¶ 24. Additionally, the First Judicial District determined that the utility failed to prove its valuation was correct. *Id.* The case was not appealed to the Montana Supreme Court.

### **Montana Tax Appeal Board Cases -- Qwest Corp. v. Dept. of Revenue**



The Montana Tax Appeal Board is generally the first stop in reviewing a final decision of the Department that relates to valuation of a centrally assessed property. *See* section [15-2-302](#), MCA. Any party that is aggrieved by a final decision of the Montana Tax Appeal Board can then appeal the matter by filing a petition in a Montana District Court. *See* section [15-2-303](#), MCA. Montana Tax Appeal Board cases (including cases that are not appealed) are located on the Montana Tax Appeal Board's website at <http://mtab.mt.gov/decisions>. In regards to the intangible personal property exemption, relevant cases can be found under the [Centrally Assessed Electric Generation Property](#) hyperlink and the [Other Centrally Assessed Property](#) hyperlink.

[Qwest Corp. v. Dept. of Revenue](#), Docket No.: SPT-2008-2 (2009), provides one example of a Montana Tax Appeal Board case where intangible personal property was at issue in the context of valuation. In *Qwest*, the Department's usage of the 15% default reduction for intangible personal property pursuant to ARM 42.22.110 (contained in Appendix) was challenged by a telecommunications company. *Qwest*, at 6, 8-10, 26, 30. At the hearing, the telecommunications company claimed that it had more intangible personal property than the 15% default amount. *Id.* at 20. The appraisal information that was presented at the hearing by the telecommunications company was not given to the Department during the appraisal process. *Id.* at 26, 28. In determining that the 15% default amount applied, the Board relied on the presumption of correctness in favor of the Department's assessment. *Id.* at 28-29. Additionally, the fact that the telecommunications company did not submit information during the appraisal process in advance of litigation made the claims for additional intangible personal property exemptions untimely. *Id.* at 29.

Despite the holding that the information was untimely, the Board reviewed the telecommunications company's appraisal and determined that the company "failed to provide the Department or this Board with credible data that would support such wide-ranging claims for deduction of intangible personal property". *Id.* at 31.

# Appendix

## Administrative Rules of Montana

Rule No.	Rule Title	Rule File	Effective Date
<a href="#">42.22.105</a>	REPORTING REQUIREMENTS		12/24/2010
<a href="#">42.22.110</a>	DEDUCTIONS FOR INTANGIBLE PERSONAL PROPERTY		9/19/2014

### [42.22.105](#) REPORTING REQUIREMENTS

(1) Each year all centrally assessed companies shall submit to the department a report of operations, called the Centrally Assessed Annual Reporting form, for the preceding year. Railroads, railroad car companies, and pipelines shall submit the report by April 15 and all others by March 31, on forms supplied by the department.

(2) If a centrally assessed company fails to file a report with the department the company will be subject to the penalties listed in [15-23-104](#), MCA. Submission of an annual business property reporting form to a local department county office does not relieve the company of its requirement to file the Centrally Assessed Annual Reporting form to the centrally assessed unit located in Helena. In addition, if the department determines that a company is a centrally assessed company, that company must cease to file the annual business property reporting form to the department's local county office.

(a) Based on the appropriate statutory authority, the department shall determine if a company meets the requirements to be centrally assessed. If a company believes that the department has improperly determined that the company is centrally assessed, the company must still file the required Centrally Assessed Annual Reporting form, and if desired, appeal the department's centrally assessed determination to the appropriate venue.

(3) The report shall contain the following information on the operating properties:

(a) balance sheet for the system;

(b) statement of income for the system;

(c) original cost and book depreciation for system property, including an estimate of current value of property leased from others;

(d) statement of outstanding preferred stock, common stock, and debt, showing both book value and market value;

(e) statement of actual revenue and expense for the Montana operation (if actual amounts are not available, a statement of allocated revenue and expense may be substituted);

(f) if nonoperating properties are included in (3)(a) through (e), their original cost,

book depreciation, market value, and income;

(g) general description, original cost, and book depreciation of Montana properties, including description and location of property leased from others, together with name of lessor, current value or annual rental, and responsibility for the property tax (lessor or lessee);

(h) if rolling stock is allocated to Montana, the method used;

(i) pertinent statistical data on the company's operations within and without this state;

(j) copy of annual report to stockholders;

(k) copy of annual report to the federal regulatory agency if one is filed;

(l) copy of annual report to the Montana Public Service Commission if one is filed;

(m) in the case of centrally assessed railroads, all information required under ARM [42.22.106](#);

(n) in the case of centrally assessed electric utilities, all information required under ARM [42.22.107](#), if applicable;

(o) all other information requested by the department which will assist in valuing the properties; and

(p) signed statement of correctness.

(4) In addition to the report each centrally assessed company must revise and update statements of situs and mileage printouts provided by the department and return them along with the report. The information on the printouts shall be reported by county and taxing units in which they are situated. The situs printouts shall contain a general description and installed cost for operating situs property.

History: [15-6-218](#), [15-23-108](#), MCA; IMP, [15-6-218](#), [15-23-103](#), [15-23-201](#), [15-23-212](#), [15-23-301](#), [15-23-402](#), [15-23-502](#), [15-23-602](#), [15-23-701](#), MCA; NEW, Eff. 12/4/76; AMD, 1980 MAR p. 1011, Eff. 3/28/80; AMD, 1982 MAR p. 705, Eff. 4/16/82; AMD, 1983 MAR p. 1930, Eff. 12/30/83; AMD, 1984 MAR p. 2041, Eff. 12/28/84; AMD, 1989 MAR p. 760, Eff. 6/16/89; AMD, 1992 MAR p. 2560, Eff. 11/26/92; AMD, 1993 MAR p. 435, Eff. 3/26/93; AMD, 2000 MAR p. 872, Eff. 3/31/00; AMD, 2010 MAR p. 2993, Eff. 12/24/10.

#### **42.22.110 DEDUCTIONS FOR INTANGIBLE PERSONAL PROPERTY**

(1) Cost, income, and market indicators can generally be expected to include the value of intangible personal property. To the extent that each unit valuation indicator includes the value of intangible personal property it shall not be relied upon unless such value of the intangible personal property is excluded or removed.

(2) The department recognizes that the following percentages may not necessarily provide a taxpayer-specific measurement of intangible personal property. However, accurately quantifying the value of intangible personal property is difficult and subject to controversy and litigation which would not clarify the issues for future appraisals. The percentages are a good faith effort to comply with the rulemaking requirements of [15-6-218](#), MCA, in a manner that is timely and efficient for both the taxpayers and the department.

(a) Subject to the provisions of (3), intangible personal property shall be removed

from the cost indicator by using the following percentages:

- (i) Airlines 10%
- (ii) Pipelines 5%
- (iii) Electric cooperatives 5%
- (iv) Telephone cooperatives 5%
- (v) Electric utilities 10%
- (vi) Telecommunications 15%

(b) Subject to the provisions of (3), intangible personal property shall be removed from the income indicator by using the following percentages:

- (i) Airlines 10%
- (ii) Pipelines 5%
- (iii) Electric cooperatives 5%
- (iv) Telephone cooperatives 5%
- (v) Electric utilities 10%
- (vi) Telecommunications 15%

(c) Subject to the provisions of (3), intangible personal property shall be removed from the market indicator by using the following percentages:

- (i) Airlines 10%
- (ii) Pipelines 5%
- (iii) Electric cooperatives 5%
- (iv) Telephone cooperatives 5%
- (v) Electric utilities 10%
- (vi) Telecommunications 15%

(d) For railroads assessed according to the provisions of [15-23-205](#), MCA, exempt intangible personal property, which shall be deducted from the railroad system value, is equal to 5 percent of the system value. If a railroad is not assessed pursuant to [15-23-205](#), MCA, but assessed using cost, income and market indicators to value, 5 percent of the value determined by each indicator shall be removed to reflect the value of intangible personal property in each indicator subject to the provisions of (3).

(3) If any taxpayer believes that the value of its intangible personal property is greater than that allowed under (2), the taxpayer may propose alternative methodology or information at any time during the appraisal process and the department will give it full and fair consideration. If the department concludes that the value of intangible personal property is greater than that allowed in (2), the unit value will be decreased accordingly. In no event, however, will the value of intangible personal property be less than that allowed in (2).

(4) A taxpayer may, at any time, make recommendations to the department, regarding the percentages in (2)(a), (b), or (c).

History: [15-23-108](#), MCA; [IMP](#), [15-6-218](#), [15-23-205](#), [15-23-303](#), MCA; [NEW](#), 2000 MAR p. 872, Eff. 3/31/00; [AMD](#), 2010 MAR p. 2993, Eff. 12/24/10; [AMD](#), 2014 MAR p. 2175, Eff. 9/19/14.