



LEGAL MEMORANDUM

Date: December 16, 2015

To: Patrick Lonergan, County Emergency Management

Cc: Gallatin County Commission; Jim Doar, County Administrator

From: Erin Arnold, Deputy County Attorney

Re: RLS 2015-063: Evacuation Authority

I. Question Presented

This memo responds to RLS # 2015-063 and rephrases the request as follows: Which local entities or officers have legal authority under Title 10, Chapter 3, Montana Code Annotated (MCA) to order an evacuation in Gallatin County in the event of an emergency or disaster?

II. Answer

The Board of Gallatin County Commissioners (“County Commission”) or the governing body of a city or town may order an evacuation within their respective jurisdictions upon the passage and approval of a resolution proclaiming an emergency or declaring a disaster. If a quorum of the governing body is unable to convene and immediate evacuation is necessary, the presiding officer may order an evacuation in the interim. Law enforcement may then perform the evacuation according to the Emergency Management Plan. Law enforcement, however, does not have authority to order an evacuation unilaterally.

III. Discussion

A. Local law enforcement does not have authority to order an evacuation.

Montana law conveys evacuation authority exclusively to the principle executive officer in the event of an emergency or disaster: “A local emergency proclamation or disaster declaration may be issued *only by the principal executive officer of a political subdivision.*” § 10-3-402(1), MCA (emphasis added). The “principle executive officer” is defined as the chief executive officer of a political subdivision. *See* § 10-3-103(10), MCA. Neither Title 10, Chapter 3, MCA (“Disaster and Emergency Services”) nor Title 7, MCA (“Local Government”) provides concurrent authority to local law enforcement.

A sheriff is limited to those powers set forth at § 7-32-2121, MCA, and a police chief to those powers at § 7-32-4105, MCA. Neither statute includes any evacuation authority. Nor does case law indicate that the general duty of a sheriff to “preserve the peace” equates to the authority to order an evacuation. The few cases discussing that duty refer to the suppression of riots, mobs, insurrections, and the like. *See e.g. McCarthy v. Anaconda Mining Company*, 70 Mont. 309 (1924) and *Annala et ux v. McLeod et al.*, 122 Mont. 498 (1949). Although a sheriff may “perform other duties that are required by law,” the authority to order an evacuation under

Title 10, Chapter 3, MCA is expressly reserved to the principal executive officer. Similarly, the requirement that the chief of police “perform other duties that the council may prescribe,” § 7-32-4105, MCA, may include the management and performance of an evacuation, but not the initial evacuation order.

B. An emergency or disaster should be formally declared through the passage and approval of a resolution of the governing body.

Although § 10-3-402(1) and § 10-3-403(1), MCA convey authority to a presiding officer to proclaim an emergency or declare a disaster, the proclamation or declaration must be made by order or resolution. §§ 10-3-402(2), -403(1), -404, MCA. Nothing in statute or case law authorizes a presiding officer to unilaterally approve a resolution or order. Only the governing body of a county, city, or town has that authority. §§ 7-5-121, 7-5-4101, MCA.

Due to this conflict, it is recommended that the governing body of the jurisdiction, rather than the individual presiding officer, formally consider and approve a resolution proclaiming an emergency or declaring a disaster. That resolution must include the contents required by § 10-3-404, MCA and, upon its adoption, will activate the applicable parts of the Emergency Management Plan. § 10-3-404(2), MCA. In addition, if evacuation is necessary, the resolution should order an evacuation and direct law enforcement to perform the evacuation according to the Emergency Management Plan. § 10-3-406 MCA.

C. The presiding officer may order an evacuation when a quorum of the governing body is unable to convene and immediate evacuation is necessary.

Situations might arise in which the need for evacuation is immediate, but a quorum of the governing body cannot be convened to consider a resolution. In such situations, the presiding officer may exercise his or her authority under §§ 10-3-402 and 10-3-403, MCA to individually order an evacuation upon determining that an emergency or disaster exists. § 10-3-402(2), -403(2), MCA. Law enforcement may then perform the evacuation according to the terms of the Emergency Management Plan. § 10-3-404(2), MCA. As advised above, however, as soon as a quorum of the governing body can be convened, the governing body should consider and approve the resolution required by § 10-3-404, MCA. The resolution also should affirm the presiding officer’s finding that an emergency or disaster exists, formally proclaim the emergency or declare the disaster, and reaffirm the evacuation order.

IV. Recommended Action

A. Revisions to the Emergency Management Plan

The Emergency Management Plan should be modified to clearly delineate the evacuation authority discussed and recommended above. Definitions also should include and not otherwise conflict with the definitions located at § 10-3-103, MCA. In addition, it appears that Annex U (“Legal”) misstates statutory authority. At a minimum, revisions are recommended to the sections identified below, which were reviewed as part of this legal request. All other sections and annexes should be reviewed for consistency.

1. Section V.B (“Definitions”), including the definitions of Principal Executive Officer, Emergency, and Disaster.

2. Section VII.G (“Emergency Authorities”).
3. Section VIII.B(3)(a) (“Assignment of Responsibilities,” “Principal Executive Officer”).
4. Annex E (“Evacuation”), including Sections V.B (“Definitions”), VI.A(2) (“Situation”), VII.B (“Evacuation Decisions”), VIII.[A] (“Organization”), VIII.B(1) (“Assignment of Responsibilities”), and IX.A (“Coordination, General”).
5. Annex U (“Legal”), including Sections B (“Definitions”), VII.A(1)-(2), (4) (“Concept of Operations, General”), and VIII.B(1) (“Assignment of Responsibilities, PEO”).

B. Interim Evacuations

Until the Emergency Management Plan is revised, the following process should be followed if an evacuation is needed:

1. The Emergency Disaster Services Manager consults with key officials and members of the governing body of the affected jurisdiction to determine whether an incident, emergency, or disaster exists.
 - a. Refer to § 10-3-103, MCA for the definitions of incident, emergency, and disaster.
 - b. The governing body of the affected jurisdiction is:
 - i. The County Commission, if the event occurs or the evacuation is needed outside of a city or town.
 - ii. The respective city or town council, if the event or evacuation is limited to the confines of the city or town.
 - iii. Both the County Commission and the respective city or town council, if the event or evacuation includes areas in the County that are outside of a city or town and areas within a city or town.
2. For Incidents:
 - a. The law enforcement agency with jurisdiction in the incident area may recommend, but not order, that residents evacuate.
 - b. No resolution or order is required.
 - c. Evacuation authority under the Emergency Management Plan is not activated.
3. For Emergencies and Disasters:
 - a. If a quorum of the governing body of the affected jurisdiction (see IV.B(1)(b), above) can be convened before the evacuation is needed, the governing body proclaims an emergency or declares a disaster by considering and approving a resolution.
 - i. The resolution must include the contents required by § 10-3-404, MCA.
 - ii. The resolution also orders an evacuation per § 10-3-406, MCA and directs law enforcement to perform the evacuation.

- b. If a quorum of the governing body of the affected jurisdiction cannot be convened and evacuation is needed immediately, the presiding officer orders an evacuation upon a finding that an emergency or disaster exists.
 - i. As soon as a quorum of the governing body can be convened, the governing body considers and approves a resolution consistent with § 10-3-404, MCA.
 - ii. The resolution also affirms the presiding officer's finding that an emergency or disaster exists, formally proclaims the emergency or declares the disaster, and reaffirms the prior evacuation order.
- c. Upon the evacuation order of the presiding officer or governing body, as applicable, law enforcement performs the evacuation pursuant to Annex E: Evacuation of the Emergency Management Plan.