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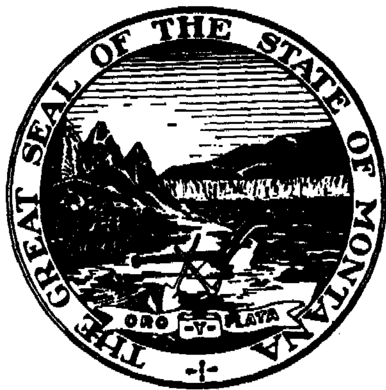

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 6

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are inserted at the back of each register.

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STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF OPTOMETRISTS

In the matter of the proposed amendment of a rule pertaining to practice requirements	)))	NOTICE OF PROPOSED AMENDMENT OF 8.36.406 GENERAL PRACTICE REQUIREMENTS NO PUBLIC HEARING CONTEMPLATED.

TO: All Interested Persons:

1. On April 23, 1988, the Board of Optometrists proposes to amend the above-stated rule.

2. The proposed amendment of 8.36.406 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-1072 and 8-1073, Administrative Rules of Montana)

"8.36.406 GENERAL PRACTICE REQUIREMENTS (1) will remain the same.

(a) the practice must be owned and under the direct supervision of an optometrist with valid Montana certificate of registration, except that a duly licensed optometrist is not prohibited from associating himself with other duly licensed optometrists and/or medical doctors for the purpose of practicing optometry within the scope of his license."

(b) through (2) will remain the same."

Auth: 37-1-131, 37-10-202, MCA Imp: 37-10-301, 37-10-311, MCA

REASON: This amendment is being proposed to allow a licensed optometrist the opportunity to be a member of a professional corporation with another licensed professional for the purpose of promoting eye care.

3. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Optometrists, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than April 21, 1988.

4. If a person who is directly affected by the proposed amendment wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Board of Optometrists, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than April 21, 1988.

5. If the board receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendment, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons

directly affected has been determined to be 23 based on the licensees in Montana.

BOARD OF OPTOMETRISTS
K. R. ZUROFF, O.D., PRESIDENT

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 14, 1988.

BEFORE THE BOARD OF OUTFITTERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of proposed amendment, repeal, and adoption of rules pertaining to outfitters and professional guides	NOTICE OF PUBLIC HEARING ON AMENDMENT TO RULES 8.39.101, 8.39.201, AND 8.39.202, REPEAL OF RULES 8.39.401 THROUGH 8.39.417, AND THE ADOPTION OF NEW RULES I. THROUGH XVIII.

TO: All Interested Persons

1. On Friday, April 22, 1988, at 9:00 a.m., a public hearing will be held in the downstairs conference room of the State of Montana Department of Commerce building located at 1424 9th Avenue, Helena, Montana, to consider the proposed amendment, repeal, and adoption of rules pertaining to outfitters and professional guides.

2. The proposed amendments will read as follows: (new matter underlined, deleted matter interlined) (full text of the rules is located at page 8-1113, Administrative Rules of Montana)

"8.39.101 BOARD ORGANIZATION AND POLICY (1) The board of outfitters hereby adopts and incorporates the organizational rules of the department of commerce listed at Chapter 1 of this title of the Administrative Rules of Montana.

(2) It is the policy, intent, and purpose of the board of outfitters to provide quality regulatory functions and services to the profession it regulates and the public in order to promote, maintain, and preserve an ever-improving high degree of competence in the profession, satisfaction in the public, and an ever-lasting environment in which the profession operates."

Auth: 2-4-201, MCA Imp: 2-4-201, MCA

"8.39.201 PROCEDURAL RULES (1) The board of outfitters hereby adopts and incorporates the procedural rules of the department of commerce as listed in Chapter 2 of this title of the Administrative Rules of Montana."

Auth: 2-4-201, 37-47-201, MCA Imp: 2-4-201, 37-47-201, MCA

"8.39.202 PUBLIC PARTICIPATION RULES (1) The board of outfitters hereby adopts and incorporates ~~by-this-reference~~ the citizen participation rules of the department of commerce as listed in Chapter 2 of this title of the Administrative Rules of Montana.

(2) Dates, times, and places for meetings and other activities of the board of outfitters may be obtained by contacting the board office.

(3) Communications to the board of outfitters may be made to: Board of Outfitters, Department of Commerce, State of Montana, 1424 9th Avenue, Helena, Montana, 59620."

Auth: 2-3-103, 2-4-201, 37-47-201, MCA Imp: 2-3-103, 2-4-201, 37-47-201, MCA

REASON: These amendments are necessary to expand and make clear the purpose and intent of the board and to provide for ready access to and communicate with the board office.

3. The proposed repeal of rules provides that ARM 8.39.401, 8.39.402, 8.39.403, 8.39.404, 8.39.405, 8.39.406, 8.39.407, 8.39.408, 8.39.409, 8.39.410, 8.39.411, 8.39.412, 8.39.413, 8.39.414, 8.39.415, 8.39.416, 8.39.417, the complete text being found at pages 8-1115 through 8-1120 of the Administrative Rules of Montana, shall be repealed.

REASON: Reallocation of the board to the department of commerce and major revisions of the practice act indicate that change in the existing rules is necessary to establish cohesive and complete rules in line with the current duties, functions, and authority of the board. Repeal of existing rules is necessary because they were intended for administration by another department of state government in concert with an advisory board and are not readily adaptable to the intended statutory changes. Amendments to the existing rules would be unduly cumbersome. It is the opinion of the board that a total revision is more orderly and efficient and understandable than would be rule amendments. It would therefore be in the best interests of the profession and the public.

4. The proposed new rules will read as follows:

"I. LICENSURE--OUTFITTER LICENSES (1) An outfitter license shall be issued to an applicant who has demonstrated to the board that he or she has:

(a) met the qualifications to provide those services of an outfitter indicated on the license application;

(b) successfully passed the required examination pertaining to those functions; and,

(c) filed an operations plan that has been approved by the board.

(2) The license issued shall designate, and thereby authorize the outfitter to conduct, those functions of an outfitter that the applicant has qualified for. Functions of an outfitter to be indicated on the license application and license issued, if qualified for, shall be one or more of the following:

(a) hunting services;

(b) fishing services;

(c) both hunting and fishing services;

(d) saddle or pack animal;

(e) personal services;

(f) camping equipment;

(g) transportation (vehicles or other conveyance);
(h) boat or other floating craft; and,
(i) lodging."
Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-101, 37-47-201, 37-47-301, 37-47-302, 37-47-307, 37-47-308, MCA

REASON: The statements of reasonable necessity for each of the three basic requirements for licensure set forth in this rule--qualifications, examination, and operations plan--will be found at the particular rule applicable to each (following immediately). This rule is necessary to set forth and make clear the basic requirements that shall be met prior to licensure. It is also necessary to make clear those functions of an outfitter that may be listed on a license. It also provides for the issuance of general and special licenses.

"II. LICENSURE--OUTFITTER QUALIFICATIONS (1) In addition to meeting all of the qualifications contained in section 37-47-302, MCA, each applicant for an outfitter license shall:

(a) have three seasons of experience in Montana as a licensed outfitter or a licensed professional guide working for a licensed outfitter; and,

(b) be qualified to provide all services and use all equipment necessary to provide the functions of an outfitter that his or her license will authorize him or her to conduct.

(2) The experience required in this part shall be in the field of hunting for an outfitter that is applying for an outfitter license that authorizes hunting, fishing for a license authorizing fishing, and both for a license authorizing both hunting and fishing.

(3) One season of experience shall mean experience, for a hunting outfitter applicant, of not less than six weeks hunting as a licensed outfitter or licensed professional guide and, for a fishing outfitter applicant, of not less than eight weeks fishing as a licensed outfitter or licensed professional guide, except:

(a) if the board determines it is not possible or practical for an applicant to obtain the required experience for the particular species of game that an applicant intends to provide services for, the board may determine other appropriate experience qualifications;

(b) one season of experience may be waived by the board for an applicant who has completed training at an outfitter or guide school approved by the board; and,

(c) under circumstances where the hunting season for any species is less than six weeks long, the board may determine that a season of experience is equal to the length of that hunting season.

(4) An applicant may accumulate only one season of experience for hunting and one season of experience for fishing in one calendar year."

Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-201, 37-47-302, 37-47-304, 37-47-307, 37-47-308, MCA

REASON: Experience, as a qualification for licensure, is required by law. This rule is necessary to safeguard participants and the public. The board has determined that the practical knowledge learned from three seasons of experience provides ability to conduct outfitter functions competently. The board has determined that one or two seasons experience, by itself, is not sufficient to provide that practical knowledge of terrain, weather, and other situations in general, that is necessary to conduct outfitter functions competently.

"III. LICENSURE--OUTFITTER EXAMINATION (1) Application to take the outfitter examination shall be by completed license application accompanied by the required fee no later than thirty days prior to the examination date.

(2) The examination shall be given in Helena, Montana, on the second Tuesday of January, April, July, and October of each year.

(3) An applicant who has failed the examination shall not be eligible to take the next scheduled examination. However, after submitting new application and new examination fee, an unsuccessful applicant may retake the examination at any scheduled examination thereafter.

(4) An applicant who fails the written examination may, within fifteen days of notification of failure, review his or her examination at the board office. During this review, the applicant may review only questions answered incorrectly. Correct answers to those questions will be furnished to the applicant. No representative of the board shall discuss the substance of the examination with the applicant. The applicant will not be allowed to record any information from the examination during the review."

Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-201, 37-47-305, MCA

REASON: Examination is required by statute. It is a generally accepted method of measuring competence to practice. Parts of the rule are necessary to preserve security of the examination. The balance of the rule is necessary to establish procedures for administering examinations, reviewing examinations, and retaking examinations.

"IV. LICENSURE--APPROVED OUTFITTER OPERATIONS PLAN

(1) On a form provided by the board and accompanied by the required fee, each outfitter shall file, for approval by the board, an operations plan that shall detail the following information:

(a) place of operation;
(b) name under which business is conducted;
(c) names of the owners of the business;
(d) area hunted;
(e) rivers and lakes fished;
(f) maximum numbers of guests to be served at one time;
(g) equipment owned;
(h) equipment leased;

(i) public land use permits held;
(j) private land leases or written permission held;
(k) game hunted or fished;
(l) number of employees to be used;
(m) type and size of facilities;
(n) liability insurance company and policy number; and,
(o) other information the board may deem necessary.

(2) The area of approved use designated on an operations plan must be an area where use is being transferred from an existing operation to a new operations plan or an area where the intended use will not cause conflicts with existing use.

(3) In order to determine if the intended use will cause conflicts with existing use the board may serve notice to the public, the Montana department of fish, wildlife, and parks administrative offices, and federal and state land management agencies in the area of intended use for the purpose of soliciting comments. The determination by the board shall be based on comments received.

(4) The equipment listed on the operations plan must be sufficient to serve the maximum number of clients listed on the plan.

(5) The area of use must be sufficient to provide a safe service for the number of clients listed on the plan.

(6) The number of employees listed in the operations plan must be sufficient to provide a safe experience for the clients.

(7) The sleeping and food preparing and serving areas must be sufficient for the numbers of persons utilizing them.

(8) The intended use shall not be detrimental to the environment or game.

(9) A representative of the board will inspect the equipment, livestock, and facilities listed on an operations plan.

(10) A new applicant's equipment, livestock and facilities shall be inspected before final approval of an operations plan. An existing outfitter's equipment, livestock and facilities may be inspected at any appropriate time.

(11) An applicant shall furnish proof that he or she has in effect a liability insurance policy as required in (Rule XIII).

(12) An operations plan shall not be approved if the applied for use is not being conducted or could not be conducted according to state or federal laws, rules or regulations."

Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-201, 37-47-301, 37-47-302, 37-47-304, 37-47-307, 37-47-308, MCA

REASON: This rule is necessary to provide a means of determining whether the functions and operations of an outfitter business can be adequately performed by the outfitter in a fashion that is compatible with the health, safety, and welfare of the public, participants, landowners, and in accord with laws and rules of state and federal agencies, and the protection of the environment.

"V. LICENSURE--OUTFITTER APPLICATION (1) Application for an outfitter license shall be on a form provided by the board and shall be accompanied by the required fee.

(2) Application shall be in two parts:

(a) a license application form which shall require information the board needs in order to determine the basic abilities and qualifications of the applicant and to verify those functions of an outfitter the applicant is applying for; and,

(b) an operations plan application form which shall require information the board needs in order to determine the functions of an outfitter an applicant can perform with the equipment listed, number of clients that can be served with equipment listed, compatibility with the area utilized, and verification of permission to utilize public or private lands.

(3) Applicants passing the examination shall have one year to complete an approved operations plan before commencing operations or will then be treated as a new applicant. However, the board may, upon written request and good cause shown, extend this period."

Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-201, 37-47-304, 37-47-307, MCA

REASON: This rule is necessary to establish the procedure through which applicants may apply for license and provides bases for issuing general or special licenses.

"VI. LICENSURE--AMENDMENT TO OUTFITTER LICENSE (1) On a form provided by the board and upon payment of the required fee, an outfitter may apply for amendment to his or her outfitter license to add or delete functions for which the license held authorizes the outfitter to perform.

(2) Application for amendment shall be approved upon demonstrating to the board that the requisite qualifications applicable to the amendment have been met."

Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-201, 37-47-310, MCA

REASON: A procedure for amendment is necessary to allow an outfitter to expand or limit the scope of functions that he or she is authorized to conduct, without the necessity of applying for a new license.

"VII. LICENSURE--AMENDMENT TO OPERATIONS PLAN (1) An outfitter may apply for an amendment to his or her operations plan by stating in writing his or her proposed changes and submitting it to the board. All amendments will be considered by the board using the same criteria as new applicants, including, if an outfitter is applying to add hunting, fishing, or horse use to his or her operations plan, being required to take those parts of the outfitter examination that apply to the proposed amendment."

Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-201, MCA

REASON: A procedure for amendment is necessary to allow an outfitter to expand or limit the scope of the approved operations plan without the necessity of re-applying for approval of a new operations plan.

"VIII. LICENSURE--RENEWAL (1) License renewal applications shall be made on forms provided by the board and shall be accompanied by the required fee.

(2) If an outfitter does not renew his or her license during a license year, the license will be deemed to have lapsed, and he or she shall then be treated as a new applicant for all purposes.

(3) For good cause the time for lapse of license shall be extended for 60 days, subject to payment of the renewal fee and a late penalty fee."

Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-201, 37-47-302, 37-47-307, 37-47-312, MCA

REASON: This rule clarifies the status and effect of licenses that are not renewed and provides a grace period for hardship late renewals.

"IX. LICENSURE--PROFESSIONAL GUIDE LICENSE (1) The applicant or employing outfitter must submit the completed professional guide license application, provided by the board, accompanied by the required fee.

(2) It shall be the responsibility of the employing outfitter to confirm that the professional guide meets all the qualifications of a professional guide.

(3) On the day after the postmarked date of the application the license applied for will be considered valid and will remain so until the actual license is issued or the board denies the application.

(4) When issued, the license shall be mailed to the employing outfitter. After receipt of the license, the employing outfitter shall endorse and date the professional guide license."

Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-201, 37-47-301, 37-47-307, 37-47-309, MCA

REASON: This rule provides an application procedure for professional guide licensure. To safeguard the public and participants, the outfitter endorsing the license shall confirm the qualifications held by the professional guide.

"X. LICENSURE--PROFESSIONAL GUIDE QUALIFICATIONS

(1) In addition to the requirements contained in section 37-47-303, MCA, an applicant for a professional guide license shall have:

(a) not less than one season of experience, as defined in (Rule II), hunting or fishing for the species of game that he will be guiding for, or have successfully completed a school approved by the board that trains persons to be professional guides;

(b) knowledge of game and hunting and fishing techniques to provide the services advertised by the endorsing outfitter; and,

(c) knowledge of equipment, terrain, and hazards, sufficient to competently provide a safe experience for those persons he guides.

(2) An applicant shall not have held an outfitter or professional guide license that is currently suspended or revoked."

Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-201, 37-47-303, 37-47-307, MCA

REASON: This rule is necessary to safeguard the public and participants.

"XI. LICENSURE--FEES FOR OUTFITTER, OPERATIONS PLAN, AND PROFESSIONAL GUIDE (1) Fees for outfitters, operations plan, and professional guides shall be as follows:

(a)	new outfitter license	
(i)	application processing	$ 50
(ii)	examination	50
(iii)	investigation	175
(iv)	annual license	100
(b)	amendment to outfitter license	
(i)	application processing	50
(ii)	examination	50
(c)	renewal of outfitter license	
(i)	annual license	100
(ii)	late renewal penalty	50
(d)	new operations plan	
(i)	review and processing	75
(ii)	equipment inspection	200
(e)	amendment to operations plan	
(i)	review and processing	75
(ii)	equipment inspection	200
(f)	new professional guide license	
(i)	processing	25

(2) New applicants for an outfitter license shall include, with application for license, payment in the amount of $375, which shall be nonrefundable, except:

(a) an applicant failing to meet the qualifications to take the examination shall be refunded the entire amount less the application processing fee; and,

(b) an applicant failing to pass the examination shall be refunded the entire amount less the application processing fee and the examination fee.

(3) Applicants for amendment to license shall include, with application for amendment, payment in the amount of $100, $50 of which shall be refunded if examination is not necessary for the amendment.

(4) Applicants for amendment to operations plan shall include, with application for amendment, payment in the amount of $275, $200 of which shall be refunded if inspection of equipment is not necessary for the amendment.

(5) Operations plans submitted for approval by the board requiring no inspection, such as in the case of an outfitter presently licensed submitting an operations plan to comply with this chapter, shall be accompanied by the review and processing fee only.

(6) Minor amendments to license or operations plan, not involving change to type of license or operation or area of operation, shall not require a fee."

Auth: 37-1-131, 37-1-134, 37-47-201, 37-47-306, MCA Imp: 37-47-306, 37-47-307, MCA

REASON: This rule is mandated by statute. It specifies the fees that will apply to the application, amendment, and renewal process.

"XII. OUTFITTER RECORDS (1) Outfitters shall maintain current, true, complete, and accurate records at all times, submit the records to the board with application to renew license, and make the records available at all times to enforcement or investigative personnel authorized or appointed by the board.

(2) Outfitter records shall be maintained on forms prescribed by the board and shall contain information as required by the board. The information required shall include, but not be limited to:

(a) names and addresses of clients;

(b) dates of service to clients;

(c) big game animals and fish taken by clients;

(d) clients hunting and fishing license numbers;

(e) districts hunted and rivers and lakes fished by clients; and,

(f) unusual incidents involving participants.

(3) Submitted outfitter records shall be maintained as confidential information and shall not be released to any person or organization without approval of the board, permission of the outfitter, or being otherwise required by subpoena."

Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-301, MCA

REASON: Statutes require outfitter records. This rule is necessary to implement the statute and aid the board in monitoring the activities of outfitters.

"XIII. CONDUCT--ADDITIONAL REQUIRED OUTFITTER PROCEDURES (1) Outfitters or an authorized agent shall furnish clients with a current and complete rate schedule, which shall include all charges and the mode of payment acceptable, a deposit policy, and deposit refund policy, all in writing, for services offered. The outfitter shall advise the client in writing of any differences in rates or policies from those published.

(2) All outfitters shall have liability insurance in effect anytime they are providing services for clients. Minimum amounts of liability insurance shall be $10,000 for property damage, $100,000 for personal injury to one person

and a total of $300,000 for personal injury to more than one person."

Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-201, 37-47-301, MCA

REASON: This rule is necessary to safeguard the public and participants.

"XIV. CONDUCT--STANDARDS OF OUTFITTER AND PROFESSIONAL GUIDE (1) All outfitters and professional guides shall:

(a) in addition to avoiding the prohibitions contained in 37-47-301(3), MCA, insure that no outfitter or employee of an outfitter shoots, kills, or takes any game animal while the outfitter is providing services for clients;

(b) make every effort to operate with respect for the rights of other, private and public property, and provide for the health, safety, and well being of their clients, employees, and the general public;

(c) provide services on public land in a manner such that they do not interfere with the general public access to public land or waterways or access to wildlife on public land;

(d) provide their services in such a manner as not to be detrimental to the wildlife or the environment where they operate;

(e) report to the board office, at their earliest opportunity, any violation of fish and game laws or outfitter and guide laws that they have knowledge of;

(f) not excessively use any narcotic drug, alcohol, or any other drug or substance, to the extent that the use impairs the user physically or mentally, while engaged by a client;

(g) not violate any law, rule, or policy of the department of fish, wildlife, and parks concerning the certification of non-residents for procuring hunting licenses;

(h) shall certify only those non-residents he or she intends to provide the functions of an outfitter for, as defined in section 37-47-101(5), MCA, and from whom he or she has received a minimum of a $400 deposit;

(i) not charge any fee for certifying or aiding or assisting any non-resident in procuring or attempting to procure a hunting license;

(j) not conduct any services on private or public land, except legal transportation across such lands, without first having obtained written permission from the landowner or written authorization from the agency administering public land;

(k) not conduct a function of an outfitter that is not authorized in his or her approved operations plan or without an approved operations plan;

(l) not conduct a function of an outfitter that is not listed on his or her license;

(m) not endorse a professional guide license if that guide has not met the qualifications of a guide;

(n) not make misrepresentation of services offered;

(o) not harass or abuse clients, employees, outfitters, professional guides, or members of the general public, verbally or otherwise;

(p) not harass or abuse livestock or wildlife;

(q) not interfere, by solicitation or otherwise, with a contract between another outfitter and client, including certifications for game license or permits, when it is known or reasonably should be known that a contract to provide services exists between that other outfitter and a client."

Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-201, 37-47-301, 37-47-302, 37-47-341, 37-47-402, 37-47-404, MCA

REASON: This rule is necessary to safeguard the public and participants and to make clear that the failure to adhere to the listed and referenced types of conduct may result in license discipline.

"XV. CONDUCT--ADDITIONAL RESTRICTIONS ON PROFESSIONAL GUIDE (1) Unless done in the name of and on behalf of the endorsing outfitter, a professional guide shall not advertise services, make agreements with clients concerning monetary consideration or services offered, or collect fees from clients. A violation of this part, if done with the knowledge of the endorsing outfitter, shall be a violation of outfitter and professional guide standards for both the endorsing outfitter and the professional guide."

Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-101, 37-47-201, 37-47-344, MCA

REASON: This rule is necessary to safeguard the public and participants and to make clear that the activities of a professional guide are limited.

"XVI. CONDUCT--OUTFITTER RESPONSIBILITY FOR PROFESSIONAL GUIDE (1) The outfitter endorsing the professional guide license shall obtain and maintain a reasonable degree of supervision over the professional guide to insure that the services offered are being provided and being provided in accordance with the law and rules, with particular regard to those laws and rules pertaining to the health, safety, and welfare of the participants, the public, and landowners."

Auth: 37-1-131, 37-47-201, MCA Imp: 37-47-201, 37-47-402, 37-47-404, MCA

REASON: This rule is necessary to safeguard the participants and public and insure competence by placing responsibility on the outfitter for certain acts of the professional guide.

"XVII. CONDUCT--REVOCATION OR SUSPENSION OF OUTFITTER OR PROFESSIONAL GUIDE LICENSE (1) The license of an outfitter or professional guide may be suspended or revoked for any of the grounds listed in section 37-47-341, MCA, Title 37, chapter 47, MCA, (Rule XV), other rules in this chapter of the Administrative Rules of Montana, and any statute or rule of a

state or federal agency referenced, specifically or generally, therein.

(2) Suspension or revocation of an outfitter license also suspends or revokes approval of the operations plan.

(3) Upon suspension or revocation of an outfitter license, the privilege of holding a professional guide license shall also be suspended."

Auth: 37-1-131, 37-1-136, 37-47-201, MCA Imp: 37-47-201, 37-47-302, 37-47-341, 37-47-342, MCA

REASON: This rule is necessary to make clear the impact that a revocation or suspension may have on the operations of the outfitter and professional guide.

6. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to the Montana Board of Outfitters, Department of Commerce, State of Montana, 1424 9th Avenue, Helena, Montana, 59620, no later than Friday, April 22, 1988.

7. Martin Jacobson, Staff Attorney, Montana Board of Outfitters, Department of Commerce, State of Montana, 1424 9th Avenue, Helena, Montana, 59620, phone (406) 444-4290, has been designated to preside over and conduct the hearing.

RON CURTISS, CHAIRMAN
BOARD OF OUTFITTERS

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State March 14, 1988.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rule I relating to Partial Payments of taxes - Rules on Waiver of Penalty and Interest.	)	NOTICE OF THE PROPOSED ADOPTION of Rule I relating to Partial Payment of taxes - Rules on Waiver of Penalty and Interest. NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On April 25, 1988, the Department proposes to adopt rule I relating to partial payment of taxes.

2. The rule as proposed to be adopted provides as follows:

RULE I APPLICATION OF PARTIAL PAYMENTS (1) All partial payments received by the department for the payment of tax, penalty, and interest must be first applied to the amount of interest due, then to the amount of penalty due and then to the tax due. AUTH, Secs. 2-4-201, 15-1-201, 15-30-305, 15-31-501, 15-35-122, 15-53-104, and 15-70-104 MCA; IMP, Secs. 2-4-201, 15-1-206, 15-30-321, 15-31-502, 15-25-105, 15-36-107, 15-37-108, 15-38-107, 15-53-111, 15-54-111, 15-55-108, 15-56-111, 15-58-106, 15-59-106, 15-59-205, 15-70-210, and 15-70-330 MCA.

3. Rule I is necessary to clarify how a partial payment shall be credited to a taxpayer if tax, penalty and/or interest is owing to the state. This rule is consistent with the provisions of the "United States rule" as stated in 45 Am.Jur.2d, Interest and Usury, § 99.

4. Interested parties may submit their data, views, or arguments concerning the proposed adoption and amendment in writing to:

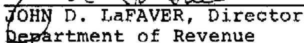
Cleo Anderson
Department of Revenue
Office of Legal Affairs
Mitchell Building
Helena, Montana 59620

no later than April 21, 1988.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Cleo Anderson at the above address no later than April 21, 1988.

6. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the

Legislature; from a governmental subdivision, or agency; or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25.



JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 3/14/88.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE STATE ELECTRICAL BOARD

In the matter of the amendment of 8.18.402 and 8.18.407 and the adoption of new rules I. (8.18.408) and II. (8.18.409)	NOTICE OF AMENDMENT AND ADOPTION OF RULES PERTAINING TO APPLICATIONS, FEES, EXAMINATIONS AND CONTINUING EDUCATION

TO: All Interested Persons:

1. On January 14, 1988, the State Electrical Board published a notice of public hearing on the proposed amendment and adoption of the above-stated rules at page 5, 1988 Montana Administrative Register, issue number 1.

2. The hearing was held on Friday, February 5, 1988, at 9:00 a.m., at 1218 East Sixth Avenue, Helena, Montana.

3. The Board amended and adopted the rules as proposed with the following changes:

"8.18.409 CONTINUING EDUCATION (1) through (b) will remain the same.

(c) Representatives of the department or state electrical ~~section~~ board shall be able to attend and monitor the courses of seminars without charge.

(d) through (vi) will remain the same."

Auth: 37-1-131, 37-68-201, MCA AUTH Extension, Sec. 5, Ch. 245, L. 1987, Eff. 10/1/87 Imp: 37-68-201, MCA.

REASON: The National Electrical Code is updated every three years. The Board is concerned that licensed electricians are not keeping up on current code and safety standards. Since October 1986, state electrical inspectors issued 237 compliance orders to licensed electrical contractors for code violations (this figure does not reflect compliance orders issued by inspectors in certified cities). If the electrician is required to update his knowledge by attending continuing education courses it is believed that the number of compliance orders will decrease.

Continuing education is also needed to keep electricians current on new technology such as optical fibers, solar photovoltaic systems, integrated electrical systems, fire protective signals, etc., which are constantly being changed and updated.

4. Comments received and the board's responses are as follows:

COMMENT: One comment was received from Bill Branden inquiring how the board will provide licensees with the opportunity to attend courses and seminars.

COMMENT: One comment was received from Terry Becker and Kent Streitmatter that educational meetings are expensive and time consuming.

RESPONSE: The board's response to the above comments is the Electrical Safety Section is currently holding 2-4 hour classes in the evening. These classes are scheduled in 2 to 3 different towns in each of the inspectors geographical areas. There is no charge for these classes. Other courses will also be available, but these will have a registration fee somewhere in the neighborhood of $25.00 to $65.00 per person.

COMMENT: Becker and Streitmatter commented that inspectors should be required to have similar instruction and education.

RESPONSE: The board's response is that inspectors are currently instructed through the Building Codes Bureau.

COMMENT: Becker and Streitmatter also propose that an educational requirement be related to deficiencies received by a contractor and if no deficiencies then the contractor should be exempt.

RESPONSE: The board's response is the intent of the rule goes beyond requiring education for those that obviously need it and extends to insuring that all licensees maintain competence in the advancing and changing field.

COMMENT: The staff of the Administrative Code Committee stated the authority citations for the proposed amendments of ARM 8.18.402 and 8.18.407 and new rule 8.18.408 fail to list the proper authority extensions required by 2-4-305(3), MCA. Also, the implemented statute listed for new rule 8.18.409 is incorrect and there is no adequate statement of reasonable necessity for the new rule.

RESPONSE: The board concurred and added Authority Extension, Sec. 5, Ch. 245, L. 1987, Eff. 10/1/87 to the rules. Implementing section 37-68-103, MCA has been changed to 37-68-201, MCA for new rule 8.18.409 as shown above. A more adequate statement of reasonable necessity appears below the changes made to 8.18.409.

COMMENTS: A comment was received from Thomas Herzig, secretary/manager, Montana Chapter National Electrical Contractors Association, Helena, Montana, in support of all of the proposed rule amendments and adoptions in their entirety.

5. No other comments or testimony were received.

STATE ELECTRICAL BOARD
JAMES L. LEWIS, CHAIRMAN

BY: Geoffrey L. Brazier
GEOFFREY L. BRAZIER, ATTORNEY
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 14, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF HORSE RACING

In the matter of the amendment of rules pertaining to licenses, general provisions, general requirements, general rules, and definition of detrimental conduct	NOTICE OF AMENDMENT OF 8.22.502 LICENSES ISSUED FOR CONDUCTING PARIMUTUEL WAGERING ON HORSE RACING, 8.22.601 GENERAL PROVISIONS, 8.22.801 GENERAL REQUIREMENTS, 8.22.1401 GENERAL RULES, 8.22.1502 DEFINITION OF CONDUCT DETRIMENTAL TO THE BEST INTERESTS OF RACING

TO: All Interested Persons:

1. On February 11, 1988, the Board of Horse Racing published a notice of public hearing on the proposed amendments of the above-stated rules at page 217, 1988 Montana Administrative Register, issue number 3.

2. The hearing was held on Tuesday, March 8, 1988, at 9:00 a.m., in the downstairs conference room 1424 - 9th Avenue, Helena, Montana.

3. The Board has amended the rules as proposed with the following change: (new matter underlined, deleted matter interlined)

"8.22.801 GENERAL REQUIREMENTS (1) through (18) will remain the same.

(19) No horse shall be allowed to ~~start~~ enter in any race unless it has been tattooed and fully identified.

(20) through (29) will remain the same."

Auth: 37-1-131, 23-4-104, 23-4-202, MCA Imp: 23-4-104, MCA

4. The above amendment should have been made in the original notice to coincide with Board policy, but was inadvertently omitted.

5. One comment was received from Allison Hines regarding the above amendment.

6. No other comments or testimony were received.

BOARD OF HORSE RACING
HAROLD GERKE, CHAIRMAN

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 14, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PSYCHOLOGISTS

In the matter of the amendment of 8.52.401, 8.52.402, 8.52.602, 8.52.604, 8.52.606, 8.52.608, 8.52.609, 8.52.610, 8.52.611, 8.52.612, 8.52.616, the repeal of 8.52.603, 8.52.605, 8.52.607, 8.52.613, 8.52.620, 8.52.621, and the adoption of new rules I. through V.	NOTICE OF AMENDMENT, REPEAL AND ADOPTION OF RULES PERTAINING TO PSYCHOLOGY

TO: All Interested Persons:

1. On December 24, 1987, the Board of Psychologists published a notice of proposed amendment, repeal, and adoption of the above-stated rules at page 2296, 1987 Montana Administrative Register, issue number 24.

2. The Board amended, repealed, and adopted the rules as proposed with the new rules being numbered as follows: I. (8.52.202), II. (8.52.603A), III. (8.52.605A), IV. (8.52.617), V. (8.52.618). The Board made changes to the following rules:

"8.52.402 BOARD MEETINGS (1) through (5) will remain the same.

(6) Ordinarily meetings will be announced one month in advance through ~~BY-OTHER~~ appropriate means and media. Special meetings may be called at any time deemed necessary by the board when members agree. Meetings may be by telephone and balloting by mail.

(7) through (9) will remain the same."

Auth: 37-17-202, MCA Imp: 37-17-201, MCA

3. The interlined capitalized words were left out of the original proposal and will be deleted.

"8.52.606 REQUIRED SUPERVISED EXPERIENCE (1) through (3)(b) will remain the same.

(4) Qualified professional experience may include one calendar year of supervised experience after the master's degree and must include at least one calendar year post-doctoral. One year may be ~~the~~ an internship in an approved training program for the Ph.D. in clinical psychology; the postdoctoral year is figured from the time of completion of all requirements for the doctoral degree. Such time of completion may be established by communication from an appropriate institutional official, ordinarily, the registrar or the dean of the graduate school.

(5) will remain the same.

(6) A person who holds a doctorate in psychology and wishes to gain a year of postdoctoral supervised experience acceptable to the board, must submit a form provided by the board, indicating an agreement~~,~~ acceptable to the board, between the holder of the doctorate degree and the supervisor,

certifying the existence of a supervisory relationship as defined in subsection (1), (2), (3), (4) above for a specified period when the doctorate level person will be working under supervision. In this case, work considered relevant to subsequent practice of psychology shall be assessed and criticized constructively; in this sense "supervision" is differentiated from consultation.

(a) through (e) will remain the same."

Auth: 37-1-131, 37-17-202, MCA AUTH Extension, Sec. 8, Ch. 347, L. 1987, Eff. 10/1/87 Imp: 37-17-302, MCA

4. The underlined words "must include at least; e; and indicating" in this rule were included in the original proposed notice but were not underlined as amendments. The Board wanted to clarify that these words were amendments to the rule. The word "the" should have been deleted and the word "an" added in the original notice, but was omitted.

"8.52.609 RECIPROCITY (1) through (4) will remain the same.

(5) Other supporting documents will be required only if information received from the other state(s) (referred to in (1) above) leaves the determination unclear as to whether the REQUIREMENTS WERE EQUIVALENT TO THOSE OF MONTANA. IF THESE requirements are not equivalent~~.~~, ~~T~~the applicant may be required to take the written examination.

(6) and (7) will remain the same."

Auth: 37-1-131, 37-17-202, MCA Imp: 37-17-304, MCA

5. The underlined capitalized words were inadvertently left out of the original notice. The Board would like these words to remain in the rule. The word "not" was taken out in the original notice and the Board would like it to remain in the rule. The other changes make the rule appear as it was before the amendments were made in the original notice. The other amendments shown in the original notice were adopted as proposed.

"8.52.616 FEE SCHEDULE (1) will remain the same.

(a) Application fee		110.00
(b) Examination fee	~~75.00-95.00*~~	150.00
(c) Renewal fee		110.00

~~*Effective July 1, 1984.~~

Auth: 37-1-134, 37-17-202, MCA AUTH Extension, Sec. 8, Ch. 347, L. 1987, Eff. 10/1/87 Imp: 37-17-302, 37-17-303, 37-17-306, 37-17-307, MCA

6. This amendment shows how it should have appeared in the original notice. The amount of "75.00*" and the words "*Effective July 1, 1984." should have been deleted in the original notice but were inadvertently omitted.

"8.52.617 UNPROFESSIONAL CONDUCT For the purpose of implementing the provisions of section 37-17-311(c), MCA, the board defines "unprofessional conduct" as follows:

(1) through (19) will remain the same.

(20) ~~Practicing psychology~~ Representing oneself as a psychologist while the practitioner's license is suspended, revoked, or not currently renewed.

(21) will remain the same."

Auth: 37-1-131, 37-17-202, 37-17-311, MCA AUTH Extension, Sec. 8, Ch. 347, L. 198, Eff. 10/1/87 Imp: 37-17-311, MCA

7. The Board wants to make this change to clarify the language.

"8.52.618 ETHICAL PRACTICE OF PSYCHOLOGY (1) through (3)(b) will remain the same.

~~(c) A psychologist who engages in radio or television activities shall not participate in commercial announcements recommending purchase or use of a product.~~

(4) through (7) will remain the same.

~~(8) A psychologist shall adhere to professional rather than commercial standards in making known the psychologist's availability for professional services.~~

~~(a) A psychologist shall not directly solicit clients for individual diagnosis or therapy;~~

~~(b) Individual listings in telephone directories shall be limited to name, highest relevant degree, certification status, address, and telephone number. They may also include identification in a few words of the psychologist's major areas of practice; for example, child therapy, personnel selection, industrial psychology. Agency listings shall be equally modest;~~

~~(c) Announcements of individual private practice shall be limited to a simple statement of the name, highest relevant degree, certification or diplomate status, address, telephone number, office hours, and a brief explanation of the types of service rendered. Announcements of agencies may list names of staff members with their qualifications. They shall conform in other particulars with the same standards as individual announcements, making certain that the true nature of the organization is apparent;~~

~~(d) A psychologist or agency announcing nonclinical professional services may use brochures that are descriptive or services rendered but not evaluative. They may be sent to professional persons, schools, business firms, government agencies, and other similar organizations.~~

~~(e) The use in a brochure of "testimonials from satisfied users" is prohibited. The offer of a free trial of services is prohibited if it operates to misrepresent in any way the nature or the efficacy of the services rendered by the psychologist. Claims that a psychologist has unique skills or unique devices not available to others in the profession may be made only if the special efficacy of these unique skills or devices has been demonstrated by scientifically acceptable evidence;~~

~~(f) The psychologist shall not encourage (nor, within the psychologist's power, even allow) a client to have~~

~~exaggerated-ideas-as-to-the--efficacy--of--services--rendered. Claims---made---to---clients---about---the---efficacy--of--the psychologist's-services-shall-not-go-beyond--those--which--the psychologist---would---be---willing---to---subject---and---the psychologist's-scrutiny-through-publishing-the-results-and-the psychologist's-claims-in-a-professional-journal.~~

(9) through (14) will remain the same but will be renumbered as (8) through (13).

Auth: 37-1-131, 37-17-202, MCA Imp: 37-1-131, MCA

8. Comments received and the Board's responses are as follows:

COMMENT: The Board received one written comment from five licensees and one written public comment concerning the restriction of the use of the word "psychologist" in proposed new rule 8.52.603A to those licensed under the practice act.

RESPONSE: The Board is not persuaded and adopts the rule as proposed, because it feels that the public is best protected when the only persons who can legally call themselves psychologists are the persons who are licensed to practice as psychologists. The Board feels that unlicensed individuals are clearly allowed to indicate the nature and level of their training by the use of academic degrees obtained such as "doctorate in psychology". However, the use of the term "psychologist" is restricted by law (37-17-301, MCA).

COMMENT: The Board received an additional comment from five licensees regarding proposed new rule 8.52.618 "Ethical Practice of Psychology". The concerns expressed were that a portion of this rule may contradict existing statutes, that the proposed rule is vague and that implementing the proposed rule may encourage malpractice litigation.

RESPONSE: The Board was not totally convinced by these arguments. Ethical standards have historically been recognized in the Board's rules (8.52.613, ARM) although not reproduced in their entirety. The statement of legislative intent for HB 443 clearly requires the Board to use the ethical standards of the American Psychological Association as a guide in adopting rules consistent with its duty to protect the public's health, safety, and welfare.

COMMENT: The Board is deleting subsection (3)(c) and subsection (8) in its entirety of proposed new rule 8.52.618 due to the recent court ruling against the American Psychological Association in an action brought by the Federal Trade Commission concerning restrictions in advertising.

COMMENT: The staff of the Administrative Code Committee advised that Authority Extension was missing from those rules that implement statutes that have been amended since 1983. Authority Extension, Sec. 8, Ch. 347, L. 1987, Eff. 10/1/87 will be added to ARM 8.52.602, 8.52.604, 8.52.605A, 8.52.606,

8.52.608, 8.52.616, and 8.52.618. The ACC staff also advised that the implementing section for 8.52.604 should be 37-17-302 rather than 37-17-303, MCA.

RESPONSE: The board concurred and made the proper changes.

9. No other comments or testimony were received.

BOARD OF PSYCHOLOGISTS
WILLIAM BREDEHOFT, Ph.D.
CHAIRMAN

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 14, 1988.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS

OF THE STATE OF MONTANA

In the matter of Adoption of New Rules establishing Guidelines for the sale of Excess Fish Eggs	))))	AMENDED NOTICE OF ADOPTION OF ARM 12.7.901 - 12.7.906 ESTABLISHING THE PROCEDURE THE DEPARTMENT WILL FOLLOW IN THE SALE OF EXCESS FISH EGGS

TO: ALL INTERESTED PERSONS

1. On January 14, 1988, the Montana Department of Fish, Wildlife and Parks published notice of proposed rules concerning procedures for the sale of fish eggs at page 19 of the 1988 Montana Administrative Register, issue number 1.

2. On March 10, 1988, the Department published notice of adoption of the rules at page 497 of the 1988 Montana Administrative Register, issue number 5.

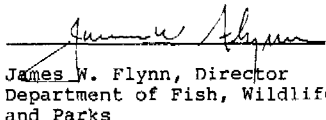
3. Because of several needed corrections, this revised notice of adoption is being published.

4. The Department has adopted the rule as proposed, except for the rationale for the rules, which is amended below.

5. Comments were received from the Administrative Code Committee staff. Initially, the staff questioned the authority of the Department to adopt the rules as proposed. A subsequent comment suggested a source of authority other than that proposed by the Department. The Department adopts the authority suggested in paragraph 7.

6. The Administrative Code Committee staff also questioned the adequacy of the Department's reason for proposing the rules as failing to adequately set forth a reasonable necessity for the rule. The Department is adopting the rule to implement 87-4-601(2), MCA, which was enacted by the 50th Legislature. The rules were proposed and adopted because potential buyers of excess fish eggs need to know the procedures that will be followed when the Department sells its excess fish eggs.

7. The authority of the department to make the rules is based on section 87-1-201, which was extended by Sec. 2 Ch. 152, L. 1987 and the rules implement section 87-4-601(2)(e).



James W. Flynn, Director
Department of Fish, Wildlife and Parks

Certified to the Secretary of State March 14, 1988.

Before the Department of Institutions
of the State of Montana

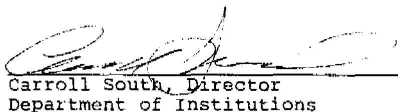
In the matter of the Adoption of Amendment to Rule 20.3.401(2). Certification of chemical dependency counselor.	))))))	Notice of Amendment of ARM 20.3.401(2), pertaining to Certification of chemical dependency counselor costs of re-examination.

To All Interested Persons:

1. On January 28, 1988, the Department of Institutions published a notice of proposed amendment of Rule 20.3.401(2). The notice was published on January 28, 1988, in the Montana Administrative Register, No. 2 at page 156.

2. No comments or testimony were received.

3. The Department of Institutions has adopted the Amendment as proposed.



Carroll South, Director
Department of Institutions

Certified to Secretary of State March 14, 1988.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rules I through VII (42.20.401-42.20.419) relating to Real Property Taxes - Sales Assessment Ratio Studies to Adjust Real Property Values.	NOTICE OF THE ADOPTION of Rules I through VII (42.20.401 through 42.20.419) relating to Real Property Taxes - Sales Assessment Ratio Studies to Adjust Real Property Values.

TO: All Interested Persons:

1. On January 18, 1988, the Department published notice of the proposed adoption of Rules I through VI (42.20.401 through 42.20.419) relating to real property taxes - sales assessment ratio studies to adjust real property values, at pages 158 through 160 of the 1988 Montana Administrative Register, issue no. 2.

2. The Department has adopted these rules as proposed.

RULE I (42.20.401) LIMITATION ON CHANGING PROPERTY VALUE The annual revaluation of taxable property under 15-7-111(10) MCA, is not a cyclical revaluation of all taxable property required under 15-7-111(1) MCA. The department shall not increase the value of taxable property as the result of the completion of a stratified sales assessment ratio study required under 15-7-111(4) MCA, if the increase in taxable value could result in a property tax increase in violation of 15-10-411 and 15-10-412 MCA. AUTH, 15-1-201 MCA; AUTH Ext, Sec. 5, Ch. 613, L. 1987, Eff. 4/27/87 and Sec. 4, Ch. 654, L. 1987, Eff. 5/13/87; IMP, 15-7-111, 15-10-411 and 15-10-412 MCA.

RULE II (42.20.404) CRITERIA FOR REDUCING PROPERTY VALUE (1) When a stratified sales assessment ratio study conducted under 15-7-111(4) MCA, establishes an assessment level of greater than 110% for a sales assessment area identified in 15-7-111(6) MCA, the department shall adjust all property values to 100% in any area where the assessment level exceeds 100% by multiplying property values by the percentage adjustment calculated in Sections (2) and (3) of this rule.

(2) The department shall make percentage adjustments to the valuations of all properties in a specific sales assessment area using the following procedure:

(a) the percentage adjustment must be rounded to the nearest whole number to coincide with the calculated value weighted mean from the following table:

VALUE WEIGHTED MEAN (Rhat) FROM	TO	PERCENTAGE ADJUSTMENT
1.0000	1.0152	No Adjustment
1.0153	1.0256	98%
1.0257	1.0362	97%

1.0363	1.0471	96%
1.0472	1.0582	95%
1.0583	1.0695	94%
1.0696	1.0810	93%
1.0811	1.0928	92%
1.0929	1.1049	91%
1.1050	1.1173	90%
1.1174	1.1299	89%
1.1300	1.1428	88%
1.1429	1.1560	87%
1.1561	1.1695	86%
1.1696	1.1834	85%
1.1835	1.1976	84%
1.1977	1.2121	83%
1.2122	1.2269	82%
1.2270	1.2422	81%
1.2423	1.2578	80%

(3) The department shall not adjust property values if the stratified sales assessment ratio study establishes a negligible change in property value. For the purposes of this rule, "negligible change" means a percentage adjustment greater than 98%. AUTH, 15-1-201 MCA; AUTH Ext, Sec. 5, Ch. 613, L. 1987; IMP, 15-7-111 MCA.

RULE III (42.20.407) PROCEDURE FOR VALIDATING SALES INFORMATION (1) In conducting the stratified sales assessment ratio study, the department shall compile sales information from realty transfer certificates and validate such sales information as required by 15-7-111(8) MCA. The department shall manually review each sale transaction evidenced by a realty transfer certificate to determine whether a sale was a valid, arms-length transaction. For the purposes of this rule, "valid, arms-length transaction" means a sale of real estate not affected by unreasonable or unusual personal influence or control, as defined in literature prepared by the International Association of Assessing Officers.

(2) The following sales transactions shall be excluded from the stratified sales assessment ratio study:

(a) a sale of agricultural or timber land;

(b) a sale in which the purchaser or seller is the United States of America, a state, a county, a municipality, or any instrumentality, agency, or political subdivision thereof, or a public utility;

(c) a sale that is recorded to confirm, correct, modify or supplement a previously recorded instrument;

(d) a sale pursuant to a court decree;

(e) a sale pursuant to a merger, consolidation, or reorganization of a corporation, partnership, or other business entity;

(f) a sale by a subsidiary corporation to its parent corporation without actual consideration;

(g) a sale of a decedent's estate;

(h) a sale constituting a gift;

(i) a sale between a husband and wife or a parent and child or other family member with only nominal actual consideration;

(j) a sale transferring property to the same party or parties;

(k) a sale for delinquent taxes, sheriff's sale, bankruptcy sale, mortgage foreclosure, or premature liquidation of property;

(l) a sale made in contemplation of death;

(m) a sale of tax exempt property;

(n) a sale of multiple parcels of property; and

(o) a sale of a mineral interest, a leasehold interest, a royalty interest or an assignment of interest.

(3) The department shall verify sales information by submitting to the parties participating in a sale transaction the sale verification form prescribed by the department. Completion of the sales verification form may be accomplished during on-site discussions with the buyer or seller, or through telephone conversation or written correspondence with the buyer or seller or their representative. Additionally, the department may secure information from the lending institution involved in the sale for purposes of verifying the terms and conditions of the sale. AUTH, 15-1-201 MCA; AUTH Ext, Sec. 5, Ch. 613, L. 1987; IMP, 15-7-111 MCA.

RULE IV (42.20.410) STRATIFIED SALES ASSESSMENT RATIO STUDY PROCEDURES (1) The stratified sales assessment ratio study under 15-7-111(4) MCA, will consist of 13 individual sales assessment ratio studies, one for each area defined in 15-7-111(6) MCA. The population being studied for each area consists of all property types listed in 15-7-111(4) MCA. The sampling base consists of realty transfer certificates judged as valid sales from the time period stated in 15-7-111(5)(c) MCA. The objective is to estimate two population parameters; the value weighted mean (vwm) and the value weighted coefficient of dispersion with respect to the value weighted mean (vwcod).

(2) For each study; the random sample will be statistically valid when two criteria are satisfied; the random sample is of sufficient size and the random sample is representative of the population being studied.

(a) The size of the random sample is sufficient if the sample size exceeds 30 and is also large enough so that coefficients of variation for the sales value mean and the appraisal value mean are both less than 10%. These conditions are found in section 6.3 of the text Sampling Techniques, by William G. Cochran, published by John Wiley & Sons, 1977.

(b) A random sample will be representative if the proportion of each property type in each county in the sample is approximately the same as the proportion of each property type in each county in the population. The sample will be selected using proportional stratification by property type and by county. The three property types are residential, commercial and other. Priority will be given to achieving proportionality by property type. A secondary priority will be given to proportionality by property type and by county.

(c) Proportional stratification by property type and by county shall be done using the following definitions and methodology.

(i) The desired number of units of each property type from each county is the sample size multiplied by the proportion of property type in each county. This is expressed mathematically as follows:

Suppose the area has k counties;

Let, h = the property type (res , com or oth).
i = 1,2,3, ... ,k.

N = Total number of units in the area.
N_h = Number of units of property type h in the area.
$N_{h,i}$ = Number of units of property type h in county i.

The proportion of property type h in the area is N_h/N .
The proportion of property type h in county i is $N_{h,i}/N$.

Let n = Number of units in the sample (sample size).
d_h = Number of desired units of property type h to be included in the sample, where

$$d_h = n*(N_h/N) .$$

$d_{h,i}$= Number of desired units of property type h in county i to be included in the sample.

$$d_{h,i} = n*(N_{h,i}/N) .$$

$a_{h,i}$= The available number of units of property type h from county i in the sampling base.

For each property type h, the number of units of property type h to be included in the sample from each county is decided in the following manner;

The counties in the area shall be divided into two groups. The first group, call it group W, is the group of counties without a surplus of available units ($a_{h,i}$ is less than or equal to $d_{h,i}$). The second group, call this one group S, is the group of counties with a surplus of available units ($a_{h,i}$ is greater than $d_{h,i}$).

The original desired number of units to be included in the sample from group W is

$$\sum^{w} d_{h,w}$$ where w represents a county in group W.

The number of units available to be included in the sample from group W is

$$\sum^{w} a_{h,w} .$$

For group W all of the available units are to be included in the sample.

The number of units to include from each county in group S is based on the weights of those counties. For example, if county b is in group S then the number of units from county b to be included in the sample is

$$\left(\sum^{s} d_{h,s} + \left(\sum^{w} d_{h,w} - \sum^{w} a_{h,w} \right) \right) * \left(N_{h,b} / \sum^{s} N_{h,s} \right)$$

Where $\sum^{s} d_{h,s}$ is number of units desired from group S, where s represents a county in group S, where $N_{h,b}$ is the number of units of property type h in county b in group S and $\sum^{s} N_{h,s}$ is the total number of units of property type h in group S.

(3) Only sample units which have been verified as valid and have assessment ratios greater than 50% and less than 200%, 15-7-111(8)(d) MCA, are included in the analysis. The vwm and vwcod sample estimates are calculated using the following definitions and methodology;

Notation:

n	=	random sample size.
i	=	$1,2,3,\ldots,n$.
A_i	=	Appraisal value for property i.
S_i	=	Sales value for property i.
R_i	=	Assessment ratio for property i where

$$R_i = \frac{A_i}{S_i} .$$

Appraisal Value Mean: The average assessed value.

$$\bar{A} = \frac{\sum^{n} A_i}{n} .$$

Sales Value Mean: The average sales value.

$$\bar{S} = \frac{\sum^{n} S_i}{n} .$$

Standard Deviation of the Assessment Mean: A measure of variation for the assessment mean. It is used in calculating the coefficient of variation of the assessment mean. The standard deviation of the assessment mean is

$$s(\bar{A}) = \sqrt{\frac{\sum^{n}(A_i-\bar{A})^2}{(n-1)*n}}$$

Standard Deviation of the Sales Mean: A measure of variation for the sales mean. It is used in calculating the coefficient of variation of the sales mean. The standard deviation of the sales mean is

$$s(\bar{S}) = \sqrt{\frac{\sum^{n}(S_i-\bar{S})^2}{(n-1)*n}}$$

Value Wtd Mean: The measure of assessment level. It is the sum of the assessed values divided by the sum of the sales values.

$$\hat{R} = \frac{\sum^{n} A_i}{\sum^{n} S_i}$$

Value Wtd Coefficient of Dispersion w/r to R: A measure of assessment uniformity The average deviation, weighted by sales value, from the value wtd mean expressed as a percentage of the value wtd mean. The VWCOD is rounded to the nearest whole percent.

$$VWCOD = \frac{\sum^{n}(S_i/\bar{S} * |R_i-\hat{R}|)}{n} * \frac{100}{\hat{R}}$$

Coefficient of Variation of Appraisal Value Mean: The standard deviation of the appraisal value mean expressed as a percentage of the expected value of the appraisal value mean.

$$COV\bar{A} = \frac{s(\bar{A})}{\bar{A}} * 100$$

Coefficient of Variation of Sales Value Mean: The standard deviation of the sales value mean expressed as a percentage of the expected value of the sales value mean.

$$COV\bar{S} = \frac{s(\bar{S})}{\bar{S}} * 100$$

AUTH, 15-1-201 MCA; AUTH Ext, Sec. 5, Ch. 613, L. 1987; IMP, 15-7-111 MCA.

RULE V (42.20.413) DIVISION OF PROPERTY INTO STRATUM (1) For purposes of this rule, the term "stratum" is defined to be all properties identified in 15-7-111(4) MCA. AUTH, 15-1-201 MCA; AUTH Ext, Sec. 5, Ch. 613, L. 1987; IMP, 15-7-111 MCA.

RULE VI (42.20.416) APPLICABILITY OF PROPERTY VALUE ADJUSTMENTS (1) The department shall notify the counties of any change of property values required under 15-7-111 MCA, on or before the date when the department notifies the counties of the valuation of all property under the provisions of 15-8-706 and 15-10-301 MCA.

(2) Changes of property value required under 15-7-111 MCA, shall be effective for the remainder of an appraisal cycle or until such time as additional changes of property valuation are required under 15-7-111 MCA. AUTH, 15-1-201 MCA; AUTH Ext, Sec. 5, Ch. 613, L. 1987; IMP, 15-7-111 MCA.

RULE VII (42.20.419) PERCENTAGE ADJUSTMENTS FOR THE 1988 TAX YEAR (1) The following table reflects the value weighted mean and the percentage adjustment as calculated in conformance with the provisions of 15-7-111 MCA, and ARM 42.20.404; 42.20.407; 42.20.410; and 42.20.413, for each area specified in 15-7-111(6) MCA.

	VALUE WEIGHTED MEAN	PERCENTAGE ADJUSTMENT
Area No. 1	1.1568	86%
Area No. 2	1.1608	86%
Area No. 3	1.0533	95%
Area No. 4	1.0783	93%
Area No. 5	.9945	100%
Area No. 6	.9199	100%
Area No. 7	.8575	100%
Area No. 8	1.0098	100%
Area No. 9	.9284	100%
Area No. 10	.9362	100%
Area No. 11	.9469	100%
Area No. 12	1.0406	96%
Area No. 13	.9090	100%

AUTH, 15-1-201 MCA; AUTH Ext, Sec. 5, Ch. 613, L. 1987; IMP, 15-7-111 MCA.

3. A public hearing was held on February 24, 1988, to consider the proposed adoption of these rules. The following are the comments received at the hearing or in writing and the response of the Department to those comments.

RULE I:
COMMENT: HB 436 and Rule I are unconstitutional because the sales assessment ratio study is applied solely to class 4, 12

and 14 properties; all other property values remain constant. The net effect is the foregoing of a net increase in property values across Montana in the amount of $11,540,000.

RESPONSE: The constitutionality of HB 436 can only be tested in a court of law. The Department must implement the statute as passed by the legislature. The rule implements the statute.

COMMENT: The Department is required to conduct appraisals in a fair and uniform manner. Implementation of Rule I would result in the inequitable appraisal of properties, both within areas and between areas.

RESPONSE: These rules address the HB 436 process which is an equalization process not an appraisal process. Rule I (ARM 42.20.401) will in fact make property values closer to being equal across the state than they are at the present time.

COMMENT: Art. XIII, Sec. 3, 1972 Montana Constitution requires all taxable properties in Montana be appraised, assessed and equalized by the Department of Revenue. The Department's proposed rules implementing HB 436 contradict the Constitution's principles. The Department has taken inconsistent positions regarding equalization of property (i.e., Department's interpretation of the constitutional equalization mandate prevented the Department from changing values only if the sales assessment ratio study established a greater than 110% difference in value but, in interpreting SB 71, the Department determined SB 71 prevented the Department from increasing property values for Cascade County and Great Falls where the sales assessment ratio study established properties were undervalued, without relying on its constitutional mandate to equalize).

RESPONSE: The constitution requires appraisal, equalization and assessment "in the manner provided by law." The statutory authorization to equalize is contained in 15-9-101, MCA. This general statutory authority can not prevail over the specific language of 15-10-412 MCA, which requires a tax freeze in very specific language. However, this general authority does supplement the requirement in 15-7-111(10) MCA to equalize. The Department is implementing somewhat conflicting statutes pursuant to the rules of statutory construction.

COMMENT: Enactment of HB 436 results in denial of equal protection of the law. Decreasing the valuation of properties in some counties under HB 436, while freezing the value of properties in other counties under I-105, results in further inequities in a school funding program already declared inequitable by the District Court of the First Judicial District.

RESPONSE: This comment addresses the constitutionality of HB 436 which has been addressed above. The alleged inequities of the statutes cannot be cured by the Department. This is an issue which the legislature must address.

COMMENT: The Department's decision not to implement increases in property values is a violation of the Constitution and statutes regarding statewide equalization of property values. In construing HB 436 in a manner not violative of I-105 and SB 71, the Department has violated other constitutional and statutory provisions requiring statewide equalization. The Constitution must prevail when it conflicts with statute. The Department must both increase and decrease values to 100% of market value.

RESPONSE: This comment concerns the constitutionality of the tax freeze (I-105 and SB 71) in light of HB 436. Again the Department cannot declare a statute to be unconstitutional. The rule implements the statutes.

COMMENT: The Department's decision to decrease but not increase property values per HB 436, results in the loss of school district revenues in the amount of $1.709 million. The impact on the State Foundation Program is a reduction in the amount of $9.624 million, which must be recovered by the state.

RESPONSE: Only the legislature can consider these issues. The Department must implement the law as written.

COMMENT: HB 436 contemplates increases and decreases of property values and the Department's proposed rules only address decreases. The areas of Montana most impacted by the Department's proposed rules are the same areas already impacted by major decreases in property values, especially in eastern Montana. When the Department's proposed rules reflect interpretations of HB 436, the interpretations affect school districts, counties and cities in the most negative manner.

RESPONSE: Again, the legislature must address these issues, not the Department.

COMMENT: We believe the annual revaluation of taxable property under 15-7-111(10) MCA, should be considered a cyclical revaluation of all taxable property required under 15-7-111(1) MCA.

RESPONSE: Valuation changes required as a result of HB 436 do not replace the cyclical reappraisal of all property in the state of Montana. That is consistent with the legislative discussions that took place on HB 436 during the 1987 session. The statutory language in 15-7-111(1)(2) and (3); 15-7-103(5); 15-10-412(5) (6); and (7) MCA, all clearly indicate that cyclical reappraisal of all property in the state of Montana is still a primary requirement of the Department.

Cyclical reappraisal is the process of conducting on-site reviews of all property in the state of Montana, making specific market value determinations on all land and improvements, and conducting rigorous market data checks and comparisons to ensure

uniformity of valuation. The specific reappraisal valuation procedures and processes are identified in ARM 42.18.101, entitled "Montana Appraisal Plan"; ARM 42.18.102, entitled "Residential and Commercial Appraisal Plan"; ARM 42.18.103, entitled "Ag and Timber Appraisal Plan"; and ARM 42.18.104, entitled "Industrial Appraisal". Additional valuation procedures are identified in ARM 42.19.101 through 42.19.103 and 42.20.101 through 42.20.158.

Cyclical reappraisal is absolutely essential if we are to detect missed or incorrectly valued property, to acknowledge the specific locational differences and factors that not only exist between counties but within counties as well. The major difference between cyclical reappraisal and HB 436 adjustments is that HB 436 adjustments are only "area" specific. Each HB 436 area identified in 15-7-111(6) MCA, normally consists of several counties. The HB 436 adjustments are very broad; they do not and cannot consider the valuation problems of individual taxpayers. HB 436 adjustments are meant to reflect the upturn or downturn in market conditions that may occur in relatively large geographic areas of the state. The locational and market differences that exist within specific neighborhoods or specific locations within individual counties are not reflected in the HB 436 adjustments. That may only be addressed through cyclical reappraisal with its on-site inspection and taxpayer/Department interaction requirements.

RULE II:
COMMENT: The Department has decided to adjust values down in cases where assessed values are less than 10% over market values as determined by the sales studies. The Department has also decided that the adjustments will be made to 100% rather than to 110% of market value. Section 15-7-111(10) MCA, says the Department shall adjust values in an area when the assessment level varies from the legal level by over 10%. This section goes on to say the adjustments must create compliance with subsection (9). Subsection (9) says the Department shall have equalized values across the state when assessed values in each area are within + or - 10% of market value. It is clear that, for any area within + or - 10% of market, the Department has no authority to adjust any values. It is equally clear that the Department has authority only to adjust values as necessary to bring them within 10% of market.

RESPONSE: If the Department were to accept this comment it would mean that there could be a difference in property values of as much as 20% between the regions of the state set forth in the statute. Thus, at least in terms of the mandatory levies, some taxpayers in Montana would be paying taxes which are 20% higher than others. This is unacceptable to the Department. It is also unacceptable to the Montana Supreme Court. In **Hanley v. Department of Revenue,** ____ Mont. ____, 673 P.2d 1257, 40 St. Rep. 2054, 2058 (1983) the court stated: "This Court has held

that when D.O.R., or its predecessor, becomes aware of unequal values of taxable property, it has a duty to equalize." Citing **State ex rel. Schoonover v. Stewart,** 89 Mont. 257, 297 P. 476 (1931).

In light of this judicial requirement, it is absolutely clear that the Department must reduce the values in regions where they exceed 110%, not to 110%, but to 100%. The Department cannot ignore a 20% disparity in values. As long as it has statutory authority, it must act. Additionally, once values in regions which exceed 110% have been reduced to 100%, there is no good reason to not adjust other values to 100% if the difference is significant and the authority exists.

Contrary to the comment, 15-7-111(9) MCA does not prevent adjustment if values are within 10% of market value. This statute merely indicates that valuation has occurred when values are within these limits. The Department has authority independent of 15-7-111(9) MCA, to equalize values, pursuant to the Constitution Art. VIII, Sec. 3 and 15-9-101 MCA. This is the authority cited by the court in **Hanley,** cited above.

COMMENT: HB 436, passed in the 1987 session, very clearly says that the Department shall have exhausted its authority under the statute when assessment levels are within 10% and not when it is assessed at 100%. The Department has taken the position that 15-8-111 MCA, mandates that all taxable property must be assessed at 100% of its market value. Since 15-8-111 MCA, includes the clause ". . . except as otherwise provided" and when 15-7-111(9) and 15-8-111 MCA, are read together, it is clear that even under the terms of 15-8-111 MCA the provisions of HB 436 are to be given precedence. The Department has done the opposite.

RESPONSE: The Department has the duty to equalize in addition to the duty to appraise at 100 percent of market value. See Response to the preceding comment.

RULE IV:
COMMENT: The Department's statistical analysis seems questionable. The validity of statistical data is questionable in light of a comparison of the number of samples used for Missoula County (70 for residential, 14 commercial) compared to Billings (67 residential, 6 commercial). Rule IV(2)(b) (42.20.410(2)(b)) requires the sales assessment ratio study be of (1) sufficient size and (2) representative. The results of the sales assessment ratio study establishes 10 areas which have no data for properties classified in the "other" category of properties. The Department cannot make a $19 million decision changing property values throughout Montana without adequate information. The Department's stratified sales assessment ratio study is neither representative nor sufficient.

RESPONSE: Each area is a unique, separate sampling exercise. The size of one area's sample relative to that of another area bears no statistical significance. What matters is that the sample of each area represents the area's population.

As stated in the Standard on Assessment Ratio Studies (SoARS) section 3.8.2, the size of a sample should be evaluated in terms of the required precision of the estimate of assessment level. There is a general relationship between statistical precision and the number of observations in a sample: the larger the number of observations, the greater the precision. Since there was no set level of required precision each study was designed to result in the most precise estimate of assessment level possible given the resources available. Certainly, more sales are preferred to less. However, one must recognize that the collection of data is costly. The workload imposed on local offices precluded larger sample sizes, particularly in the city areas.

The significance of the "small sample sizes" pales in face of the fact that the population ratios (from all valid sales) are very close to the sample based estimates, which implies that the Billings sample was statistically valid.

Residential and commercial classifications are broad enough to include all types of property. Either it is used in the production of income (commercial) or it is used as a dwelling. Vacant land was considered to be either residential or commercial and is included in the samples.

The category "other" includes agricultural type property. However, generic agricultural sales data must be deleted because agricultural land is not valued on its market value. Comparisons between appraised values and agricultural land selling prices, hence, are meaningless. Valid comparisons are possible for sales of a farm building and the one acre homesite. However, as a practical matter, the sale of agricultural property usually includes the buildings, the homesite, and the agricultural land. There is no viable method to extract and separate the respective values. As a result there are few sales of "other" properties in the file of valid sales because of the reasons previously discussed. Hence, the inclusion of "other" properties in the samples was unnecessary.

In some areas the property type "other" makes up less than half a percent of the total affected property count. For example, in area 6 the property type breakdown is; "residential" 88.2%, "commercial" 11.5% and "other" is 0.3%. So to keep the property proportions in any sample selected from area 6 approximately the same as the proportions in the population, 293 "residential" properties must be included for each unit of "other" property included. This is not practical.

COMMENT: The Department is requested to look at its sales assessment ratio study to determine if it is accurate, reliable and representative.

RESPONSE: See response to previous comment.

COMMENT: Rule IV relies on a standard on Sampling Techniques by William G. Cochran, but HB 436 says the methodology must be based upon the standard adopted by the International Association of Assessing Officers. The criteria for selecting the sample size is not the same under the two sources. The Department is violating HB 436 by relying on the Cochran text.

RESPONSE: The Department's rule is based on IAAO standards. The Cochran text is referenced with respect to establishing criteria for the minimum size of a sample for subsequent statistical analysis to be valid (no such criteria is listed in SoARS). The only formula for selecting a sample size listed in SoARS is with respect to the median ratio, not the value weighted mean. The sample sizes were selected using appropriate statistical method.

Dr. Cochran is a recognized author of statistical texts. His experience and expertise is over-and-above that of the IAAO. In fact, Cochran is cited in SoARS in section 9.2 as a selected reference.

COMMENT: Defective sampling is typified by an over $5 million reduction in value in Billings being based upon the fewest number of samples in the studies when it had the greatest number of sales (73 sales out of over 1,000 valid sales, 92% of sales residential). Two sections of HB 436 require the Department to use information from all valid arms length transactions in performing the sales assessment ratio study. Section 15-7-111(8) MCA, requires the Department review all RTC's and establish a weighted mean assessment ratio for 3 stratum of properties.

RESPONSE: See response to first comment on Rule IV. In addition, 15-7-111(5) MCA says that the study "must be based on a statistically valid sample of sales". Use of all valid arms length transactions may lead to statistically invalid analysis. The data set of all valid arms length transactions may not be representative of the population.

COMMENT: Sections 15-1-101(1)(q) and 15-7-111(8)(a) MCA, and the standard methodology referred to in the publication, "Standard on Assessment Ratio Studies", all require the Department to use information from all valid arms length sales in performing the sales studies. The Department has not done so.

RESPONSE: See response to the previous comment. The Department did, in fact, consider the information from all valid arms length sales in performing the sales assessment ratio studies.

RULE V:
COMMENT: HB 436 requires sales assessment ratio studies to be conducted on residential real property and improvements, commercial real property and improvements and all other property. The Department must conduct 3 stratified sales assessment ratio studies for each of the 13 areas in Montana. The Department, by virtue of its position in Rule V, proposes to conduct one unified sales assessment ratio study in direct violation of the requirements of HB 436.

RESPONSE: On an area basis, the use of three percentage adjustments will result in the same reduction in taxable value that results from one adjustment. They are mathematically equivalent.

There is no specific requirement that individual sales assessment ratio studies for each of these property types must be conducted. Rather there is specific direction that each of these property types must be considered and appropriately analyzed within the parameters of the larger sales assessment ratio study conducted by the Department. The methodology and development of sales assessment ratio studies are complex at best. We need to keep the process as simple as possible. If the aggregate samples meet the statutory tests and the statistical tests of size and representation for each area, there is no need for further stratum.

Additionally, the Legislature has considered, and rejected, different property tax treatment of residential and commercial properties. The use of one stratum is in keeping with this legislative philosophy.

Many counties do not have the computer capability to make separate percentage adjustments for residential and commercial property. Hence, manual adjustments would be required. Other duties of the assessor/appraisal offices would be postponed (e.g. completion of personal property tax rolls, new construction, reappraisal, etc.). One adjustment helps mitigate these staffing problems and the additional workload on local offices.

The Standard on Assessment Ratio Studies (SoARS)in section 2.3 states that a basic design principle should be to keep the study as simple as possible, consistent with the purposes of the study. It is also stated (section 3.8.1) that available resources should be a consideration when choosing strata and that stratification can only be carried so far before running into the problem of inadequate sample size.

RULE VI:
COMMENT: HB 436 and Department rules will make it nearly impossible for school districts to budget and establish levies in March for April elections when final values are not known until

July. The Department should look at a more timely assessment process.

RESPONSE: While Rule VI (42.20.416) says we will annually let each county know of property adjustments required by HB 436 on or before the second Monday in July, the HB 436 adjustment information will normally be known and be made available by the first of March. The only event that would move that date farther back in the calendar would be a regularly scheduled legislative session or a special session during the first half of the calendar year in which HB 436 language was being addressed or changed by legislative action. In that circumstance, it would seem to serve no useful purpose to give taxing jurisdictions valuation adjustments by March when it might be changed in May or June. It is our intent to keep taxing jurisdictions advised of preliminary estimates of impact in valuation. It is also our clear intent to get a final valuation adjustment number out to taxing jurisdictions as early as possible each year.

RULE VII:
COMMENT: Sections 15-7-111(9) and (10) MCA require two criteria for adjustment: (1) Over 10% different in value, and Coefficient of dispersion with respect to weighted means for each of three stratum of property must exceed 20%. Rule VII does not adequately reflect these requirements. Section 15-7-111(8) MCA requires adjustment when assessment levels exceed 10% for each stratum and when coefficients of dispersion exceed 20% and must comply with subsection (7). The Department's proposed rules do not conform to those requirements. (3) Under sections 15-7-111(9) and (10) MCA, two conditions must be met before adjustments can be made. First, the assessment levels for all strata of property must deviate from market values by over 10%. Second, the coefficient of dispersion with respect to the weighted mean assessment ratio for three different types of real property must exceed 20%. The proposed rules set out numbers related to the first condition but not for the second. What are the three coefficients of dispersion for each of the 13 areas? Do they exceed 20%? (4) Section 15-7-111(10)(a) MCA, provides that the Department of Revenue has the authority to act only when the over all assessment exceeds 10% of the legal level of assessment and when the coefficients of dispersion with respect to the weighted means for each stratum exceeds 20%. Both of those conditions must be met. I am not aware of any analysis with regard to coefficient of dispersion with respect to the weighted means for each strata even having been considered in your rule making process.

RESPONSE: Section 15-7-111(10)(a) and 15-7-111(9) MCA, are inconsistent. The more specific language in subsection (9) controls.

Section 15-7-111(9) MCA, requires that the level of assessment must be within 10 percent of the legal limit and the coefficient

of dispersion (COD) must be equal to or less than 20 percent for property values to be equalized. Either an assessment level outside the 10 percent window or a COD greater than 20 percent would trigger a percentage adjustment.

However, 15-7-111(10)(a) MCA, requires the Department to make percentage adjustments when the assessment level exceeds 10 percent and COD's are greater than 20 percent. Under this section, both conditions must be met.

Strict compliance with (10)(a) would not create compliance with (9) and the Department would not fulfill its equalization mandate.

However, (10)(a) goes on to state that ". . . the percentage adjustments must create compliance with (9)". Therefore, (9) controls and the percentage adjustments must be made to conform with (9). Moreover, (9) contains the equalization test the Department must follow.

Initially the table in Rule VII (42.20.419) was intended to include a listing of the coefficient of dispersion for each area specified in 15-7-111(6) MCA. Insertion of the coefficient of dispersion information in the table would have offered the potential for additional confusion and misunderstanding. Since the value weighted mean is the determinate in calculating the percentage adjustment it was decided to include it only in the tables. Both the value weighted mean and the coefficient of dispersion were calculated for the stratum within each area. The results of that calculation were implemented in accordance with 15-7-111(9) and (10) MCA. To provide additional clarification, the weighted coefficient of dispersion for each area is indicated in the table below.

	Weighted Coefficient of Dispersion
Area No. 1	20%
Area No. 2	18%
Area No. 3	13%
Area No. 4	14%
Area No. 5	19%
Area No. 6	15%
Area No. 7	19%
Area No. 8	18%
Area No. 9	15%
Area No. 10	9%
Area No. 11	8%
Area No. 12	14%
Area No. 13	18%

GENERAL COMMENTS:

COMMENT: Why did the Department select 1988 as the year of implementation for HB 436?

RESPONSE: The implementation requirements with respect to HB 436 are very clear. The statute was effective upon passage and approval. HB 436 was passed and approved during 1987. The applicability date for HB 436 is (Ch. 613, L. 1987) taxable years after December 31, 1987.

COMMENT: The selection of 13 areas is arbitrary. The suburbs of Billings, Montana are not economically and demographically similar to rural counties.

RESPONSE: The 13 areas are contained in law and the Department must follow the law in the completion of the studies.

COMMENT: HB 436 decreases in valuation satisfy SB 71 criteria for "5% decreases in valuation" thereby justifying local governments authority to increase taxes to 1986 levels.

RESPONSE: If, in a taxing jurisdiction, the values for 1987 fall in 1988 by 5% and included within that 5% are decreases in valuation as a result of implementation of HB 436, mill levies can be increased to maintain 1986 revenue levels.

COMMENT: HB 436's requirement that values be determined from information Realty Transfer Certificate (RTC) which are kept secret denies the public's right to know and the public's right to participate in government.

RESPONSE: The RTC information has been held as confidential since it was first required by statute. Confidentiality was not created by HB 436. The legislature chose to again support that confidentiality through passage of 15-7-111(8)(b) MCA. As with all information developed, the work is open for inspection by the Revenue Oversight Committee, the Office of the Legislative Auditor, and the Legislative Fiscal Analyst Office.

Obviously, individual taxpayers or groups could gather the same information and conduct the same type of sales assessment ratio study. Such a study would yield the same results as the Department of Revenue sales assessment ratio study.

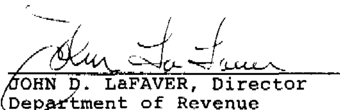
COMMENT: HB 436 became effective April 27, 1987 but the Department failed to promulgate the sales assessment ratio study rules until after the sales assessment ratio study was completed. The proposed rules merely ratify decisions already made by the Department in interpreting HB 436 and performing the sales assessment ratio study.

RESPONSE: Implementation of HB 436 is an enormous project. The requirements of HB 436 are entirely new to the property taxation system in the State of Montana. As a result each step has been

given a great deal of scrutiny in an attempt to reach a fair, equitable and defensible result. As has been stated previously during the administrative hearing process, if the methodology of making the sales assessment ratio study or the methodology of adjusting property values could be impeached, then the sales assessment ratio study would have to be redetermined using a new set of criteria. The argument posed would have validity if the rules had been adopted without public hearing and comment.

The courts have directed the Department to publish rules on specific adjustments, rather than outlining a general process for the calculation of the adjustments (e.g. personal property trended depreciation adjustments). Obviously, the Department cannot comply with this direction without actually knowing the numbers.

Rule VII (42.20.419) specified the property adjustment by area and was included so there would be no misunderstanding regarding the impact on the taxing jurisdictions in each area. If the Department had not provided that information it would have been labeled as secretive and uncooperative by those individuals impacted by the proposed rule.



JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 3/14/88.

BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES
OF THE
STATE OF MONTANA

In the matter of the amendment of Rule 44.10.331 pertaining to limitations on receipts from political committees to legislative candidates, the amendment of Rule 44.10.501 pertaining to uniform system of accounts and the amendment of Rule 44.10.521 pertaining to mass collections at fund-raising events	)	NOTICE OF THE AMENDMENT OF RULE 44.10.331 PERTAINING TO LIMITATIONS ON RECEIPTS FROM POLITICAL COMMITTEES TO LEGISLATIVE CANDIDATES, THE AMENDMENT OF RULE 44.10.501 PERTAINING TO UNIFORM SYSTEM OF ACCOUNTS AND THE AMENDMENT OF RULE 44.10.521 PERTAINING TO MASS COLLECTIONS AT FUND-RAISING EVENTS.

TO: All Interested Persons:

1. On January 28, 1988, the Commissioner of Political Practices published notice of proposed amendments to Rules 44.10.331, 44.10.501 and 44.10.521 concerning receipts from political committees to legislative candidates, a uniform system of accounts and mass collections at fund-raising events respectively at page 161 of the 1988 Montana Administrative Register, issue number 2.

2. The agency has amended the rules as proposed.

3. One comment was received from the Legislative Council requesting further clarification for amending Rule 44.10.521 as it pertains to mass collections at an event for both statewide and any other candidates or political committees (i.e., a mixed event). A law enacted by the 1987 legislature set new reporting thresholds of $75 and $35 respectively for statewide and all other candidates or political committees. The law did not address the matter of fund-raising events that would benefit candidates or political committees at both statewide and other levels; therefore, the commissioner of political practices determined administratively to set the reporting threshold at the lower level for such mixed events since money would be commingled.

4. Authority for amending rules is section 13-37-114, MCA; the amendments to rules implement sections 13-37-218, 15-30-101(8), 13-37-117(2), and 13-37-229(8) and (11), MCA.

Valerie Collins
Commissioner of Political Practices

Certified to the Secretary of State March 10, 1988.

BEFORE THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of Rules 46.12.541 and 46.12.542 pertaining to hearing aids	)	NOTICE OF THE AMENDMENT OF RULES 46.12.541 AND 46.12.542 PERTAINING TO HEARING AIDS

TO: All Interested Persons

1. On January 14, 1988, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.12.541 and 46.12.542 pertaining to hearing aids at page 36 of the 1988 Montana Administrative Register, issue number 1.

2. The Department has adopted Rule 46.12.542 as proposed.

3. The Department has amended the following rule as proposed with the following changes:

46.12.541 HEARING AID SERVICES, REQUIREMENTS Subsections (1) through (3) remain the same.

~~(4) Medicaid recipients must be physician referred for a hearing aid evaluation (HAE) by a licensed audiologist prior to the fitting and purchase of a hearing aid.~~

~~(5) Where travel and recipient immobility prohibit the audiological HAE, a recipient must receive a medical examination from a physician and the physician must certify the need for a hearing aid.~~

~~(6) Medicaid payment for a hearing aid purchase following the original aid purchase will be allowed only when replacement is medically necessary due to a marked change in the client's hearing loss.~~

~~(7) Medicaid payment for hearing aid purchase will include the cost of the hearing aid (model and serial number and ear fit) and ear mold, the fitting, adjusting, two return office calls, aid orientation, and counseling.~~

~~(8) Hearing aid rentals are limited to a maximum of 30 days.~~

~~(9) All hearing aid purchases and rentals will be reviewed and approved by the designated review organization.~~

(4) A hearing aid may be provided for under the medicaid program if:

(a) the recipient has been referred ~~for medical reasons~~ by a physician for an audiological examination~~,~~ AND THE PHYSICIAN HAS DETERMINED THAT THERE IS NO MEDICAL REASON FOR WHICH A HEARING AID WOULD NOT BE EFFECTIVE IN CORRECTING THE RECIPIENT'S HEARING LOSS;

(b) the examination by a licensed audiologist results in a determination that a hearing aid or aids are needed; and

(c) THE FOLLOWING CRITERIA ARE MET:

(ei) FOR PERSONS OVER 21 YEARS OF AGE, the audiological examination results show that there is a AN AVERAGE pure tone loss of at least forty (40) decibels plus or minus five (5) decibels over the frequency at 500, 1,000, 2,000, and 3,000 AND 4,000 hertz in the best ear.;

(ii) FOR PERSONS UNDER 21 YEARS OF AGE, THE DEPARTMENT OR ITS DESIGNEE DETERMINES AFTER REVIEW OF THE AUDIOLOGY REPORT THAT THE HEARING AID WOULD BE APPROPRIATE FOR THE PERSON. PERSONS UNDER 21 YEARS OF AGE WILL BE EVALUATED UNDER THE EARLY PERIODIC SCREENING AND TESTING PROGRAM.

(5) The-audiologist's-report-will-be-prepared--in-accordance-with-the-format-described-in-the--audiologists'-provider manual. The audiologist shall indicate in the A WRITTEN report whether in his or her professional opinion a hearing aid is required for the recipient. The report shall also indicate the type of hearing aid required by the recipient and whether monaural or binaural hearing aids are required. THE AUDIOLOGIST'S REPORT WILL BE PREPARED IN ACCORDANCE WITH THE FORMAT DESCRIBED IN THE AUDIOLOGISTS' PROVIDER MANUAL.

(6) A claim for coverage of a hearing aid must be approved IN WRITING by the department or its designee prior to the provision of the service. Prior-approval-must-be-in-writing--from-the--department. Copies of the physician's referral and audiologist's report must be submitted with the claim.

(7) Reimbursement for hearing aid rentals is limited to a maximum of thirty (30) days.

AUTH: Sec. 53-6-113 MCA; AUTH Extension, Sec. 2, Ch. 77, L. 1985, Eff. 10/1/85; Sec. 4, Ch. 329, L. 1987, Eff. 10/1/87
IMP: Sec. 53-6-101 and 53-6-141 MCA

4. The Department has thoroughly considered all commentary received:

COMMENT: The proposed referral by a physician for an audiology evaluation based on a medical reason ("medical necessity") for a hearing aid is unnecessary. The doctor may not be aware of any specific medical need for a hearing aid. The doctor should indicate that there are no contra-indications which would make a hearing aid ineffective, such as infection or other permanent ear damage.

RESPONSE: The rule language will be revised to provide that the physician determination will be that there is no medical reason which would make a hearing aid ineffective based on a physical examination of the patient.

COMMENT: A referral for an audiology examination should be made by either a physician or an audiologist.

RESPONSE: The Department is mandated by 42 CFR 110(c) (which covers services for persons with speech, hearing and language disorders) to require that all services provided are referred by a physician.

COMMENT: The Department should change its proposed hearing level criteria from 500, 1,000, 2,000 and 3,000 db to 1,000, 2,000, 3,000 and 4,000 db and a hearing loss should be established as an average loss of 40 db over these ranges. This method of determination would be similar to the methodology used by the veterans administration. In addition, a word discrimination test should be incorporated into the hearing aid evaluation procedure.

RESPONSE: The Department will adopt the suggested hearing levels for testing. The Department will not require the proposed speech discrimination test but will allow audiologists to use their professional judgement in determining if that test is necessary.

COMMENT: The proposed hearing impairment levels should not be applied to children under twenty-one years of age. Young children are still in an important developmental stage of life which includes school and the development of social and communication skills.

RESPONSE: The Department has changed the rules to provide that the criteria for services to persons under twenty one (21) years of age through the Early Periodic Screening and Testing (EPSDT) program are not the same as for adults. The Department believes that the special needs of children with respect to their growth and development justify an exclusion from the normal hearing levels. However, requests for hearing aids for children will be subject to review by the Department's consulting audiologist and will incorporate other supporting documention about the need for a hearing aid as deemed appropriate.

COMMENT: The consulting audiologist should perform a post fitting review of the hearing aid fitting after services have been completed.

RESPONSE: The Department believes that this procedure may be appropriate on a sample basis to assure quality of care. To implement this type of procedure, criteria would have to be developed to quantify and qualify the services given to the recipient. The program will discuss this matter with the consulting audiologist and will consider the feasibility of implementing some sort of post-service review.

COMMENT: The program should consider other disabilities such as blindness which may have an impact on hearing levels. Special consideration should be made that would exclude those persons from the proposed hearing loss criteria.

RESPONSE: The program believes that the specific need for a hearing aid should be documented by an audiological evaluation. In those cases where a child is affected with multiple handicaps such as mental retardation or cerebral palsy, consideration will be given to the child's need for hearing amplification based on a review of the case by the consulting audiologist. Services will be approved for adults if the results of an audiological evaluation indicate the need for a hearing aid.

COMMENT: A thirty-day trial of the hearing aid should be implemented before final payment for a hearing aid is made.

RESPONSE: The program believes that a thirty day trial period would be of benefit to both the program and the recipient. However, at the present time, this policy would conflict with the thirty day rental limit and could cause additional expenditures. In addition, the trial period would require a post fitting review which the program is unable to implement at this time. The program will consider this at a later date.

COMMENT: The proposed rule infringes on the rights of hearing aid dispensers because it would not allow them to test and fit individuals with hearing aids. A suggestion also made was that the words hearing aid dispenser and audiologist be used on an interchangeable basis in the hearing aid rule.

RESPONSE: The proposed rule does not prohibit licensed hearing aid dispensers from receiving Medicaid payments (ARM 46.12.541(2)). The requirements of these rules parallel those of the federal regulations. 42 CFR 440.110(c) does require that services for persons with speech, hearing and language disorders inclusive of diagnostic, screening, preventive or corrective services are to be provided by or under the direction of a speech pathologist or audiologist for which the patient is referred by a physician. In addition, 42 CFR 440.60 limits licensed practitioners to providing Medicaid services within the scope of their practice as defined under state law.

The scope of the hearing aid dispenser's practice under Chapter 16 of Title 37, MCA is limited to audiometric testing for the purpose of properly fitting a hearing aid. The diagnosis or treatment of a speech, hearing or language disorder under Chapter 15 of Title 37, MCA may only be conducted by an audiologist. State regulations do allow hearing aid dispensers to

fit hearing aids and provide for the proper functioning of the aids. The Medicaid program does not intend to generally eliminate the function of the hearing aid dispenser in providing hearing services to recipients.

COMMENT: Several audiologists in southeastern Montana are licensed as both audiologists and hearing aid dispensers. This is unfair competition and action should be taken to prevent this type of situation.

RESPONSE: The Medicaid program believes that the recipient should be free to choose the hearing aid dispenser whom the recipient thinks can best meet the persons needs and with whom the person feels comfortable dealing.

COMMENT: Objection was indicated in the proposed rule to the audiologists ability to recommend the type of hearing aid for the patient.

RESPONSE: The audiologist may recommend the type of hearing aid in respect to whether the aid should be a bone or air conduction type. The audiologist may base a recommendation on other factors which are important to the effectiveness of the hearing aid. The audiologist is not authorized to direct the provision of a hearing aid by brand name or manufacturer.

COMMENT: Several hearing aid dispensers indicated their concern that they were not personally notified of the public meeting concerning the hearing aid rule.

RESPONSE: The Department was under the impression that a certain person was the President of the Montana Hearing Aid Society and that by notifying that person, other members of the Association would be notified. The program normally communicates through professional organizations with respect to proposed policy changes. The program expects the professional organization will then communicate with its membership. The Department acknowledges that miscommunication appears to have occurred. The Department will attempt to communicate more effectively with hearing aid dispensers in the future with regard to any rule or policy changes.

COMMENT: It was suggested that the Montana Medicaid program attempt to contract directly with the hearing manufacturers to obtain a lower price on hearing aids. It was indicated that other State Medicaid programs have done this, notably, New York and Tennessee, as well as the Indian Health Service and the Veterans Administration.

RESPONSE: The Medicaid program will take this comment under consideration for possible consideration at a future date. If

action in this area is taken, the Medicaid program will coordinate with the hearing dispensers associations.

COMMENT: It was indicated that some hearing aids still require a mercury cell battery or a special sized battery (size 401). The program should make allowances for these types of batteries.

RESPONSE: The program has decided not to cover these types of batteries under its proposed rule.

COMMENT: A question was raised from within the Department as to whether the program will include the cost of shipping and handling as part of the dispensing fee for the hearing aid. It was noted that wide discrepancies existed for shipping charges.

RESPONSE: The program will allow for first class postage and normal insurance for the shipping of the hearing aid to the dealer as part of the manufacturers invoice price.

COMMENT: The proposed rules do not provide for the hiring of an audiologist consultant.

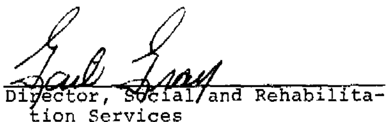
RESPONSE: The hiring of the audiologist consultant is an administrative procedure of the program and does not have to be indicated in the rule.

COMMENT: The program should retain the provision for an exclusion from audiological testing for people unable to travel.

RESPONSE: There is access throughout the State to adequate services which will allow persons to be evaluated by an audiologist.

COMMENT: The language in ARM 46.12.541(5) and (6) should be rewritten for clarity.

RESPONSE: The language in those provisions have been rewritten.



Director, Social and Rehabilitation Services

Certified to the Secretary of State March 14, 1988.

VOLUME NO. 42 OPINION NO. 72

CORRECTIONAL FACILITIES - Right to accelerated parole-release consideration when Montana State Prison or Women's Correction Center exceeds maximum prisoner population limits;
PARDONS, BOARD OF - Right to accelerated parole-release consideration when Montana State Prison or Women's Correction Center exceeds maximum prisoner population limits;
PRISONERS - Right to accelerated parole-release consideration when Montana State Prison or Women's Correction Center exceeds maximum prisoner population limits;
MONTANA CODE ANNOTATED - Sections 46-18-202, 46-19-301, 46-19-401, 46-23-201, 46-23-401 to 46-23-426, 53-30-105, 53-30-212.

HELD: A convict is entitled to accelerated parole-release eligibility under section 46-23-201(3), MCA, only if he or she is actually residing within the Montana State Prison or the Women's Correction Center during the effective period of certification.

1 March 1988

Nick A. Rotering
Chief Legal Counsel
Department of Institutions
1539 Eleventh Avenue
Helena MT 59620

Dear Mr. Rotering:

You have requested my opinion concerning the following question:

> Is a person sentenced to incarceration under Montana law but who is located other than at the Montana State Prison or the Women's Correction Center entitled to accelerated parole-release eligibility when certification under section 46-23-201(3), MCA, occurs with

respect to the state prison or the correction center?

I conclude that certification under section 46-23-201(3), MCA, with respect to the Montana State Prison or the Women's Correction Center affects the parole-release eligibility only of those inmates actually residing within the facility during the effective period of the certification.

Section 46-23-201, MCA, establishes the minimum time-of-incarceration conditions for parole-release eligibility of persons sentenced under Montana law and not restricted from parole under section 46-18-202(2), MCA. Prisoners, other than those serving a life sentence, are eligible for parole-release consideration after serving (1) one-quarter of their sentences, less any good time allowance earned under section 53-30-105, MCA, if not designated a dangerous offender, or (2) one-half of their sentence, less accrued good-time allowances, if designated a dangerous offender; any inmate serving a time sentence, however, is eligible for parole-release consideration after 17½ years. § 46-23-201(1)(a), MCA. Inmates serving life sentences may be paroled only after 30 years of incarceration less earned good time. § 46-23-201(1)(b), MCA.

Section 46-23-201(3), MCA, accelerates parole-release consideration when specified prisoner-population limits are exceeded at the Montana State Prison or the Women's Correction Center:

> If the department of institutions certifies to the board that the population at the Montana state prison exceeds its design capacity of 744 by 96 inmates or that the population at the women's correction center exceeds its design capacity of 35 inmates and that the prison or the center has exceeded its capacity for a period of more than 30 days, the board shall consider convicts in the institution in which the design capacity has been exceeded eligible for parole 120 days prior to the eligibility date provided for in subsection (1).

Accelerated consideration under section 46-23-201(3), MCA, may not take place with respect to any inmate who

becomes eligible for parole release within his initial twelve months of incarceration at the Montana State Prison. § 46-23-201(4), MCA. Not all inmates committed by district court order to the state prison or the correction center are actually incarcerated there. Thus, for example, male inmates 25 years of age or younger may be located at the Swan River Forest Camp (§ 53-30-212, MCA), and any inmate may, if deemed appropriate, be confined at the Montana State Hospital or, under the supervised release program (§§ 46-23-401 to 426, MCA), at one of four pre-release centers.

Not all inmates convicted under Montana statutes, moreover, serve their sentences within the state's penal facilities. Prisoners may be transferred to an out-of-state institution pursuant to the Western Interstate Corrections Compact or the Interstate Corrections Compact, codified respectively in sections 46-19-301 and 46-19-401, MCA. Under those compacts, party states may contract with one another "for the confinement of inmates on behalf of a sending state in institutions situated within receiving states." Western Interstate Corrections Compact at Article III(1); Interstate Corrections Compact at Article III(a). Inmates so confined remain subject to the general jurisdiction of the sending state (Western Interstate Corrections Compact at Article IV(1) and (3); Interstate Corrections Compact at Article IV(a) and (c)), and "[t]he fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state" (Western Interstate Corrections Compact at Article IV(5); Interstate Corrections Compact at Article IV(e)). See Fest v. Bartee, 804 F.2d 559, 560 (9th Cir. 1986) (Nebraska inmate transferred to Nevada prison under Interstate Corrections Compact required to initiate federal habeas corpus proceeding in Nebraska since "[u]nder the compact the Nevada officials are not responsible for the unfavorable parole decision"); Wilkins v. Erickson, 484 F.2d 969, 973 (8th Cir. 1973) (Montana inmate housed in South Dakota prison pursuant to Western Interstate Corrections Compact must initiate federal habeas corpus proceeding in Montana since "South Dakota is acting only as agent for Montana"); Falkner v. Nebraska Board of Parole, 213 Neb. 474, 330 N.W.2d 141, 142 (1983) (time served in Nebraska prison following transfer from Iowa under Interstate Corrections Compact did not accrue against sentence for

prior Nebraska crime because, "[a]lthough confined in Nebraska, he continued to serve the Iowa sentence"). An inmate confined out of state under the compacts is further entitled "to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state." Western Interstate Corrections Compact at Article IV(8); Interstate Corrections Compact at Article IV(h).

Your question is directed to the effect of certification under section 46-23-201(3), MCA, on parole-release eligibility of inmates confined other than at the Montana State Prison or the Women's Correction Center. Section 46-23-201(3), MCA, is unambiguous in accelerating parole-release eligibility only for those inmates who are actually housed in the facility as to which the certification is made; i.e, any person among that population whose number exceeds the facility's design capacity by the stated amount and who is, if at the state prison, not otherwise eligible for parole-release consideration during his first twelve months of incarceration there. Because prisoners located at the Swan River Forest Camp, the Montana State Hospital, or a pre-release center are not among that population, their parole-release eligibility is unaffected by certification under section 46-23-201(3), MCA. Similarly, certification as to the state prison has no effect on such eligibility for persons incarcerated at the correction center, nor does certification as to the latter facility affect parole-release eligibility of inmates at the former. Excluding those individuals confined out of state pursuant to the Western Interstate Corrections Compact or the Interstate Corrections Compact, your question must be answered negatively.

As to individuals placed out of state pursuant to those compacts, the issue is complicated by their entitlement not to be deprived of any legal rights which they would have "if confined in an appropriate institution of the sending state." The ostensible purpose of this provision is to ensure that all substantive rights possessed under Montana law are retained by a person from this state who is confined under either compact. Although entitlement to parole-release consideration is

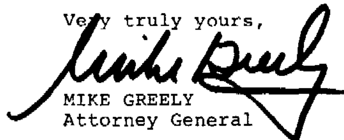
clearly one of those rights (Hannon v. Maynard, 3 Kan. App. 2d 522, 597 P.2d 1125, 1126 (1979)), it is nonetheless equally obvious that prisoners confined out of state are not among the class of individuals for whom accelerated eligibility is directed when certification under section 46-23-201(3), MCA, occurs and that such prisoners therefore possess no right to early parole-release consideration under Montana law. In this regard, it should be emphasized that Article IV(5) of the Western Interstate Corrections Compact and Article IV(e) of the Interstate Corrections Compact refer only to confinement at "an appropriate institution" of the sending state, and the term "institution" is broadly defined in Article II(5) of the former compact as "any prison, reformatory, or other correctional facility (including but not limited to a facility for the mentally ill or mentally defective) in which inmates may be lawfully confined" and in Article II(e) of the latter in essentially the same manner. Inmates placed out of state under the compacts are thus not assured of treatment precisely identical to that which they would experience if incarcerated at a particular facility; they are instead guaranteed only those rights to which all Montana prisoners, irrespective of where located in this state, are entitled. I accordingly refuse to adopt an interpretation of the compacts which would require departure from the otherwise clear and unequivocal directive of section 46-23-201(3), MCA.

Lastly, nothing in Article IV(8) of the Western Interstate Corrections Compact or Article IV(h) of the Interstate Corrections Compact affects my conclusion. Those provisions apply only to benefits or obligations associated with any "action or proceeding" in which an inmate could have participated if confined at a Montana institution, and the entitlement at issue is statutory in nature.

THEREFORE, IT IS MY OPINION:

> A convict is entitled to accelerated parole-release eligibility under section 46-23-201(3), MCA, only if he or she is actually residing within the Montana State Prison or the Women's Correction Center during the effective period of certification.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 73

CONSERVATION DISTRICTS - Whether regular or special assessments are subject to property tax limitations;
PROPERTY, REAL - Whether regular or special assessments of conservation districts are subject to property tax limitations;
SOIL AND WATER CONSERVATION - Whether regular or special assessments of conservation districts are subject to property tax limitations;
TAXATION AND REVENUE - Whether regular or special assessments of conservation districts are subject to property tax limitations;
MONTANA CODE ANNOTATED - Sections 15-10-401 to 15-10-412, 15-10-402, 15-10-412, 76-15-101, 76-15-102, 76-15-215, 76-15-311, 76-15-401 to 76-15-411, 76-15-501, 76-15-506, 76-15-512, 76-15-514 to 76-15-516, 76-15-601, 76-15-606, 76-15-607, 76-15-609, 76-15-622, 76-15-623;
MONTANA LAWS OF 1987 - Chapter 654;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 21 (1987); 39 Op. Att'y Gen. No. 38 (1981); 39 Op. Att'y Gen. No. 5 (1981); 37 Op. Att'y Gen. No. 76 (1977).

HELD: Regular and special assessments by conservation districts are subject to the property tax limitations in sections 15-10-401 to 412, MCA.

1 March 1988

Larry Fasbender, Director
Department of Natural Resources
and Conservation
1520 East Sixth Avenue
Helena MT 59620

Dear Mr. Fasbender:

You have requested my opinion concerning the following question:

> Are regular and special assessments by conservation districts under sections 76-15-515 and 76-15-623, MCA, subject to the

property tax limitations in sections 15-10-401 to 412, MCA?

I conclude that regular and special assessments by conservation districts are properly characterized as taxes and are therefore subject to the limitations in sections 15-10-401 to 412, MCA.

Conservation districts are political subdivisions of the State whose general purpose is to protect soil within their boundaries from erosion. §§ 76-15-101, 76-15-102, 76-15-215, MCA; 39 Op. Att'y Gen. No. 38 at 152 (1981); 37 Op. Att'y Gen. No. 76 at 316 (1977). They are governed by boards of five or seven supervisors, which have broad powers to carry out the purposes for which the districts have been formed. E.g., §§ 76-15-311, 76-15-401 to 411, MCA. Among the boards' powers are the authority to issue bonds after elector approval to finance the district's operations, to charge fees for services, facilities, or materials furnished by the district, and to cause regular and special assessments to be levied by boards of county commissioners. §§ 76-15-501, 76-15-506, 76-15-514, MCA; 39 Op. Att'y Gen. No. 5 at 22 (1981).

Regular conservation district assessments may not exceed 1.5 mills and are levied against all taxable valuation within the district. § 76-15-515, MCA. Special assessments, in contrast, are levied against real property within specific "project areas" and can be utilized solely to finance the expenses of the involved project area. §§ 76-15-516(2), 76-15-622, 76-15-623, MCA. A project area may be established only after an affirmative vote of the electors within the proposed area and is created to implement a particular project benefiting the area. §§ 76-15-601, 76-15-606, 76-15-607, MCA. A project area may encompass all or part of one or more districts. § 76-15-609, MCA. The expenses associated with the project area need not be financed by special assessments but may, either in whole or part, be defrayed through regular assessments. § 76-15-622(1), MCA.

Initiative No. 105 (I-105),. codified in sections 15-10-401 and 15-10-402, MCA, and 1987 Mont. Laws, chapter 654, codified in sections 15-10-411 and 15-10-412, MCA, substantially limit the authority of a "taxing jurisdiction" to increase the property tax

liability of individual taxpayers over that amount levied for the 1986 tax year. See generally 42 Op. Att'y Gen. No. 21 (1987) (responding to broad range of questions concerning the proper application of I-105 and chapter 654). The term "taxing jurisdiction" is not defined but presumably means all entities which, under Montana law, may cause tax levies to be assessed against those classes of property to which the basic limitation in the initiative and the clarifying legislation applies. See § 15-10-402(1), MCA. Specifically excluded from the reach of I-105 and chapter 654 are rural improvement districts, special improvement districts, city street maintenance districts, and tax increment financing districts. §§ 15-10-402(2), 15-10-412(8), MCA. Conservation districts, however, are not exempted.

I held in 42 Op. Att'y Gen. No. 21 that I-105 and chapter 654 were intended only to affect property taxes and not special assessments. See generally Vail v. Custer County, 132 Mont. 205, 217, 315 P.2d 993, 1000 (1957) (distinguishing between a "tax" and an "assessment"). At issue in that opinion were irrigation district assessments which, unlike those of conservation districts, are not based on the value of a taxpayer's property but are instead calculated to relate directly the amount assessed to the benefit bestowed. I concluded that those assessments were not property taxes subject to I-105 and chapter 654 and commented that other special district levies might be similarly classified. With respect to such levies, I said "[t]he central inquiry will ... normally be whether the purpose of the levy or assessment is to compensate the district for benefits directly conferred upon a particular piece of property within its jurisdiction in direct proportion to the cost of those benefits[.]" Id., slip op. at 6-7. Thus, as the Washington Supreme Court recently stated in Bellevue Associates v. City of Bellevue, 108 Wash. 2d 671, 741 P.2d 993, 996 (1987), special assessments "support construction of local improvements that are appurtenant to specific property and bring a benefit to that property substantially more intense than is conferred on other property.... There must be an actual, physical and material benefit to the land."

Neither the regular nor the special assessments of conservation districts may fairly be termed an "assessment" as that term was defined in Vail v. Custer

County, supra, and used in 42 Op. Att'y Gen. No. 21. Regular conservation district assessments may thus be levied "to pay the incidental expenses of the district and to fund a conservation practice loan program in those districts having elected to establish such a program." § 76-15-512, MCA. Quite obviously, such "incidental expenses" will likely bear no relationship to particular benefits conferred upon particular parcels of land, and the costs attributable to any conservation practice loan programs are equally general, nonspecific expenses. Special conservation district assessments are also apportioned solely on the basis of real property valuation and without any manifested intent to relate directly the amount taxed to a benefit specially conferred upon the taxed property. Moreover, as developed above, conservation districts have authority under section 76-15-501(3), MCA, to charge for services performed or facilities provided, and I can only assume that, to the extent regular or special assessments are necessary to fund their operations, the need for the assessments derives either from costs which could not be directly attributed to a particular parcel of land or from a decision to apportion wholly or partially the expense of a benefit conferred upon such parcel throughout the entire district or project area. These levies are therefore taxes subject to the limitations in I-105 and chapter 654.

THEREFORE, IT IS MY OPINION:

> Regular and special assessments by conservation districts are subject to the property tax limitations in sections 15-10-401 to 412, MCA.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 74

RETIREMENT - Qualification of out-of-state public employment service within Public Employees' Retirement System (PERS);
RETIREMENT SYSTEMS - Qualification of service time earned in out-of-state public employment following qualification of prior Montana public service for purposes of Public Employees' Retirement System (PERS);
MONTANA CODE ANNOTATED - Sections 19-3-401, 19-3-512, 19-3-701, 19-3-703, 19-3-704.

HELD: Reinstatement of membership in the Public Employees' Retirement System (PERS) with past service credit under section 19-3-704, MCA, does not preclude a member from earning credit under section 19-3-512, MCA, for non-PERS service which occurred during the period between initial membership and reinstatement of membership in PERS.

2 March 1988

Paul A. Smietanka, Counsel
Public Employees' Retirement Board
Department of Administration
1712 Ninth Avenue
Helena MT 59620-0131

Dear Mr. Smietanka:

On behalf of the Public Employees' Retirement Board, you have requested my opinion on the following question:

> Does a redeposit of refunded contributions to the Public Employees' Retirement System (PERS) under section 19-3-704, MCA, reestablish PERS membership at the beginning of the individual's earliest PERS service, such that the member is barred from qualifying out-of-state public service under section 19-3-512, MCA, that occurs subsequent to the original Montana service and prior to the current Montana service?

The Montana Public Employees' Retirement System (PERS) originated July 1, 1945, and became the first retirement program for Montana public employees. Under the program, members accumulate creditable service based on the length of time during which they and their employers regularly contribute to the PERS fund. Over the years PERS members have been given the opportunity to qualify different forms of public service for inclusion within their total amount of PERS creditable service. Generally, the statutory authority to qualify other service is conditioned upon the member's paying into the retirement fund the amount plus interest which would have been paid through normal contributions for the length of service being qualified.

A particular form of service qualification is provided for the person who becomes a member after his accumulated normal contributions have been refunded upon termination of a previous membership. A member who voluntarily terminates service may request and be paid his accumulated contributions. § 19-3-703, MCA. Those contributions are now typically 6 percent of one's total compensation. § 19-3-701, MCA. Following termination and refund of contributions, many former PERS members return to public employment. A 1973 amendment to the PERS statutes allows these individuals to "buy back" the prior benefits and creditable service that have been previously refunded. Section 19-3-704, MCA, states in pertinent part:

> [A]ny person who again becomes a member subsequent to the refund of his accumulated normal contributions after a termination of previous membership is considered a new member without credit for any previous membership service. He may reinstate that membership service by redepositing the sum of the accumulated normal contributions which were refunded to him at the last termination of his membership plus the interest which would have been credited to his account had the refund not taken place. If he makes this redeposit, his membership shall be the same as if unbroken by such last termination.

In 1987 the Legislature approved House Bill 132 which provided PERS members an opportunity to qualify prior public service not subject to PERS. The opportunity is

qualified by several conditions. The resulting statute provides in part:

> A member with 5 or more years of creditable service in the public employees' retirement system may qualify up to 5 years of public service employment covered under a public retirement system other than a system provided for in Title 19 for which he received a refund of his membership contribution before becoming a member of the public employees' retirement system.

§ 19-3-512(1), MCA. The sponsor of the legislation explained that the bill's purpose was to allow a member of PERS to buy an additional five years of creditable service earned while working in another public employee retirement system including out-of-state public service, for which the member had received a refund. Minutes of Senate State Administration Committee, January 28, 1987, at 1.

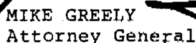
The statute in question, § 19-3-512, MCA, is easily applied with respect to an individual with prior civil service not subject to PERS contributions who thereafter becomes a member of PERS for the first time and, after earning five years of PERS creditable service, seeks to qualify five of those years of non-PERS prior employment. Your opinion request, however, identifies a variation on this background which implicates not only section 19-3-512, MCA, but also section 19-3-704, MCA. You have indicated that the individual seeking qualification of the prior civil service was employed by Montana before leaving the state and obtaining employment subject to another public retirement system. This individual wishes to qualify the prior PERS service under section 19-3-704, MCA, and additionally qualify the non-PERS service under section 19-3-512, MCA. The individual who first qualifies the prior PERS service has membership "the same as if unbroken by such last termination" and, therefore, various PERS membership attributes relating back to the previous Montana employment. § 19-3-704, MCA. You suggest that a problem may thus arise for this individual when attempting to qualify the non-PERS service since section 19-3-512, MCA, requires the non-PERS refund be received before becoming a PERS member.

The primary purpose of the retroactive membership provisions of section 19-3-704, MCA, is to aggregate prior creditable service with current service time. Pension and retirement statutes should be liberally construed to the end that the beneficent aims of such legislation may be achieved. Wheeler v. Board of Administration, 149 Cal. Rptr. 336, 601 P.2d 598 (1979). The aim of the 1987 amendment to the PERS statutory scheme was to allow members to qualify prior non-PERS public service. Accordingly, I construe the condition in section 19-3-512, MCA, that receipt of a non-PERS refund occur "before becoming a member" of PERS to mean that the refund must occur before initiation of the membership from which the request for qualification arises. One becomes a member of PERS upon the first day of employment. § 19-3-401, MCA. Thus, as long as the member seeking non-PERS service credit received the refund in question prior to initiation of the present employment, credit for prior membership in PERS restored under section 19-3-704, MCA, will not preclude the opportunity to qualify non-PERS service under section 19-3-512, MCA.

THEREFORE, IT IS MY OPINION:

> Reinstatement of membership in the Public Employees' Retirement System (PERS) with past service credit under section 19-3-704, MCA, does not preclude a member from earning credit under section 19-3-512, MCA, for non-PERS service which occurred during the period between initial membership and reinstatement of membership in PERS.

Very truly yours,



MIKE GREELY
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules or amendment or repeal of existing rules filed with the Secretary of State. Proposals of the Department of Revenue are reviewed only in regard to the procedural requirements of the Montana Administrative Procedure Act. The Committee has the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. In addition, the Committee may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt or amend a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with the existing or proposed rules. The address is Room 138, Montana State Capitol, Helena, Montana 59620.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter

1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute Number and Department

2. Go to cross reference table at end of each title which list MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 1987. This table includes those rules adopted during the period December 31, 1987 through March 31, 1988 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through December 31, 1987, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1987 or 1988 Montana Administrative Register.

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