RESERVE

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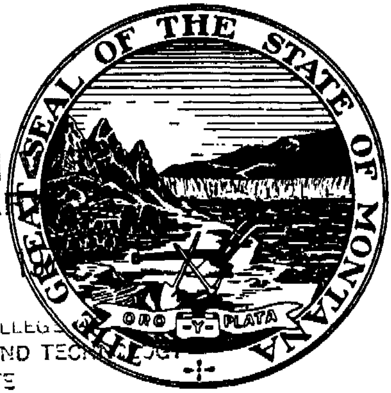

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 13

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BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA

In the matter of the repeal of rule ARM 16-2.14(1)-S1400 and the adoption of rule ARM 16-2.14(1)-S____, a rule for permits, construction and operation of air contaminant sources	NOTICE OF PUBLIC HEARING FOR REPEAL OF RULE ARM 16-2.14(1)-S1400 AND FOR THE ADOPTION OF A RULE CONCERNING THE ISSUANCE OF PERMITS FOR AIR CONTAMINANT SOURCES

1. On or about November 17, 1978, at 9:00 a.m., or as soon thereafter as practicable, a public hearing will be held in the basement auditorium of the Department of Social and Rehabilitation Services building, 111 Sanders, Helena, Montana, to consider the repeal of the present rule governing the issuance of permits for air pollution equipment and the adoption of a new rule concerning permits for the construction and operation of air contaminant sources.

2. The proposed rule replaces the present rule concerning the issuance of permits under the Montana Clean Air Act. The present rule, ARM 16-2.14(1)-S1400, will be repealed if the new rule is adopted.

3. The proposed rule reads as follows:

16-2.14(1)-S PERMITS, CONSTRUCTION AND OPERATION OF AIR CONTAMINANT SOURCES (1) Permits required and exclusions. Except as hereafter specified, no person shall construct, install, alter or use any air contaminant source or stack associated with any source without first obtaining a permit from the Department or the Board. A permit shall not be required for the following:

(a) Residential and commercial fuel burning equipment of less than 1,000,000 BTU/HR heat input;

(b) Residential and commercial fireplaces, barbeques and similar devices for recreational, cooking or heating use;

(c) Motor vehicles, trains, aircraft and other such self-propelled vehicles;

(d) Laboratory equipment used exclusively for chemical or physical analysis;

(e) Food service establishments;

(f) Any activity or equipment associated with the use of agricultural land or the planting, production, harvesting or storage of agricultural crops (this exclusion does not apply to the processing of agricultural products by commercial businesses);

(g) Ventilating systems used in buildings to house animals;

(h) Emergency equipment installed in hospitals or other public institutions or buildings for use when the usual sources of heat, power and lighting are temporarily unobtainable;

(i) Any activity or equipment associated with the construction, maintenance, alteration or use of roads, except for stationary sources, including but not limited to, rock crushers and asphalt plants, and roads associated with a source that is otherwise required to obtain a permit under this rule;

(j) Agricultural and forest slash burning activities (the adoption of this exclusion does not exempt such activities from regulation under the Open Burning Rule, ARM 16-2.14(1)-S1490); and

(k) All other sources and stacks not specifically excluded which have the potential to emit less than 10 tons per year of any pollutant for which a rule has been adopted in this subchapter.

(2) Definitions. For the purpose of this rule:

(a) "New or altered source or stack" means a source or stack associated with a source which has not been constructed or upon which construction has not commenced prior to the effective date of this rule. However, if the owner or operator of a source or stack has not commenced construction prior to the effective date of this rule, but the owner or operator has received a permit from the Department or the Board, then the source or stack shall not be considered a new or altered source or stack.

(b) "Existing source or stack" means a source or stack associated with a source which is in existence and operating or capable of being operated or which has a permit from the Department or the Board on the effective date of this rule.

(c) "Owner or operator" means the owner of a source or stack associated with a source or the authorized agent of the owner, or the person who is responsible for the overall operation of the source or stack.

(d) "Construct" or "construction" means on-site fabrication, erection or installation of a source or control equipment, including a reasonable period for startup and shakedown.

(3) Emission control requirements. The owner or operator of a new or altered source or stack for which a construction permit is required by this rule shall install the maximum air pollution control capability which is technically practicable and economically feasible, except that the lowest achievable emission rate requirements of Section 173 of the Federal Clean Air Act Amendments of 1977 (P.L. 95-95) shall apply to any pollutant emitted from such sources and stacks if an area has been designated nonattainment for a particular pollutant. All equipment shall be operated to provide the maximum air pollution control for which it was designed.

(4) Permit and application requirements for existing sources and stacks.

(a) The owner or operator of an existing source or stack shall apply for an operating permit on or before January 1, 1981. This subsection does not relieve the owner or operator of an existing source or stack from complying with the application requirements of subsection (5) of this rule if the owner or operator intends to alter, reconstruct or use the existing source or stack in a manner that would require the submission of an application to construct or operate a new or altered source or stack.

(b) The owner or operator of an existing source shall apply for an operating permit on forms available from the Department and shall be subject to the signature requirements of subsection (5)(a). The information to be submitted shall include the following:

(i) Any information described in subsection (5)(b) of this rule which was not submitted as a part of any previous permit application reviewed by the Department;

(ii) Any information relating to the matters described in subsection (5)(b) of this rule which has changed or is no longer applicable; and

(iii) A certification by the applicant that the source or stack is being operated in compliance with the conditions of an existing permit if one has been issued.

(c) An operating permit shall be granted to an existing source or stack which can satisfy the applicable requirements of subsection (7)(c) without the need for a hearing as provided in Section 69-3911(8) or additional environmental review under the Montana Environmental Policy Act unless it is demonstrated that new informationor changed conditions exist which could significantly affect the operation of the source or stack or affect compliance with applicable rules or standards.

(d) Nothing in this subsection shall require an applicant to submit information already filed with the Department. In situations where the applicant believes information has already been submitted to the Department, the applicant shall so indicate and, wherever possible, shall specify the date upon which the information was submitted. Any information so submitted shall be considered part of the application.

(5) Permit and application requirements for new or altered sources and stacks.

(a) The owner or operator of a new or altered source shall, not less than 180 days before construction begins, submit an application for a permit to construct on an application form provided by the Department. The application form shall contain a certification by the person signing the application that all information contained therein is true and an agreement that the person submitting the application assumes responsibility for the construction of the source or stack as described in the application. An unsigned or improperly signed application shall be considered incomplete. The following persons are authorized to sign an application on behalf of the owner or operator of a new or altered source or stack:

(i) An application submitted by a corporation must be signed by a principal executive officer of at least the level of vice president, or his authorized representative, if that representative is responsible for the overall operation of the source or stack;

(ii) An application submitted by a partnership or a sole proprietorship must be signed by a general partner or the proprietor respectively;

(iii) An application submitted by a municipal, state, federal or other public agency shall be signed by either a principal executive officer, appropriate elected official or other duly authorized employee; and

(iv) An application submitted by an individual must be signed by the individual or his authorized agent.

(b) The application for a permit to construct a new or altered source or stack shall include the following:

(i) A map and diagram showing the location of the proposed new or altered source and each stack associated with the source, the property involved, the height and outline of the buildings associated with the new or altered source, and the height and outline of each stack associated with the new or altered source;

(ii) A description of the new or altered source including data on expected production capacity, raw materials and major equipment components;

(iii) A description of the control equipment to be installed;

(iv) A description of the composition, volume and temperatures of the effluent stream, including the nature and extent of air contaminants emitted, quantities and means of disposal of collected contaminants, and the air quality relationship of these factors to conditions created by existing sources or stacks associated with the new or altered source or stack;

(v) Normal and maximum operating schedules;

(vi) Adequate drawings, blueprints, specifications and information to show the design and operation of the equipment involved;

(vii) Process flow diagrams containing material balaces;

(viii) A detailed schedule of construction or alteration of the source or stack;

(ix) A detailed description of the shakedown procedures and time frames that will be used at the source or stack; and

(x) Such other information requested by the Department for the review of the application and a determination of compliance with applicable standards and rules.

(c) The owner or operator of a new or altered source shall, not less than 120 days before construction is scheduled to end as specified in the permit to construct, submit an application for a permit to operate on an application form provided by the Department. The information to be submitted shall include the following:

(i) Any information relating to the matters described in subsection (5)(b) of this rule which has changed or is no longer applicable; and

(ii) A certification by the applicant that the new or altered source or stack has been constructed in compliance with the conditions of the construction permit.

(d) An operating permit shall be granted to a new or altered source or stack which satisfies the requirements of subsection (7)(c) without the need for a hearing as provided in Section 69-3911(8) or additional environmental review under the Montana Environmental Policy Act unless it is demonstrated that new information or changed conditions exist which were not considered in originally issuing the permit to construct and which could significantly affect the operation of the source or stack or affect compliance with applicable rules or standards.

(e) Nothing in this subsection shall require an applicant to submit information already filed with the Department. In situations where the applicant believes information has already been submitted to the Department, the applicant shall so indicate and, wherever possible, shall specify the date upon which the information was submitted. Any information so submitted shall be considered part of the application.

(6) Public review of permit applications.

(a) Where an application for a permit requires the compilation of an environmental impact statement under the Montana Environmental Policy Act, the procedures for public review shall be those required by the Montana Environmental Policy Act and the rules adopted by the Board and Department to implement the Act, ARM 16-2.2(2)-P2000 through P2080.

(b) Where the application for a permit does not require the compilation of an environmental impact statement, the Department shall, pursuant to Section 69-3911(5), notify the applicant in writing within thirty (30) days after receiving the application if the application is incomplete. The notice shall specify a date by which the additional information must be submitted and shall describe the information which is needed. If the information is not submitted as required, the application shall be considered withdrawn unless the applicant requests in writing an extension of time for submission of the additional information. The application is complete and filed on the date the required additional information is received. After an application is complete and filed, the Department shall:

(i) Notify the public of the receipt of a complete and filed application. For the purposes of complying with this subsection and subsection (6)(b)(iii), notice shall be sent to the local governing body within whose jurisdiction the source or stack is located and any member of the public who has requested a copy of such notices.

(ii) Within forty (40) days after receiving a complete and filed application for a permit, make a preliminary determination whether the permit should be issued, issued with conditions or denied; and

(iii) After making a preliminary determination, notify the public and the applicant of the Department's preliminary determination. The notice shall specify that comments may be submitted on the information submitted by the applicant and the Department's preliminary determination to issue, issue with conditions or deny the permit. The notice shall also specify the following:

(A) Where a complete copy of the application and the Department's analysis of the applicant can be reviewed. One copy of this material shall be made available for inspection by the public in the air quality control region where the source or stack is located.

(B) All comments on the Department's preliminary determination must be submitted in writing within fifteen (15) days after notice is mailed.

(C) Notwithstanding the opportunity for public comment, a final decision must be made within sixty (60) days after a completed and filed application is submitted to the Department as required by Section 69-3911(7). The notice shall specify the date upon which the sixty (60) day period expires.

(c) If a prevention of significant deterioration (PSD) rule has been adopted by the Board on or before the effective date of this rule, the following additional public review requirements shall apply to any source or stack which is subject to the PSD rule:

(i) The Department shall advertise in a newspaper of general circulation in the air quality control region affected by the proposed source or stack that an application has been received, the preliminary determination made by the Department, the degree of increment consumption that is expected from the source or stack, how written comments may be submitted, and how the final determination of the Department may be appealed to the Board; and

(ii) The Department shall send a copy of the notice of public comment to the applicant, the Region VIII Administrator of the Environmental Protection Agency and to officials and agencies having cognizance over the location where the proposed construction would occur as follows: any other state or local air pollution control agencies, the governing body of the city and county where the source or stack would be located; any comprehensive regional land use planning agency, and any state, federal land manager, or Indian governing body whose lands may be affected by emissions from the source or stack.

(7) Conditions under which permits may be issued.

(a) Any permit issued under the provisions of this rule may be issued with such conditions as are necessary to assure compliance with all applicable rules and standards.

(b) A permit to construct shall not be issued, except as provided in subsection (7)(d), unless the applicant demonstrates that the source or stack can be expected to operate in compliance with the standards and rules adopted under the Montana Clean Air Act and the applicable regulations and requirements of the Federal Clean Air Act, including but not limited to a demonstration that:

(i) The source or stack will not interfere with the attainment or maintenance of any federal ambient air quality standard; and

(ii) If a prevention of significant deterioration (PSD) rule has been adopted by the Board on the effective date of this rule, the source or stack will not cause the allowable incremental increase in ambient air quality levels to be exceeded as specified in the PSD rule.

(c) A permit to operate shall not be issued, except as provided in subsection (7)(d), unless the applicant demonstrates that:

(i) Construction has occurred in compliance with the terms and conditions of the construction permit if such a permit has been issued;

(ii) The source or stack can operate in compliance with applicable rules and standards; and

(iii) The source has operated in compliance with the conditions and terms of an existing permit.

(d) The Department may issue a permit to construct or operate a source or stack which cannot immediately comply with an applicable rule or standard. Any permit issued under this subsection shall be issued with a compliance schedule specifying interim construction and modification requirements that must be satisfied to achieve compliance with applicable rules and standards. Such a compliance schedule permit shall only be issued if it is demonstrated that the source or stack can operate or be expected to operate in compliance with applicable rules and standards within two (2) years after the date of issuance of the permit.

(e) Commencement of construction or operation under any permit containing conditions shall be deemed acceptance of all conditions so specified, provided that nothing contained herein shall affect the right of the permittee to appeal the imposition of conditions to the Board as provided in Section 69-3911(8).

(8) Denial of permits. If the Department denies the issuance of a permit to construct or operate, it shall:

(a) Notify the applicant in writing of the reasons why the permit is being denied and advise the applicant of his right to appeal the Department's decision to the Board as provided in Section 69-3911(8). Service of the Department's decision to deny the permit shall be made as provided in the Montana Rules of Civil Procedure except that the applicant may agree by written acknowledgement to service by mail; and

(b) Refuse to accept any further application from the applicant until:

(i) The period for appeal to the Board has expired;

(ii) The Board has rendered a final decision in the matter if an appeal is undertaken; or

(iii) The applicant has agreed to adequately address the reasons for denial.

(9) Duration and renewal of permits.

(a) Permits to construct shall be valid for two (2) years from the date of issuance. If the construction, installation or alteration of a source or stack for which a permit is issued is not completed within two (2) years, a renewal of the permit shall be required. For the purposes of computing the two (2) year life of the permit, any time which elapses as a result of an appeal to the Board or an appropriate court shall not be counted as part of the two (2) year time period. Applications for renewal of the permit shall be submitted not less than sixty (60) days before the expiration date of the permit and subject to the informational and application review requirements of subsections (5)(c), (d) and (e) of this rule.

(b) Permits to operate shall be valid until revoked or modified as provided in this rule. The owner or operator of such a source or stack shall certify to the Department every five years that no changes of operation have occurred which would increase emissions from the source or stack. This subsection does not relieve the owner or operator of such a source from complying with the application requirements of subsection (5) of this rule if the owner or operator intends to alter, reconstruct or use the existing source or stack in a manner that would require the submission of an application to construct or operate a new or altered source or stack.

(10) Revocation of permits. A permit may be revoked for violations of any condition of a permit, rule, or standard adopted pursuant to the Clean Air Act of Montana, applicable Federal Clean Air Act regulation, or any provisions of the Montana Clean Air Act or applicable provisions of the Federal Clean Air Act. The Department shall notify the permittee of its intent to revoke the permit in writing. Service of the Department's intention to revoke shall be made as provided in subsection (8)(a) of this rule. The Department's decision to revoke a permit shall become final within fifteen (15) days after service of the notice unless the permittee requests a hearing before the Board. The filing of a request for a hearing postpones the effective date of the Department's decision to revoke the permit until the conclusion of the hearing and issuance of a final decision by the Board.

(11) Modification of permits. A permit may be modified for the following reasons:

(a) Changes in any applicable rules and standards adopted by the Board; or

(b) Changed conditions of operation at a source or stack which do not involve the construction, installation or use of a new source or stack. A determination of whether a permit should be modified because of changed conditions of operation shall be based upon a determination of whether total emissions from a source or stack will be increased as a result of the changed operations.

(12) Waivers. The Department may, as specified in Section 69-3911(3):

(a) Waive the requirements for submittal of information required in an application; and

(b) Waive or shorten the time required for the submission of an application.

(13) Transfer of permits. After approval by the Department, a permit may be transferred from one location to another or from one person to another.

(14) General provisions.

(a) Permits shall be made available for inspection by the Department at the location of the source or stack for which the permit has been issued.

(b) Nothing in this rule shall be construed as relieving any permittee of the responsibility for complying with any applicable Federal or Montana statute, rule or standard except as specifically provided in this rule.

4. The repeal of the present permit rule and the adoption of a new rule to govern the issuance of permits for the construction and operation of air contaminant sources is being proposed to deal with regulatory problems encountered in the administration of the present rule and to satisfy certain requirements imposed upon the State of Montana by the 1977 Federal Clean Air Act Amendments.

5. Interested persons may present their data, views or arguments either orally or in writing at the hearing.

6. C. W. Leaphart, Jr., 1 N. Last Chance Gulch, Helena, Montana, has been designated to preside over and conduct the hearing.

7. The authority of the agency to make the proposed rule is based on Sections 69-3909 and 69-3911, R.C.M. 1947.

John W. Bartlett

JOHN W. BARTLETT

Certified to the Secretary of State October 3, 1978

BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA

In the mater of the amendment of rule ARM 16-2.14(1)-S1440, particulate matter, airborne)	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF ARM 16-2.14(1)-S1440 (Particulate Matter, Airborne)

1. On Friday, November 17, 1978, at 1 p.m., or as soon thereafter as the matter can be heard, a public hearing will be held before the Board in the basement auditorium of the Department of Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana, to consider the amendment of rule ARM 16-2.14(1)-S1440 found in the Administrative Rules of Montana. The proposed amendment would delete the existing language and replace it with numerical limitations for various kinds of airborne particulate.

2. The rule as proposed to be amended, provides as follows:

16-2.14(1)-S1440 PARTICULATE MATTER, AIRBORNE

~~(1) No person shall cause or permit the handling or transporting or storage of any material in a manner which allows or may allow controllable particulate matter to become airborne.~~

~~(2) No person shall cause or permit a building or its appurtenances or a road, or a driveway, or an open area to be constructed, used, repaired or demolished without applying all such reasonable measures as may be required to prevent particulate matter from becoming airborne. The director may require such reasonable measures as may be necessary to prevent particulate matter from becoming airborne, including, but not limited to, paving or frequent cleaning of roads, driveways and parking lots, application of dust free surfaces, application of water, and the planting and maintenance of vegetative ground cover.~~

(1) No person shall cause or authorize the production, handling, transportation, or storage of any material unless reasonable precautions to control emissions of airborne particulate matter are taken. Such emissions of airborne particulate matter shall not exhibit an opacity of 20 percent or greater, except for emissions of airborne particulate matter originating from any transfer ladle or operation engaged in the transfer of molten metal which was installed or operating prior to November 23, 1968.

(2) No person shall cause or authorize emissions of airborne particulate matter to be discharged into the outdoor atmosphere from any transfer ladle or operation engaged in the transfer of molten metal which was installed or operating prior to November 23, 1968, which exhibits an opacity of 40 percent or greater.

(3) No person shall cause or authorize the use of any street, road, or parking lot without taking reasonable

precautions to control emissions of airborne particulate matter.

(4) No person shall operate a construction site or demolition project unless reasonable precautions are taken to control emissions of airborne particulate matter. Such emissions of airborne particulate matter shall not exhibit an opacity of 20 percent or greater.

(5) Within any area designated non-attainment for total suspended particulate (TSP) for primary or secondary National Ambient Air Quality Standards (NAAQS), no person shall cause or authorize the use of any paved road or street which exhibits an emission factor for airborne particulate matter greater than that allowed by the following table:

ADT or EADT	Allowable Emission Factor (lb/VMT)
0-100	.208
100-200	.200
200-400	.192
400-600	.184
600-800	.176
800-1000	.170
1000-1500	.154
1500-2000	.138
2000-3000	.106
3000-4000	.080
4000-5000	.068
5000-6000	.057
6000-8000	.030
8000-10,000	.016
10,000-12,000	.011
12,000-15,000	.009

The determination of the actual emission factor for an applicable paved road shall be based on the following equation.

OPEN DUST SOURCE: Vehicular Traffic on Paved Roads

$$EF = 0.45 \left(\frac{s}{10}\right) \left(\frac{L}{5000}\right) \left(\frac{W}{3}\right)^{0.8} \text{ lb/veh-mi}$$

where: s = silt content of road surface material (%)
W = average vehicle weight (tons)
L = surface dust loading on traveled portion of road (lb/mile)

Value determination for the above variables (s,W,L) shall be based on procedure specified by the Department.

(6) Within any area designated non-attainment for TSP for either primary or secondary NAAQS, no person shall cause or authorize the use of any unpaved road or street which exhibits an emission factor for airborne particulate matter greater than that allowed by the following table:

ADT OR EADT	Allowable Emission Factor (lb/VMT)
0-100	4.15

ADT OR EADT	Allowable Emission Factor (lb/VMT)
100-200	4.10
200-400	4.05
400-600	4.00
600-800	3.95
800-1000	3.90
1000-1500	3.78
1500-2000	3.67
2000-3000	3.45
3000-4000	3.26
4000-5000	3.10
5000-6000	2.92
6000-8000	2.62
8000-10,000	2.35
10,000-12,000	2.12
12,000-15,000	1.80

The determination of the actual emission factor for an applicable unpaved road shall be based on the following equation:

OPEN DUST SOURCE: Vehicular Traffic on Unpaved Roads

$$EF = 5.9 \left(\frac{s}{12}\right) \left(\frac{S}{30}\right) \left(\frac{W}{3}\right)^{0.8} \left(\frac{d}{365}\right) \text{ lb/veh-mi}$$

where: s = silt content of road surface material (%)
S = average vehicle speed (mph)
W = average vehicle weight (tons)
d = dry days per year

Value determinations for the above variables (s, S, W, d) shall be based on procedures specified by the Department.

(7) Within any area designated non-attainment for TSP for either primary or secondary NAAQS, any person who owns or operates a slag pile, strip mine or open pit mine shall apply best available control technology to minimize emissions of airborne particulate matter.

(8) Within any area designated non-attainment for TSP for either primary or secondary NAAQS, the Department may require any person or persons having jurisdiction over any road or street to perform traffic counts on such road, if a preliminary analysis by the Department implies that such road may be exceeding the emission standards established in Sections 5 and 6 of this rule. The Department's preliminary analysis shall be based upon the best available information, which may include but is not limited to air monitoring data, public complaints, or prelimiary emission factor calculations utilizing the most current traffic estimates as determined by the applicable state or local agency having responsibility for making such estimates.

(9) Definitions: For purposes of this rule the following definitions apply:

(a) "Annual Average Daily Traffic (ADT)" means the annual average number of vehicles, during 24 consecutive hours that pass a particular point on the road over the period of 365 days.

Annual average daily traffic is calculated by averaging the average daily traffic for each of the 12 months. The average daily traffic for the month is calculated using the equation:

$$\text{Average day of month} = \frac{5\ \text{Av. Weekday} + \text{Av. Saturday} + \text{Av. Sunday}}{7}$$

Where Av. weekday = average daily volume for all weekdays of month
Av. Saturday = average daily volume for all Saturdays of month
Av. Sunday = average daily volume for all Sundays of month

This procedure is considered the simplest feasible method for providing comparable values when counts for certain days are unusable.

(b) "Estimated Average Daily Traffic (EADT)" means an average daily traffic derived from short-term traffic counts and calculated in accordance with established Montana Department of Highway procedures. Estimated average daily traffic shall be substituted for ADT for any road or street where continuous sampling is not available to calculate ADT.

(c) "Vehicle Miles Traveled (VMT)" means the vehicle miles traveled normally obtained by multiplying the ADT by 365 and by multiplying themileage of road to which the ADT is applicable. One VMT is equivalent to one vehicle traveling one mile on an applicable road.

(d) "Airborne Particulate Matter" means any particulate matter discharged into the outdoor atmosphere which is not discharged from the normal exit of a stack or chimney for which a source test can be performed in accordance with Method 5 (Determination of Particulate Emissions from Stationary Sources), Appendix A, Part 60.275 (Test Methods and Procedures), Title 40, Code of Federal Regulation (revised July 1, 1977).

3. The amendment to this rule is proposed for the purposes of bringing the state into compliance with the provisions of the 1977 Federal Clean Air Act Amendments. The state is required to submit to the Environmental Protection Agency revisions to the state implementation plan by January 1, 1979. Said provisions must provide a means to attain national ambient air quality standards for those areas of the state which have been designated as non-attainment areas. The proposed changes are designed to address the attainment of national ambient air quality standards for total suspended particulate.

4. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing.

5. C. W. Leaphart, Jr., 1 North Last Chance Gulch, Helena, Montana, has been designated to preside over and conduct the hearing.

6. The authority of the Board to make the proposed amendment is based on Section 69-3913, R.C.M. 1947.

JOHN W. BARTLETT, Chairman

Certified to the Secretary of State October 3, 1978

BEFORE THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA

In the matter of proposed revisions to Montana's plan implementing the federal clean air act.	))))	NOTICE OF PUBLIC HEARING FOR PROPOSED REVISIONS TO THE STATE IMPLEMENTATION PLAN (S.I.P.) OF THE FEDERAL CLEAN AIR ACT

1. On November 16, 1978, at 1 p.m., and continuing on November 17, and 18,1978, at 8:30 a.m., a public hearing will be held by the Board in the auditorium of the Social and Rehabilitation Services Building, 111 N. Sanders, Helena, Montana, to consider revisions to Montana's state implementation plan (S.I.P.) of the Federal Clean Air Act, 42 USC §7401 et seq.

2. The proposed revisions are being considered for adoption by the board in order to comply with the August, 1977, amendment to the Federal Clean Air Act.

3. The following matters are proposed revisions to the state implementation plan of the Federal Clean Air Act:

(a) Sulfur dioxide (SO_2) emission limitation control strategies for the Anaconda, Montana, area; East Helena, Montana, area; and Laurel, Montana, area;

(b) A total suspended particulate (TSP) emission limitation control strategy for East Helena, Montana;

(c) ARM 16-2.14(1)-S1400, the rule regulating permits for construction and operation of equipment;

(d) ARM 16-2.14(1)-S1440, the rule regulating airborne particulate matter;

(e) Total suspended particulate (TSP) emission limitation control strategies for the Butte, Montana area, and the Great Falls, Montana, area;

(f) Total suspended particulate (TSP) emission limitation control strategies for the Colstrip, Montana, area and Columbia Falls, Montana, area;

(g) Total suspended particulate (TSP) and carbon monoxide(CO) emission limitation control strategies for the Billings, Montana, area and Missoula, Montana, area;

(h) revisions to the following rules:

(i) ARM 16-2.14(1)-S1410, Definitions affecting limitations of levels of emissions;

(ii) ARM 16-2.14(1)-S1420, incinerators;

(iii) ARM 16-2.14(1)-S1460, visible air contaminants;

(iv) ARM 16-2.14(1)-S14030, wood waste burners;

(i) proposed rules pertaining to:

(i) new source performance standards (NSPS);

(ii) prevention of significant deterioration of air quality (PSD);

(iii) limiting the use of tall stacks and other dispersion techniques as emission limitation controls.

4. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing, or may address their comments in writing to Michael Roach, Chief

of the Air Quality Bureau, Department of Health and Environmental Sciences, Capitol Station, Helena, Montana, 59601, no later than November 15, 1978.

5. C. W. Leaphart, Jr., 1 North Last Chance Gulch, Helena, Montana, has been designated as the hearings officer to preside over and conduct the hearings.

John W. Bartlett

JOHN W. BARTLETT, Chairman

Certified to the Secretary of STate October 3, 1978

BEFORE THE DEPARTMENT OF PUBLIC SERVICE REGULATION
PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

In The Matter of the Adoption of New Rules Regarding "Stand-by Charges" by Public Utilities	NOTICE OF PUBLIC HEARING FOR ADOPTION OF PROPOSED NEW RULES ON "STANDBY CHARGES"

TO: All Interested Persons

The notice of proposed agency action published in the Montana Administrative Register on August 24, 1978, is renoticed as follows because one person has requested a public hearing:

1. On November 15, 1978, at 1:00 p.m., a public hearing will be held in the Public Service Commission's offices, 1227 11th Avenue, Helena, Montana to consider proposed adoption of new rules relating to "standby charges" by public utilities to customers whose homes, businesses, or industries are equipped with alternative energy sources.

2. The rules proposed for adoption are found in the 1978 Montana Administrative Register Issue No. 10 at pages 1228-1229. Copies of the proposed rules are available at the office of the Public Service Commission, 1227 11th Avenue, Helena, Montana 59601.

3. The purpose of the rule is to prohibit imposing stand-by fees on users of alternative sources of energy who want conventional systems as a backup.

Under the proposed rule, utilities seeking authority from the Commission to impose future standby charges must submit detailed information supporting the extra charge.

4. Interested persons may submit their data, views or arguments concerning the proposed rule orally, or in writing, at the hearing. Comments may also be submitted in writing to the Commission, at the above address, prior to November 13, 1978.

5. The authority of the Commission to promulgate this rule is based upon Sections 70-113 and 70-104, R.C.M. 1947.

Thomas J. Schneider

THOMAS J. SCHNEIDER, Commissioner

CERTIFIED TO THE SECRETARY OF STATE October 3, 1978.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of rule 48-2.6(2)-S680 referencing the Board of Public Education's Indian Studies rule in accreditation standards	NOTICE OF PROPOSED AMENDMENT OF RULE 48-2.6(2)-S680 referencing the Board of Public Education's Indian Studies in accreditation standards. NO PUBLIC HEARING CONTEMPLATED.

TO: All Interested Persons

1. On November 13, 1978, the Board of Public Education proposes to amend ARM Rule 48-2.6(2)-S680, Boards of Trustees.

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

(1) Remains the same.

(2) Remains the same.

(3) Remains the same.

(4) Contracts Each district shall have valid written contracts with all regularly employed administrative, supervisory and teaching personnel.

<u>(a) The board of trustees of school districts that lie wholly or partially within the confines of an Indian reservation or school districts that adjoin (i.e., share a common border with) an individual reservation shall employ certified personnel in accordance with Section 75-6131 School Laws of Montana and Board of Public Education rules contained in ARM Title 48, Chapter 54, Indian Studies. (Note: the provisions of this standard shall be implemented by the 1979-80 school term.)</u>

3. The rule is proposed to be amended because the Board's Indian Studies rule is to be monitored in school districts' fall reports and, therefore, must be referenced in accreditation standards.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to Earl J. Barlow, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59601, at any time prior to November 9, 1978.

5. If a person who is directly affected by the proposed amendment 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 Earl J. Barlow, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59601, no later than October 23, 1978.

6. If the agency receives requests for a public hearing on the proposed amendment from more than 10 percent or 25 or more persons who are directly affected by the proposed amendment, or from the Administrative Code Committee of the legislature, a hearing will be held at a later date. Notice of hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 350, based on 3500 teachers in schools affected by the rule.

7. The authority of the agency to make the proposed amendment is based on sections 75-5616(a) and 75-6131, R.C.M. 1947, and on HJR 60, 43rd Legislature (1974).

In the matter of the amendment of subchapter 18, Chapter 10, Title 48, revising procedures for hearing requests for revocation or suspension of teacher certificates	)	NOTICE OF PROPOSED AMENDMENT OF SUBCHAPTER 18, CHAPTER 10, TITLE 48, revising procedures for hearing requests for revocation or suspension of teacher certificates. NO PUBLIC HEARING CONTEMPLATED.

TO: All Interested Persons

1. On November 13, 1978, the Board of Public Education proposes to amend ARM Subchapter 18, Procedures to Guide the Hearing of Requests for Revocation or Suspension of Teacher Certificates.

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

48-2.10(10)-P10160 PRELIMINARY ACTION ~~(1) The Board of Public Education is requested with reason to suspend or revoke a teacher certificate.~~

~~(2) The Board of Public Education implements an investigation to determine whether or not a substantial reason for suspension or revocation of the teacher certificate exists.~~

~~(3) The Board of Public Education determines whether or not a substantial reason for the suspension or revocation of a teacher certificate exists.~~

~~(a) If the Board of Public Education determines that no substantial reason exists to suspend or revoke the teacher certificate, the matter is ended.~~

~~(b) If the Board of Public Education determines that there is substantial reason to suspend or revoke the teacher certificate, the Board proceeds to provide notice of the pending action to the teacher and of the opportunity for the teacher to contest the pending action.~~

(1) Requests to suspend or revoke a teacher certificate shall be brought before the Board of Public Education by only:

(a) an official action of the board of trustees of a local district for any teacher currently employed by that district or under contract or otherwise employed by that district at any time during the twelve months prior to the receipt by the Board of the suspension or revocation request; or

(b) the Superintendent of Public Instruction for any other teacher.

(2) Upon receipt of such request, the Board of Public Education shall implement an investigation to determine whether or not a substantial reason for suspension or revocation of the teacher certificate exists. This investigation shall include notifying the affected teacher of the charges against him and allowing him ten days to respond to those charges.

48-2.10(18)-P10170 NOTICE AND OPPORTUNITY FOR HEARING UPON DETERMINATION THAT SUBSTANTIAL REASON EXISTS TO SUSPEND OR REVOKE TEACHER CERTIFICATE. ~~(1)--The-Board-chooses-one-of three-methods-to-provide-an-opportunity-for-hearing:~~

~~(a)--a-hearing-before-the-Board-of-Public-Education-at a-special-or-regular-meeting-of-the-Board;~~

~~(b)--a-hearing-before-Board-member(s)-who-will-report to-the-Board-proposed-findings-of-fact,-proposed-conclusions of-law-and-proposed-order;-or~~

~~(c)--a-hearing-before-a-hearing-examiner-appointed-by the-Board-of-Public-Education-who-will-report-to-the-Board proposed-findings-of-fact,-proposed-conclusions-of-law-and a-proposed-order.~~

~~(2)--The-Board-of-Public-Education-requests-the-Secretary-to-the-Board-(the-Superintendent-of-Public-Instruction) to-notify-the-teacher-of-the-pending-action.--The-notice-will contain:~~

~~(a)--time-and-place-of-hearing,~~

~~(b)--statement-of-allegation-to-justify-suspension-or revocation,~~

~~(c)--copy-of-Board-procedures-to-guide-hearing-of-requests-for-suspension-or-revocation,-and~~

~~(d)--who-will-hear-the-allegation.~~

~~(3)--If-teacher-does-not-notify-Superintendent-of-Public-Instruction-of-teacher's-intention-to-contest-pending action,-Board-of-Public-Education-will-act-to-suspend-or-revoke-teacher-certificate-at-next-meeting.~~

~~(4)--If-teacher-does-notify-Superintendent-of-Public-Instruction-of-intention-to-contest-pending-action,-the-matter will-proceed-to-hearing.~~

(1) On the basis of the preliminary investigation, the Board shall determine whether or not a substantial reason exists to suspend or revoke the teacher certificate.

(a) If the Board determines that no substantial reason exists to suspend or revoke the teacher certificate, the matter is ended.

(b) If the Board determines that there is substantial reason to suspend or revoke the teacher certificate, the Board shall provide notice of the pending action to the teacher and of the opportunity for the teacher to contest the pending action. Such notice shall include:

(i) A statement of the time, place and nature of the hearing;

(ii) A statement of the legal authority and jurisdiction under which the hearing is to be held;

(iii) A reference to the particular sections of the statutes and rules involved;

(iv) A statement of the matters asserted;

(v) A designation of who will hear the allegation;

(vi) A provision advising parties of their right to be represented by counsel at the hearing.

(2) If the teacher does not notify the Board of the teacher's intention to contest pending action within twenty (20) days of the service of notice, the Board will suspend or revoke the teacher certificate at its next meeting.

(3) If the teacher does notify the Board within twenty (20) days of service of notice of the teacher's intention to contest pending action, the matter will proceed to hearing.

48-2.10(18)-P10180 HEARING IF TEACHER INTENDS TO CONTEST PENDING ACTION ~~(1)--At-time-and-place-set-in-the-notice to-the-teacher-the-Chairperson-of-the-Board-of-Public-Education/Board-member(s)/hearing-examiner-hears-the-parties-in the-following-order:~~

~~(a)--statement-and-evidence-of-the-Board-of-Public-Education-in-support-of-the-pending-action,~~

~~(b)--statement-and-evidence-of-affected-parties-supporting-pending-action,~~

~~(c)--statement-and-evidence-of-teacher-contesting-pending-action,-and~~

~~(d)--rebuttal-testimony.~~

~~(2)--Though-a-transcript-need-not-be-made-of-the-hearing-except-at-the-request-of-a-party,-it-is-suggested-that a-transcript-be-made-of-every-hearing-to-facilitate-further review.~~

(1) The Board shall select one of the following methods for providing a hearing:

(a) a hearing before the Board of Public Education at a special or regular meeting of the Board;

(b) a hearing before Board member(s) who will report to the Board proposed findings of fact, proposed conclusions of law and a proposed order; or

(c) a hearing before a hearing examiner appointed by the Board of Public Education who will report to the Board proposed findings of fact, proposed conclusions of law and a proposed order.

(2) At the time and place set in the notice to the teacher, the Chairperson of the Board of Public Education or designated Board member(s) or an appointed hearing examiner shall conduct the hearing in accordance with rules 9-21 of the Attorney General's model rules for hearing contested cases, as found in the Administrative Rules of Montana, Volume I, Part I, Chapter 6, (3-24-78).

~~48-2.10(18)-P10190--NOTICES--(1)--ALL-NOTICES-will-be served-thirty-days-in-absence-of-a-hearing-and-in-accordance with-the-Montana-Rules-of-Civil-Procedure.--(History:--Sec. 75-6002,-75-6010,-R.C.M.-1947,-Eff.-12/10/74;-ARM-Pub. 11/26/77.)~~

48-2.10(18)-P10200 AFTER HEARING BY MEMBER OF BOARD/ HEARING EXAMINER/BOARD OF PUBLIC EDUCATION ~~(1)--After hearing-examiner-prepares-proposed-findings-of-fact,-proposed conclusions-of-law-and-a-proposed-order-which-are-sent-to-the Secretary-to-the-Board-of-Public-Education-with-the-record.~~

~~(a)--If-a-majority-of-the-members-of-the-Board-of-Public Education-were-not-present-at-the-hearing-by-the-member(s)-or hearing-examiner-or-have-not-read-the-record-of-the-hearing the-Secretary-to-the-Board-of-Public-Education-transmits-to the-party-adversely-affected-by-the-proposed-order,-copies of-the-proposed-findings-of-fact,-proposed-conclusions-of law-and-proposed-order.--This-party-may-then-file-exceptions, present-briefs-and-make-oral-argument-before-the-Board-of Public-Education-when-it-considers-the-report-of-the-hearing examiner-or-member(s).~~

~~(b)--If-a-majority-of-the-members-of-the-Board-were present-at-the-hearing-by-the-member(s)-or-hearing-examiner or-have-read-the-record-the-Board-of-Public-Education-considers-the-report-of-the-hearing-examiner-or-member(s)-at its-next-meeting-and-adopts,-modifies-or-does-not-adopt-the report.~~

~~(2)--After-hearing-by-the-Board-of-Public-Education-the Board-adopts-findings-of-fact,-conclusions-of-law-and-an order-either-suspending-or-revoking-the-teacher-certificate or-not-suspending-or-revoking-the-teacher-certificate.--These are-entered-on-the-minutes-of-the-Board-of-Public-Education and-sent-to-the-party-adversely-affected.~~

(1) After hearing by the Board of Public Education, the Board adopts findings of fact, conclusions of law and an order either suspending or revoking the teacher certificate or not suspending or revoking the teacher certificate. These are entered on the minutes of the Board of Public Education and sent to the party adversely affected. When a certificate is suspended or revoked, the Superintendent of Public Instruction shall notify certifying agencies in each of the other states.

3. The rule is proposed to be amended to clarify the rule's language and to bring the rule into compliance with the Administrative Procedures Act.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to Earl J. Barlow, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59601, at any time prior to November 9, 1978.

5. If a person who is directly affected by the proposed amendment 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 Earl J. Barlow, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59601, no later than October 23, 1978.

6. If the agency receives requests for a public hearing on the proposed amendment from more than 10 percent or 25 or more persons who are directly affected by the proposed amendment, or from the Administrative Code Committee of the legislature, a hearing will be held at a later date. Notice of hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 2200, based on the 22,000 teacher and administrative certificates in Montana.

7. The authority of the agency to make the proposed amendment is based on sections 75-6002, 75-6010, R.C.M. 1947.

Earl J. Barlow

CHAIRMAN
BOARD OF PUBLIC EDUCATION

Certified to the Secretary of State September 29, 1978.

BEFORE THE COMMISSIONER
DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

In the Matter of the Repeal of the Rule Requiring A Job Order, Section 24-3.14BI(1)-S1400	))))	Repeal of Rule (Job Order for Private Employment Agencies)

TO: All Interested Persons

1. On April 24, 1978, the Department of Labor and Industry published notice of the proposed repeal of a rule relating to job orders for private employment agencies at page 464 of the 1978 Montana Administrative Register, issue No. 4.

2. No comments or testimony were received.

3. The agency has repealed the rule. The reasons for the repeal were set forth in the Notice mentioned above.

Dated this 2nd day of October, 1978.

DAVID E. FULLER
Commissioner
Department of Labor and Industry

Certified to the Secretary of State October ____, 1978

BEFORE THE BOARD OF
OIL AND GAS CONSERVATION
STATE OF MONTANA

In the matter of the adoption of rules relating to Associated Gas Flaring)	NOTICE OF ADOPTION OF RULES 36-3.18(10)-S18275 ASSOCIATED GAS FLARING

TO: All Interested Parties

1. On June 29, 1978, the Board of Oil and Gas Conservation published Notice No. 36-3-18-11 of proposed adoption of rules ARM 36-3.18(10)-S18275 relating to Associated Gas Flaring at page 938, Montana Administrative Register; 1977 Issue No. 7.

2. The Board of Oil and Gas Conservation adopted the rule with the following changes at its September 13, 1978 meeting:

36-3.18(10)-S18275 ASSOCIATED GAS FLARING. Within sixty (60) days following the completion or recompletion of an oil well, the operator shall file with the Board's Petroleum Engineer at its Billings office the results of a stabilized production test of at least 72 hours duration showing the average daily oil production and average daily ~~associated~~ gas production during the test period. If the average daily gas production exceeds 100 MCF and the operator intends to flare or otherwise waste the associated gas, the well may not produce more than an average of 100 MCFG per day each calendar month after the sixty day test ~~following-completion~~ until such time as further relief may be granted by the Board. If the operator wishes to flare more than an average of 100 MCFG per day each calendar month, the operator must submit~~,~~ with the production test results, a statement justifying the need to flare or otherwise waste more than ~~100-MCFG~~ that amount. The statement ~~shall~~ should include such information as a gas analysis, estimated gas reserves, proximity of the well to a market, estimated gas price at the nearest market, estimated cost of marketing the gas, reinjection potential or other conservation-oriented disposition alternatives, amount of gas used in lease operations and any other information pertinent to a determination of whether marketing or not marketing or otherwise conserving the associated gas is economically feasible.

The Petroleum Engineer will review the justification statement with the Board ~~for-its-consideration~~ at its next regularly scheduled meeting. The Board may elect to: (1) docket a hearing for the operator to show further cause why it should be allowed to flare or otherwise waste more than an average of 100 MCFG ~~of-associated-gas~~ per day each calendar month, ~~or~~ (2) restrict production until the gas is marketed or otherwise beneficially utilized in which case the operator may docket a hearing on its own behalf to seek further relief~~,~~, or (3) take any other action the Board deems appropriate in the circumstances.

~~In-these-instances-where-a-group-of-three-or-more-offset-or nearby-wells,-none-of-which-individually-produces-more-than-100~~

~~MCFG-per-day,-collectively-produce-more-than-200-MCFG-per-day, the-Board-shall-docket-a-hearing-for-the-operator-or-operators to-show-cause-why-production-from-the-group-of-wells-should-not be-restricted-pending-sale-or-other-conservation-oriented-use-of gas.~~ All existing oil wells which are flaring an average of 100 MCFG or more per day each calendar month shall file the justification statement required by this rule not later than December 1, 1978.

3. A public hearing on the proposed rule was held August 3, 1978, at 10:00 a.m. in Kalispell, Montana. The Board has adopted the rule because the Board is concerned with the conservation of associated gas. The Board adopted the above rule to prevent the waste of gas produced with oil. Therefore the Board has adopted the rule requiring that an operator justify the need to flare or otherwise waste more than an average of 100 MCFG per day each calendar month. As originally proposed, the second paragraph of the proposed rule did not contain clause (3) nor did it contain the third paragraph. Clause (3) of the second paragraph was added to enlarge the Board's area of permissible action to allow the Board, for example, to simply approve a justification statement which has been filed. The final paragraph was added to clarify the time within which existing oil wells flaring more than the minimum average MCFG per day would be required to submit the justification statement prescribed by this rule.

4. These rules will become effective immediately upon publication in the Montana Administrative Register.

Assistant Administrator
Oil and Gas Division

Certified to the Secretary of State ____________.

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE STATE ELECTRICAL BOARD

In the matter of the Repeal of Sub-Chapter 10, Electrical Inspection, ARM 40-3.38(10)-S3880 through ARM 40-3.38(10)-S38070.	NOTICE OF THE REPEAL OF RULES ARM 40-3.38(10)-S3880 through ARM 40-3.38 (10)-S38070 ELECTRICAL INSPECTIONS

TO: All Interested Persons:

1. On August 24, 1978, the State Electrical Board published a notice of the proposed repeal of rules 40-3.38(10)-S3880 through 40-3.38(10)-S38070 concerning electrical inspections at page 1230 of the 1978 Montana Administrative Register, issue number 10.

2. The Board has repealed the rules,found on pages 40-154 through 40-154.6 of the Administrative Rules of Montana,as proposed.

3. The Board repealed the rules as inspection functions were removed from the State Electrical Board in Senate Bill 401 of the 1977 Legislative Session.

STATE ELECTRICAL BOARD
CHARLES S. POWELL, PRESIDENT

BY: Ed Carney
Ed Carney, Director
Department of Professional and Occupational Licensing

Certified to the Secretary of State October 3 , 1978.

46-2.10(18)-S11450 SOCIAL AND REHABILITATION SERVICES

EMERGENCY RULES TO AMEND

Statement of reasons for emergency.

On March 24, 1978, the Department adopted an interim set of nursing home reimbursement rules intended to meet the minimum federal requirements for the Medicaid Program. Those rules were intended to be in effect temporarily until more satisfactory and comprehensive rules governing reimbursement for skilled and intermediate care could be adopted. By their terms, the rules were effective only until July 1, 1978. These rules were then amended in June, 1978, to keep the rules in effect until October 1, 1978. However, the Department has not yet adopted nursing home reimbursement rules to provide a basis for reimbursement on and after October 1, 1978.

In order to continue to receive Federal Financial Participation in the Montana Medicaid Program, and to fulfill the Department's statutory and contractual duties to Montana's providers and recipients of Medicaid services, the Department must have in effect rules governing reimbursement for those services. In the absence of such rules, the Department would be unable to provide for the needs of Medicaid-eligible persons in the state thus endangering their health, safety and welfare.

Because the leadership of the Department has changed in the past few months and needs additional time to develop an interim set of workable rules and a workplan for permanent rules, the Department is amending the existing rules, with very few changes, corrections, and clarifications, which now read as follows:

46-2.10(18)-S11450 MEDICAL ASSISTANCE, NURSING HOME CARE PROVIDER REIMBURSEMENT (1) Reimbursement of nursing home care shall be made in accordance with the rules set out below. ~~the~~ A copy of the Manual of Reimbursement for Nursing Home Care, not printed herein due to its length, ~~a copy of which~~ is available from the Budget and Management Bureau, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana, 59601.

(2) If a patient requires and qualifies for skilled nursing home care benefits under Titles XVIII and XIX of the Social Security Act, Title XIX skilled nursing home care benefits will not be used to reimburse any skilled nursing home care facility for caring for said patient even if the skilled nursing home care facility does not participate in the Title XVIII program. Those skilled nursing home care facilities not participating in the Title XVIII skilled nursing home care program on the effective date of this regulation shall have 120 days from the effective date of this regulation to apply and be certified as Title XVIII facilities before this regulation is applicable to them or their

patients. (History: Section 71-1511, R.C.M. 1947; NEW, Eff. 11/4/74; EMERG, AMD, Eff. 7/1/75; AMD, Eff. 8/12/75; AMD, Eff. 11/4/76, EMERG, AMD, Eff. 10/1/78.)

46-2.10(18)-S11450A REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, PURPOSE AND DEFINITIONS

(1) Reasonable cost related reimbursement for skilled nursing and intermediate care facility services is mandated by Section 249 of Public Law 92-603, the 1972 amendment to the Social Security Act.

(a) The purpose of the following rules is to meet the requirements of Title XIX of the Social Security Act including Section 249 of Public Law 92-603 and 42 C.F.R. 450, while treating the eligible recipient, the provider of services, and the Department fairly and equitably. The rules prescribe rates of payment reasonably adequate to reimburse in full the actual allowable costs of skilled care and intermediate care facilities that are economically and efficiently operated.

~~(b) In addition, the system of reimbursement described in these rules is intended to facilitate a transition from the current method of reimbursement to a more comprehensive system of reimbursement and to minimize the impact on providers from implementation of the new system. This more comprehensive system is currently being developed by the Department in cooperation with an advisory committee representing the nursing home industry.~~

~~(1)~~ (2) The following method of reimbursement shall be effective ~~from~~ April 1, 1978, ~~to October 1, 1978,~~ for all skilled nursing and intermediate care facilities participating in the Montana Medicaid Program. (History: Section 71-1511, R.C.M. 1947; IMP, Sec. 71-1517; NEW, Eff. 3/25/78; EMERG, AMD, Eff. 6/30/78. EMERG, AMD, Eff. 10/1/78.)

46-2.10(18)-S11450B REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, PROSPECTIVE RATES

(1) Reimbursement of the costs of skilled nursing and intermediate care services shall be by means of a prospective rate. The difference between the prospective rate for a rate period and the provider's actual cost for the same period shall constitute a profit or loss to that provider for that period.

(2) The initial prospective rate shall be effective ~~from~~ April 1, 1978 ~~to October 1, 1978~~.

(3) The prospective rate of reimbursement for a provider shall be based upon the historic operating costs and property costs of the provider, reported in cost reports filed for the period ending March 31, 1978, to the extent those costs are allowable under the Manual of Reimbursement for Nursing Home ~~Cost~~ Care, May 1974.

(4) The reported allowable operating costs of each provider shall be adjusted for inflation by reference to the

Consumer Price Index (CPI) published monthly by the Bureau of Labor Statistics, U.S. Department of Labor in accordance with the provisions of Rule #4 46-2.10(18)-S11450D(2)(a)(i).

(5) The allowable operating cost of the provider shall also be adjusted for the actual effect of increases in the minimum wage on the salaries and benefits paid by the provider in accordance with the provisions of Rule #4 46-2.10(18)-S11450D(2)(a)(iii).

(6) The provider's allowable per diem property cost shall be added to the above per diem operating costs in accordance with the provisions of Rule #4 46-2.10(18)-S11450D (2)(b) to reach a prospective per diem rate.

(7) In no case will the prospective rate exceed the private pay limits prescribed in 42 C.F.R. 450.30(b)(6)(iii) which are hereby incorporated and made a part of this rule by reference.

(8) Interim Rates - The interim prospective rate for each provider for the period commencing April 1, 1978 shall be the rate in effect on March 31, 1978. Requests for the new interim rates will be processed in accordance with Part II, A, 1 and 2 of the Manual of Reimbursement for Nursing Home Care, May, 1974.

(9) The difference between the prospective rate calculated according to subsections 1-7 above, and the interim rates paid according to subsection 8 above shall be recovered or paid as an overpayment or underpayment in accordance with 46-2.10(18)-S11450H. (History: Section 71-1511 R.C.M. 1947; IMP, Sec. 71-1517; NEW, Eff. 3/25/78; EMERG, AMD, Eff. 6/30/78, EMERG, AMD, Eff. 10/1/78.)

46-2.10(18)-S11450C REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, PARTICIPATION REQUIREMENTS (1) The skilled nursing and intermediate care facilities participating in the Montana Medicaid program shall meet the following basic requirements to receive payments for services:

(a) Maintain a current license under the rules of the State Department of Health and Environmental Sciences for category of care being provided.

(b) Maintain a current certification for Montana Medicaid under the rules of the Department for the category of care being provided.

(c) Maintain a current agreement with the Department to provide the care for which payment is being made.

(d) Have a licensed Nursing Home Administrator or such other qualified supervisor for the facility as statutes or regulations may require.

(e) Accept, as payment in full for operating and property costs, the amounts calculated and paid in accordance with the reimbursement method set forth in these rules. (History: Section 71-1511 R.C.M. 1947; IMP, Sec. 71-1517; NEW, Eff. 3/25/78; EMERG, AMD, Eff. 6/30/78, EMERG, AMD, Eff. 10/1/78.)

46-2.10(18)-S11450D "REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, RATE DETERMINATION

(1) Prospective rates for each facility are established on the basis of costs reported by each facility for the period ending March 31, 1978, adjusted for non-allowable costs and adjusted for inflation. Reimbursement shall not, however, exceed the average of customary charges to private patients receiving similar nursing services calculated for the quarter in which a rate is set or adjusted, except that a state or county facility charging nominally may be reimbursed at its rate. Payment rates shall not be set lower than the level which the Department reasonably finds to be adequate to reimburse in full allowable costs of a provider operating economically and efficiently and having no deficiencies.

(2) Reimbursement Formula: Base per diem operating costs allowable as adjusted for inflation plus per diem property cost equals reimbursement rate.

(a) Base per diem operating cost is the adjusted operating cost for the period ending March 31, 1978 with an annual inflation adjustment plus a minimum wage adjustment.

(i) Adjusted Operating Costs - operating costs for use in setting a provider's Base Per Diem Operating Cost will be determined from cost reports for the period ending March 31, 1978. These costs will be adjusted based on the definitions of allowable cost contained in the Manual of Reimbursement for Nursing Home ~~Cost~~ Care, May, 1974, and to remove increased wage, salary and benefit expenses in the January 1, 1978, through March 31, 1978, period due to minimum wage adjustment.

(aa) The total allowable operating cost less the increased wage, salary and benefit expenses in the January 1, 1978, through March 31, 1978, period due to minimum wage adjustment will be divided by the total days of care for all patients provided during the period covered by the cost report to determine a per diem rate.

(ab) The per diem rate will be adjusted for inflation using the Consumer Price Index (CPI) data (published monthly by the Bureau of Labor Statistics, 911 Walnut Street, Kansas City, Missouri 64106). The adjustment percentage shall be based 2/3 on the 1977 change in CPI for All Items (derived by comparing the December, 1976, and December, 1977, figures) and 1/3 by the change in the CPI Medical Component, and has been determined to be 7.5 per cent. ~~This percentage will be multiplied by the average of per diem costs as determined in D(2)(a)(i)(aa) to determine the amount of the inflation adjustment. This amount will be added to each provider's rate as determined in D(2)(a)(i)(aa) to obtain the provider's adjustment historical operating cost.~~

The following formula shall be applied to calculate the figure for the inflation adjustment:

Step 1. Add together all nursing home care operating costs for each participating long term care facility in the State of Montana.

Step 2. Add together the minimum wage adjustment derived under the first two sentences of subsection (2)(a)(ii) of this Rule for each long term care facility in the State of Montana as the adjustment applies for the January 1, 1978, through March 31, 1978, period.

Step 3. Subtract the figure derived under Step 2 from the figure derived under Step 1.

Step 4. Add together the total of all nursing home care patient days for each participating long term care facility in the State of Montana.

Step 5. Divide the figure derived under Step 3 by the figure derived under Step 4 to arrive at the Statewide weighted average of per diem operating costs.

Step 6. Multiply the figure derived under Step 5 by .075, to arrive at 7.5 percent of the Statewide weighted average of per diem operating costs.

Step 7. Add the figure derived under Step 6 to each long term care facility's per diem rate as derived under subsection (2)(a)(i)(aa) of this rule to arrive at the provider's adjusted per diem rate.

(ii) Minimum Wage Adjustment -- An adjustment for inflation shall be made to the operating cost of providers affected by the minimum wage increase which became effective January 1, 1978. The adjustment shall reflect the individual provider's increase in salaries, wages and benefits of employees necessary to bring those employees subject to the minimum wage requirement up to the minimum wage and necessary to maintain a reasonable differential in all employee's salaries. The amount of such costs for the January 1, 1978, through March 31, 1978, period will be divided by the total days of care provided during this period to determine a per diem minimum wage increase.

(b) Property Costs -- Property costs reimbursement will be calculated using historical property costs reported in cost reports for the period ending March 31, 1978.

(i) Property costs are interest, depreciation, property taxes, comprehensive property insurance, utility cost and lease costs to the extent allowable under the Manual of Reimbursement for Nursing Home Cost, May, 1974. These costs will be converted to a per diem figure using actual occupancy in the base reporting period. Adjustments to the prospective rate will be made for equipment acquisitions or capital improvements put into service subsequent to March 1, 1978.

(ii) Depreciation recovery under the Manual of Reimbursement for Nursing Home Cost, May, 1974, shall not be modified by this rule.

(c) The prospective rate shall be limited to the average per diem charges to private patients receiving similar services. The prospective rate shall then be adjusted to reflect the private pay limitation where applicable. For purposes of comparison, the provider shall classify private patients according to the Department's criteria found in ARM 46-2.10(18)-S11441, S11442 and S11443. If, it is determined that the provider's projected charges to private patients were erroneous, recovery or payment proceedings will be undertaken immediately in accordance with the provisions of Rule 46-2.10(18)-S11450H. (History: Section 71-1511 R.C.M. 1947; IMP, Sec. 71-1517; NEW, Eff. 3/25/78; EMERG, AMD, Eff. 6/30/78, EMERG, AMD, Eff. 10/1/78.)

46-2.10(18)-S11450E REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, ALLOWABLE COSTS

(1) For purposes of determining allowable costs for individual facilities to be utilized in setting the individual facility's prospective rate, the principles governing allowable cost contained in the Manual of Reimbursement for Nursing Home ~~Reimbursement~~ Care, May, 1974, shall be applied.

(2) Costs of meeting federal or state certification standards including those outlined in 42 C.F.R. 450.30(a)(3)(iii)(A) are allowable. Cost of meeting new certification standards implemented subsequent to March 31, 1978, shall be added to existing prospective rates. (History: Section 71-1511 R.C.M. 1947; IMP, Sec. 71-1517; NEW, Eff. 3/25/78; EMERG, AMD, Eff. 6/30/78, EMERG, AMD, Eff. 10/1/78.)

46-2.10(18)-S11450F REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, CLOSE OUT COST REPORTS

(1) A cost report detailing costs incurred by a provider from the close of the provider's last fiscal year to March 31, 1978, shall be filed with the Department no later than June 1, 1978.

(2) A special cost report detailing increased wage, salary and benefit expense in the January 1, 1978, through March 31, 1978, period due to minimum wage adjustment shall also be completed on forms provided by the Department.

(3) The close out cost report may, with the prior approval of the Department, detail costs incurred over a period not to exceed 15 months prior to March 31, 1978. Such an extended close out cost report shall be in lieu of the provider's normal year end cost report and the short period cost report for the period from year end to March 31, 1978.

(4) Audits shall be performed, adjustments made and final settlements reached in accordance with the provisions of the Manual of Reimbursement for Nursing Home Care, May, 1974, except that the Department shall have ~~180~~ 270 days from the receipt of the cost report to offer a final rate.

(5) The allowed costs shall be the basis for the prospective rate. (History: Section 71-1511 R.C.M. 1947;

IMP, Sec. 71-1517; NEW, Eff. 3/25/78; EMERG, AMD, Eff. 6/30/78, EMERG, AMD, Eff. 10/1/78.)

462.10(18)-S11450G "REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, COST REPORTING The procedures and forms for maintaining cost information and reporting are as follows:

(1) Generally accepted accounting principles shall be employed in all record keeping and cost finding by a provider.

(2) The accrual method of accounting shall be employed except in government institutions operating on a cash method.

(3) Cost finding means the process of allocating and prorating the data derived from the accounts ordinarily kept by a provider to ascertain its costs of the various services provided. In preparing cost reports, all providers shall utilize the Medicare step down method of cost finding described at 42 C.F.R. 405.453(d)(1) and related sections, which is hereby incorporated and made a part of this rule by reference. Notwithstanding the above, distinctions between skilled nursing and intermediate care need not be made in cost finding.

(4) Uniform Chart of Accounts. The American Health Care Association Chart of Accounts adopted July 1, 1975, as updated is the system to be used to maintain provider cost data for cost reporting and audit verification purposes. The use of the uniform chart of accounts becomes mandatory for participating provider for provider fiscal years beginning on or after April 1, 1978.

(5) Montana Uniform Financial and Statistical Report. Provider costs are to be reported on the Montana Financial and Statistical Report Form provided by the Department. These reports shall be complete and accurate; incomplete reports or reports containing inconsistent data will be returned to the provider for correction.

(a) Filing Period -- An annual cost report ~~Cost reports~~ must be filed within 90 days after the end of the provider's fiscal year.

(b) Rate Period -- Rates are promulgated quarterly starting with the period April 1, 1978, through June 30, 1978.

(6) Maintenance of Records. Records of financial and statistical information submitted to support and verify cost reports must be maintained by the provider at the facility for five years after the date a cost report is filed, or due whichever is later. The Department shall maintain on file the cost reports submitted by the providers for a period of five years. These reports shall be available to authorized representatives of the Department of Health, Education, and Welfare.

(a) Each provider will maintain, as a minimum, a general ledger and the following supporting ledgers and journals: revenue, accounts receivable, cash receipts, accounts payable, cash disbursements, and payroll, patient census records and records pertaining to private pay patients and patient trust funds.

(b) All of the above records and documents shall be available at the facility ~~or at a location within Montana where these records are ordinarily kept~~, subject at all reasonable times to inspection, review or audit by the Department and the U.S. Department of Health, Education and Welfare personnel, or any designated representative of the Department. The provider will make all records available as may be necessary for purposes of Legislative post-audit or analysis in accordance with the provisions of Section 9 of HB145 the General Appropriations Act of 1977. Upon refusal of the provider to allow access to the above materials costs reimbursed on the basis of unsupported data shall be recovered by the Department. (History: Section 71-1511 R.C.M. 1947; IMP, Sec. 71-1517; NEW, Eff. 3/25/78; EMERG, AMD, Eff. 6/30/78, EMERG, AMD, Eff. 10/1/78.)

46-2.10(18)-S11450H REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, OVERPAYMENT AND UNDERPAYMENT (1) Overpayment and Underpayment on Prospective Rate.

(a) For most providers the prospective rate will be based on a cost report that has received only a desk review. In situations where the Department finds during field audit that the prospective rate was based on an erroneous cost report resulting in an overpayment, the Department will notify the provider of the overpayment.

(b) In the event of an overpayment the Department will, within 30 days after the day the Department notifies the provider that an overpayment exists, adjust the provider's prospective rate and arrange to recover the overpayment by set-off against amounts paid under the adjusted prospective rate or by repayments by the provider.

(c) If an arrangement for repayment cannot be worked out within 30 days after notification of the provider the Department will make deductions from prospective rate payments with full recovery to be completed within 120 days from date of the initial request for payment. Recovery will be undertaken even though the provider disputes in whole or in part the Department's determination of the overpayment, unless a formal request for a hearing is filed by the provider within 30 days after notification.

(d) Errors in cost report data identified by the provider may be corrected and given consideration for rate adjustment if submitted within 30 days after rate notification. Adjustments will also be made for computational errors in rate determination review by the Department.

(e) In the event an underpayment has occurred, the Department will reimburse the provider within 30 days of the

Department's determination of error and adjust the prospective rate accordingly."

(f) All overpayments or underpayments will be accounted for by the Department on the Federal report OA-41. (History: Section 71-1511 R.C.M. 1947; IMP, Sec. 71-1517; NEW, Eff. 3/25/78; EMERG, AMD, Eff. 6/30/78, EMERG, AMD, Eff. 10/1/78.)

46-2.10(18)-S11450I REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, NEW FACILITIES (1) New facilities participating for the first time in the program will be given an interim prospective rate based upon the average prospective rate of facilities currently in the program.

(2) A new prospective rate based on the audited cost report will be subsequently determined. (History: Section 71-1511 R.C.M. 1947; IMP, Sec. 71-1517; NEW, Eff. 3/25/78; EMERG, AMD, Eff. 6/30/78, EMERG, AMD, Eff. 10/1/78.)

46-2.10(18)-S11450J REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, AUDITS, RATE REVIEW

(1) Department audit staff will perform a desk audit of cost statements prior to rate setting and will conduct on-site audits of facility records. Where appropriate, audit procedures defined in the Provider Reimbursement Manual, Health Insurance Manual 18 shall be adopted by the Department but the Department shall not be confined to these guidelines and may utilize other methods.

(a) Desk Review. Desk review of cost statements will determine the adjustments to be applied to reported costs for rate determination. Incomplete reports, or inconsistency in reported costs will cause the return of the statement to the provider for correction.

(b) Field Audits. On-site audits of provider detail records will be made to assure validity of ~~reports~~ reported costs and statistical information and may be used as a basis for adjustments. A schedule of on-site audits will be developed so that each participating provider is audited over a three-year period beginning April 1, 1978, (the scheduled receipt date of cost reports for providers whose fiscal reporting periods which began January 1, 1977), and no less than one-third of participating providers whose fiscal reporting periods are audited each year. After the end of the above three-year period, on-site audits shall be conducted for a minimum of 15% of the participating providers yearly. Five percent of the providers shall be selected on a random sample with the remainder being selected on a basis of exceptional profiles.

(c) Exit Conferences. On conclusion of on-site audit, the auditor shall write a summary of his findings and recommendations. This summary shall be mailed to the provider no later than 10 days after the completion of the on-site audit. Within 10 days of receipt of the written findings or recommendations the provider may request an exit conference. Such conference shall be held no later than 30 days after receipt of request.

(d) Prospective Rate Review Conferences. Prospective rate review conferences with agency staff may be requested by the provider within 30 days after rate notification. The request for prospective rate review shall identify all items for consideration at the administrative conference by specific reference to the appropriate section of the cost statement. The request for review shall identify the provider representatives who will be present.

The rate review conference, if timely requested, shall be held no later than 30 days from the receipt of request. (History: Section 71-1511 R.C.M. 1947; IMP, Sec. 71-1517; NEW, Eff. 3/25/78; EMERG, AMD, Eff. 6/30/78, EMERG, AMD, Eff. 10/1/78.)

46-2.10(18)-S11450K REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, FAIR HEARING PROCEDURES

(1) In the event the provider does not agree with the rates recommended by the Department, the following fair hearing procedures will apply:

(a) The written request for a fair hearing shall be addressed to the Department of Social and Rehabilitation Services, Hearings Officer, Helena, Montana

(b) The request shall be signed by the provider or his designee.

(c) The fair hearing request must be received not later than the 60th calendar day following the date of the rate notification, or within 30 days of the rate review conference. If it is filed later, justification for the delay must be given to the hearings officer who, for good cause, may waive the time limit.

(d) The fair hearing request shall identify the individual settlement items and amount in disagreement, give the reasons for the disagreement, and furnish substantiating materials and information.

(e) The hearings officer will fix a time and place for the prehearing conference, and will mail notices thereof to the provider and other parties not less than ten days prior to the conference date. The notice will state the purpose of the prehearing conference and the issues to be resolved, stipulated to, or excluded. The hearings officer may waive the prehearing conference.

(f) The hearings officer will fix a time and place for the hearing, and will mail notices thereof to the provider and other parties not less than ten days prior to the hearing date.

(g) The hearings officer will reduce his decision to writing within ten days of completion of the hearing based upon evidence and other material presented at the hearing.

(h) In the event the provider or Department disagrees with the hearings officer's decision, a Notice of Appeals may be submitted to the Board of Social and Rehabilitation Appeals within ten days of the hearings officer's decision. The Notice of Appeals shall set forth the specific grounds for appeal.

(i) All evidence in the record and offers of proof shall be transmitted to the Appeals Board by the hearings officer. The decision of the Board shall be based solely on the record transmitted by the hearings officer. A legal brief or a legal argument may be presented personally or through a representative of the provider to the Board.

(j) The Board shall reduce its decision to writing and mail copies to the providers within ten days of completion of the hearing. The provider shall be notified of its right to judicial review under the provisions of Section 82-4216, R.C.M. 1947. (History: Section 71-1511, R.C.M. 1947; IMP, Sec. 71-1517; NEW, Eff. 3/25/78; EMERG, AMD, Eff. 6/30/78, EMERG, AMD, Eff. 10/1/78.)

VOLUME NO. 37 OPINION NO. 159

MARRIAGE AND DIVORCE, denial of marriage license because of default in support obligation;
LICENSES, denial of marriage license because of default in support obligation;
SUPPORT, denial of marriage license because of default in support obligation;
PARENT AND CHILD, denial of marriage license because of default in support obligation;
PRIVACY, requirement of disclosure of information on marriage license application as envasion of;
DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES, authority to require diclosure of vital statistics;
VITAL STATISTICS, requirement of disclosure of information on marriage license application as invasion of right of privacy;
UNIFORM LAWS, authorization of Department of Health and Environmental Sciences to prescribe marriage license application form by the Uniform Marriage and Divorce Act;
CIVIL RIGHTS, requirement of disclosure of information on marriage license application as violation of;
DISCRIMINATION, requirement of disclosure of information on marriage license as discrimination;
STATUTES, Sections 48-305, 48-148, 66-4401 66-4402, R.C.M. 1947;
1972 MONTANA CONSTITUTION, Article II, Section 3 and Section 10;
MONTANA ADMINISTRATIVE CODE, 16-2.6(6)-S6100.

HELD: 1. A judicial opinion concerning the constitutionality of Section 48-148 should be sought before denying a license to marry under that section.

2. An applicant for a marriage license can be required to disclose information concerning his or her dependants race, education and support obligations.

18 September, 1978

J. Fred Bourdeau
Cascade County Attorney
Cascade County Courthouse
Great Falls, Montana 59401

Patrick M. Springer
Flathead County Attorney
Flathead County Courthouse
Kalispell, Montana 59901

Dear Gentlemen:

I have combined and restated your requests for opinions in the following manner:

1. Can a marriage license be denied an applicant by reason of a default in a prior obligation to support dependants?

2. Is an applicant for a marriage license required to supply information concerning his or her race and education and information concerning default of an obligation to support dependants?

As to your first question, §48-148, R.C.M. 1947, is entitled "Applicants Delinquent in Support Obligations" and states:

> No license to marry shall be issued...if either of the applicants...is or has been failing to support lawful dependants..., unless a judge...after hearing shall determine that despite such failure said applicant is financially able to discharge the duty to support existing dependants and those resulting from the contemplated marriage and shall authorize the clerk to issue the license.

An applicant for a marriage license who is behind in support payments for dependant children cannot get a license unless a judge specifically finds that he is financially able to comply with the existing and future support obligations.

The United States Supreme Court in <u>Zablocki v. Redhail</u>, 98 S.Ct. 673 (1978), found a similar Wisconsin statute to be a denial of equal protection of the law as provided in the

Fourteenth Amendment to the United States Constitution. The Wisconsin statute provided that an applicant for a marriage license who had minor issue to whom he had an obligation to support could not receive a marriage license except upon a court order. Under that Wisconsin statute a court could not issue the license unless the applicant submitted proof that the issue to whom he owed the obligation of support were not then nor were they likely to become public charges.

Although worded differently, the Montana statute and the Wisconsin statute are quite similar. Both attempt to prevent marriage of a certain class of people, of applicants who are not supporting or will not in the future support dependants. In Zablocki the Supreme Court held that the right to marry is part of the fundamental right of privacy. Id. at 681. (The 1972 Montana Constitution specifically sets out the right of privacy and requires that it not be infringed without a compelling state interest. Art. II, §10. The Court in Zablocki said reasonable regulations that do not significantly interfere with the decision to enter into a marital relationship may be legitimately imposed but the Wisconsin statute at issue clearly did interfere directly and substantially with the right. Id. at 681.

Like the Wisconsin statute the Montana statute prevents some people from entering into a marriage because they cannot prove that they are financially able to discharge their duty to support. Even those who can satisfy the requirement of proof may be so burdened by having to do so that they will in effect be coerced into forgoing their right to marry. Id. at 681. When a statutory classification significantly interferes with the exercise of a fundamental right it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effect these interests. 98 S.Ct. 673, 682.

The welfare and support of the dependants to whom the applicant owes a support obligation is a legitimate state interest. However, in effect §48-148 is a device for collection of support. There are other collection devices available to the state which do not interfere with the right to marry.

Although there is a difference between the Montana statute and the Wisconsin statute, the rule established in Zablocki may be applicable to the Montana statute. In Montana only those applicants who are in default in their support payments are denied the marriage license without court order.

The Wisconsin statute denied a license without a court order to all applicants who have support obligations. This distinction, however, only reinforces the applicability of the rule. Section 48-148 acts as an absolute prohibition to the indigent and is a substantial infringement on the right to marry to all those who are in default in their support obligations. As previously stated this state has enacted other means of collecting support which do not infringe on the right to marry.

Under Zablocki a serious question is raised whether §48-148 violates the equal protection clause of the Fourteenth Amendment of the United States Constitution, as well as Article II, Section 3 of the 1972 Montana Constitution. A logical conclusion of the above analysis would be a declaration of the constitutional invalidity of §48-148, R.C.M. 1947. However such a declaration is solely within the authority of the judicial, not the executive branch. I recommend that you seek a judicial determination before you advise the clerk not to issue a license to marry under the circumstances of Section 48-148.

As an officer of the executive branch I do not consider it within my power to declare a statute unconstitutional unless the act is in reliance upon an adjudication in which the particular statute or an identical statute has been subject to the scrutiny of judical review by an appropriate appeals court and specifically found to be constitutionally defective. The presumption of the constitutionality of Section 48-148 is seriously in doubt.

The Zablocki decision should be brought to the attention of the court in any case where a judge is petitioned to find that an applicant in default on his support payments is financially able to comply with existing and future support payments. The similarity between the Wisconsin and Montana statutes is pronounced and the court may and likely will apply the Zablocki rule to the provisions of the Montana statute.

Referring to your second question, the marriage license application supplied to clerks of court in Montana by the department of Health and Environmental Sciences contains questions requiring applicants to divulge their race and educational background as well as information concerning default of any obligation to support dependents.

The Department of Health and Environmental Sciences is required to gather vital statistics. Section 69-4402, R.C.M. 1947 requires the Department of Health and Environmental Sciences to establish a statewide system of vital statistics and to adopt rules for gathering, recording, using and preserving vital statistics. Vital statistics are defined to include:

> [T]he registration, preparation, transcription, collection, compilation, and preservation of data pertaining to births, adoptions, legitimations, deaths, fetal deaths, marital status, and incidental supporting data.

Section 69-4401, R.C.M. 1947.

In addition to this authorization to gather vital statistics the Department of Health and Environmental Sciences is directed by the Uniform Marriage and Divorce Act to prescribe the form for an application for marriage license. Section 48-305, R.C.M. 1947. Section 48-305 requires that the license application include the name, sex, address, date and place of birth of each party, information concerning any previous marriage, information concerning the parents of each party, and any information concerning any children born to the parties prior to making the application.

Therefore, as part of the Department's power, under both the Uniform Marriage and Divorce Act and the statutes dealing with vital statistics, the Department has devised a marriage application form which includes disclosure of information concerning race, education and support obligations. See Montana Administrative Codes 16-2.6(6)-S6100.

The question then becomes, is the requirement of disclosure of this information a violation of some constitutional right? Requirements regarding race, of course, raise the spectre of the Thirteenth Amendment of the Federal Constitution and statutory provisions attendant thereto. However, there is no allegation of discrimination based on race. The applicants are not denied a marriage license because of their race. The designation of race, just as sex or religious denomination, may serve a useful purpose and the procurement and compilation of such information cannot be outlawed per se. The securing and chronicling of data for identification or statistical use violates no constitutional privilege. Hamm v. Virginia State Board of Elections, 230 F.Supp. 156 (D.C. Va. 1964), aff'd, per curiam, Tancil et al. v. Woolls et al., 379 U.S. 19 (1964). Because the information is not used to discriminate on the basis of race there is no intrusion of constitutional provisions based on discrimination.

However, the right of privacy, as set forth in the 1972 MONT. CONST. Art. II, §10, and as established under the Federal Constitution, does create a question as to the validity of requiring disclosure of such information. Undoubtedly, many matters required to be disclosed are personal in nature. The question is, are they overcome by a governmental interest? In other contexts, the disclosure of extremely personal data has consistently been upheld. In U.S. v. Little, 321 F.Supp. 388 (D.C. Del. 1971) a defendant, charged criminally for failure to disclose information as required by the census, defended on grounds that the questions were an unconstitutional invasion of his right to privacy. The court found that the authority to gather reliable statistical data reasonably related to governmental purposes is a necessity of modern government, if modern government is to legislate intelligently and effectively. Requiring disclosure of personal information in order to provide accurate statistical reports is not an unconstitutional invasion of the right to privacy. Id. at 392. Even in the highly sensitive area of abortions, requirements that personal data of patients be disclosed have been upheld as part of the compelling state interest to gather vital statistics. Schulman v. New York City Health and Hospital Corporation, 75 Misc.2d 150, 346 N.Y.Supp.2d 920 (1973); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).

THEREFORE, IT IS MY OPINION:

1. A judicial opinion concerning the constitutionality of Section 48-148 should be sought before denying a license to marry under that section.

2. An applicant for a marriage license can be required to disclose information concerning his or her dependants race, education and support obligations.

Very truly yours,

MIKE GREELY
Attorney General

MG/DM/ar

VOLUME NO. 37 OPINION NO. 160

SCHOOLS AND SCHOOL DISTRICTS - Counting pupil-instruction-related days in computing the ANB;
SECTIONS 75-6902 and 75-7405, R.C.M. 1947;

HELD: Pupil-instruction-related days may be counted in computing the ANB number pursuant to administrative regulation interpreting Section 75-6902, R.C.M. 1947.

21 September, 1978

Mr. Morris L. Brusett
Legislative Auditor
State Capitol
Helena, Montana 59601

Dear Mr. Brusett:

You have requested my opinion concerning the correct method for computing the "average number belonging", or "ANB", for pupils attending public schools. The ANB is computed to determine the funding a school district receives from the school foundation program under Title 75, Chapter 69, R.C.M. 1947. You stated that school districts are adding seven "pupil-instruction-related days" to the number of pupil instruction days, which increases the ANB of school districts, and thus, the funds paid by the state to each school district. You have requested my opinion as to whether these "pupil-instruction-related days" may be counted in computing the ANB.

The basis for calculating the ANB is provided by Section 75-6902, R.C.M. 1947, as amended, which states in pertinent part:

> Definition and calculation of average number belonging (ANB). The term "average number belonging" or "ANB" shall mean the average number of regularly enrolled, full-time pupils attending the public schools of a district. Average number belonging shall be computed by determining the total of the aggregate days of attendance by regularly enrolled, full-time pupils during the current school fiscal year plus the aggregate days of absence by regularly enrolled, full-time pupils

> during the current school fiscal year, and by dividing such total by one hundred eighty (180) ... When any pupil has been absent, with or without excuse, for more than ten (10) consecutive days including pupil instruction related days, his absence after the tenth (10th) day of absence shall not be included in the aggregate days of absence and his enrollment in the school shall not be considered in the calculation of the average number belonging until he resumes attendance at school.

"PIRD" is defined and explained by Section 75-7405, R.C.M. 1947:

> Pupil-instruction-related day. A pupil-instruction-related day shall be a day of teacher activities devoted to improving the quality of instruction. Such activities may include, but are not limited to, in-service training, attending state meetings of teacher organizations, and conducting parent conferences. A maximum of seven pupil-instruction-related days may be approved by the superintendant of public instruction in accordance with the policy adopted by the board of education. Such days shall not be included as a part of the required minimum of one hundred eighty (180) days of pupil instruction.

The fundamental rule of interpreting these statutes is that the intention of the legislature controls, and if that intent can be determined from the plain meaning of the words, the statute speaks for itself, and there is nothing left to construe. Security Bank and Trust Co., v. Connors, ___ Mont. ____, 550 P.2d 1313 (1976). In this instance, Section 75-6902 does not mention PIRDs for purposes of determining the "aggregate days of absence." It does mention, however, that PIRDs are to be included in the ten consecutive days of absence for which a student is removed from consideration for ANB computation. Section 75-7405 states that PIRDs shall not be included in the minimum 180 days for pupil instruction, but does not address the question whether they may be added after 180 days of pupil instruction are provided. Thus, the statutes are ambiguous as to whether the legislature intended PIRDs to be counted in the computation of ANB.

Where a statute is doubtful or ambiguous, practical administrative interpretations of that statute by the executive department charged with its administration are entitled to the highest respect. Where such interpretation is acted on for a number of years, it will not be disturbed except for very cogent reasons. Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426 (9th Dir. 1967), cert. denied, 389 U.S. 1046, 88 S.Ct. 764, 19 L.Ed. 838; Bartels v. Miles City, 145 Mont. 116, 399 P.2d 768 (1965). A majority of jurisdictions which have considered the question of school attendance, enrollment, or pupil population for purposes of apportionment of funds adhere to the view that the determination of the issue by the proper administrative official is conclusive. 80 A.L.R.2d 955, Section 3. The administrative interpretation was thus controlling in a situation similar to this issue, where the legislature was aware of the application of the administrative interpretation over a twelve year period, and made no material or substantial changes. Long v. Dick, 87 Ariz. 25, 347 P.2d 581, 80 AlR.2d 949 (1961).

It is also a rule of statutory construction in Montana that the legislature acts with full knowledge and information as to subject matter and existing conditions, including the construction placed on a law by the executive officers acting under it. Helena Valley Irrigation Dist. v. State Highway Commission, 150 Mont. 192, 433 P.2d 791 (1967). Although legislative intent is generally indicated by the legislature's action rather than failure to act, its silence may give rise to the implication of its legislative purpose. Bottomly v. Ford, 117 Mont. 160, 157 P.2d 108 (1945). Thus, the legislature is deemed to have sanctioned an interpretation of an executive department where it does not change it upon continued opportunity to do so. Miller Ins. Agency V. Porter, 93 Mont. 567, 20 P.2d 643 (1933).

In this instance, the Superintendent of Public Instruction has issued an administrative rule pursuant to the Montana Administrative Procedure Act, Title 82, Chapter 43, R.C.M. 1947, which directly addresses the issue of using PIRDs in computing the ANB. A.R.M. 48-2.38(1)-S3800 provides:

> POLICY GOVERNING PUPIL INSTRUCTION-RELATED DAYS APPROVED FOR FOUNDATION PROGRAM CALCULATIONS (1) A school which in any year was in session for at least 180 pupil instruction days may count for the

following year's foundation program a total of not more than seven days in addition to the required 180 pupil instruction days provided that such additional days were used for one or more of the following purposes in accordance with the regulations hereby established:

(a) Pre-school staff orientation (not to exceed two days): staff meeting(s) held prior to the beginning of pupil instruction for the purpose of organization for the school year.

(b) Staff in-service training programs: programs scheduled during the year for the purpose of improving instruction.

(c) Parent-teacher conferences: conferences between teachers and parents for the purpose of acquainting parents with the school and the progress of their children.

(d) Post-school record and report completion (not to exceed one day): record and report completion at the end of the pupil instruction year. This day may be divided so as to provide 1/2 day at the end of each semester.

(e) State teachers' association meetings (not to exceed two days).

The history of this administrative regulation indicates that the rule was effective July 1, 1962, and has been followed since that date. The legislature has not altered the interpretation of this rule either by statute or legislative review. Under the foregoing analysis, this interpretation by the Superintendant of Public Instruction has thus been sanctioned by the legislature. Further, if this rule was adopted in accordance with MAPA, under expressly delegated authority, it has the force of law as a substantive rule. Section 82-4202(2), R.C.M. 1947.

THEREFORE, IT IS MY OPINION:

"Pupil-instruction-related days" may be counted in computing the ANB number pursuant to administrative regulation implementing Section 75-6902, R.C.M. 1947.

Very truly yours,

Mike Greely

MIKE GREELY
Attorney General

VOLUME 37 OPINION NO. 161

CLERKS - Registration of voters, election on annexation of portions of Yellowstone Park;
ELECTIONS - Power of the Legislature to prescribe residency requirements for electors;
ELECTIONS - Eligible voters, referendum on annexation of portions of Yellowstone Park;
ELECTIONS - Nature of the majority required for ratification of annexation of portions of Yellowstone Park;
SECTION - 23-3011, R.C.M. 1947, Laws of 1977, Chapter 447;
1972 MONTANA CONSTITUTION - Article IV, Section 2, Article XI, Sections 2 and 3.

HELD: 1. Eligible residents of the portion of the Yellowstone National Park proposed for annexation into Park County under Chapter 447, Laws of 1977, must be accorded the opportunity to vote on the question of annexation.

2. A majority vote must be attained both among voters registered in Park County and among voters who reside in the area to be annexed in order to ratify the annexation.

26 September 1978

Mr. Jack Yardley
Park County Attorney
Box 482
Livingston, Montana 59047

Dear Mr. Yardley:

Chapter 447, Section 3, Laws of 1977, (hereinafter Chapter 447) provides for a referendum on the question of the annexation into Park and Gallatin Counties of the portions of Yellowstone National Park lying within the borders of the State of Montana. You have requested my opinion on the following questions:

1. Do the people residing within the area proposed to be annexed have a right to vote on the issue?

2. If they do, would it take a favorable vote of those persons voting in the county and also a favorable vote of those persons living within the area proposed to become a part of the county to ratify the annexation?

The statute in question provides:

> The question of whether the boundaries of Gallatin County or Park County shall be changed as provided in (sections 1 and 2 of the Act) shall be placed on the ballot in each of the respective counties. The registrar of each affected county shall designate a place to register and vote for eligible persons located in the areas proposed for inclusion in the county. If approved, by a majority of those voting on the question in the county affected and area proposed for inclusion in that county, the amendments in (sections 1 and 2) become effective upon approval.

The statute seems plain on its face. It provides a referendum on the annexation question, makes special provision for registration of "eligible persons" in the area to be annexed, and requires a majority vote of those voting "in the county affected and the area proposed for inclusion" for ratification. Had the Legislature intended to limit the franchise to voters registered in Park County, it could easily have done so without reference to voters in the area to be included. The references to such voters therefore suggests an intent to extend the franchise.

Further, and more significantly, a construction of Chapter 447 which excludes persons residing in the Park from voting renders the entire second sentence of the act meaningless. That sentence requires the registrar in the county affected to "designate a place to register and vote for eligible persons located in the areas proposed for inclusion in the county." Persons whose right to vote in Park County has been established by residency therein already have a place to register and vote. See R.C.M. Title 23, ch. 30. Therefore, the provision of the second sentence only has meaning if Chapter 447 as a whole is construed to extend the franchise to persons residing in Yellowstone Park.

A statute should be construed so as to give effect to all its parts if possible, Fletcher v. Paige, 124 Mont. 114, 119, 220 P.2d 484 (1950). The only way to satisfy this rule is to read Chapter 447 as granting the franchise to "eligible persons" residing in the portion of Yellowstone Park sought to be annexed.

Article XI, §2, 1972 Montana Constituton provides that "[n]o county boundary may be changed ... until approved by a majority of those voting on the question in each county affected." Your letter suggests that since the Constitution refers only to "counties affected," a vote among residents of the Park is not required. However, in my opinion, Article XI, §2 requires only that a referendum be held in all counties affected before an annexation may take place. It does not tie the Legislature's hands when dealing with annexations in which only one county is affected. The purpose of the constitutional provision is obvious; by requiring an affirmative vote in each county affected, "a large county could not swallow a small county without the latter's permission." Minutes of the Constitutional Convention at 7670 (Remarks of Delegate Anderson). Article XI, §3(1) explicitly allows the Legislature to provide procedures whereby counties may alter their boundaries. The Constitutional Convention plainly did not intend to prevent the Legislature from enacting legislation under Article XI, §3(1) to deal with annexations not directly controlled by Article XI, §2 so long as the residents of all counties affected are consulted by referendum.

The question then arises whether the Legislature may constitutionally extend the franchise to allow residents of Yellowstone Park to vote on the question of annexation. The question of whether such persons possess the qualifications to vote was answered in the negative in a previous opinion of this office reported at 10 OP. ATT'Y GEN. 246. However, the jurisprudential underpinnings of that opinion have been eroded and it is no longer authority for the point.

Attorney General Rankin's holding appears in 10 OP. ATT'Y GEN. at 250:

> [I]t appears that residents of Yellowstone National Park, even though they reside on that part of its territory which was ceded to the general government by the State of Montana, are not residents of the State of Montana by virtue of that residence, and unless they have their legal residence at some other place which is within the State of Montana, they would not be entitled to vote in this State. *** [O]nly those mentioned in the constitution as having the right to vote, have that right. One of the qualifications is that the voter shall be a resident of the State of Montana. If these persons living in the park have no residence at some other place within the State of Montana, they are not residents of the State, and it appears from the case of Sinks v. Reese [19 Ohio St. Rptr.

> 306 (1870)] that after having ceded jurisdiction over the territory ..., it would be constitutionally incompetent for the Legislature to attempt to extend or reserve the right of voting to the residents of the ceded territory.

This reasoning is no longer valid since the qualifications for the franchise are different under the 1972 Constitution than they were under the Constitution in force in 1923. Under the earlier document, an elector was constitutionally required to be at least twenty-one years of age, a citizen of the United States, and a resident of Montana for one year and of his town, county, or precinct for a period of time prescribed by law. Attorney General Rankin felt the Legislature lacked the power to vary a constitutional residency requirement by extending the franchise to persons who were considered to be non-residents under the precedent then extant. Under Montana's 1972 Constitution, however, residency requirements for voting are a matter of legislative discretion. Article IV, §2 provides that "[a]ny citizen of the United States 18 years of age or older <u>who meets the registration and residency requirements provided by law</u> is a qualified elector..." (emphasis added). Thus, in extending the franchise to residents of Yellowstone Park for the limited purpose of ratifying the annexation of Park lands into the county, the Legislature is exercising a power explicitly enumerated in the constitution.

Chapter 447 also eliminates certain practical problems pertaining to registration identified in the former Attorney General's opinion. Attorney General Rankin pointed out that state law required registration in the county of residence as a qualification for exercise of the franchise. Since residents of Yellowstone Park were residents of no county in Montana, they were unable to comply with this requirement. 10 OP. ATT'Y GEN. at 251. Chapter 447 explicitly meets this deficiency by allowing "eligible persons" living in Yellowstone Park to register and requiring the county registrar to establish a place where they may do so.

The former Attorney General's opinion is also infirm in that the authorities relied upon there embody a theory of public land law which has long since been discarded by the United States Supreme Court. The former opinion relied heavily on the reasoning of an Ohio court in <u>Sinks</u> v. <u>Reese</u>, 19 Ohio St. Rptr. 306, that a resident of a <u>federal enclave</u> "becomes subject to the exclusive jurisdiction of another power, as foreign to Ohio as the State of Indiana, or Kentucky, or the District of Columbia." This reasoning was the basis of the then commonly-held view that a federal enclave was a separate area divested from the sovereign control of the state, such that its residents necessarily forfeited their state residency. The Supreme Court specifically disapproved the reasoning of Sinks in Evans v. Cornman, 398 U.S. 419 (1970), a case involving an equal protection attack on Maryland's disenfranchisement of residents of a federal enclave established for the National Institute of Health (NIH). The Court found the theory of Sinks to be outmoded in view of the changes in "the relationship between federal enclaves and the States in which they are located." The Court also held the Maryland eligibility requirement to be unconstitutional, stating:

> Appellees clearly live within the geographical boundaries of the State of Maryland, and they are treated as state residents in the census and in determining congressional apportionment. They are not residents of Maryland only if the NIH grounds ceased to be a part of Maryland when the enclave was created. However, that "fiction of a state within a state" was specifically rejected by this Court in Howard v. Commissioners of Louisville, 344 U.S. 624, 627 (1953), and it cannot be resurrected here to deny appellees the right to vote.

Id. at 421-22.

As noted above, Evans dealt with an equal protection challenge to the denial of the vote to residents of a federal enclave. Your opinion request does not question the constitutionality of Montana's denial of the franchise to residents of Yellowstone Park, and I therefore express no opinion thereon. However, Evans does establish that the holding in Sinks is no longer good law. It is apparent that the legal and constitutional bases for the prior Attorney General's opinion reported at 10 OP. ATT'Y GEN. 246 will not withstand serious analysis. I therefore overrule that opinion and hold that there is no constitutional impediment to state legislation extending the franchise to "eligible persons" residing in those portions of Yellowstone National Park lying within the borders of the State of Montana.

The term "eligible persons" should be construed in light of the rules established by the State of Montana pursuant to its constitutional power to establish reasonable qualifications for voters. See Pope v. Williams, 193 U.S. 621 (1904).

The requirements are set forth in Section 23-2701, R.C.M. 1947.

> (1) No person may be entitled to vote at elections unless he has the following qualifications:
> (a) He must be registered as required by law;
> (b) He must be eighteen (18) years of age or older;
> (c) He must be a resident of the State of Montana and of the county in which he offers to vote for at least thirty (30) days;
> (d) He must be a citizen of the United States.
> * * *

Subdivisions (b) and (d) are constitutionally mandated, and cannot be altered by legislation. See Art. IV, §2, 1972 Mont. Const. However, Chapter 447 works an implicit amendment to the registration and residence requirements. As noted above, the second sentence of Chapter 447 removes any legal impediment to registration of voters residing in Yellowstone Park. Further, the impact of Chapter 447 as a whole is to permit Park residents to vote on the annexation question, abrogating the in-county residency requirement for this limited purpose. I therefore conclude that an "eligible person" under Chapter 447 is one who is a United States citizen, eighteen years of age or older, who has registered under procedures established by the county registrar, and who has resided in the area to be annexed for a period of thirty days. Such residence must be a legal residence for voting purposes. The registrant must establish that the Park is "where his habitation is fixed, ... to which, whenever he is absent, he has the intention of returning." §23-3022(1), R.C.M. 1947. To this end, the registrar should require that registrants agree to cancel any prior registrations in the State of Montana or elsewhere. §23-3011, R.C.M. 1947.

To summarize, I hold in answer to your first question that "eligible persons" who have established a bona fide residence in the area of Yellowstone Park proposed to be annexed must be permitted to register and vote on the question of annexation under Chapter 447, §3. The act extends the franchise for the limited purpose of ratifying the proposed annexation. Park residents who register under the act may therefore vote only on the referendum, and not on any other ballot issues or electoral races.

Your second question deals with the effect of the third sentence of Chapter 447, §3, which provides: "If approved, by a majority of those voting on the question in the county affected and area proposed for inclusion in that county, the amendments [in sections 1 and 2] become effective upon approval." (Emphasis added.) You inquire whether a majority must be obtained among both constituencies, park and county, to ratify the annexation. I conclude that such majorities must be obtained in order to ratify. I base my conclusion on a reading of the statute in light of the rule of Fletcher v. Paige, supra, that a statute should be construed so that no part of it is rendered meaningless. The Legislature has on other occasions used the phrase "a majority of those voting on the question" to express an intent that a simple majority vote be sufficient to approve a ballot issue. See, e.g., §37-136(2), R.C.M. 1947. This phrase appears in Chapter 447. If, as you suggest, only a simple majority of those voting were required to approve the referendum, the phrase, "in the county affected and the area proposed for inclusion" would be surplusage. My conclusion is further supported by analogy to the Montana Constitution, Article XI, §2 which requires the approval of the voters of all counties affected to ratify a change in county boundaries. The plain intent of this provision is to prevent the annexation of a county against its will. The Legislature might well have analogized the constitutional provision to the present circumstance by providing that residents of Yellowstone Park not be subject to annexation into Park County without their approval.

THEREFORE, IT IS MY OPINION:

1. Eligible residents of the portion of Yellowstone National Park proposed for annexation into Park County under Chapter 447, Laws of 1977, must be accorded the opportunity to vote on the question of annexation.

2. A majority vote must be attained both among voters registered in Park County and among voters who reside in the area to be annexed in order to ratify the annexation.

Very truly yours,

Mike Greely

MIKE GREELY
Attorney General

MG/CT/br

CONTRACTS - Waiver of competitive bidding requirements for certain county contracts during disaster or emergency situations;
COUNTY COMMISSIONERS - Authority to let certain county contracts without competitive bidding during disaster or emergency situations;
DISASTERS - Waiver of competitive bidding requirements for certain county contracts during disaster or emergency situations;
EMERGENCIES - Waiver of competitive bidding requirements for certain county contracts during disaster or emergency situations;
HIGHWAYS - Waiver of competitive bidding requirements for road and bridge repair contracts during disaster or emergency situations;
PUBLIC FUNDS - Waiver of competitive bidding requirements for certain county contracts during disaster or emergency situations;
PURCHASING - Waiver of competitive bidding requirements for certain county contracts during disaster or emergency situations;
SECTION - 16-1803, R.C.M. 1947.

HELD: Under Section 16-1803, R.C.M. 1947, counties may contract for the repair of bridges and roads damaged by disasters and calamities without competitive bidding, provided there is an express determination the repairs are urgently and immediately needed.

26 September 1978

James E. Seykora
Big Horn County Attorney
Hardin, Montana 59034

Dear Mr. Seykora:

You have requested an opinion concerning the following question:

> Does Section 16-1803, R.C.M. 1947, require a county to call for bids for the repair of roads and bridges damaged by flood or other natural disaster where the cost of repairs will exceed $10,000 but are urgently and immediately needed?

Section 16-1803, R.C.M. 1947, generally requires counties to let contracts in excess of $10,000 to the lowest responsible bidder, providing in relevant part:

> (1) No contract shall be entered into by a county governing body for the purchase of any vehicle, or road machinery, or for any other machinery, apparatus, appliances or equipment, or for any materials or supplies of any kind for which must be paid a sum in excess of ten thousand dollars ($10,000), or for the construction of any building, road or bridge for which must be paid a sum in excess of ten thousand dollars ($10,000), without first publishing a notice calling for bids furnishing the same, which notice must be published at least once a week, for three (3) consecutive weeks before the date fixed therein for receiving bids, in the official newspaper of the county, and every such contract shall be let to the lowest and best responsible bidder; provided that the provisions of this section shall not apply to contracts for public printing entered into in accordance with the provisions of chapter 12 of Title 16 and <u>provided</u> further, <u>that the provisions of this section shall not apply to contracts for purchases, which in the opinion of the governing body</u>, are made necessary by fires, flood, explosion, storm, earthquake, or other elements, epidemic, riot, insurrection, or for the immediate preservation of order, or of the public health, or for the restoration of a condition of usefulness which has been destroyed by accident, wear, tear, mischief, or for the relief of a stricken community overtaken by calamity. (Emphasis added.)
>
> * * *

The section expressly exempts from competitive bidding requirements those "contracts for <u>purchases</u>" which are necessitated by enumerated disasters and calamities. The Legislature's use of the word "purchase" has caused concern that the exemption is limited to contracts for materials, supplies and equipment and does not include contracts for repair of roads and bridges. It is my opinion that the exemption is not so limited.

Section 16-1803 must be construed in its entirety to give effect to all words and provisions. Words cannot be taken out of context and construed in isolation; their meanings must be determined by the context in which they are employed, from the evident purpose of the Act, and from the subject to which they relate. State ex rel. Bowler v. Board of County Commissioners, 106 Mont. 251, 256, 76 P.2d 648 (1938). In the context of Section 16-1803, it is apparent that the Legislature used the word "purchase" in its broad sense to include the "purchase" of construction services as well as the purchase of materials and equipment. At the outset, the section refers to "construction" contracts in the same conjunctive series as contracts for vehicles, machinery, and materials at the beginning of the section. Then, in the exempting language, "purchase" is used without distinction among any of the items in the initial series. The apparent purpose of the exemption is to allow counties to meet emergency, disaster situations without delays of competitive bidding. Reference in the exempting language to "restoration of a condition of usefulness which has been destroyed" clearly contemplates restoration of roads, buildings and bridges, and rebuts any contention that the bidding exemption extends only to the purchase of equipment, materials and supplies.

This opinion should not be construed as granting counties a blanket exemption from the bidding requirements of Section 16-1803 in disaster situations. Wherever practical, counties must comply with the bidding requirements. They may dispense with competitive bidding only where equipment, supplies, materials, or services are urgently and immediately needed and the appropriate authority has expressly made this finding.

THEREFORE, IT IS MY OPINION:

> Under Section 16-1803, R.C.M. 1947, counties may contract for the repair of bridges and roads damaged by disasters and calamities without competitive bidding, provided there is an express determination the repairs are urgently and immediately needed.

Very truly yours,

MIKE GREELY
Attorney General

MG/MMcC/br