RESERVE

MONTANA ADMINISTRATIVE REGISTER

1978 ISSUE NO. 14
PAGES 1459 — 1508

NOTICE - The July 1977 through June 1978 Montana Administrative Registers have been placed on jacketing, a method similar to microfiche. There are 31 jackets 5 3/4" x 4 1/4" each, which take up less than one inch of file space. The jackets can be viewed on a microfiche reader and the size of print is easily read. The charge is $.12 per jacket or $3.72 per set plus $.93 postage per set. Montana statutes require prepayment on all material furnished by this office. Please direct your orders along with a check in the correct amount to the Secretary of State, Room 202, Capitol Building, Helena, Montana, 59601. Allow one to two weeks for delivery.

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 14

TABLE OF CONTENTS

NOTICE SECTION

INTERPRETATION SECTION

Opinions of the Attorney General

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

In the matter of the adoption of rule ARM 16-2.14(1)-S____, a rule establishing procedures for hearings on proposed ambient air quality standards	NOTICE OF PUBLIC HEARING FOR ADOPTION OF A RULE ESTABLISHING PROCEDURES FOR HEARINGS ON PROPOSED AMBIENT AIR QUALITY STANDARDS

1. On or about Friday, December 8, 1978, at 9:00 a.m., or as soon thereafter as practicable, a public hearing before the Board of Health and Environmental Sciences will be held in Room 142-143 of the Cogswell Building, Capitol Complex, Helena, Montana, to consider adoption of a rule establishing procedures for hearings on proposed ambient air quality standards.

2. The proposed rule is new and does not replace any section currently found in the Administrative Rules of Montana.

3. The proposed rule provides as follows:

16-2.14(1)-S_____ Procedures for Hearings on Proposed Ambient Air Quality Standards. The following procedures shall be followed with respect to the hearings before the Board of Health and Environmental Sciences and its presiding officer for the establishment of ambient air quality standards in the State of Montana:

(1) The testimony of interested parties shall be prefiled on or before February 15, 1979 with copies going to all parties on the service list. Thereafter, within forty-five (45) days or before April 3, 1979, all responses thereto shall be prefiled with the Board or its presiding officer. The prefiling of direct testimony and response testimony applies to both expert witnesses and policy witnesses, if any.

The opening statements of the direct or responses thereto must contain a description of the witnesses' qualifications. The description of qualifications shall include but not be limited to the following:

(a) Educational background and experience;

(b) Description of any post graduate training and professional career since graduation;

(c) Identification of all publications authored by the witness; and

(d) A disclosure of group representation, if any.

(2) Rebuttal statements to responses, to opening statements and to any testimony presented by the parties or expert witnesses at public hearing must be filed within forty-five (45) days after the date upon which the public hearings are closed.

(3) All statements must be made under oath.

(4) Cross examination shall not be permitted except by the presiding officer or any Board member.

(5) Witnesses and parties with prefiled opening statements or responses shall be subject to the call of the

presiding officer or the Board to attend any public hearing for questioning by the presiding officer or Board members.

(6) A schedule for the appearance of any such witness will be prepared by the presiding officer or the Board which will identify each witness and the party that he represents; and the date upon which said witness is expected to appear for questioning. Copies of such schedule will be provided all names on the service list.

(7) Even though all expert witnesses are required to prefile their statements and/or responses to opening statements, it shall not be a requirement that a party or expert witness shall have filed opening statements in order to file a response to opening statements. All parties or expert witnesses who have filed opening statements or responses to opening statements shall be entitled to file rebuttal statements as hereinabove provided.

(8) Rules of discovery shall not be applicable to these proceedings. Discovery among the parties or expert witnesses shall not be permitted. The order of contaminant or pollutant will be addressed at the public hearings as follows: Sulfur dioxide (SO^2), total suspended particulates (TSP), fluorides (FL), urban pollutants, heavy metals and hydrogen sulfide (H^2S).

(9) A period for public comment will be set aside at the end of all testimony. The public is entitled to attend any and all sessions. The presiding officer will be authorized to take public testimony at his discretion if there is justification therefor.

(10) The Notice of Hearing shall require that a service list containing all parties be provided.

4. The adoption of this rule is proposed by the Board in order to supplement ARM 1-1.6(2)-P680 adopted through ARM 16-2.2(1)-P200, particularly in areas left to the discretion of the presiding officer.

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 Section 69-3909, R.C.M. 1947.

JOHN W. BARTLETT, Chairman

Certified to the Secretary of State October 17, 1978

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

In the matter of the adoption of a rule setting standards for haulers of water for human consumption	NOTICE OF CHANGE OF DATE OF ADOPTION OF A RULE Water Haulers for Cisterns NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

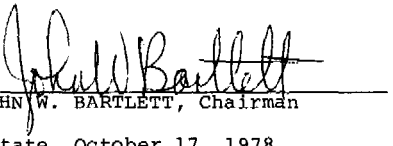
1. On July 27, 1978, notice was published in the Montana Administrative Register that the Board of Health and Environmental Sciences proposed to adopt, on September 8, 1978, a rule setting sanitation standards for haulers of water for human consumption. On that date, the Board postponed making a decision on the rule. The new decision date is December 8, 1978.

2. Text of the proposed rule may be found on page 1006 of the Montana Administrative Register, issue number 8.

3. Interested parties may submit their data, views or arguments concerning the proposed rule orally or in writing to Art Clarkson, Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59601 (phone: 449-2406) no later than December 7, 1978.

4. If a person who is directly affected by the proposed rule 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 Art Clarkson, at the address above, no later than November 6, 1978.

5. If the agency receives requests for a public hearing on the proposed rule from more than 10% or 25 or more persons who are directly affected by the proposed rule, or from the Administrative Code Committee of the legislature, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be ten persons based on a rough estimate of approximately 100 water haulers in the state.



JOHN W. BARTLETT, Chairman

Certified to the Secretary of State October 17, 1978

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

In the matter of the repeal of Rule 16-2.14(10)-S14510(2) regarding disposal of garbage not fed to stock	)))))	NOTICE OF PROPOSED REPEAL OF RULE 16-2.14(10)-S14510(2) (Garbage Disposal) NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On December 8, 1978, at 9:00 a.m. or as soon thereafter as possible, in room 142 of the Cogswell Building, in Helena, Montana, the Board of Health and Environmental Sciences proposes to repeal rule 16-2.14(10)-S14510(2) regarding the disposal of garbage not fed to stock.

2. The rule proposed to be repealed can be found on page 16-395 of the Administrative Rules of Montana and reads as follows:

> Garbage which is not fed to stock shall be burned, buried in a flytight trench or otherwise disposed of so that it will not create a nuisance. (Rule 16-2.14(10)-S14510(2))

3. The rule is proposed to be repealed because the Board of Health and Environmental Sciences has rules of similar import for solid waste management (see Rule 16-2.14(8)-S14315). Rule 16-2.14(10)-S14510(2) is thus superfluous to the extent it is consistent with the Board's solid waste management rule and confusing to the public to the extent it is inconsistent.

4. Interested persons may submit their written or oral data, views or arguments to Mr. Vic Anderson, Department of Health and Environmental Sciences, Solid Waste Management Bureau, 1400 Eleventh Avenue, Helena, Montana 59601, (phone 449-2821), no later than December 1, 1978.

5. If a person who is directly affected by the proposed repeal of rule 16-2.14(10)-S14510(2) wishes to express his data, views and arguments orally or in writing at a public hearing, he must make a written request for a public hearing and submit this request along with any written comments, to Mr. Vic Anderson, at the address given in paragraph 4, no later than December 1, 1978.

6. If the agency receives requests for a public hearing on the proposed repeal of rule 16-2.14(10)-S14510(2) from 25 persons who are affected by the proposed repeal, or from the Administrative Code Committee of the legislature, a public hearing will be held at a later date. Since the proposed repeal can affect all Montana residents, it has been determined that 25 persons is less than 10% of Montana's population; therefore, if 25 persons request a public hearing, a public hearing will be held. Notice of such a hearing would be published in the Montana Administrative Register.

7. The authority of the agency to repeal the rule is

based on section 69-4903, R.C.M. 1947.

JOHN W. BARTLETT, Chairman

Certified to the Secretary of State October 17, 1978.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 16-2.26(1)-S2600 setting forth methods and procedures for quality control of alcohol analysis in the criminal investigation laboratory.	NOTICE OF PROPOSED AMENDMENT OF ARM 16-2.26(1)-S2600: Quality Control of Alcohol Analysis. NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On November 27, 1978, the Department of Justice proposes to amend ARM 16-2.26(1)-S2600 which sets forth methods and procedures to insure quality control of alcohol analysis in the criminal investigation laboratory.

2. The amendment proposed is: ~~16-2.26(1)-S2600~~ ALCOHOL ANALYSIS, QUALITY CONTROL

(1) - (2) Same as present rule

(3) Types of certificates.

(a) Installation Certificate. Same as present rule

(b) Operator Supervisor Certificate. A person meets the qualifications for an Operator Supervisor certificate by:

(i) Having successfully completed training approved by the department and/or passing an examination prescribed by the department.

(ii) Having successfully completed a ~~40 hour~~ course in chemical tests for alcohol including legal aspects of chemical testing, the effect of alcohol on the human body, operational principles of the selected testing methods ~~(including calibration)~~, and laboratory participation using the appropriate equipment.

(iii) (prior to July 1, 1971) Having not less than one year of experience in the operation, care and maintenance of the testing device to be utilized, and

(iv) Demonstrating the ability to adhere to the provisions of this rule.

(c) Operator's Certificate. Same as present rule.

(4) - (8) Same as present rule.

(9) Levels of training.

(a) Persons to be Trained. Same as present rule.

(b) Operator Supervisors. In order to receive certification as an Operator Supervisor, an applicant shall

successfully complete a course of instruction which includes at minimum the following:

(i) ~~Three-(3)-hours-of~~ Instruction on the effects of alcohol on the human body.

(ii) ~~Five-(5)-hours-of~~ Instruction on operational principles of the equipment to be employed, which shall include a functional description and a detailed operational description to include appropriate demonstration.

(iii) ~~Six-(6)-hours-of~~ Instruction on the legal aspects of chemical tests generally, and of the particular method to be employed.

(iv) ~~Five-(5)-hours-of~~ Instruction on supplemental information which shall include nomenclature appropriate to the field of chemical tests for alcohol.

(v) ~~Twelve-(12)-hours-of~~ Laboratory participation using appropriate equipment. Laboratory practice shall include the use of the reference standard, and analyses using the approved field sampling devices.

(vi) ~~One-(1)-hour-of~~ Instruction on selected field tests and field sampling.

(vii) ~~One-(1)-hour-of~~ Instruction on forms, records and reporting.

(viii) ~~One-(1)-hour-of~~ Formal examination for purposes of determining competency and qualification.

(c) Operators. Persons classified as operators shall have ~~at-least-eight-(8)-hours-of~~ department approved instructions in the operation of the specific testing device to be employed, and/or have passed a written examination.

(d) - (e) Same as present rule.

(10) Blood sampling.

(a) Sample collection. Blood samples shall be collected from living individuals ~~within-two-hours-of-an alleged-offense~~ only by persons authorized by law, ~~namely~~, ~~physicians and registered nurses,~~ upon written request of a peace officer. The skin at the area of puncture shall be thoroughly cleansed and disinfected with an aqueous solution of non-volatile antiseptic. Alcohol of phenolic solutions shall not be used as a skin antiseptic.

(b) - (c) Same as present rule.

(d) Sample container. The blood sample shall be deposited into a clean dry container, containing a solid anti-coagulant and preservative and the container should then be capped or stoppered and sealed ~~with a gummed tape or sticker which bears~~ in a mailing container with at least the following information:

(i) Name of suspect;

~~(ii) Arrest or state number;~~

~~(iii)~~ (ii) Date, time and site (location of body) of collection;

~~(iv)~~ (iii) Name or initials of person collecting and/or sealing sample.

(e) Sample preservation. ~~While not in transit to an installation or under examination, all blood samples shall be refrigerated at a temperature of 42 degrees Fahrenheit or below.~~ Sodium fluoride ~~(20 mg per milliliter of blood)~~ or its ~~solid form~~ equivalent shall be used as a preservative. Sodium citrate or potassium oxalate or equivalent, ~~in final concentrations of 0.3 to 0.5 percent,~~ shall be used as an anti-coagulant. If no additive or additives other than those listed above are used as a matter of necessity, a comment so stating should accompany the sample. If other additives are employed, the name of the additive and its quantity should be listed.

(f) Sample witness. Same as present rule.

(11) Urine sampling.

(a) Urine collection. Same as present rule.

(b) Sample container. When urine collection is necessary, the specimen shall be deposited into a clean, dry, glass container and capped or stoppered. The container should be sealed in a mailing container with ~~a gummed tape or sticker which bears~~ at least the following information:

(i) Name of suspect;

~~(ii) Arrest or state number;~~

~~(iii)~~ (ii) Date and time of collection, and

~~(iv)~~ (iii) Name or initials of person witnessing collection and/or sealing sample.

(c) Sample witness. Same as present rule.

(d) Sample preservation. ~~While not in transit to an installation or under examination, urine samples shall be refrigerated at a temperature of 42 degrees Fahrenheit or below.~~ If preservatives are used, a comment stating the preservative and amount should accompany the sample.

(e) Sample size. At least five ~~Ten to thirty~~ milliliters of urine shall be considered sufficient quantity for analysis.

(f) Postmortem sampling of urine. Same as present rule.

(12) Breath sampling.

(a) Sample collection. Same as present rule.

(b) Field samples. Breath samples taken outside an installation by an alcohol capture device shall be taken by a person who has been trained and certified as an operator in a specific application of breath analysis. The sample should be sealed in a container with ~~bearing~~ at least the following information:

(i) Name of suspect;
~~(ii) Arrest or state number;~~
~~(iii)~~ (ii) Date and time of collection,
~~(iv)~~ (iii) Name or initials of person collecting ~~witnessing collection~~ and/or sealing sample.
(c) Sample size. Same as present rule.
(13) - (15) Same as present rule.
(16) Instrumentation.
(a) - (c) Same as present rule.
(d) Approval of techniques. Manufacturer suggested breath-testing techniques are subject to approval by the department. Any breath-testing device submitted to the department for approval shall be accompanied by a detailed set of instructions which shall include information pertinent to the operation, ~~calibration~~, and interpretation of results of the submitted device.
(17) Expression of results. Same as present rule.
(18) Calibration or Standardization
(a) Breath testing instruments. Instruments designed to test direct breath samples shall be calibrated or standardized ~~no less frequently than every ten (10) tests, or after any nine (9) days if fewer than ten (10) tests are performed in any nine(9) day period, by an operator supervisor or operator, using appropriate solutions of ethyl alcohol, and using methods and techniques for calibration recommended by the manufacturer of the calibration device~~ as approved by the department.
(b) Other methods. Procedures other than direct breath tests shall be calibrated or standardized as approved by the department ~~with known concentrations of ethyl alcohol at least once each day that tests are run. This calibration shall be performed by an operator supervisor, laboratory director, or under a laboratory director's general supervision.~~
~~(c) Other calibration solutions. Gas chromatograph calibration may be accomplished by addition of an appropriate internal standard.~~
(19) Records and reporting requirements. Same as present rule.
(20) Installing records, breath test. The following records shall be kept by an installation performing breath analysis:
(a) -(b) Same as present rule.
~~(c) Records of maintenance and calibration of the instrument;~~
~~(d)~~ Records reflecting training levels of certified personnel pursuant to this rule;
~~(e)~~ (d) A copy of this rule.

(21) Installing records, other substances. Records to be kept by installations testing blood and urine shall include:

(a) - (b) Same as present rule.

(c) Records of maintenance ~~and calibration~~ of instrumentation where applicable;

(d) - (f) Same as present rule.

(22) Reporting to the department. Same as present rule.

3. The rule is proposed to be amended to provide flexibility for the operation of the chemistry laboratory by removing restrictive clauses regarding hours of training required and methodology and procedures used in alcohol analysis; and to simplify the rule in general.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to Attorney General, State Capitol, Helena, Montana 59601, no later than November 24, 1978.

5. The authority of the department to make the proposed amendment is based on Section 32-2142.3, R.C.M. 1947.

MIKE GREELY
Attorney General

Certified to the Secretary of State October 17, 1978.

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
STATE OF MONTANA

In the matter of the amendment of Rule 36-2.8(18)-S8110 relating to Alternative Renewable Energy Source Grants	)))))	NOTICE OF PROPOSED AMENDMENT OF RULE 36-2.8(18)-S8110 NO PUBLIC HEARING CONTEMPLATED

To: All Interested Persons

1. On December 5, 1978, the Department of Natural Resources and Conservation proposes to amend Rule 36-2.8(18)-S8110 relating to Alternative Renewable Energy Source Grant Application submittal deadlines.

2. The Rule proposed to be amended is as follows:

36-2.8(18)-S8110 APPLICATION SUBMITTAL DEADLINES. Applications for unsolicited grants shall be submitted from ~~January through February 15 and from July 1 through August 5~~ August 1 through October 1. Applications for solicited grants shall be submitted at a time specified by the Department in a solicitation announcement.

3. The rule is proposed to be amended to broaden the scope of the application process.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendments in writing to Gerhard M. Knudsen, Bureau Chief, Energy Division, Department of Natural Resources and Conservation, 32 South Ewing, Helena, Montana 59601. Written comments in order to be considered must be received by not later than November 27, 1978.

5. If a person directly affected wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a public hearing and submit his request along with any written comments he has to Mr. Knudsen on or before November 27, 1978.

6. If the Department receives requests for a public hearing on the proposed rule from more than ten percent (10%) or twenty-five or more persons directly affected, a public hearing will be held at a later date. Notification of parties will be made by publication in the Administrative Register.

7. The authority of the Department to make the proposed amendment is based on Section 84-7410, R.C.M. 1947.

Ted J. Doney

TED J. DONEY, DIRECTOR
Department of Natural Resources
and Conservation

Certified to the Secretary of State 10/17/78.

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 the Granting of Interim Rate Increases	))))	NOTICE OF PROPOSED NEW RULES ON INTERIM RATE INCREASES NO HEARING CONTEMPLATED

TO: All Interested Persons

1. On November 27, 1978, the Public Service Commission proposes to adopt new rules which establish general policy and procedure for its consideration of requests for interim (temporary) rate increases.

2. This proposed rule does not replace or modify any section currently found in the Montana Administrative Code.

3. The proposed rules are as follows:

RULE I. DEFINITION (1) An interim rate increase is an increase granted by the Commission prior to a hearing or after a hearing and before a final decision.

Rule II. PREREQUISITE TO INTERIM RATE INCREASE REQUEST (1) Any application for an interim grant of authority to increase utility rates must be filed in conjunction with a permanent rate case proceeding.

Rule III. NOTICE (1) The Commission will issue notice of all applications for interim rate increases. The notice will be transmitted to the Consumer Counsel, to all media of general dissemination in the area affected by the increase in rates and to all intervening parties participating in the most recent general rate increase application involving the particular utility.

Rule IV. HEARINGS (1) An interim rate increase request which is part of a general rate increase request will not be approved until a contested case hearing has been held on the general rate request, except as provided in Rule VI(3).

(2) An interim rate increase requested to meet increased costs of a single, clearly measurable expense item (tracking case) may be granted prior to hearing; however, a contested case hearing will be held if requested by an interested person before the interim increase is authorized as a permanent increase.

Rule V. SUPPORTING MATERIAL (1) Any application for interim authority to increase utility rates sought as part of a general rate increase shall only be deemed filed when all material supporting the general rate increase request has been submitted.

(2) For every interim rate increase request, the applicant shall file the original and 6 copies of the letter of transmittal, application, and exhibits, with the Commission; 2 copies of the letter of transmittal the application and any exhibits shall be simultaneously filed with the Montana Consumer Counsel

(3) Any applications for interim authority to increase utility rates to meet increased costs of a single, clearly measurable expense item (tracking cases) shall be supported by the following:

(a) Letter of transmittal
(b) Application
(c) Rate schedules - current and proposed
(d) Detail of increased expense item
(e) Summary of base cost of expense item and proposed adjustment
(f) Statements of operating income, and rate of return, and return on average equity, showing effect of proposed adjustment
(g) Most recent twelve month balance sheet and income statement

Rule VI. CRITERIA FOR APPROVAL OF REQUEST (1) Consideration of an application to increase rates on an interim basis in a general rate increase proceeding will be guided by the facts in the whole record and generally established principles of utility rate regulation.

(2) Consideration of an application to increase rates on an interim basis in a tracking case will be guided by:

(a) A clear showing that the expense item concerned is a significant cost to the utility;
(b) A clear showing that the proposed rate increase precisely matches the increased expenses;
(c) A clear showing that deferred rate relief would result in unreasonable and irreparable loss of income to the petitioning utility; and
(d) Supporting material as enumerated in Rule IV (1).

(3) If an application to increase rates on an interim basis is made which seeks to implement interim relief at times and under circumstances not contemplated by these rules, the Commission will be guided by:

(a) A clear showing that the petitioning utility is suffering an obvious income deficiency; and
(b) A clear showing of any two of the following circumstances:
(i) A sudden decline in income caused by factors outside of the control of the utility;
(ii) An inability on the part of the utility to arrange debt financing or attract capital at a reasonable cost without increased operating income;
(iii) That deferred rate relief until a final order can be issued would result in unreasonable and irreparable loss of revenue to the petitioning utility; and
(iv) That reasonable grounds exist for the Commission to believe that, under its current utility rate-making standards, the utility would be entitled to rate relief at the time a final order is issued in the proceedings.

Rule VII. WAIVER (1) The Commission, in its discretion, may at anytime, waive any or all of these rules.

4. Rationale for Rules on Interim Rate Increases: These rules are being proposed by the Commission as a result of a Petition by the Montana Consumer Counsel. The Consumer Counsel alleges that these rules are required to insure that interim rate relief will be provided in only those extraordinary situations in which a utility cannot wait for a full public hearing on its application.

The Commission believes that interested persons should have notice of general procedures it will usually follow in exercising the broad discretionary powers granted it in Section 70-113 regarding temporary approval of rate increases.

5. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing to Robert Smith, Montana Public Service Commission, 1227 11th Avenue, Helena, Montana 59601, no later than November 24, 1978.

6. Should the Public Service Commission receive a request from an interested party prior to November 24, 1978, such a hearing shall be scheduled for a later date, to be published in the Montana Administrative Register.

7. The Montana Consumer Counsel, 34 West Sixth Avenue, Helena, Montana 59601 (Telephone 449-2771), is available and may be contacted to represent consumer interests in this matter.

8. The authority for the Commission to make this rule is based on Sections 70-113 and 70-104, Revised Codes of Montana, 1947.

JAMES R. SHEA
Acting Chairman

CERTIFIED TO THE SECRETARY OF STATE October 17, 1978.

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF ATHLETICS

IN THE MATTER OF THE Proposed Amendments of ARM 40-3.14(6)-S1430 Licensing Requirements, Sub-section (10) and ARM 40-3.14(6)-S1490 Contest regulations, Sub-Section (6) (a).	)))))	NOTICE OF PROPOSED AMENDMENTS OF RULES ARM 40-3.14(6)-S1430 (10) LICENSING REQUIREMENTS AND ARM 40-3.14(6)-S1490(6) (a) CONTEST REGULATIONS NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On November 25, 1978, the Board of Athletics proposes to amend rules ARM 40-3.14(6)-S1430, Sub-section (10) which is related to licensing requirements for individuals and ARM 40-3.14(6)-S1490 Sub-section (6)(a) relating to sale of refreshments.

2. The proposed amendment to ARM 40-3.14(6)-S1430 (10) deletes the references to fees for individuals and reads as follows: (deleted matter interlined)

"(10) Applicants for license shall, before such license is issued and annually thereafter, pay to the Board a license fee as follows: ~~-Managers,-$10.00,-Referees,-$10.00,-Professional-Wrestler-or-Boxer,-$10.00,-Seconds,-$5.00,-and-~~Promoters and Matchmakers for professional boxing or wrestling conducted by licensed clubs, whether acting individually or as an employee or agent of a club or clubs, $100.00 in conjunction with bond requirement. ~~The-Board-may-require-the-club-or-clubs-to-deduct-the license-fees-from-the-contestants'-guarantee-as-provided-in-the-contract.~~"

3. The rule is proposed to be amended in response to a recommendation of the Legislative Council that the Board delete license fees for individuals because the Board does not have statutory authority over individuals licenses or to charge fees for individuals. The Council also suggested the Board propose legislation to include such licensing functions during the next Legislative Session.

4. The proposed amendment to ARM 40-3.14(6)-S1490 (6)(a) deletes the reference to sale of refreshments and re-numbers sub-section (b) as (a) and reads as follows: (deleted matter interlined)

" (6) Sale of ~~Refreshments-and~~ Programs:
~~(a)--The-sale-of-drinkables-or-refreshments-of-any kind-or-the-rental-or-sale-of-cushions,-in-the-arena-or-hall-where-boxing-contests-are-given,-is-strictly prohibited.~~"

5. The rule is proposed to be amended because it is antiquated. The sale of refreshments has become a common practice at all sporting events.

6. Interested parties may submit their data, views or arguments concerning the proposed amendments in writing to the

Board of Athletics, Lalonde Building, Helena, Montana 59601, no later than November 23, 1978.

7. If a person who is directly affected by the proposed amendments 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 the Board of Athletics, Lalonde Building, Helena, Montana 59601, no later than November 23, 1978.

8. If the Board receives requests for a public hearing on the proposed amendments from more than 10% of the persons who are directly affected by the proposed amendments, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

9. The authority of the Board to make the proposed amendments is based on section 82-303 (4) R.C.M. 1947.

BOARD OF ATHLETICS
PATRICK J. CONNORS, CHAIRMAN

BY: _____
ED CARNEY, DIRECTOR
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

Certified to the Secretary of State, October 17, 1978.

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF NURSING

IN THE MATTER of the Proposed) Adoption of a rule regarding) Strike Policies for Faculty) and Student Nurses)

NOTICE OF PROPOSED ADOPTION OF A RULE FOR STRIKE POLICIES FOR FACULTY AND STUDENT NURSES

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On November 25, 1978, the Board of Nursing proposes to adopt a rule concerning strike policies for faculty and student nurses.

2. The proposed adoption will read as follows:

"The faculty and currently registered students of the Schools of Nursing comprising all Montana Schools/Programs of Nursing will maintain a position of neutrality in relation to strike notices and arbitration at agencies used for clinical experience. Regular clinical courses will continue in so far as adequate clinical experience is available and faculty members and students will continue to maintain only their regular educational activities during work or clinical assigned hours. All courses will be continuously assessed for the appropriateness of the learning environment and available experience. No faculty member or student will engage in any strike related activity during work or clinical assignment hours. Each faculty member and student, as an independent professional, will assume accountability for his/her actions regarding strike notice activities during non-working or non-clinical assignment hours."

3. The Board is proposing this adoption because of the increased number of strikes within the state and nation. They feel the faculty and student nurses need definite guidelines in a strike situation.

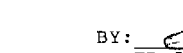
4. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing to the Board of Nursing, Lalonde Building, Helena, Montana 59601, no later than November 23, 1978.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to the Board of Nursing, Lalonde Building, Helena, Montana 59601, no later than November 23, 1978.

6. If the Board receives requests for a public hearing on the proposed adoption from more than 10% of those persons who are directly affected by the proposed adoption, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

7. The authority of the Board to make the proposed adoption is based on section 66-1225(2) R.C.M. 1947.

BOARD OF NURSING
JANIE CROMWELL, R.N., PRESIDENT

BY: 
ED CARNEY, DIRECTOR
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

Certified to the Secretary of State, October 17, 1978.

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

In the matter of the amendment of Rule 46-2.10(14) -S11280 pertaining to failure to comply (WIN)	)))))	NOTICE OF PROPOSED AMENDMENT OF RULE 46-2.10 (14)-S11280 pertaining to failure to comply (WIN). NO PUBLIC HEARING CONTEMPLATED

TO: All interested persons

1. On December 5, 1978, the Department of Social and Rehabilitation Services proposes to amend rule ARM 46-2.10 (14)-S11280 which pertains to failure to comply (WIN).

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

46-2.10(14)-S11280 FAILURE TO COMPLY (WIN) (1) If a non-exempt applicant or participant (subject to prior exceptions) fails to comply with the work requirement without good cause, he will be determined ineligible for assistance until he complies with the requirement.

(2) As long as an individual is certified to the WIN program and refuses without good cause to participate in the Work Incentive Program or to accept a bona fide offer of employment, then:

(a) If such individual is a caretaker relative receiving AFDC, his needs will not be taken into account in determining the family's need for assistance, and assistance in the form of protective or vendor payments or of foster care will be provided.

(i) When protective payments are made, the entire payment will be made to the protective payee; and when vendor payments are made, at least the greater part of the payment will be through this method.

(ii) Termination of protective payee payments or vendor payments shall occur when adults who refused training or employment without good cause either accept training or employment or agree to do so.

(b) If such individual is one of several dependent children in the family, assistance for such child will be denied and his needs will not be taken into account in determining the family's need for assistance.

(i) The specified sanctions shall not be applied during the period of 60 days in which an individual is being provided counseling and other services for the purpose of persuading him to accept appropriate training, except that financial assistance paid in behalf of the individual and his or her family will be provided in the form of protective or vendor payments.

(ii) If an individual registered on a voluntary basis (a mother or other relative of a child under the age of six who is caring for the child) discontinues participation in the Work Incentive Program, he and his family are not subject to the sanctions.

(c) If such individual is the only dependent child in the family, assistance for the family will be denied.

(d) If such individual is receiving AFDC as an unemployed father, assistance will be denied or closed for the entire family so long as the father is not registered for the work incentive program or if exempt, is not registered with a public employment office in the state.

(3) If a mandatory participant refuses to accept child care that is suitable to the child's needs and meets the required standards, this is tantamount to refusing to participate in WIN and the individual becomes subject to the sanctions.

3. This amendment is needed to bring state WIN regulations into compliance with Section 407 (b)(2)(c) of the Social Security Act which denies AFDC-UF to the entire family whenever the father is not registered for work either through WIN, or if exempt, through the state public employment office.

4. Interested parties may submit their data, views or arguments concerning the proposed rule in writing to the Office of Legal Affairs, P. O. Box 4210, Helena, MT 59601, no later than November 27, 1978.

5. The Department's authority to make and implement this proposed amendment is found in Section 71-210, 71-501, and 71-503 R.C.M. 1947.

Keith P. Colbo
Director, Social and Rehabilitation Services

Certified to the Secretary of State October 17, 1978.

BEFORE THE DEPARTMENT OF ADMINISTRATION
BUILDING CODES DIVISION
OF THE STATE OF MONTANA

In the matter of the amendment of Rules ARM 2-2.11(1)-S1100, Subsection (1); 2-2.11(2)-S11140, Subsection (5); and 2-2.11(6)-S11410, Subsection (1) concerning requested inspection fees.	NOTICE OF AMENDMENT OF RULES Requested Inspection Fees

TO: All Interested Persons:

1. On August 10, 1978, the Department of Administration published notice of the proposed amendments to the rules concerning fees for requested inspections. The Department is proposing these amendments to its rules because presently only electrical, recreational vehicles, and modular fees have provisions for charging for requested inspections. The Division is self-supporting and all services performed must be charged for or they cannot be provided. In addition, it is felt that the charge for requested inspections should be equal throughout all functions of the Division. Notice of the proposed amendment was published on pages 1126-1127 of the Montana Administrative Register, 1978 Issue Number 9.

2. A formal hearing was held on September 20, 1978 and following receipt of comments by various interested persons, the Department has adopted the proposed amendments.

3. This rule is being adopted by the Department of Administration in order to cover the cost of providing requested inspections. The authority for the amendments is found in Section 69-2124, R.C.M. 1947.

4. The only objection received was resolved through discussions at the hearing and was a misunderstanding rather than an objection.

BEFORE THE DEPARTMENT OF ADMINISTRATION
BUILDING CODES DIVISION
OF THE STATE OF MONTANA

In the matter of the adoption of Rule ARM 2-2.11(1)-S11060 concerning asbestos in building construction.	NOTICE OF THE ADOPTION OF RULE ARM 2-2.11(1)-S11060 pertaining to asbestos in building construction.

TO: All Interested Persons:

1. On August 10, 1978, the Department of Administration published notice of the proposed adoption of a new rule concerning asbestos in building construction. The purpose of this

adoption is to satisfy the mandate contained in Sections 69-7401 through 69-7407, R.C.M. 1947, which calls for the protection of the citizens of Montana from the dangers precipitated by the use of spray materials containing mineral fibers and the destruction of structures containing asbestos insulation. Notice of the proposed adoption was published on pages 1128-1129 of the Montana Administrative Register, 1978 Issue Number 9.

2. A formal hearing was held on September 20, 1978 and following receipt of comments by various interested persons, the Department proposes to adopt the rule in its following amended form:

2-2.11(1)-S11060 ASBESTOS IN BUILDING CONSTRUCTION

(1) The following rules result from the mandate of Legislature contained in Section 69-7401 through Section 69-7407, R.C.M. 1947.

(2) Building Demolitions. (a) All buildings scheduled for demolition which contain asbestos insulation or fireproofing must follow the safeguards listed in Section 69-7403, R.C.M. 1947~~, as follows:~~.

~~(i)--Whenever possible, the local fire department shall be notified of the demolition.~~

~~(ii)--Signs must be posted in conspicuous locations around the building or structure being demolished warning persons to take proper precautions against exposure to asbestos fibers before entering the area.~~

~~(iii)--Boilers, pipes, and steel members insulated or fireproofed with asbestos must be wetted before toppling of the wall begins.--This mandatory procedure applies, where practicable, to all asbestos lined surfaces.~~

~~(iv)--When demolition by toppling is performed, a reasonable enclosure for dust emission control must be constructed.~~

~~(v)--Adequate wetting to suppress dust must be performed before and during the demolition or toppling.~~

~~(vi)--Asbestos containing debris may not be dropped or thrown from any floor and must be transported by dust tight chutes or buckets with the chutes or buckets sufficiently wetted to prevent dust.~~

~~(vii)--During transportation of the debris, it must be thoroughly wetted before loading and must be enclosed or covered during its transport to prevent dust dispersion.~~

~~(viii)--The asbestos containing debris must be deposited at a sanitary landfill at which it is unlikely to be disturbed, and signs must be posted around the landfill warning that asbestos containing debris is buried there.~~

(b) Before demolition of a building is started, a building permit must be obtained from the building official of the appropriate jurisdiction, that being a municipality, county, or the State of Montana.

(c) At the time of application for the permit, the building official having jurisdiction shall be informed, by the person or corporation performing the work, as to whether the building to be demolished contains asbestos materials. Such information shall be furnished in writing before the permit is issued and before the demolition is started.

(d) Periodic inspections may be made by the building official to determine compliance with Section 69-7403, R.C.M. 1947, and these rules.

(3) Asbestos-Containing Spray Products. (a) "Asbestos-containing spray product" shall mean any fibrated product or compound which is applied to a surface utilizing a spray or pneumatic means of application, for whatever purpose. ~~"Fibrated product" means a substance used in construction, for whatever purpose, which contains asbestos fibers, which tend to disperse into ambient air during application or upon destruction or removal.~~ "Friable asbestos material" means any material that contains more than one percent asbestos by weight and that can be crumbled, pulverized, or reduced to powder, when dry, by hand pressure.

(b) The use of asbestos-containing spray products, other than those in which the asbestos fibers are encapsulated with a bituminous or resinous binder and which are not friable after drying, for whatever purpose, in the construction, remodeling, renovation, alteration of a building or structure is prohibited.

~~(4) Violations - Penalties. Any person, firm, or corporation found guilty of violating any of the provisions of these rules and/or the State statutes shall be fined no more than $1,000 or be imprisoned in the county jail for a term not to exceed 60 days or both.~~

3. This rule is being adopted by the Department of Administration in order to comply with the legislative mandate of Sections 69-7406 and 69-2111, R.C.M. 1947.

4. Comments regarding the proposed rule were received by mail. The majority of the comments received were satisfied by the above changes in the rule. Those suggested changes not made are explained below.

a. It was suggested that "reasonable enclosure" be clarified or defined. The law in Section 69-7403(d), R.C.M. 1947, calls for construction of a reasonable enclosure to control dust emission. To address all possible configurations in a rule would be impossible and therefore it is felt better to be left open.

b. It was suggested that asbestos-containing debris could be properly transported in open vehicles after thorough wetting and traveling at 25 m.p.h. or less. This change would need to be legislative since Section 69-7403(g), R.C.M. 1947, states, "(g) During transportation of the debris, it must be thoroughly wetted before loading and must be enclosed or covered during its transport to prevent dust dispersion."

c. It was suggested that the requirement for disposal of asbestos-containing material in a landfill dump was not practical for mining operations which have their own mine dump areas. We would agree with this suggestion, but feel there was no need to change the rule since in our opinion disposal in a mine dump would satisfy the intent of the law.

BEFORE THE DEPARTMENT OF ADMINISTRATION
BUILDING CODES DIVISION
OF THE STATE OF MONTANA

In the matter of the adoption of Rule ARM 2-2.11(1)-S11070 concerning the minimum number of plumbing fixtures to be provided in new buildings.	) NOTICE OF THE ADOPTION OF) RULE ARM 2-2.11(1)-S11070) pertaining to Minimum Re-) quired Plumbing Fixtures)

TO: All Interested Persons

1. On August 10, 1978, the Department of Administration published notice of proposed adoption of a new rule concerning the minimum number of plumbing fixtures to be provided in new buildings. The Department is proposing this rule as a result of public complaints filed with the Department of Health and Environmental Sciences and the Building Codes Division regarding the lack of toilet facilities in public places. The Uniform Building Code, as adopted by the Department, has some requirements but they do not include all occupancies. Notice of the proposed adoption was published on pages 1130-1131 of the Montana Administrative Register, 1978 Issue Number 9.

2. A formal hearing was held on September 20, 1978 and following receipt of comments by various interested persons, the Department has adopted the proposed rule ARM 2-2.11(1)-S11060.

3. This rule is being adopted by the Department of Administration in order to resolve the public complaints being received. The authority for the change is found in Section 69-2111, R.C.M. 1947.

4. No objections were received from persons attending the hearing nor by mail.

David M. Lewis
Director
Department of Administration

CERTIFIED TO THE SECRETARY OF STATE October 4, 1978.

BEFORE THE DEPARTMENT OF JUSTICE
FIRE MARSHAL BUREAU
OF THE
STATE OF MONTANA

In the matter of the repeal of rules pertaining to fire and life safety protection	)))	NOTICE OF THE REPEAL OF RULES pertaining to fire and life safety protection.

To: All Interested Persons:

1. On August 10, 1978 the Department of Justice, Fire Marshal Bureau published notice of proposed repeal of rules pertaining to fire and life safety protection, at page 1223 of the Montana Administrative Register, issue number 10.

2. The agency has repealed these rules as proposed.

3. No comments or testimony were received. The agency has repealed these rules as they have been adopted by reference as part of the Uniform Fire Code, therefore no longer needed.

Robert E. Kelly
ROBERT E. KELLY, Chief
Fire Marshal Bureau

Certified to the Secretary of State 10/4/78

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

In the matter of the adoption of New Rules I through XXI pertaining to Sanitation, Safety, Clearance, Sidetracks and Station and Station Service of Railroads.	NOTICE OF THE ADOPTION OF NEW RULES I THROUGH XXI

TO: All Interested Persons:

1. On April 24, 1978, the Department of Public Service Regulation published notice of a proposed adoption of rules concerning Railroad sanitation, safety, clearance, sidetracks and station service at page 465 of the 1978 Montana Administrative Register, issue number 4.

2. The Commission has adopted the rules with the following additions:

Rule I has been assigned 38-2.24(1)-S2400 and has been adopted as proposed.

Rule II has been assigned 38-2.24(2)-S2410 and has been adopted as proposed.

Rule III has been assigned 38-2.24(6)-S2420 and has been adopted as proposed.

Rule IV has been assigned 38-2.24(6)-S2430 and has been adopted with the following additions:

(1) through (10) No change.

(11) CROSSING: An intersection of a railroad and a public crossing in the same plane, the means by which one crosses from one side of the railroad to the other.

(12) SIDETRACK OR SPURTRACK: A track which extends a short distance from a main line on branch line, may serve one or more industries.

(13) STATION: A point designated in tariffs and time tables where train(s) may stop for traffic, or to enter or to leave main track(s), or from which fixed signals are operated, and where freight will be received from and delivered to the general public.

Rule V has been assigned 38-2.24(6)-S2440 and has been adopted as proposed.

Rule VI has been assigned 38-2.24(6)-S2450 and has been adopted as proposed.

Rule VII has been assigned 38-2.24(6)-S2460 and has been adopted as proposed.

Rule VIII has been assigned 38-2.24(6)-S2470 and has been adopted as proposed.

Rule IX has been assigned 38-2.24(6)-S2480 and has been adopted as proposed.

Rule X has been assigned 38-2.24(10)-S2490 and has been adopted as proposed.

Rule XI has been assigned 38-2.24(10)-S24000 and has been adopted as proposed.

Rule XII has been assigned 38-2.24(10)-S24010 and has been adopted as proposed.

Rule XIII has been assigned 38-2.24(10)-S24020 and has

been adopted as proposed.

Rule XIV has been assigned 38-2.24(10)-S24030 and has been adopted as proposed.

Rule XV has been assigned 38-2.24(10)-S24040 and has been adopted as proposed.

Rule XVI has been assigned 38-2.24(10)-S24050 and has been adopted as proposed.

Rule XVII has been assigned 38-2.24(10)-S24060 and has been adopted as proposed.

Rule XVIII has been assigned 38-2.24(10)-S24070 and has been adopted as proposed.

Rule XIX has been assigned 38-2.24(10)-S24080 and has been adopted as proposed.

Rule XX has been assigned 38-2.24(10)-S24090 and has been adopted as proposed.

Rule XXI has been assigned 38-2.24(10)-S24100 and has been adopted as proposed.

3. At the public hearing representatives of the Butte, Anaconda, and Pacific Railway Company protested that the installation of such sanitary facilities in locomotives as Rule XII requires would be financially burdensome. The Railway argued that Rule XII should be made applicable only to those main line runs exceeding 30 miles.

Butte, Anaconda, and Pacific Railway's argument is overruled. Installation costs cited by the Railway are over 19 times those cited by the Union. It is felt that the costs are not as prohibitive as the Railway figures would indicate and do not outweigh the benefits to the health and welfare of the railroad employees. Moreover, the Butte, Anaconda, and Pacific Railway is the only railway without such facilities and should be updated.

It became evident at the hearing that the use and meaning of various terms; crossing, sidetrack or spurtrack, station, and tool house, remained unclear and in dispute. Variations in term definitions offered by the parties were indicative of the railroads desire to have such vocabulary interpreted as strictly as possible and the Union's desire to have the terms construed as broadly as possible. Definitions adopted by the Commission steer a middle course between the two sides and present a clearer and more concise explanation of the intent of the rules. Clarifications are listed above: the term tool house remains unchanged.

4. Authority of the Department to make the proposed rules is found in §§ 72-150 and 70-104, R.C.M. 1947.

James R. Shea

JAMES R. SHEA
Acting Chairman

CERTIFIED TO THE SECRETARY OF STATE October 17, 1978.

BEFORE THE DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
STATE OF MONTANA

In the matter of the adoption of) rule for discovery)	NOTICE OF ADOPTION OF A RULE 40-2.2(6)-P2215 RULES OF DISCOVERY

TO: All Interested Persons:

1. On September 14, 1978, the Department of Professional and Occupational Licensing published a notice of a proposed adoption of a rule concerning rules of discovery for contested cases at page 1355, 1978 Montana Administrative Register, issue number 11.

2. The Department has adopted the rule as proposed.

3. No comments or testimony were received. The Department has adopted the rule because such is mandated by the legislature under Section 82-4220 R.C.M. 1947. While the Department is entitled to adopt its own set of rules, for the sake of uniformity and because of the well studied and tested precedent established in the civil rules, the Department has elected to adopt them.

BEFORE THE BOARD OF ARCHITECTS

In the matter of the amendment) of ARM 40-3.10(6)-S10050 (5)) Standards of Professional Con-) duct)	NOTICE OF AMENDMENT OF ARM 40-3.10(6)-S10050 (5) STANDARDS OF PROFESSIONAL CONDUCT

TO: All Interested Persons:

1. On September 14, 1978, the Board of Architects published a notice of proposed amendment of ARM 40-3.10(6)-S10050(5) concerning solicitation of employment under standards of professional conduct at page 1356, 1978 Montana Administrative Register, issue number 11.

2. The Board has adopted the rule as proposed.

3. No comments or testimony were received. The Board has adopted the rule in response to a letter of August 4, 1978 from the Attorney General stating the sentence which was deleted in the rule was in violation of both state and federal anti-trust laws. Copies of the letter may be obtained from the Board of Architect.

ED CARNEY, DIRECTOR
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

Certified to the Secretary of State October 17, 1978.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 48-2.10(1)-S1010, concerning the definition of "accredited" as used in certification rules	NOTICE OF THE AMENDMENT OF RULE 48-2.10(1)-S1010

TO: All Interested Persons:

1. On August 10, 1978, the Board of Public Education published notice of a proposed amendment to rule 48-2.10(1)-S1010 concerning the definition of "accredited" as used in certification rules at page 1231 of the 1978 Montana Administrative Register, issue number 10.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule to make minor editorial changes to foster consistency in the certification system.

In the matter of the amendment of Rule 48-2.10(2)-S10020, concerning substitute teaching experience in experience verification.	NOTICE OF THE AMENDMENT OF RULE 48-2.10(2)-S10020

TO: All Interested Persons:

1. On August 10, 1978, the Board of Public Education published notice of a proposed amendment to Rule 48-2.10(2)-S10020, concerning substitute teaching experience in experience verification at page 1232 of the 1978 Montana Administrative Register, issue number 10.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule to make minor editorial changes to foster consistency in the certification system.

In the matter of the amendment of Rule 48-2.10(2)-S10050, concerning correspondence, extension and inservice credits.	NOTICE OF THE AMENDMENT OF RULE 48-2.10(2)-S10050

TO: All Interested Persons:

1. On August 10, 1978, the Board of Public Education published notice of a proposed amendment to Rule 48-2.10(2)-S10050, concerning correspondence, extension and inservice credits at page 1233 of the 1978 Montana Administrative Register, issue number 10.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule to make minor editorial changes to foster consistency in the certification system.

In the matter of the amendment of Rule 48-2.10(2)-S10060, concerning reinstatement of certificates.) NOTICE OF THE AMENDMENT OF RULE 48-2.10(2)-S10060

TO: All Interested Persons

1. On August 10, 1978, the Board of Public Education published notice of a proposed amendment to rule 48-2.10(2)-S10060 concerning the reinstatement of certificates at pages 1234-1235 of the 1978 Montana Administrative Register, issue number 10.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule to make minor editorial changes to foster consistency in the certification system.

In the matter of the amendment of Rule 48-2.10(6)-S10090, concerning endorsement of certificates.) NOTICE OF THE AMENDMENT OF RULE 48-2.10(6)-S10090

TO: All Interested Persons

1. On August 10, 1978, the Board of Public Education published notice of a proposed amendment to rule 48-2.10(2)-S10090 concerning endorsement of certificates at pages 1235-1236 of the 1978 Montana Administrative Register, issue number 10.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule to make minor editorial changes to foster consistency in the certification system.

In the matter of the amendment of Rule 48-2.10(10)-S10100, concerning Class 1 professional teaching certificates.) NOTICE OF THE AMENDMENT OF RULE 48-2.10(10)-S10100

TO: All Interested Persons

1. On August 10, 1978, the Board of Public Education published notice of a proposed amendment to rule 48-2.10(10)-S10100 concerning Class 1 professional teaching certificates at pages 1236-1238 of the 1978 Montana Administrative Register, issue number 10.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule to make minor editorial changes to foster consistency in the certification system.

In the matter of the amendment of Rule 48-2.10(10)-S10110, concerning Class 2 standard teaching certificates.) NOTICE OF THE AMENDMENT OF RULE 48-2.10(10)-S10110

TO: All Interested Persons

1. On August 10, 1978, the Board of Public Education published notice of a proposed amendment to Rule 48-2.10(10)-S10110 concerning Class 2 standard teaching certificates at pages 1238-1240 in the 1978 Montana Administrative Register, issue number 10

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule to make minor editorial changes to foster consistency in the certification system.

In the matter of the amendment of Rule 48-2.10(10)-S10120, concerning Class 3 administrative certificates.) NOTICE OF THE AMENDMENT OF RULE 48-2.10(10)-S10110

TO: All Interested Persons

1. On August 10, 1978, the Board of Public Education published notice of a proposed amendment to Rule 48-2.10(10)-S10120 concerning Class 3 administrative teaching certificates at pages 1241-1244 in the 1978 Montana Administrative Register, issue number 10.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule to make minor editorial changes to foster consistency in the certification system.

In the matter of the amendment of Rule 48-2.10(10)-S10140, concerning Class 5 provisional certificates.) NOTICE OF THE AMENDMENT OF RULE 48-2.10(10)-S10140

TO: All Interested Persons

1. On August 10, 1978, the Board of Public Education published notice of a proposed amendment to Rule 48-2.10(10)-S10140 concerning Class 5 provisional certificates at pages 1244-1247 in the 1978 Montana Administrative Register, issue number 10.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule to make minor editorial changes to foster consistency in the certification system.

In the matter of the amendment of Rule 48-2.10(1)-S1010 regarding Class 2 standard teaching certificates.) NOTICE OF THE AMENDMENT OF RULE 48-2.10(1)-S1010

TO: All Interested Persons

1. On July 27, 1978, the Board of Public Education published notice of a proposed amendment to Rule 48-2.10(1)-S1010 regarding secondary endorsement of teaching certificates at pages 1020-1021 in the 1978 Montana Administrative Register, issue number 8.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule so that small schools will have more flexibility in assigning teachers in that they will be able to assign both elementary and secondary endorsed teachers at the fifth and sixth grade levels.

In the matter of the amendment of Rule 48-2.10(1)-S1070 regarding substitute teaching.) NOTICE OF THE AMENDMENT OF RULE 48-2.10(1)-S1070

TO: All Interested Persons

1. On July 27, 1978, the Board of Public Education published notice of a proposed amendment to Rule 48-2.10(1)-S1070 regarding substitute teaching at page 1022 in the 1978 Montana Administrative Register, issue number 8.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule to clarify the use of substitute teachers by local school boards.

In the matter of the amendment of Rule 48-2.6(2)-S6000 regarding administrative assistants.) NOTICE OF THE AMENDMENT OF RULE 48-2.10(1)-S1070

TO: All Interested Persons

1. On July 27, 1978, the Board of Public Education published notice of a proposed amendment to Rule 48-2.6(2)-S6000 regarding administrative assistants at pages 1024-1025 in the 1978 Montana Administrative Register, issue number 8.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule because there is evidence that in schools this size, many administrative duties can be accomplished by an administrative assistant.

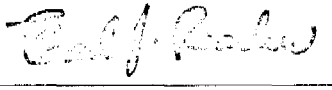
In the matter of the amendment of Rule 48-2.6(6)-S6090 regarding teaching assignments.) NOTICE OF THE AMENDMENT OF RULE 48-2.6(6)-S6090

TO: All Interested Persons

1. On July 27, 1978, the Board of Public Education published notice of a proposed amendment to Rule 48-2.6(6)-S6090 regarding teaching assignments at page 1026-1027 of the 1978 Montana Administrative Register, issue number 8.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule because it recognizes that in order to comply with the present standard, new teachers with different qualifications would have to be hired in some cases; that in order to avoid the necessity of terminating currently employed teachers, the Board would grant a five-year period during which positions created by attrition could be filled with new teachers with the requisite clarifications. The Board is also proposing this amendment to allow schools additional time to meet the provisions of the rule with the stipulation that they have a plan for complying as soon as possible.



CHAIRMAN
BOARD OF PUBLIC EDUCATION

Certified to the Secretary of State October 17, 1978.

DECLARATORY RULING
DEPARTMENT OF PUBLIC SERVICE REGULATION

In the Matter of the Proposed Residential Energy Efficiency Rider of PACIFIC POWER & LIGHT COMPANY.	))))	DECLARATORY RULING

On August 18, 1978, the Pacific Power and Light Company (PP&L or the Company) applied to this Commission for approval of the Company's proposed tariff rider and associated accounting and rate making treatment and a declaratory ruling.

With approval of this Commission, PP&L will implement a residential conservation program in which it will cause insulation and other weatherization material to be installed in the homes of qualifying PP&L customers. The Company will let each job for competitive bid and will make interest free loans to qualifying homeowners with repayment due at the time of ownership transfer.

All of PP&L's Montana Customers will eventually pay for this program through their electric rates. Under the rationale of the program, however, future energy costs will be lower because of the program than if PP&L secured the energy from new generating plants. PP&L will recover costs of the program by placing amounts paid to insulation and weatherization contractors in its rate base; operating expenses associated with the program, including Company labor, material costs and transportation will be charged to a deferred debits account and amortized over a ten year period.

The Company requested that the Montana Public Service Commission:

1. approve the Company's proposed efficiency rider pursuant to 70-113;

2. find the proposed service will not constitute undue preference, prejudice or discrimination in violation of Montana law, including R.C.M. 70-114;

3. approve the Company's proposed accounting and rate-making treatment of the costs associated with the proposed service; and

4. declare that the proposed installation of insulation or weatherization materials is a purpose for which the Company may issue securities under R.C.M. 70.117.1.

FINDINGS, CONCLUSIONS AND
MATTERS OFFICIALLY NOTICED

1. The Commission finds that the Company may institute this program in Montana without specific authorization or approval from this Commission; the Commission does understand, however, that it is in the Company's interest to gain as much assurance as possible that its shareholders will not be required to fund the program.

2. The Commission finds that Section 70-113, R.C.M. 1947, is not appropriate to this application because the Company is

not proposing new rates or rate changes at this time.

3. The Commission finds that Section 82-4218, R.C.M. 1947, "Declaratory Rulings by Agencies," authorizes it to dispose of the entire PP&L application for its weatherization program.

4. The Commission finds that a declaratory ruling is the most appropriate means by which to dispose of this application, since all other procedures available would result in considerable delay to its consideration of the application. It is in the best interest of PP&L's Montana customers that this program be available for as much of the 1978-1979 heating seasons as possible.

5. The Commission finds that it is the policy of the legislative and executive branches of Montana government, as well as of the Commission itself to encourage energy conservation by Montana citizens.

6. The Commission finds that Montana law allows utilities to make loans to customers for installation of energy conservation materials. Section 84-7405, R.C.M. 1947.

7. The Commission finds that PP&L's weatherization program is consistent with the State's policy to encourage energy conservation.

8. The Commission finds that energy made available through conservation efforts can be made available to all PP&L customers at a cost below energy generated by new plants.

9. The Commission finds that the Company's proposed cost/benefit criteria and the loan provisions of the program, reasonably assure that energy secured through the proposed weatherization measures will benefit all of PP&L's Montana customers, including those who do not participate directly in the program.

10. The Commission agrees with the Company that it is reasonable to limit the program at this time to single-family and duplex dwellings, since occupants of these dwellings constitute a unique class of customers and have the most homogeneity of the customer classes served by the Company. The Commission also finds that there is more information available regarding the energy conservation potential of this group than any other, and the Company can therefore, better identify and quantify costs and benefits of the program as proposed than would be possible if other groups were included.

RULING

This Commission, subject to the qualifications that it may not bind future Commissions and that it may not make rate determinations except under the contested case provisions of Section 82-4209 et. seq, R.C.M. 1947 and its rules of procedure, ARM 38-2.2(2)-P210 et. seq. makes the following rulings:

1. The Company's proposed Residential Energy Efficiency Rider will benefit all of PP&L's Montana customers and is

approved.

2. The proposed service will not constitute undue preference, prejudice or discrimination under Montana law, including Section 70-114, R.C.M. 1947 since there is a rational economic basis for the program's limitations and criteria for eligibility.

3. The Commission approves the proposed accounting and rate-making treatment of the costs associated with the proposed service, subject, however, to appropriate adjustments for tax benefits which may be available to the Company under Section 84-7405, R.C.M. 1947. The Commission interprets Montana law to allow the proposed treatment.

4. The Commission declares that the proposed installation of insulation or weatherization materials is a purpose for which the Company may issue securities under Section 70-117.1, R.C.M. 1947.

5. The Commission finds that the program, as proposed, is consistent with the intent of Section 84-7405, R.C.M. 1947, and is authorized by that statute.

CONDITIONS FOR APPROVAL

The Commission approves the proposed program on the condition that the following requirements are met:

1. All of PP&L's Montana customers who request the service and who qualify for the program under the limitations and criteria established in the Energy Efficiency Rider shall receive loans. PP&L shall do whatever is necessary to secure funding which is adequate to assure the full participation of qualifying customers who request the service.

2. PP&L shall report to the Commission on the progress of this program six months after the effective date of the Commission's approval, and every six months thereafter. These reports shall include:

(a) the number of Montana customers who have requested an energy analysis;
(b) the number of Montana customers who have qualified for a loan;
(c) the average amount of each loan;
(d) the total investment made by the Company for Montana loans;
(e) the total administrative cost of the program to the Company;
(f) the total estimated amount of energy saved;
(g) problems PP&L has encountered in implementing the program.

The Commission also requests that similar figures be supplied for the program as it is implemented throughout the PP&L system.

3. Approval of this program does not constitute "state action" so as to grant immunity from antitrust laws.

APPROVED BY THE COMMISSION October 3, 1978.

GORDON E. BOLLINGER, Chairman

THOMAS J. SCHNEIDER, Commissioner

GEORGE TURMAN, Commissioner

ATTEST:

Joyce Baumberger
Acting Secretary

(SEAL)

P. J. GILFEATHER, Commissioner
(Voting to Dissent)

JAMES R. SHEA, Commissioner
(Voting to Dissent)

VOLUME NO. 37 OPINION NO. 163

CREDIT UNIONS - Powers limited to those expressly or implicitly granted by statute;
CREDIT UNIONS - Operation of branch offices not authorized absent approval of Department;
CREDIT UNIONS - Administrative procedure, application for special order granting additional powers under Section 14-676, R.C.M. 1947;
SECTIONS - 14-603(2)(a), 14-603(5), 14-607(1), 14-611, 14-613, 14-614, 14-676, R.C.M. 1947.

HELD: State chartered credit unions are not authorized to open branch offices similar to those referred to in Section 5-1028, R.C.M. 1947, absent authorization from the Department of Business Regulation under Section 14-676, R.C.M. 1947.

3 October 1978

Mr. Kent Kleinkopf
Department of Business Regulations
805 North Main
Helena, Montana 59601

Dear Mr. Kleinkopf:

You have requested my opinion on the following question:

> May a state chartered credit union maintain a branch office or facility of the type spoken to in Section 5-1028, R.C.M. 1947?

Your question is somewhat unclear in that Section 5-1028 refers to two types of facilities: branch offices and remote electronic banking machines. However, your letter and memoranda focus on the power of credit unions to open branch offices, and I will therefore interpret your question as follows: Does a credit union organized under Title 14, Chapter 6, R.C.M. 1947, have the power to establish a branch office for the transaction of business with its members?

A credit union, like any other financial institution, is a creature of statute, possessing limited powers. See Iowa Credit Union League v. Iowa Dept. of Banking, ___ Iowa ___, 268 N.W.2d 165, 171 (1978). As a prior Attorney General's

Opinion noted in relation to banks, "the extent of its powers is measured not by what is prohibited but by what is granted by law." 16 OP. ATT'Y. GEN. NO. 191 (1935). The answer to your question therefore depends on whether the power to establish branch offices may be found among the powers granted, implicitly or explicitly, by the Montana Credit Union Act.

Initially, it is suggested that authority to branch may be inferred from Section 14-6-603(2)(a), which requires a credit union's Articles of Incorporation to include the location of its "principal place of business." In my opinion, however, the use of the term "principal place of business" is not sufficient, by itself, to mandate the conclusion that the Legislature intended to allow a credit union to establish other places of business. It should be noted that statutes relating to both banks and savings and loans use the phrase "principal place of business," even though neither entity may legally branch. See, e.g., Sections 5-214, 7-102, R.C.M. 1947. Further, the use of the phrase "principal place of business" in Section 14-603 is balanced by the provision of Section 14-607(1), which states: "A credit union may change its place of business within this state upon written notice to the department of Business Regulation.". (Emphasis added). This inconsistency suggests that the Legislature did not intend to convey any special meaning by the use of the word "principal" in Section 14- 603, and any suggestion that power to branch be inferred therefrom is ill-founded.

The powers of a credit union are set forth in Sections 14-613, 14-614. Section 14-613 is a listing of expressly granted powers. The power to establish branch offices is not among them. However, the Montana Credit Union Act also recognizes the existence of certain implied and incidental powers in Section 14-614:

> Incidental Powers. A credit union may exercise such incidental powers as are granted corporations organized under the laws of this state including those that are necessary to enable it to promote and carry on most effectively its purpose.

The statute expresses two concepts. The first clause states that a credit union is a corporation and that it possesses the "incidental" powers which exist in all corporations

organized under Montana law. Significantly, the statute does not grant full general corporate powers but only those that are incidental to the existence of the corporate entity regardless of its purpose. Cf. West's Cal. Fin. Code, Section 14807. These powers include the power to maintain perpetual existence, the power to hold and convey property for corporate purposes, the power to sue and be sued, the power to adopt a corporate seal, the power to make by-laws, and the power to receive and expel members. 6 W. Fletcher, Cyclopedia of Corporations, Section 2485 (Perm. Ed. 1968).

These powers are common to all corporations and they plainly do not include the power to branch. Both banks and savings and loan associations possess the incidentals of corporateness, and neither is empowered to branch under Montana law. It appears that the first clause of Section 14-614, relating to incidental powers, was placed in the act to ensure that the enumeration of powers in Section 14-613 would not be held to divest credit unions of any unenumerated incidental attributes of corporateness. It does not convey the power to establish branch offices.

The second clause of Section 14-614 provides that the powers granted shall include "those that are necessary to enable it to promote and carry on most effectively its purpose." This clause expresses the concept that in addition to expressly granted powers, credit unions possess certain powers which must necessarily be inferred therefrom if it is to achieve "most effectively" its corporate purpose of promoting thrift and establishing a source of credit for its members. The question is whether the power to open a branch office is among those implied powers.

The question appears to be one of first impression. The Montana Supreme Court has not construed the implied powers clause of the Montana Credit Union Act, and my research reveals no decisions on point from the four other states with similar statutory provisions. Ariz. Rev. Stat. Section 6-509(18). My research also discloses no cogent legislative history on the meaning of Section 14-614. However, a statute should be construed in light of the other portions of the act of which it is a part, with an eye toward harmonizing all parts of the act if possible. State ex rel. Malott v. Bd. of County Commissioners, 89 Mont. 37, 87, 269 P.1 (1931). Following this rule and reading Section 14-614 in light of the remainder of the Montana Credit Union Act, I hold that a credit union may not open a branch office for the transaction of business absent prior approval by the

Department of Business Regulation (hereinafter "the Department").

Unlike corporations organized for general business purposes, a credit union is a financial institution regulated in the public interest by an agency of state government. In order to incorporate, it must, inter alia, comply with technical requirements similar to those required of all corporations organized under the laws of Montana, viz. draft and file articles of incorporation and by laws, select a board of directors, etc. See, R.C.M. Section 14-603, cf. R.C.M. Sections 15-2248, 2249. Unlike general business corporations, however, credit unions, savings and loan associations and banks must make a further showing that they are organized on sound financial foundations and that their incorporation will serve the public interest. R.C.M. Section 14-603(5) (credit unions); 7-106 (savings and loan associations); 5-202 (banks). As a necessary element of its determination whether the public will benefit from the establishment of a credit union, the Department must inquire whether the proposed credit union has demonstrated a likelihood of success in its "proposed field of operation." Obviously, the Department must consider the competitive climate of the area in which the credit union will operate; if that climate is such that a new financial institution is unnecessary, or that success in the area is unlikely, it is incumbent on the Department to deny certification. The Credit Union Act further requires the Department to conduct periodic financial examinations or audits to ensure that the affairs of the credit union are competently managed. Section 14-611, R.C.M. 1947.

The rationale for the high degree of regulation is two-fold. A credit union is in the business of providing a source of credit at reasonable rates for those persons who invest their savings in the credit union. The Legislature has determined that due regard for the safety of the investor requires the exercise of regulatory control over the operation of the credit union itself. In a larger sense, however, the operation of a credit union impacts on the operation of the other credit unions, banks, and savings and loan associations in the area. The Department must also regulate with an eye toward protecting the investors in these other institutions.

Against this regulatory backdrop, it is clear that the power to branch is not implied by Section 14-614. The Department's regulatory control over the competition among sources

of credit would be severely curtailed if credit unions could establish branch offices at will without regard to the extent and quality of existing services. See 29 OP. ATT'Y GEN. NO. 2 (1961) which held that indiscriminate branching by savings and loan associations would weaken the regulatory control of the State over such enterprises. The Legislature did not intend to allow the Department's extensive regulatory power over financial institutions to be undermined by allowing credit union branch offices. Such power is antithetical to the most effective achievement of the purpose for which credit unions were authorized, and therefore may not be implied under Section 14-614.

It should be noted, however, that the Department does have the power, on a case by case basis, to allow credit unions, organized under Montana law, to branch. Section 14-676, R.C.M. 1947, provides:

> The director may authorize any credit union to engage in any activity in which such credit union could engage were it operating as a federal chartered credit union.... *** Upon receipt of a written request from any state chartered credit union, the director shall exercise such power by issuance of a special order therefor if he deems it reasonably required to preserve and protect the welfare of such an institution and promote the general economy of this State.

Since it is generally recognized that federally chartered credit unions may branch, see 12 CFR Section 740.3(a), the Department could, in its discretion, authorize a state credit union to do likewise upon written request if the interest of the state credit union and the economy of the State should so require. See also 37 OP. ATT'Y GEN. NO. 86 (1977).

The statute calls upon the director to make dual findings on each written request received under Section 14-676: (1) the activity for which authorization is sought is one which federal credit unions may undertake; and (2) the public interest would be served by a grant of authority. The statute necessarily implies that the director take evidence from interested parties on the factual questions involved, under a procedure similar to that followed by the department in an application for an original charter, with similar avenues of judicial review available from an adverse ruling. The provisions of the Montana Administrative Procedure Act

governing contested cases do not appear to be applicable, since a hearing is not expressly required by law. See Section 82-4202(3), R.C.M. 1947.

THEREFORE, IT IS MY OPINION:

> State chartered credit unions are not authorized to open branch offices similar to those referred to in Section 5-1028, R.C.M. 1947, absent authorization from the Department of Business Regulation under Section 14-676, R.C.M. 1947.

Very truly yours,

MIKE GREELY
Attorney General

MG/CDT/br

VOLUME NO. 37 OPINION NO. 164

CONTRACTORS - Applicability of Open Cut Mining Act to;
MINES AND MINING - Open Cut Mining Act, reclamation contract requirement of;
PUBLIC LANDS - Open Cut Mining Act, applicability to open cut mining operations conducted on;
UNITED STATES - Applicability of Open Cut Mining Act to agencies of;
SECTIONS - Title 50, chapter 15, R.C.M. 1947.

HELD: 1. The Open Cut Mining Act, Title 50, Chapter 15, R.C.M. 1947, does not apply to federal agencies conducting open cut mining operations on private or federal land absent congressional authorization.

2. The Open Cut Mining Act does apply to private contractors mining on private land and unless conflicting federal legislation applies, the Act also applies to private contractors mining on federal land. Any private contractor to whom the Act applies is required to enter into a contract pursuant to Section 59-1507, R.C.M. 1947.

4 October 1978

Leo Berry, Jr., Commissioner
Department of State Lands
Capitol Station
Helena, Montana 59601

Dear Mr. Berry:

You have requested my opinion on the following questions:

1. Does the Open Cut Mining Act, Title 50, chapter 15, R.C.M. 1947, apply to federal agencies conducting open cut mining operations on private or federal land; and, if so, are such agencies required to enter into contracts pursuant to section 50-1507, R.C.M. 1947?

2. Does the Open Cut Mining Act apply to private contractors, mining on federal or private land,

who supply materials and labor on federal projects such as the Libby Dam Regulating Project; and, if so, are such private contractors required to enter into contracts pursuant to section 50-1507, R.C.M. 1947?

The Open Cut Mining Act (hereinafter the Act), sections 50-1501 through 50-1517, R.C.M. 1947, provides for the reclamation and conservation of lands subjected to open cut bentonite, clay, scoria, phosphate rock, sand or gravel mining. Section 50-1516 exempts surface mining operations regulated by Title 50, chapter 12, R.C.M. 1947, and section 50-1517 allows for the exemption of operations conducted on federal lands subject to federal reclamation controls which equal or exceed controls mandated by the Act. Whether the open cut operation is conducted on federal or private land, the Act itself applies unless the operation is exempt under the above provisions.

Persons engaged in and controlling the specified open cut operations are required by the Act to enter into a reclamation contract with the State Board of Land Commissioners. §50-1517, R.C.M. 1947. This contract requirement applies to "a natural person or a firm, association, partnership, cooperative or corporation or any department, agency or instrumentality of the state or any governmental subdivision or any other entity whatever." §50-1504(8), R.C.M. 1947. On its face, the contract requirement applies to federal agencies and to private contractors who supply labor and material on federal projects.

When a state seeks to regulate federal agencies or the use of federal property, however, the state's regulatory scheme alone is not determinative. The state's reach must finally be measured in light of constitutional principles governing federal-state power relationships. While the kinds of operations addressed by your questions are within the scope of the Act itself, they may be shielded from state regulation as a matter of constitutional law. The discussion of those operations necessarily involves consideration of constitutional constraints that can limit or preclude an exercise of state regulatory power authorized by state law.

1. Federal agencies conducting open cut mining operations on private or federal lands. In M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), the Supreme Court ruled federal supremacy embodied in the Supremacy Clause, U.S. Constitution, Article VI, chapter 2, modified the

taxing power vested in state governments, exempting federal operations from state taxation. Subsequent decisions have invoked this intergovernmental immunities doctrine to prevent or limit state regulation of federal instrumentalities in other contexts. A postal worker was found to be immune from state driver's license requirements in Johnson v. Maryland, 254 U.S. 51 (1920), and federal transportation procurement bids were found to be free from state minimum rate schedules in United States v. Georgia Public Service Commission, 371 U.S. 285 (1962), and Public Utilities Commission of California v. United States, 355 U.S. 534 (1958).

In a leading case, Mayo v. United States, 319 U.S. 441 (1943), state regulations were held inapplicable to a federal fertilizer distribution plan. Mayo should not be read to support categorical immunity from state regulation of federal operations, but it does underscore the court's willingness to use the Supremacy Clause to block state authority over federal operations.

Another limitation on state regulatory power is grounded in the Property Clause, U.S. Const. Art. IV, §3, cl. 2, which provides, "Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Standing alone, the Property Clause grants a federal proprietorship over Art. IV lands, not complete sovereignty. Accordingly, except with regard to the creation or recognition of private rights in such lands, which remain an exclusively federal concern, Art. IV lands are subject to the legislative jurisdiction of the States. Federal preemption of this jurisdiction should occur only when the federal property is used to effectuate a constitutionally enumerated federal power. See, Wilson v. Cook, 327 U.S. 474 (1946); Colorado v. Tell, 208 U.S. 228 (1925).

A recent decision indicates the traditional view of Art. IV property power may be too restrictive. In Kleppe v. New Mexico, 426 U.S. 529 (1976), the Supreme Court ruled the Property Clause entrusts Congress with broad power over Art. IV land. Under Kleppe's holding, federal power over such lands is more like sovereignty than a proprietorship and state power is correspondingly diminished.

Taken together, the Property Clause, the Supremacy Clause and the doctrine of intergovernmental immunities would seem to preclude enforcement of the Open Cut Mining Act's

contract requirement as to federal mining operations. A similar conclusion was reached in 37 OP. ATT'Y GEN. NO. 15 (1977), where the Montana Natural Streambed and Land Preservation Act was held to be inapplicable to projects undertaken by the federal government either on or off federal lands.

As that opinion noted, the federal government's immunity from state regulation may be waived and the States invited to assert their jurisdiction. However, the intent to do so must be clear and unambiguous, and any authority so granted will be narrowly construed. See, Kentucky ex rel. Hancock v. Ruckelshaus, (6th Cir. 1974) 497 F.2d 1172, aff'd sub. nom. Hancock v. Train, 426 U.S. 167 (1976); Minnesota v. Hoffman (8th Cir. 1976) 543 F.2d 1198.

I therefore conclude that Montana's Open Cut Mining Act does not apply to federal agencies conducting open cut mining operations on private or federal land absent Congressional authorization. However, cases construing the scope of authority granted the States also reflect a tendency on the part of the courts to approve federal compliance with substantive requirements of state regulations while denying that federal agencies must comply with procedural requirements. Absent congressional consent to state regulation, it is arguable whether this distinction would be accepted by a court asked to construe the applicability of the Open Cut Mining Act to federal operations in Montana. In any event it is questionable whether a federal agency could be required to enter into a reclamation contract pursuant to section 50-1507, R.C.M. 1947.

2. Private contractors who supply materials and labor on federal projects conducting open cut operations on private or federal lands. The constitutional constraints discussed above do not protect a private contractor mining on private lands, and the fact such a contractor supplies materials and labor on a federal project does not cloak him with immunity from state regulation. If the operation is on private land and is open cut mining as defined in section 50-1504, R.C.M. 1947, the Act applies.

If the private contractor is mining on federal lands he may or may not be spared from compliance with the Act, depending on whether state regulation directly conflicts with federal legislation or policy. If not, the Act applies. Penn Dairies v. Milk Control Commission, 318 U.S. 257 (1943). If there is such a conflict, however, the Act would not apply.

Paul v. United States, 372 U.S. 245 (1963); Kleppe v. New Mexico, 416 U.S. 529 (1976).

An Idaho decision, State ex rel. Andrus v. Clik, 97 Id. 791, 554 P.2d 969 (1976), includes an analysis of federal pre-emption in the context of a private operation conducted on federal land. The Idaho Board of Land Commissioners sought an injunction against a dredge mining operation conducted on Art. IV lands without a permit required by state law. The court found there was no federal preemption, reasoning that since there was neither a direct conflict between state and federal regulation nor a pervasive federal regulatory scheme, the state retains jurisdiction over federal lands. That decision emphasized the following language from the National Environmental Quality Improvement Act of 1970, 42 U.S.C 4371:

> The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality ***. The primary responsibility for implementing this policy rests with state and local governments.

Congressional policy expressly favors state control of environmental policy. Thus, private contractors operating on federal lands should be held to the Open Cut Mining Act's contract requirement unless there is a conflicting federal law. The Act itself provides that federal lands subject to federal reclamation controls may be exempt from the Act (section 50-1517, R.C.M. 1947), so only if an applicable federal law set reclamation standards lower than those of the Act would a conflict arise.

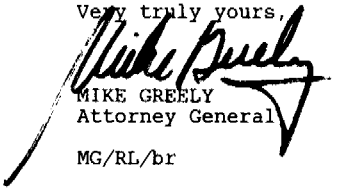
THEREFORE, IT IS MY OPINION:

1. The Open Cut Mining Act, Title 50, chapter 15, R.C.M. 1947, does not apply to federal agencies conducting open cut mining operations on private or federal land absent congressional authorization.

2. The Open Cut Mining Act does apply to private contractors mining on private land, and unless conflicting federal legislation applies, the Open Cut Mining Act also applies to private contractors mining on federal land. Any private contractor to

whom the Act applies is required to enter into a contract pursuant to section 50-1507, R.C.M. 1947.

Very truly yours,



MIKE GREELY
Attorney General

MG/RL/br