MONTANA ADMINISTRATIVE REGISTER

1978 ISSUE NO. 17

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 17

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NOTICE SECTION

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BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 12-2.6(1)-S650 relating to priorities for special permits	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULE 12-2.6(1)-S650

TO: All Interested Persons:

1. Public hearings on the proposed amendment will be scheduled at the Fish and Game regional office locations, as follows:

Region 1 - Kalispell	9 Jan. 1979	7:00 p.m.
Region 2 - Missoula	8 Jan. 1979	7:00 p.m.
Region 3 - Bozeman	23 Jan. 1979	7:30 p.m.
Region 4 - Great Falls	10 Jan. 1979	7:00 p.m.
Region 5 - Billings	15 Jan. 1979	7:00 p.m.
Region 6 - Glasgow	17 Jan. 1979	7:00 p.m.
Region 7 - Miles City	16 Jan. 1979	7:00 p.m.
Region 8 - Helena	18 Jan. 1979	7:00 p.m.

Dates and times are tentative depending on weather. Meeting places will be announced in local newspapers, except for the meeting in Helena, which will be held in the Fish & Game commission room, 1420 E. 6 Avenue, Helena.

2. The proposed amendment would eliminate the current priority system for limited moose, mountain sheep, and mountain goat permit drawings to afford a fair and equal opportunity each season for applicants to obtain a permit to hunt for those animals.

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

12-2.6(1)-S650 SPECIAL PERMITS - PRIORITIES

(1) There is hereby established a priority system for hunters applying for limited special moose, sheep, and goat permits. Hunters who have received five (5) or more annual consecutive unsuccessful notices for the same species are eligible to apply for priority status for that species by enclosing the five (5) or more annual consecutive unsuccessful application notices in the current year's application envelope, marking the number of years priority claimed on the outside of the envelope, and mailing to the Department of Fish and Game, Helena, Montana.

Notices must be for the same species in consecutive years and all issued to the person applying. Unsuccessful notices are not transferable.

Priority applications will be given first consideration in the order of number of unsuccessful notices submitted. When the number of priority

applications exceeds the number of permits to be issued, a drawing will be held to determine successful priority applicants.

(2) This priority system remains effective and the department shall utilize it through the 1979 hunting season. Thereafter, this priority system will be null and void.

4. The proposed amendment is but one of several possibilities. It is presented as a starting point for discussion and is not intended to represent the only alternative in this matter. There are no wildlife resource problems involved in this rule; rather, the problem is of distribution of a limited supply of highly desirable hunting permits to an increasing number of interested applicants. Information on other alternatives may be obtained by contacting the persons listed below.

5. Interested persons may present their data, views, or arguments either orally or in writing at the hearing; or submit same to the following no later than January 24, 1979:

Tom Hay, Reg. Supervisor-490 N.Meridian Rd,Kalispell 59901
Jim Ford " 3309 Brooks, Missoula 59801
LeRoy Ellig " Rt 3,Box 274, Bozeman 59715
Nels Thoreson " Rt 4,Box 243, Great Falls 59405
Roger Fliger " 1125 Lake Elmo Dr,Billings 59101
Dick Johnson " R R 1 - 210, Glasgow 59230
Keith Seaburg " Box 430, Miles City 59301
Robert Wambach, Director-1420 E 6 Ave,Helena 59601

6. Hearing officers will be designated to preside over and conduct the hearings.

7. The authority of the agency to make the proposed amendment is based on section 26-103.1, R.C.M. 1947.

Joseph J. Klabunde, Chairman
Montana Fish and Game Commission

Certified to Secretary of State December 5, 1978

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 restricting the emissions of volatile organic compounds in Yellowstone County.	NOTICE OF PUBLIC HEARING FOR ADOPTION OF A RULE RESTRICTING THE EMISSIONS OF VOLATILE ORGANIC COMPOUNDS IN YELLOWSTONE COUNTY

1. On or about January 19, 1979, at 9:00 a.m., or as soon thereafter as practicable, a public hearing will be held in the basement auditorium of the Social and Rehabilitation Services Building, Capitol Complex, 111 N. Sanders, Helena, Montana, to consider the adoption of a new rule restricting the emissions of volatile organic compounds in Yellowstone County.

2. The proposed rule does not replace or modify any section currently found in the Administrative Rules of Montana.

3. The proposed rule provides as follows:

16-2.14(1)-S____ VOLATILE ORGANIC COMPOUNDS, RESTRICTIONS IN YELLOWSTONE COUNTY

(1) General provisions.

(a) Definitions. For the purpose of this rule, the following definitions apply:

"Approved" means approved by the department.

"Capture system" means the equipment used to contain, capture, or transport a pollutant to a control device.

"Facility" means an identifiable process, operation, or piece of process equipment.

"Hydrocarbon" means any organic compound of carbon and hydrogen only.

"VOC incinerator" means a combustion apparatus designed for high temperature operation in which solid, semisolid, liquid, or gaseous combustible wastes are ignited and burned efficiently and from which the solid and gaseous residues contain little or no combustible material.

"Intermittent vapor control system" means a vapor control system that employs an intermediate vapor holder to accumulate vapors displaced from tanks during filling. The control device treats the accumulated vapors only during automatically controlled cycles.

"Loading rack" means an aggregation or combination of gasoline loading equipment arranged so that all loading outlets in the combination can be connected to a tank truck or trailer parked in a specified loading space.

"Organic material" means a chemical compound of carbon excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate.

"Reid vapor pressure" means the absolute vapor pressure of volatile crude oil and volatile nonviscous petroleum liquids except liquified petroleum gases as determined by

American Society for Testing and Materials, Part 17, 1973, D-323-72 (Reapproved 1977).

"Shutdown" means the cessation of operation of a facility or emission control equipment.

"Source" means any structure, building, facility, equipment, installation or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control).

"Startup" means the setting in operation of a source or emission control equipment.

"True vapor pressures" means the equilibrium partial pressure exerted by a petroleum liquid as determined in accordance with methods described in American Petroleum Institute Bulletin 2517, "Evaporation Loss from Floating Roof Tanks," 1962.

"Vapor collection system" means a vapor transport system which uses direct displacement by the liquid loaded to force vapors from the tank into a vapor control system.

"Vapor control system" means a system that prevents release to the atmosphere of at least 90% by weight of organic compounds in the vapors displaced from a tank during the transfer of gasoline.

"Volatile organic compound" (VOC) means any compound of carbon that has a vapor pressure greater than 0.1 millimeters of mercury at standard conditions excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, methane, ethane,1,1,1-trichloroethane (methyl chloroform), Trichlorotrifluoroethane (Freon 113).

(b) Applicability.

(i) This rule shall apply to:

(A) any facility located within Yellowstone County having the potential to emit over fifteen pounds of VOC's a day or more than 1.4 kilograms (3 pounds) of VOC's per hour;

(B) any source located within Yellowstone County which has the potential to emit 100 tons or more per year of VOC's, regardless of whether individual facilities within the source are subject to this rule pursuant to subsection (b)(i)(A) above.

(ii) This rule shall not apply to:

(A) Sources used exclusively for chemical or physical analysis or determination of product quality and commercial acceptance provided:

(I) the operation of the source is not an integral part of the production process; and

(II) the emissions from the source do not exceed 363 kilograms (800 pounds) in any one month; and

(III) the exemption is approved in writing by the department.

(c) Required and prohibited acts.

(i) No owner or operator of a source of VOC's shall

cause or authorize the operation of any source subject to this rule, except as provided in section (3), unless:

(A) the operation and emissions of the source comply with the requirements of section (2), except as allowed under subsection (1)(e); and

(B) a Standard Operating Procedure, which includes a detailed description of process and emission control equipment startup, operating, and shutdown procedures for minimization of VOC release, has been submitted to and approved by the department; and

(C) a Standard Maintenance Procedure, which provides for the operation of the VOC source as required by (A) and (B) of this subsection, has been submitted to and approved by the department.

(d) Recordkeeping, reporting, monitoring.

(i) The owner or operator of any volatile organic compound emission source or control equipment shall maintain, as a minimum, the following records:

(A) details of all activities relating to any compliance schedule under subsection (3);

(B) details of all malfunctions under subsection (1)(e);

(C) details of startups and shutdowns under subsection (1)(c);

(D) all testing conducted under subsection (1)(d)(ii);

(E) all monitoring conducted under paragraphs (d)(iii)(A) and (B) of this subsection.

(ii) The owner or operator of any volatile organic compound emission source or control equipment shall submit to the department, as a minimum, annual reports detailing the nature, specific sources, and total annual quantities of all volatile organic compound emissions. However, the department may require more frequent reports where necessary to accomplish the purposes of this rule.

(iii) The owner or operator of any volatile organic compound emission source or control equipment shall:

(A) install, operate, and maintain process and/or control equipment monitoring instruments or procedures as necessary to comply with paragraphs (1)(d)(i) and (ii); and

(B) maintain, in writing, data and/or reports required by the department relating to monitoring instruments or procedures adequate to document the compliance status of the volatile organic compound emission source or control equipment to the satisfaction of the department.

(iv) Copies of all records and reports of this section shall be retained by the owner or operator for a minimum of three years after the date on which the record was made.

(v) Copies of all records and reports under this section shall be made available to the department upon written request, within ten days of such a request.

(e) **Malfunctions, Breakdowns, Upsets.** In the event of a process or equipment malfunction resulting in emissions in

excess of those permitted by the rule, the owner or operator of the source shall comply with the applicable provisions of ARM 16-2.14(1)-S14000.

(2) Specific emission limitations and operating requirements.

(a) Disposal of volatile organic compounds.

(i) No person may cause or authorize the disposal of more than 5.7 liters (1.5 gallons) of any materials containing more than 5.7 liters (1.5 gallons) of any VOC in any one day in a manner that would permit their evaporation into the atmosphere.

(ii) Paragraph (i) of this subsection includes, but is not limited to, the disposal of volatile organic compounds which must be removed from volatile organic compound control devices so as to maintain their required operating efficiency.

(b) Petroleum liquid storage.

(i) For the purpose of subsection (2)(b), the following definitions apply:

"Condensate" means hydrocarbon liquid separated from natural gas which condenses due to changes in the temperature and/or pressure and remains liquid at standard conditions.

"Crude oil" means a naturally occurring mixture which consists of hydrocarbons and/or sulfur, nitrogen, and/or oxygen derivatives of hydrocarbons and which is a liquid at standard conditions.

"Custody transfer" means the transfer of produced crude oil and/or condensate, after processing and/or treating in the producing operations, from storage tanks or automatic transfer facilities to pipelines or any other forms of transportation.

"External floating roof" means a storage vessel cover in an open top tank consisting of a double deck or pontoon single deck which rests upon and is supported by the petroleum liquid being contained and is equipped with a closure seal or seals to close the space between the roof edge and the tank shell.

"Petroleum liquids" means crude oil, condensate, and any finished or intermediate products manufactured or extracted in a petroleum refinery.

(ii) Notwithstanding subsection (1)(a) of this rule, or rule ARM 16-2.14(1)-S14050, subsection (2)(b) will apply in accordance with subsection (3), to all fixed roof storage vessels with capacities greater than 150,000 liters (39,000 gallons) containing volatile petroleum liquids whose true vapor pressure is greater than 10.5 kilo Pascals (kPa) (1.52 psia).

(iii) Subsection (2)(b) will not apply to volatile petroleum vessels:

(A) equipped with external floating roofs before the effective date of this rule.

(B) having capacities less than 1,600,000 liters (416,000 gallons) used to store produced crude oil and

condensate prior to lease custody transfer.

(iv) No owner or operator of an affected source under paragraph (2)(b)(ii) shall permit the use of such source unless:

(A) the source has been retrofitted with an internal floating roof equipped with a closure seal, or seals, to close the space between the roof edge and tank wall; or

(B) the source is maintained such that there are no visible holes, tears, or other openings in the seal or any seal fabric or materials; and

(C) all openings, except stub drains are equipped with covers, lids, or seals such that:

(I) that cover, lid, or seal is in the closed position at all times except when in actual use; and

(II) automatic bleeder vents are closed at all times except when the roof is floated off or landed on the roof leg supports, and

(III) rim vents, if provided, are set to open when the roof is being floated off the roof leg supports or at the manufacturers recommended setting; and

(D) routine inspections are conducted through roof hatches once per month; and

(E) a complete inspection of cover and seal is conducted whenever the tank is emptied for nonoperational reasons or once per year; and

(F) records are maintained in accordance with subsection (1)(d) that shall include:

(I) reports of the results of inspections conducted under paragraphs (D) and (E) of this subsection; and

(II) a record of the average monthly storage temperature and true vapor pressures of volatile petroleum liquids stored; and

(III) records of the throughput quantities and types of volatile petroleum liquids for each storage vessel.

(c) Bulk gasoline plants.

(i) For the purpose of subsection (2)(c), the following definitions apply:

"Botton filling" means the filling of a tank truck or stationary storage tank through an opening that is flush with the tank bottom.

"Bulk gasoline plant" means a gasoline storage and distribution facility with an average daily throughput of less than 76,000 liters (20,000 gallons) per day which receives gasoline from bulk terminals by trailer transport, stores it in tanks, and subsequently dispenses it via account trucks to local farms, businesses, and service stations.

"Gasoline" means any petroleum distillate having a Reid vapor pressure of 27.8 kPa (4 pounds) or greater.

"Splash filling" means the filling of a tank truck or stationary storage tank through a pipe or hose whose discharge opening is above the surface level of the liquid in the tank

being filled.

"Submerged filling" means the filling of a tank truck or stationary tank through a pipe or hose whose discharge opening is entirely submerged when the pipe normally used to withdraw liquid from the tank can no longer withdraw any liquid.

"Vapor balance system" means a combination of pipes or hoses which create a closed system between the vapor spaces of an unloading tank and a receiving tank such that vapors displaced from the receiving tank are transferred to the tank being unloaded.

(ii) Notwithstanding subsection (1)(b), subsection (2)(c) will apply, in accordance with section (3), to the unloading, loading, and storage facilities of all bulk gasoline plants and all tank trucks or trailers delivering or receiving gasoline at bulk gasoline plants.

(iii) This subsection will not apply to:

(A) stationary surface storage tanks of less than 2,000 liters (528 gallons) capacity; or

(B) sources exempted under subsection (1)(b)(ii)(A).

(iv) Except as provided under paragraph (iii) of this subsection, no owner or operator of a bulk gasoline plant may permit stationary storage tanks to load or unload gasoline unless each tank is equipped with a vapor balance system as described under paragraph (vii) of this subsection and approved by the department; and:

(A) each tank is equipped with a submerged fill pipe, approved by the department; or

(B) each tank is equipped with a fill line whose discharge opening is flush with the bottom of the tank.

(v) Except as provided under paragraph (iii) of this subsection, no owner or operator of a bulk gasoline plant, tank truck or trailer may permit the loading or unloading of tank trucks or trailers at a bulk gasoline plant unless each tank truck or trailer is equipped with a vapor balance system as described under paragraph (vii) of this subsection and approved by the department; and:

(A) equipment is available at the bulk gasoline plant to provide for the submerged filling of each tank truck or trailer; or

(B) each tank truck or trailer is equipped for bottom filling.

(vi) Notwithstanding subsection (1)(c), no owner or operator of a bulk gasoline plant, tank truck or trailer may prmit the transfer of gasoline between tank truck or trailer and stationary storage tank unless:

(A) the transfer is conducted in accordance with paragraphs (iv) and (v) of this subsection; and

(B) the vapor balance system is in good working order and is connected and operating; and

(C) tank truck or trailer hatches are closed at all times during loading operations; and

(D) there are no leaks in the tank trucks' or trailers' pressure/vacuum relief valves and hatch covers, nor the truck tanks or storage tanks or associated vapor and liquid lines during loading or unloading; and

(E) the pressure relief valves on storage vessels and tank trucks are set to release at no less than 4.8 kPa (0.7 psi) or the highest possible pressure (in accordance with state and local fire codes).

(vii) Vapor balance systems required under paragraphs (iv) and (v) of this subsection shall consist of the following major components:

(A) a vapor space connection on the stationary storage tank equipped with fittings which are vapor tight and will automatically and immediately close upon disconnection so as to prevent release of organic material; and

(B) a connecting pipe or hose equipped with fittings which are vapor tight and will automatically and immediately close upon disconnection so as to prevent release of organic material; and

(C) a vapor space connection or the tank truck or trailer equipped with fittings which are vapor tight and will automatically and immediately close upon disconnection so as to prevent release of organic material.

(viii) Notwithstanding subsection (2)(a), no owner or operator of a bulk gasoline plant may permit gasoline to be spilled, discarded in sewers, stored in open containers or handled in any other manner that would result in evaporation.

(d) Bulk gasoline terminals.

(i) For purpose of this subsection, the following definition applies:

(Bulk gasoline terminal" means a gasoline storage facility which receives gasoline from refineries primarily by pipeline and delivers gasoline to bulk gasoline plants or to commercial accounts primarily by tank truck, and has a daily average throughput of more than 76,000 liters (20,000 gallons) of gasoline.

(ii) Notwithstanding subsection (1)(b), this section will apply, in accordance with section (3), to bulk gasoline terminals and the appurtenant equipment necessary to load the tank truck or trailer compartments.

(iii) No person may load gasoline into any tank trucks or trailers from any bulk gasoline terminal unless:

(A) the bulk gasoline terminal is equipped with a vapor control system, capable of complying with paragraph (iv) of this subsection, properly installed, in good working order, in operation and consisting of one of the following:

(I) an absorber or condensation system which processes and recovers at least 90 percent by weight of all vapors and gasses from the equipment being controlled; or

(II) a vapor collection system which directs all vapors to a fuel gas system; or

(III) a control system, demonstrated to have control efficiency equivalent to or greater than paragraphs (I) or (II) above and approved by the department; and

(B) all displaced vapors and gasses are vented only to the vapor control system; and

(C) a means is provided to prevent liquid drainage from the loading device when it is not in use or to accomplish complete drainage before the loading device is disconnected; and

(D) all loading and vapor lines are equipped with fittings which make vapor-tight connections and which close automatically when disconnected.

(iv) Sources affected under paragraph (iii)(A) of subsection (2)(d) may not allow mass emissions of volatile organic compounds from control equipment to exceed 80 milligrams per liter (4.7 grains per gallon) of gasoline loaded.

(v) Sources affected under paragraph (ii) of subsection (2)(d) may not:

(A) allow gasoline to be discarded in sewers or stored in open containers or handled in any manner that would result in evaporaton; nor

(B) allow the pressure in the vapor collection system to exceed the tank truck or trailer pressure relief settings.

(e) Petroleum refinery sources.

(i) for the purpose of this subsection, the following definitions apply:

"Accumulator" means the reservoir of a condensing unit receiving the condensate from the condenser.

"Condenser: means any heat transfer device used to liquefy vapors by removing their latent heats of vaporization. Such devices include, but are not limited to, shell and tube, coil, surface, or contact condensers.

"Forebays" means the primary sections of a wastewater separator.

"Hot well" means the reservoir of a condensing unit receiving the warm condensate from the condenser.

"Refinery fuel gas" means any gas which is generated by a petroleum refinery process unit and which is combusted, including any gaseous mixture of natural gas and fuel gas.

"Turnaround" means the procedure of shutting a refinery unit down after a run to do necessary maintenance and repair work and putting the unit back on stream.

"Vacuum producing system" means any reciprocating, rotary, or centrifugal blower or compressor, or any jet ejector or device that takes suction from a pressure below atmospheric and discharges against atmospheric pressure.

"Vapor recovery system" means a system that prevents release to the atmosphere of no less than 90 percent by weight of organic compounds emitted during the operating of any transfer, storage, or process equipment.

"Wastewater (oil/water" separator" means any device or

piece of equipment which utilizes the difference in density between oil and water to remove oil and associated chemicals from water, or any device, such as a flocculation tank, clarifier, etc., which removes petroleum derived compounds from wastewater.

(ii) Notwithstanding subsection (1)(b), subsection (2)(e) will apply, in accordance with section (3), to vacuum producing systems, wastewater separators, and process unit turnarounds at petroleum refining sources.

(A) The owner or operator of any vacuum producing systems at a petroleum refinery may not permit the emission of any noncondensable volatile organic compounds from the condensers, hot wells or accumulators of the system.

(B) The emission limit under paragraph (ii)(A) of this section shall be achieved by:

(I) piping the noncondensable vapors to a firebox or VOC incinerator; or

(II) compressing the vapors and adding them to the refinery fuel gas.

(C) The owner or operator of any wastewater (oil/water) separators at a petroleum refinery shall:

(I) provide covers and seals approved by the department, on all separators and forebays; and

(II) equip all openings in covers with lids or seals such that the lids or seals are in the closed position at all times except when in actual use.

(D) Notwithstanding section (3), no later than three months after the effective date of this rule, the owner or operator of a petroleum refinery shall develop and submit to the department for approval a detailed procedure for minimization of volatile organic compound emissions during process unit turnaround. As a minimum the procedure shall provide for:

(I) depressurization venting of the process unit or vessel to a vapor recovery system, flare or firebox; and

(II) no emission of volatile organic compounds from a process unit or vessel until its internal pressure is 136 kPa (19.7 psia) or less; and

(III) recordkeeping of the following items in accordance with subsection (1)(d):

- every date that each process unit or vessel is shut down; and
- the approximate vessel volatile organic compound concentration when the volatile organic compounds were first discharged to the atmosphere; and
- the approximate total quantity of volatile organic compounds emitted to the atmosphere.

(f) Cutback asphalt.

(i) For the purpose of subsection (2)(f), the following definitions apply:

"Asphalt" means a dark brown to black cementitious material (solid, semisolid, or liquid in consistency) in which the

predominating constituents are bitumens which occur in nature as such or which are obtained as residue in refining petroleum.

"Cutback asphalt" means asphalt cement which has been liquefied by blending with petroleum solvents (diluents). Upon exposure to atmospheric conditions the diluents evaporate, leaving the asphalt cement to perform its function.

"Emulsified asphalt" means an emulsion of asphalt cement and water which contains a small amount of an emulsifying agent; a heterogeneous system containing two normally immiscible phases (asphalt and water) in which the water forms the continuous phase of the emulsion and minute globules of asphalt form the discontinuous phase.

"Penetrating prime coat" means an application of low viscosity liquid asphalt to an absorbent surface. It is used to prepare an untreated base for an asphalt surface. The prime penetrates the base and plugs the voids, hardens the top, and helps bind it to the overlaying asphalt course. It also reduces the necessity of maintaining an untreated base course prior to placing the asphalt pavement.

(ii) Notwithstanding subsection (1)(b), subsection (2)(f) will apply to the manufacture and use of cutback asphalts.

(A) No person may cause or authorize the manufacture, mixing, storage, use of application of cutback asphalts without approval of the department as provided in paragraph (b) below;

(B) The department may approve the manufacture, mixing, storage, use or application of cutback asphalts where:

(I) long-life stockpile storage is necessary; or

(II) the use or application at ambient temperatures less than 10°C (50° F) is necessary; or

(III) the cutback asphalt is to be used solely as a penetrating prime coat.

(3) Compliance schedules.

(a) Process and emission control equipment installation.

(i) Except as provided under subsections (3)(c) or (d), the owner or operator of a volatile organic compound emission source proposing to install and operate volatile organic compound emission control equipment and/or replacement process equipment to comply with section (2) shall adhere to the increments of progress contained in the following schedule:

(A) Final plans for the emission control system and/or process equipment must be submitted within six months of the effective date of this rule.

(B) Contracts for the emission control system and/or process equipment must be awarded or orders must be issued for purchase of component parts to accomplish emission control within twelve months of the effective date of this rule.

(C) Initiation of on-site construction or installation of the emission control and/or process equipment must begin within fifteen months from the effective date of this rule.

(D) On-site construction or installation of the emission control and/or process equipment must be completed

within twenty-one months from the effective date of this rule.

(E) Final compliance, determined in accordance with section (4), shall be achieved within twenty-two months from the effective date of this rule.

(F) Any owner or operator of a stationary emission source subject to the compliance schedule of this section shall certify to the department within five days after the deadline for each increment of progress, whether the required increment of progress has been met.

(b) Equipment modification.

(i) Except as provided under subsections (3)(c) or (d), the owner or operator of a volatile organic compound emission source proposing to comply with section (2) by modification of existing processing equipment shall adhere to the increments of progress contained in the following schedule:

(A) Final plans for process modification must be submitted within six months from the effective date of this rule.

(B) Contracts for process modifications must be awarded or orders must be issued for the purchase of component parts to accomplish process modification within eight months from the effective date of this rule.

(C) Initiation of on-site construction or installation of process modifications must be completed within sixteen months from the effective date of this rule.

(D) On-site construction or installation of process modifications must be completed within sixteen months from the effective date of this rule.

(E) Final compliance, determined in accordance with section (4), shall be achieved within eighteen months from the effective date of this rule.

(F) Any owner or operator of a stationary source subject to the compliance schedule of this section shall certify to the department within five days after the deadline for each increment of progress, whether the required increment of progress has been met.

(c) Alternate compliance schedule.

(i) Nothing in section (3) shall prevent the department from promulgating a separate schedule for any source if it finds that the application of a compliance schedule in subsections (3)(a) or(b) would be technologically infeasible.

(ii) NOthing in section (3) shall prevent the owner or operator of a volatile organic compound source from submitting to the department a proposed alternative compliance schedule provided:

(A) the proposed alternative compliance schedule is submitted within two months from the effective date of this rule;

(B) the final control plans for achieving compliance with section (2) are submitted simultaneously;

(C) the alternative compliance schedule contains the same increments of progress as the schedule for which it is

proposed.

(D) sufficient documentation and certification from appropriate suppliers, contractors, manufacturers, or fabricators is submitted by the owner or operator of the volatile organic compound source to justify the dates proposed for the increments of progress.

(E) All alternative compliance schedules proposed or promulgated under this section shall provide for compliance of the volatile organic compound emission source with section (2) as expeditiously as practicable but not later than December 31, 1982.

(F) Any schedule approved under this section may be revoked at any time if the source does not meet the increments of progress stipulated.

(d) Exception. Sections (3)(a), (b) and (c) will not apply to sources which are in compliance with section (2) by the effective date of this rule, as determined and certified to the satisfaction of the department by two months from the effective date of this rule.

(4) Test methods and procedures.

(a) General provisions.

(i) The owner or operator of any VOC compound source required to comply with section (2) shall, at his own expense, demonstrate compliance as requested in this section or an alternative method approved by the department.

(ii) No VOC emission compliance testing results will be accepted unless the department has been notified as provided in paragraph (iii) below.

(iii) Any person proposing to conduct a volatile organic compound emissions test shall notify the department, in the manner set forth under paragraph (iv) below, of the intent to test not less than thirty days before the proposed initiation of the tests so that a department representative may observe the test.

(iv) Any person notifying the department of a proposed volatile organic compound emissions test shall include as part of notification the following minimum information:

(A) a statement indicating the purpose of the proposed test and the applicable subsection of section (2); and

(B) a detailed description of the facility to be tested; and

(C) a detailed description of the test procedures, equipment, and sampling sites; and

(D) a timetable, setting forth the dates on which:

(I) the testing will be conducted; and

(II) preliminary test results will be reported (not later than fifteen days after sample collection); and

(III) the final test report will be submitted (not later than thirty days after completion of on-site sampling); and

(E) proposed corrective actions should the tests show noncompliance.

(e) For compliance determination, the owner or operator of any VOC source shall be responsible for providing:

(A) Sampling ports, pipes lines, or appurtenances for the collection of samples and data required by the test procedure; and

(B) Safe access to the sample and data collection locations; and

(C) light, electricity, and other utilities required for sample and data collection.

(b) Determination of volatile organic compound emission control system efficiency.

(i) The provisions of this subsection are generally applicable, in accordance with subsection (4)(a), to any test method employed to determine the collection or control efficiency of and device or system designed, installed, and operated for the purpose of reducing volatile organic compound emissions.

(ii) The following procedures shall be included in any efficiency determination:

(A) The volatile organic compound containing material shall be sampled and analyzed in a manner approved by the department such that the quantity of emissions that could result from the use of the material can be quantified.

(B) The efficiency of any capture system used to transport the volatile organic compound emissions from their point of origination to the control equipment shall be computed using accepted engineering practice and in a manner approved by the department.

(C) Samples of the volatile organic compound containing gas stream shall be taken simultaneously at the inlet and outlet of the emission control device in a manner approved by the department.

(D) The total combustible carbon content of the samples shall be determined by a method approved by the department.

(E) The efficiency of the control device shall be expressed as the fraction of total combustible carbon content reduction achieved.

(F) The volatile organic compound mass emission rate shall be the sum of emissions from the control device, emissions not collected by the capture system and capture system losses.

4. Volatile organic compounds are constituents in the formation of photochemical oxidants (smog), which may have significant deleterious effects on human health. Yellowstone County has been identified as an area in which the levels of photochemical oxidants exceed the national ambient air standards for those pollutants. Federal law requires the state to establish controls sufficient to lower pollutants in a nonattainment area such as Yellowstone County below the relevant ambient standard. In order to meet that requirement, the

proposed rule restricts the use and handling of materials containing volatile organic compounds, provides procedures for approving control measures, and establishes testing and reporting requirements.

5. Interested parties may submit their data, views or arguments concerning the proposed rule orally or in writing either to Jon Bolstad, Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana, 59601 (phone 449-3454) prior to the hearing, or at the hearing itself.

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

7. The authority of the agency to make the proposed rule is based on Sections 69-3909, 69-3910, and 69-3913, R.C.M. 1947.

John W. Bartlett

JOHN W. BARTLETT, Chairman

Certified to the Secretary of State December 5, 1978

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

In The Matter of the Adoption of New Rules Regarding the Consideration of Interim Utility Rate Increases	))))	NOTICE OF PUBLIC HEARING FOR ADOPTION OF PROPOSED NEW RULES FOR INTERIM UTILITY RATE INCREASES

TO: All Interested Persons

The notice of proposed agency action published in the Montana Administrative Register on October 26, 1978, is renoticed as follows because one person has requested a public hearing.

1. On January 4, 1979, at 10:00 a.m., a public hearing will be held in the Public Service Commission's offices, 1227 11th Avenue, Helena, Montana to consider proposed adoption of new rules relating to the procedure for its consideration of requests for interim (temporary) rate increases.

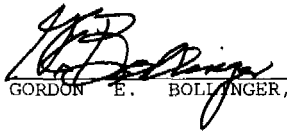
2. The rules proposed for adoption are found in the 1978 Montana Administrative Register Issue No. 14 at pages 1471-1473. Copies of the proposed rules are available at the office of the Public Service Commission, 1227 11th Avenue, Helena, Montana 59601.

3. The purpose of the proposed rules is to effectuate a clear understanding of Commission policy regarding temporary rate increases and to establish a timely and orderly procedure for the consideration of such cases.

Under the proposed rules, standards are established for the type of supporting material that must accompany a request for an interim rate increase; criteria for consideration of a request for an interim rate increase are also elaborated in the proposed rules.

4. Interested persons may submit their data, views or arguments concerning the proposed rules orally, or in writing, at the hearing. Comments may also be submitted in writing to the Commission, at the above address, prior to January 11,1979.

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



GORDON E. BOLLINGER, Chairman

CERTIFIED TO THE SECRETARY OF STATE December 5, 1978.

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF PODIATRY EXAMINERS

IN THE MATTER of the Proposed) Adoption of a new rule setting) an Annual Renewal Fee)	NOTICE OF PROPOSED ADOPTION OF A RULE SETTING AN ANNUAL RENEWAL FEE

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On January 13, 1979, the Board of Podiatry Examiners proposes to adopt a rule concerning an annual renewal fee for podiatrists.

2. The proposed rule will read as follows:

"The annual renewal fee for a podiatrist whether actively engaged or not, in the practice of podiatry in the state of Montana shall be $25."

3. The rule is proposed to be adopted to comply with the interpretation of the hearing examiner in the case of W.E. Cashmore, M.D., before the Board of Medical Examiners and to implement the authority granted the Board in Section 66-605 R.C.M. 1947.

4. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing to the Board of Podiatry Examiners, Lalonde Building, Helena, Montana 59601, no later than January 11, 1979.

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 Podiatry Examiners, Lalonde Building, Helena, Montana, 59601, no later than January 11, 1979.

6. If the Board receives requests for a public hearing on the proposed adoption from more than 10% of the 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 82A-1605, R.C.M. 1947.

BOARD OF PODIATRY EXAMINERS
W.W. WILKINSON, ACTING CHAIRMAN

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

Certified to the Secretary of State, December 5, 1978.

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF HORSE RACING

IN THE MATTER of the Proposed Adoption of a new rule setting annual fees.	NOTICE OF PROPOSED ADOPTION OF A NEW RULE SETTING ANNUAL FEES

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On Jaunary 13, 1979, the Board of Horse Racing proposes to adopt a new rule setting annual fees.

2. The proposed adoption will read as follows:

"The following fees shall be charged annually:

(1) Owner	$10.00
(2) Trainer	10.00
(3) Temporary Owner	10.00
(4) Occupational	
(a) Announcer	10.00
(b) Exercise Boy	5.00
(c) Gate Admission Seller	3.00
(d) Gate Attendant	3.00
(e) Groom	3.00
(f) Horseman's Bookkeeper	3.00
(g) Hot Walker	3.00
(h) Valet	6.00
(i) Photo Manager	10.00
(j) Office Personnel	3.00
(k) Outrider	6.00
(l) Photo Employee	4.00
(m) Plater	10.00
(n) Pony Boy	6.00
(o) Security Staff	3.00
(p) Starter, Assistant	4.00
(q) Stable Foreman	6.00
(r) Stable Superintendent	4.00
(s) Tip Sheet Seller	10.00
(t) Veterinarian, Practicing	10.00
(u) Veterinarian, Assistant	3.00
(v) Watchman	2.00
(w) Others not listed	3.00
(5) Authorized Agents	10.00
(6) Mutuel	
(a) Pari-mutuel Manager	10.00
(b) Auditor	10.00
(c) Calculator Operator	10.00
(d) Totalizor Operator	10.00
(e) Pari-mutuel Employee	3.00
(7) Jockey	10.00
(8) Jockey Agent	10.00
(9) Jockey - Apprentice	10.00
(10) Stable Name Registration	10.00

(11)	Racing Official	
(a)	Custodian of Jockey's Room	$ 5.00
(b)	Clerk of Scales	5.00
(c)	Chief of Security	10.00
(d)	Director or Coordinator of Racing	10.00
(e)	Handicapper	6.00
(f)	Identifier	6.00
(g)	Paddock Judge	6.00
(h)	Placing Judge	3.00
(i)	Patrol Judge	5.00
(j)	Racing Secretary	10.00
(k)	Racing Secretary, Assistant	6.00
(l)	Steward	10.00
(m)	Starter	10.00
(n)	Track Veterinarian	10.00
(o)	Track Superintendent	6.00
(p)	Timer	3.00
(12)	Track Tote Fee to be Paid by Pari-mutuel Operator	10.00 per day
(13)	Not Requiring Licenses but Requiring Identification [Wives, children, duplicate (lost i.d. cards)]	2.00
(14)	Track License Fee	10.00"

3. The rule is proposed to be adopted to comply with the interpretation of the hearing examiner in the case of W. E. Cashmore, M.D., before the Board of Medical Examiners and to implement the authority granted the Board in Section 62-505 R.C.M. 1947.

4. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing to the Board of Horse Racing, Lalonde Building, Helena, Montana 59601, no later than January 11, 1979.

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 Horse Racing, Lalonde Building, Helena, Montana, 59601,no later than January 11, 1979.

6. If the Board receives requests for a public hearing on the proposed adoption from 25 or more 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 62-505 R.C.M. 1947.

BOARD OF HORSE RACING
DALE MAHLUM, CHAIRMAN

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

Certified to the Secretary of State, December 5, 1978.

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF HORSE RACING

IN THE MATTER of the Proposed Amendments of ARM 40-3.46(6)-S4660 Definitions, sub-section (1); ARM 40-3.46(6)-S4690 Racing Officials, sub-section (d)(ii) and sub-section (i); ARM 10-3.46(6)-S46000 Occupational Licenses, sub-sections (h) and (z)(a1); ARM 40-3.46(6)-S46010 General Conduct of Racing, sub-sections (30), (56) and (59); ARM 40-3.46(6)-S46020 Medication, sub-section (12)(d),(e) and (f); ARM 40-3.46(6)-S46040 Pari-Mutuel Operations, Sub-section (18)(b) and sub-section (21)(a).	) NOTICE OF PROPOSED AMENDMENTS OF ARM 40-3.46(6)-S4660 DEFINITIONS; ARM 40-3.46(6)-S46090 RACING OFFICIALS; ARM 40-3.46(6)-S46000 OCCUPATIONAL LICENSES; ARM 40-3.46(6)-S46010 GENERAL CONDUCT OF RACING; ARM 40-3.46(6)-S46020 MEDICATION; ARM 40-3.46(6)-S46040 PARI-MUTUEL OPERATIONS NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On January 13, 1978, the Board of Horse Racing proposes to amend rules ARM 40-3.46(6)-S4660 Definitions, sub-section (1); ARM 40-3.46(6)-S4690, Sub-section (d)(ii) and sub-section (i) concerning racing officials; ARM 40-3.46(6)-S46000, sub-sections (h) and (z)(a1) concerning occupational licenses; ARM 40-3.46(6)-S46010, sub-sections (30), (56) and (59) concerning general conduct of racing; ARM 40-3.46(6)-S46020, sub-section (12)(d),(e) and (f) concerning medication; and ARM 40-3.46(6)-S46040, sub-sections (18)(b) and (21)(e) concerning pari-mutuel operations.

2. The proposed amendment to 40-3.46(6)-S4660 adds a new sub-section (1)(j) and re-letters the present (j) and all remaining sub-sections thereafter and will read as follows:

"(j) BREAKAGE - is the odd cents over any multiple of 10 cents in the amount calculated on a dollar basis of the pay-off computation made on a wagering pool."

3. The reason for the proposed change is to clarify to the public and horsemen what breakage is.

4. The proposed amendment to 40-3.46(6)-S4690 is to delete sub-section (1)(d)(ii) in its entirety and amend sub-section (1)(i) to read as follows:

"(i) No horse shall carry more than ~~five (5)~~ seven (7) pounds overweight without first being approved by the stewards."

5. The reason for the proposed change is because the 7 pound overweight rule is in effect in rule 40-3.46(6)-S46000 (e1) page 40-187, but this rule on page 40-176 was not changed to conform.

6. The proposed amendment to ARM 40-3.46(6)-S46000 (h) deletes the present language in sub-section (1)(h) in its entirety and replaces it with the following language:

"(h) Applicant for license shall fill out, complete, and submit the application to the board licensing

secretary on the track, accompanied with the appropriate fee. The validity of that license is subject to the approval of the application by the state steward. The state pari-mutuel supervisor shall approve all pari-mutuel applications. The licensing secretary shall forward the application and a copy of the receipt to the board office, along with a copy of that day's deposit. The licensing secretary shall make a deposit at the end of each race day. At the time of receipt of the application and fee, the licensing secretary on the track, shall issue to the applicant an identification card which shall serve as the license."

7. The proposed amendment to ARM 40-3.46(6)-S46000 also deletes (10)(z)(al) in its entirety.

8. The reason for the proposed amendment stated in 6. above is because it is impossible to comply with the existing rule as the licensing must be done on the tracks in order for an applicant to receive the license the day he applies. Since the Board is now licensing over 4,000 individuals a year, it would be impossible for the state office to handle the licensing by mail.

9. The reason for the proposed amendment stated in 7. above is that it is a duplication of (10)(r) of the same rule.

10. The proposed amendment to ARM 40-3.46(6)-S46010 will amend sub-section (30); add a new section (c) under sub-section (56); amend sub-section (59)(1) and add a new section (y) under sub-section (59) and will read as follows: (new matter underlined, deleted matter interlined)

"(30) No trainer may enter more than two horses in a purse race or overnight event. ~~A trainer may enter and start two horses in a purse race or overnight event of separate ownership.~~ When making a double entry in the same ownership or trainership, the owner or trainer must express a preference, and in no case may two horses start in the same ownership or trainership to the exclusion of a single entry."

"(56)(c) Any horse failing to start or finish in any race shall not share in the purse distribution of that race."

"(59)(1) All claims shall be deposited in the claiming box at least 10 minutes before each post time. Any exception to this rule must be made by the board of stewards and posted in the racing office before the meet starts."

"(59)(y) When a horse is claimed, all of its conditions accompany the claim."

11. The reason for the amendment of sub-section (30) is that this rule would prevent the coupling of horses for betting purposes if there were enough single ownership or trainership entries to fill the race.

The reason for the additions of (c) to sub-section (56) and (y) to sub-section (59) is that there are no rules specifically covering these situations. These rules will standardize and clarify the procedure throughout the state.

The reason for the amendment of (59)(l) is to clarify that claims may be made 10 minutes before each post time and not at the first post time of the day as the old rule stated. There was confusion on the tracks this year regarding this rule.

12. The proposed amendment of ARM 40-3.46(6)-S46020 will delete (d), (e), and (f) under sub-section (12) in their entirety and replace them with a new sub-section (d) which will read as follows:

"(d) As a result of the evidence gathered, the board of stewards shall have the authority to fine and/or suspend or revoke the license of a trainer up to the limits allowed in Section 66-508, R.C.M. 1947. If for any reason the stewards determine the matter should be heard by the Board of Horse Racing, they have the option of imposing such sanctions as they see fit and referring the matter for further action to the Board of Horse Racing."

13. The reason for the proposed amendment is that the rule as now written makes it mandatory that the Stewards refer drug violations cases to the Board. The Board feels that the stewards should have authority to make final determination, subject to the right of appeal, if the stewards feel the circumstances are proper. Therefore this rule change will allow stewards to do so and will not require them to refer the matter unless in their judgement it is necessary. As before, this change will not affect the right of the licensee to appeal the stewards' decision.

14. The proposed amendment of ARM 40-3.46(6)-S4660 amends sub-section (18)(b) and (21)(a). The proposed amendments will read as follows: (new matter underlined, deleted matter interlined)

"(18)(b) Twin Quin tickets will be sold only at Twin Quin windows by the licensee ~~for $2.00~~."

"(21)(a) Effective January 2, 1977, the payor of a pari-mutuel payoff that is over $1,000 and 300 to 1 odds must withhold federal income tax on the total winnings payment at a 20 percent rate."

15. The proposed amendment to (18)(b) is proposed because twin quin tickets are now $3.00 and may vary from year to year.

The proposed amendment to (21)(a) is being made to comply with federal law.

16. Interested parties may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Horse Racing, Lalonde Building, Helena, Montana 59601, no later than January 11, 1979.

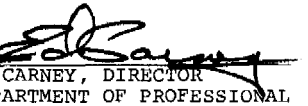
17. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally

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 Horse Racing, Lalonde Building, Helena, Montana 59601, no later than January 11, 1979.

18. If the Board receives requests for a public hearing on the proposed amendments from 25 or more 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.

19. The authority of the Board to make the proposed amendments is based on Section 66-505 R.C.M. 1947.

BOARD OF HORSE RACING
DALE MAHLUM, CHAIRMAN

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

Certified to the Secretary of State, 12-5, 1978.

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF MEDICAL EXAMINERS

IN THE MATTER of the Proposed Adoption of a rule setting recertification fees for basic Emergency Medical Technicians and adoption of a rule setting Annual license fees for physicians	NOTICE OF PROPOSED ADOPTION OF RULES SETTING RECERTIFICATION FEES FOR BASIC EMERGENCY MEDICAL TECHNICIANS AND SETTING ANNUAL LICENSE FEES FOR PHYSICIANS NO PUBLIC HEARING CONTEMPLATED

To: All Interested Persons:

1. On January 13, 1978, the Board of Medical Examiners proposed to adopt rules concerning recertification fees for basic emergency medical technicians and annual license fees for physicians.

2. The proposed rule for recertification for basic emergency medical technicians is to read as follows:

"Recertification fee for basic emergency medical technician shall be $15.00"

3. The reason for the proposed adoption is to comply with the interpretation of the hearing examiner in the case of W.E. Cashmore, M.D. before the Board of Medical Examiners and to implement the authority granted the Board in Section 69-7008, R.C.M. 1947.

4. The proposed adoption of a rule setting annual license fees for physicians will read as follows:

"(1) The annual license fee for a physician actively engaged in the practice of medicine on a permanent certificate shall be $50.

(2) The annual license fee for a physician not actively engaged in the practice of medicine shall be $50."

5. The reason for the proposed adoption is to comply with the interpretation of the hearing examiner in the case of W.E. Cashmore, M.D. before the Board of Medical Examiners and to implement the authority granted the Board in Section 66-1042 R.C.M. 1947.

6. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing to the Board of Medical Examiners, Lalonde Building, Helena, Montana 59601, no later than January 11, 1979.

7. 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 Medical Examiners, Lalonde Building, Helena, Montana 59601, no later than January 11, 1979.

8. If the Board receives requests for a public hearing on the proposed adoption from 10% or more or 25 or more of the 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.

9. The authority of the Board to make the proposed adoption is based on Sections 66-1017 and 69-7008 R.C.M. 1947.

BOARD OF MEDICAL EXAMINERS
LLOYD L. GARRELS, D.O., PRESIDENT

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

Certified to the Secretary of State, December 5, 1978.

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

IN THE MATTER of the Proposed Amendment of ARM 40-3.82(6)-S8280 Examination, Sub-section (c) and ARM 40-3.82(6)-S8290 Renewals	NOTICE OF PROPOSED AMENDMENT OF ARM 40-3.82(6)-S8280 EXAMINATIONS AND ARM 40-3.82(6)-S8290 RENEWALS NO PUBLIC HEARING CONTEMPLATED

To: All Interested Persons:

1. On January 13, 1979, the Board of Plumbers proposes to amend ARM 40-3.82(6)-S8280 concerning examinations and ARM 40-3.82(6)-S8290 to provide for an annual renewal fee.

2. ARM 40-3.82(6)-S8280 is proposed to be amended by adding a new section (i) under (1)(c) and will read as follows:

"(i) Examinations papers may be reviewed in the Board office for the period of 30 days immediately following the examination date only. Note taking will not be allowed during the time of review."

3. The reason for the proposed adoption is that the Board has in the past had requests from individuals to review their failed examinations the day or so prior to re-examination. The Board feels that this allows the individual to study his past examination, rather than relying on his abilities and knowledge which through the experience requirement he should have. By studying a past examination, the Board cannot guarantee they are protecting the public health and safety, as the individual is not reviewing the code,under which he will be working once licensed, in order to pass the examination.

4. ARM 40-3.82(6)-S8280 is proposed to be amended by adding new sub-sections (2) and (3) and renumbering the present (2) as (4) and will read as follows:

"(2) The annual renewal fee for a master plumber shall be $50.00.

(3) The annual renewal fee for a journeyman plumber shall be $10.00."

5. The reason for the proposed amendment is that Section 66-2405 R.C.M. 1947 provides for a maximum renewal fee and allows the Board to set the fee within that maximum. The Board has reviewed its cost of operation and determined that the above stated fees are necessary and adequate to cover those costs.

6. Interested parties may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Plumbers, Lalonde Building, Helena, Montana 59601, no later than January 11, 1979.

7. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally 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 Plumbers, Lalonde Building, Helena, Montana, 59601, no later than January 11, 1979.

8. If the Board receives requests for a public hearing

on the proposed amendments from more than 10% or 25 or more 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 sections 66-2405 and 66-2409 R.C.M. 1947.

BOARD OF PLUMBERS
WALTER E. TYNES, CHAIRMAN

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

Certified to the Secretary of State, December 5, 1978.

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

In the matter of the adoption of six rules pertaining to reimbursement for skilled nursing and intermediate care services and repeal 46-2.10(18)-S1140A, 46-2.10(18)-S1140B, 46-2.10(18)-S1140C, 46-2.10(18)-S1140D, 46-2.10(18)-S1140E, 46-2.10(18)-S1140F, 46-2.10(18)-S1140G, 46-2.10(18)-S1140H, 46-2.10(18)-S1140I, 46-2.10(18)-S1140J.	NOTICE OF PUBLIC HEARING ON THE ADOPTION OF SIX RULES PERTAINING TO REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES

TO: All interested Persons

1. On January 11, 1979, at 9:00 a.m., a formal rulemaking hearing pertaining to Section 82-4216 RCM 1947, will be held in the Auditorium of the State Department of Social and Rehabilitation Services, 111 Sanders Street, Helena, Montana, to consider the adoption of six rules pertaining to reimbursement for skilled nursing and intermediate care services.

2. The proposed rules succeed all rules governing reimbursement for skilled nursing and intermediate care, currently found in the Administrative Rules of Montana.

3. The rules proposed to be repealed are on pages 94.7H through 94.7Q of the Administrative Rules of Montana.

4. The proposed rules provide as follows:

RULE I REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, CLOSEOUT OF PRIOR RULES SINCE APRIL 1, 1978 AND TRANSITION

(1) The rules in effect between April 1, 1978 and March 31, 1979, provide for determining prospective rates based on costs represented in cost reports ending March 31, 1978. The Department will process and settle the March 31, 1978, cost reports and provide the appropriate reimbursement for the period April 1, 1978 through March 31, 1979.

(2) The prospective rates determined under rules in effect between April 1, 1978 and March 31, 1979, are hereby modified to allow for an inflationary adjustment not anticipated when the April 1, 1978 rules were established. The prospective rates established for April, 1978, will be adjusted October 1, 1978, to reflect the changes in the CPI and MPI during the six months following April 1, 1978, that were not anticipated in the 7.5 percent adjustment percentage determined in Rule 46-2.10(18)-S11450D(2)(a)(i)(ab) of the April 1, 1978 rules. The annualized adjustment percentage to be effective October 1, 1978, has been determined to be 9.2 percent. This percentage will be multiplied by the average of per diem adjusted operating costs as determined in Rule 46-2.10(18)-S11450D(2)(a)(i)(aa) of the April 1, 1978, rules

to determine the amount of the inflation adjustment. This amount will be added to each provider's per diem adjusted operating cost as determined in Rule 46-2.10(18)-S11450D(2)(a)(i)(aa) of the April 1, 1978, rules which, in turn, is added to per diem property costs as determined in Rule 46-2.10(18)-S11450D(2)(b)(i) of the April 1, 1978, rules to yield the prospective rate effective October 1, 1978.

(3) Beginning April 1, 1979, the new prospective rate described in Rules II through VI will be implemented.

RULE II REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, PURPOSE AND DEFINITIONS

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

The purpose of the following rules is to meet the requirements of Title XIX including Section 249 of Public Law 92-603 and 42 CFR 450, while treating the eligible recipient, the provider of services, and the Department fairly and equitably.

(2) As used in these rules governing nursing home care reimbursement the following definitions apply:

(a) "CPI" means the All Items figure from the Consumer Price Index for all Urban Consumers published monthly by the Bureau of Labor Statistics, U.S. Department of Labor.

(b) "MPI" means the Medical Care component of the CPI.

(c) "Department" means the Montana Department of Social and Rehabilitation Services.

(d) "Facility" means a long-term care facility which provides skilled nursing or intermediate care, or both to two or more persons and which is licensed as such by the Montana Department of Health and Environmental Sciences.

(e) "Provider Group" means the classification of providers by reference to their operation of a free-standing nursing home, a combined hospital and nursing home, or a facility licensed and serving the mentally ill or retarded, for purposes of determining cost limits.

(f) "HIM 15" means Provider Reimbursement Manual, Health Insurance Manual 15, Part I, 1967, as updated from time to time.

(g) "HIM 18" means the Audit Manual for Extended Care Facilities under the Health Insurance for the Aged Act, Title XVIII, as updated from time to time.

(h) "Nursing care services" means skilled or intermediate nursing care as defined in rules for nursing home care in ARM 46-2.10(18)-S11443 and S11444.

(i) "Owner" means any person, agency, corporation, partnership or other entity which has an ownership interest, including a leasehold or rental interest, in assets used to provide nursing care services pursuant to an agreement with

the Department.

(j) "Provider" means any person, agency, corporation, partnership or other entity which has entered into a contract with the Department for the providing of nursing care services.

(k) "Administrator" means the person, including an owner, salaried employee, or other provider, with day-to-day responsibility for the operation of the facility. In the case of a facility with a central management group, the administrator, for the purpose of these rules, may be some person (other than the titled administrator of the facility), with day-to-day responsibility for the nursing home portion of the facility. In such cases, this other person must also be a licensed nursing home administrator.

(l) "Related parties" for purposes of interpretation hereunder, shall include the following:

(i) An individual shall be deemed a related party to his spouse, ancestors, descendants, brothers and sisters, or the spouses of any of the above, and also to any corporation, partnership, estate, trust, or other entity in which he or a related party has a substantial interest or in which there is common ownership.

(ii) A substantial interest shall be deemed an interest directly or indirectly, in excess of ten percent (10%) of the control, voting power, equity, or other beneficial interest of the entity concerned.

(iii) Interests owned by a corporation, partnership, estate, trust, or other entity shall be deemed as owned by the stockholders, partners, or beneficiaries.

(iv) Control exists when an individual or entity has the power, directly or indirectly, whether legally enforceable or not, to significantly influence or direct the actions or policies of another individual or entity, whether or not such power is exercised.

(v) Common ownership exists when an individual has substantial interests in two or more providers or entities serving providers.

(m) "Fiscal year" and "fiscal reporting period" both mean the facility's Internal Revenue tax year.

(n) "Property Costs" are depreciation, and interest on property.

(o) "Operating costs" are the difference between total allowable cost and property costs.

(p) "Certificate of Need" is the authorization to proceed with the making of capital expenditures under Section 1122, Title XI of the Social Security Act.

(q) "New facility" means an entirely newly constructed facility which has not provided nursing care services long enough to have a cost report with a complete audit as provided under Rule IV(6) covering a twelve-month fiscal reporting period.

(r) "New provider" means a provider who acquires ownership or control of a skilled nursing or intermediate care facility whether by purchase, lease, rental agreement, or in any other way, subsequent to the effective date of this rule.

(s) "Date of interest" is the date to be used in determining changes in the prospective rate. When computing changes in the CPI the dates of interest are the beginning date of a prospective rate period and the ending date of a prospective rate period. The date of interest related to adding a CPI/MPI adjustment factor to cost per day is the beginning date of a prospective rate period.

(t) References to laws and regulations refer to citations current as of January 31, 1978, and shall be deemed to include all successor provisions.

RULE III REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, PARTICIPATION REQUIREMENTS

The skilled nursing and intermediate care facilities participating in the Montana Medicaid program shall meet the following basic requirements to receive payments for services:

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

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

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

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

(5) Accept, as payment in full for all operating and property costs, the amounts calculated and paid in accordance with the reimbursement method set forth in these rules.

RULE IV REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, REIMBURSEMENT METHOD AND PROCEDURES

(1) Reimbursable Cost. Reimbursable cost is the amount the Department pays for nursing home services provided to Medicaid patients. Reimbursable cost for the applicable period is the prospective rate times Medicaid patient days.

(2) Prospective Rates. Prospective rates are determined as follows and shall be announced no later than the beginning date of the period for which the prospective rate is to be effective:

(a) The prospective rate for each facility is the sum of its cost per day (see Rule IV(2)(b)), a CPI/MPI adjustment factor (see Rule IV(2)(c)), a maximum-return-over-cost factor (see Rule IV(2)(d), and a performance incentive factor (see Rule IV(2)(e)). The prospective rates are subject to an adjusted-cost-per-day limit (See Rule IV(2)(f)) and to private

pay limitations (see Rule IV(2)(g)). Prospective rates are effective for periods beginning on or after April 1, 1979, and will be updated by the CPI/MPI adjustment factor at the beginning of each six-month period thereafter.

(b) Cost per day is the allowable cost for a facility divided by related total patient days. If the occupancy rate is less than 90 percent, related total patient days will be computed on the basis of a 90 percent occupancy rate. Allowable cost is determined from each facility's most recent fiscal year cost report ending on or before November 30, 1977. For facilities that do not have a fiscal year cost report ending on or before November 30, 1977, allowable cost is determined from that facility's most recent fiscal year cost report available at the time that facility's initial prospective rate is being determined and deemed acceptable for the purposes of rate determination.

(c) The CPI/MPI adjustment factor is an amount that is added to cost per day at a date of interest to reflect changes in the CPI and MPI. This factor is determined by deriving the mean cost per day for each provider group using costs per day determined in Rule IV(2)(b) after such costs per day have been adjusted by the CPI and MPI to a common date. Eighty percent of the mean cost per day is deemed attributable to operating costs. The mean operating cost per day is multiplied by a percentage based 2/3 on the CPI change between two dates of interest and 1/3 on the MPI change between the same two dates of interest to yield the CPI/MPI adjustment factor. The change in the CPI and MPI is determined by using the index established for two months previous to the date of interest. For example, to determine the CPI/MPI adjustment factor to be applied to prospective rates beginning on October 1, 1979, the index for the months ending January 31, 1979 and July 31, 1979, would be used.

(d) The maximum return over cost is 20 percent of allowable cost. Cost reports with periods ending April 1, 1979, and reviewed according to Rule V(6) will be evaluated for the difference between the reimbursable cost paid during the cost reporting period and the allowable cost determined for the cost report. Any amount of the difference exceeding 20 percent of allowable cost will be converted to a per diem amount. This amount shall be subtracted from the cost per day as adjusted by Rule IV(2)(c) for each subsequent six-month rate determination period until the results of the next review of the facility's cost reports according to Rule V(6) determine a new maximum-return-over-cost factor.

(e) The performance incentive factor is determined by a facility's relation to the 80th percentile of costs per day for its provider group. If the facility's cost per day is at or above the 80th percentile, its performance incentive factor is zero. If the facility's cost per day is less than the 80th percentile, the performance incentive factor is 50 percent of

the difference between the 80th percentile of all costs per day in its provider group and its cost per day up to $1.50 per patient day.

(f) The adjusted-cost-per-day limit is the maximum prospective rate that will be allowed any facility. This limit is the cost per day as adjusted by Rule IV(2)(c) that is applicable to the facility that is at the 80th percentile for its provider group.

(g) The prospective rate for any facility shall not exceed private pay limitations, except that a state or county facility charging nominally is not subject to the private pay limitation. The lowest scheduled charges for similar nursing care services to private paying patients in effect at any time during the period for which the prospective rate applies shall be used when determining whether the prospective rate is limited or not. The provider shall be responsible for notifying the Department immediately if or when the prospective rate exceeds the private pay rate.

(h) Prospective rates shall be adjusted for property cost increases needed for nursing care services implemented after the period covered by the cost report used to determine cost per day in Rule IV(2)(b) provided those increases have been approved through the Certificate of Need process. Cost per day in Rule IV(2)(b) shall be adjusted accordingly. However, such adjustments shall not affect the performance incentive factor determined in Rule IV(2)(e).

(i) Because intermediate care facilities for the mentally retarded are so few, an 80th percentile cannot be calculated, and these providers shall have Rules IV(2)(d) and (e) determined with reference to the intermediate care facility for the mentally retarded with the highest cost per day.

(j) New facilities participating for the first time in the program will be given an initial prospective rate based on the sum of the mean operating cost per day determined in Rule IV(2)(c) (adjusted by the change in CPI and MPI according to that rule to the beginning date of the initial prospective rate period) and property expenses using a 90 percent occupancy factor. Property expenses will be established on the basis of costs defined under Certificate of Need procedures. A subsequent prospective rate based on the provider's first twelve-month cost report will be determined for the period following completion of the audit of that cost report.

(k) An individual who is a new provider by reason of his purchase or lease of a facility which is currently participating in the program will receive the prospective rate set for the previous provider.

(3) Allowable Cost. Allowable costs will be determined in accordance with HIM 15 subject to the exceptions and clarifications herein provided, including the following:

(a) Return on equity will not be an allowable cost.

(b) Costs incurred in the provision of routine nursing care services to the extent such costs are reasonable and necessary are allowable. Routine services include regular room, dietary services, nursing services, minor medical and surgical supplies, and the use of equipment and facilities. Excluded from such services is social service consultation acknowledging such consultation is provided by the Department. Examples of routine nursing care services are:

(i) All general nursing services including but not limited to administration of oxygen and related medications, hand-feeding, incontinent care, tray service, and enemas;

(ii) Items furnished routinely and relatively uniformly to all patients without charge, such as patient gowns, water pitchers, basins and bed pans;

(iii) Items stocked at nursing stations or on the floor in gross supply and distributed or used individually in small quantities without charge, such as alcohol, applicators, cotton balls, bandaids, antacids, aspirin (and other non-legend drugs ordinarily kept on hand), suppositories, and tongue depressors;

(iv) Items which are used by individual patients which are reusable and expected to be available, such as ice bags, bed rails, canes, crutches, walkers, wheelchairs, traction equipment, and other durable medical equipment;

(v) Special dietary supplements used for tube feeding or oral feeding such as elemental high nitrogen diet;

(vi) Laundry services whether provided by the facility or by a hired firm, except for patients' personal clothing which is dry cleaned outside of the facility.

(c) Allowable property cost shall be limited to the amount allowed for the 90th percentile non-leased/non-rent property cost determined allowable in a sample of cost reports the Department deems representative of all Montana facilities participating in the Medicaid program during a study period. The initial study period shall utilize those cost reports filed with the Department that demonstrate the requisite data and are the most recent twelve-month cost reports available through November 30, 1977. Subsequent study periods will be conducted every seven years and shall utilize the most recent twelve-month cost reports available through November 30th of those years. In order to apply the property cost limit test, the 90th percentile non-lease/non-rent property cost from the most recently available study period results shall be indexed using the CPI to the end date of the cost report being reviewed, shall be converted to a per diem figure, and then compared with the per diem amount for the property cost in the cost report being reviewed. After comparison, any property cost amount in excess of the limit shall be disallowed.

(d) Administrators Compensation:

(i) Administrators compensation is limited to the following schedule of compensation based on bed size of facility.

No. Beds	Compensation
0- 50	$19,000
51-100	22,000
101 and over	25,000

This schedule shall be adjusted annually by percentage change in CPI for the previous year.

(ii) Administrators compensation and the reporting of administrators' compensation shall include:

(aa) Salary amounts paid to the administrator for managerial, administrative, professional and other services.

(ab) Employee benefits excluding employer contributions required by state or federal law--FICA, WCI, FUI, SUI. For a self-employed administrator, an amount equal to what would have been the employer's contribution for FICA and WCI may be excluded from such employee benefits.

(ac) Deferred compensation either accrued or paid.

(ad) Supplies, services, special merchandise, and the cost of assets paid or provided for the personal use or benefit of the administrator.

(ae) Wages of a domestic or other employee who works in the home of the administrator.

(af) Personal use of a car owned by business.

(ag) Personal life, health, or disability insurance premium paid.

(ah) A portion of the physical plant occupied as a personal residence.

(ai) Other types of remuneration, compensation fringe benefits or other benefits whether paid, accrued, or contingent.

(e) Employee benefits:

(i) Employee benefits are defined as amounts paid to or on behalf of an employee, in addition to direct salary or wages, and from which the employee or his beneficiary derives a personal benefit before or after the employee's retirement or death.

(ii) All employer contributions which are required by State or federal law, including FICA, WCI, FUI, SUI are allowable employee benefits. In addition, employee benefits which are uniformly applicable to all employees are allowable. A bona fide employee benefit must directly benefit the individual employee, and shall not directly benefit the owner, provider or related parties.

(iii) Costs of activities or facilities which are available to employees as a group, such as condominiums, swimming pools or other recreational activities, are not allowable.

(iv) For purposes of this subsection, an employee is one

from whose salary or wages the employer is required to withhold FICA. Stockholders or officers of a corporate provider, and partners owning or operating a facility are not employees even if FICA is withheld for them.

(v) Paid vacation and sick leave shall be considered employee benefits to the extent that the facility has in effect a written policy which is uniformly applicable to all employees within a given class of employees, and paid vacation and sick leave are reasonable in amount.

(f) Bad debts, charity and courtesy allowances are deductions from revenue and shall not be allowable as costs.

(g) Revenues received for services or items provided to employees and guests are recoveries of cost and shall be deducted from the related cost.

(h) Dues, membership fees or subscriptions to organizations unrelated to the provider's provision of nursing care services are not allowable costs.

(i) Charges for services of a chaplain are not an allowable cost.

(j) Fees for management or professional services (e.g., management, legal, accounting or consulting services) are allowable to the extent they are identified to specific services, and the hourly rate charged is reasonable in amount. In lieu of compensation on the basis of an hourly rate, the provider may compensate for professional services on the basis of a reasonable retainer agreement which specifies in detail the services to be performed. Documentation that such services were in fact performed shall be provided by the provider. No cost in excess of the agreed upon retainer fee shall be allowed for services specified under the fee.

(k) Transportation costs for travel related to patient care are allowable in accordance with Internal Revenue guidelines for items of expense. Vehicle operating costs will be pro-rated between business and personal use based on mileage logs or a prior approved percentage derived from a sample mileage log or other method acceptable to the Department. For vehicles used primarily by the administrator, any portion of vehicle costs disallowed on pro-ration shall be included as compensation subject to the limits specified in Rule IV (3) (e). Depreciation shall be allowed on a straight-line basis (subject to salvage value) with a minimum of 3 years. Depreciation and interest or comparable lease costs may not exceed $2,400 per year. Other reasonable vehicle operating expenses will be allowed. Public transportation costs will be allowable at tourist or other available commercial rate (not first class).

(4) Ancillaries. Ancillary medical supplies and services are not allowable costs. The provider shall be paid for ancillary medical supplies and services in addition to the reimbursement rate determined by this rule provided that the ancillary medical supplies and services have been previously

authorized by the Montana Foundation for Medical Care to signify that the item is medically necessary and the bills for these items have the authorization on the face of the claim form. Payment for ancillary medical supplies and services are limited to the medical supplies and services needed to provide nursing care to patients who are required by doctor's orders to received extraordinary care, and shall be the actual cost the provider incurred. The provider must maintain a separate cost center or centers for ancillary medical supplies and services. Revenues received from the Department and/or patients for ancillary medical supplies or services are recoveries of cost and shall be deducted from the related cost when determining allowable cost. Any cost remaining after offsetting the related revenues must be eliminated from the cost report before determining allowable costs.

Ancillary medical supplies and services shall be designated on bills using codes established by the Department and are limited to the following: oxygen (code 932-3308-00), wheelchairs customized with special design for a unique condition (code 932-3242-00), wheelchairs that are standard but motorized (code 932-3237-00), wheelchairs for children and are motorized (code 932-3241-00), helmets (code 932-3315-00), disposable colostomy appliances (code 932-4210-00), colostomy shield appliances (code 932-4213-00), disposable lelostomy appliances (code 932-4219-00), catheters (urethral, rubber or silicone) (code 932-4233-00), catheters (indwelling Foley balloon retention) (code 932-4234-00), miscellaneous catheters (code 932-4235-00), scrotal truss (code 932-6101-00), umbilical truss (code 932-6102-00), shoulder braces (code 932-6103-00), sacroiliac supports (code 932-6104-00), lumbosacral supports (code 932-6105-00), post hernia truss (code 932-6106-00), hinged joint steel knee cap (code 932-6707-00), wrist support leather (code 932-6108-00), corsets (code 932-6109-00), abdominal supports (code 932-6110-00), dorso lumbar supports (code 932-6111-00), orthopedic braces (code 932-6113-00), elastic stockings (sheer type, Jobst or comparable) (code 932-6201-00), elastic stockings (surgical type, Jobst or comparable) (code 932-6201-00), prescription drugs; occupational, speech, physical and other therapy; x-rays.

RULE V REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, COST REPORTING

The procedures and forms for maintaining cost information and reporting are as follows:

(1) Accounting Principles. Generally accepted accounting principles shall be used by each provider to record and report costs. As part of the cost report these costs will be adjusted in accordance with these rules to determine allowable costs.

(2) Method of Accounting. The accrual method of

accounting shall be employed, except that, for governmental institutions that operate on a cash method or a modified accrual method, such methods of accounting will be acceptable.

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

(4) Uniform Financial and Statistical Report. Provider costs are to be reported based upon the provider's fiscal year using the Financial and Statistical Report Form provided by the Department. The use of the Department's Financial and Statistical Report Form is mandatory for participating facilities. These reports shall be complete and accurate; incomplete reports or reports containing inconsistent data will be returned to the provider for correction.

(a) Filing Period -- Cost reports must be filed within 60 days after the end of the provider's fiscal year.

(b) Late Filing -- In the event a provider does not file within 60 days of the closing date of its fiscal year, or files an incomplete cost report, an amount equal to 10 percent of the provider's total reimbursement for the following month shall be withheld by the Department. If the report is overdue or incomplete a second month, 20 percent shall be withheld. For each succeeding month the report is overdue or incomplete, the provider's total reimbursement shall be withheld. All amounts so withheld will be payable to the provider upon submission of a complete and accurate cost report. Unavoidable delays may be reported with a full explanation and a request made for an extension of time limits prior to the filing deadline. However, there is a limitation of one 30-day extension.

(c) Cost reports shall be executed by the individual provider, a partner of a partnership provider, the trustee of a trust provider, or an authorized officer of a corporate provider. The person executing such reports shall sign under penalties of false swearing, that he has examined the report including accompanying schedules and statements, and that to the best of his knowledge and belief, the report is true, correct, and complete, and prepared consistent with governing laws and regulations.

(d) Cost reports shall be signed by the preparer stating that the report has been prepared based on all information of which he has knowledge. The preparer shall be deemed to be any individual who prepares for compensation any cost reports or a portion thereof. If more than one individual

participates in preparation of the report, each participating individual shall sign as preparer. Clerical assistants who furnish typing, reproducing, or other routine assistance shall not be deemed preparers.

(5) Maintenance of Records. Records of financial and statistical information supporting cost reports shall be maintained by the provider for five years after the date a cost report is filed, or the date the cost report is due, whichever is later.

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

(b) To support allowable costs, all business records of any related party, including any parent or subsidiary firm, which relate to a provider under audit, shall be available at the facility for audit by the Department or its designated representative upon reasonable notice to the provider. To support allowable costs, the owner's or related party's personal financial records relating to the facility shall be made available for audit by the Department or its designated representative upon reasonable notice given by the Department.

(c) Cost information as developed by the provider shall be current, accurate and in sufficient detail to support payments made for services rendered to beneficiaries and recorded in such a manner to provide a record which is auditable through the application of reasonable audit procedure. This includes all ledgers, books, records and original evidences of cost (purchase requisitions, purchase orders, vouchers, checks, invoices, requisitions for materials, inventories, labor time cards, payrolls, bases for apportioning costs, etc.) which pertain to the determination of reasonable cost.

(d) All of the above records and documents shall be available at the facility subject at all reasonable times to inspection, review or audit by the Department and other appropriate governmental agencies. Upon refusal of the provider to make available and allow access to the above records and documents, the costs which are based upon the withheld data will be deemed unsupported and not allowable for reimbursement purposes. If payments have been made based upon interim information the applicable amounts shall be recovered by the Department. In addition, the Department may at its option terminate any such contracts between the Department and provider if any such records and documents are withheld.

(e) The data contained in the cost reports is financial information particular to the facility and therefore is

confidential and exempts such information from disclosure under the Freedom of Information Act.

(6) Audits. Department audit staff will perform a desk review of cost statements prior to rate setting and may conducts on-site audits of provider records. Where appropriate, audit procedures defined in the HIM 18 shall be adopted by the Department but the Department shall not be confined to these guidelines and may utilize other methods.

(a) Desk review of cost reports will determine the adjustments to be applied to reported costs for rate determination. Incomplete reports, or inconsistency in reported costs will cause the return of the cost report to the facility for correction and may result in withholding payment as set forth in the (4) (b) of this rule.

(b) On-site audits of provider detailed records shall be made to assure validity of reports, costs and statistical information in conformity with federal laws and regulations.

(c) On conclusion of a review of a cost report, an exit conference may be held in which evidential facts can be submitted and reviewed, following which a summary of findings and recommendations shall be mailed to the provider.

(d) Within 10 days of receipt of the written findings or recommendations the provider may detail in writing, any objections or justifications concerning the findings, and may also request a conference. Such conference shall be held no later than 30 days after the Department receives the provider's written objections and justifications, and the request for a conference. No later than 60 days following receipt of the written objections and justifications, or the conference, whichever is later, the Department shall mail a written final determination concerning the provider's objections and justifications, and the position the Department takes concerning the audit findings.

(8) Overpayment and underpayment.

(a) Where the Department finds that the prospective rate was based on an erroneous cost report resulting in overpayment, the Department will correct the rate and notify the provider of overpayment.

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

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

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

(e) In the event an underpayment has occurred, the Department will reimburse the provider promptly following the Department's determination of error.

(f) Court or administrative proceeding for collection of an overpayment or underpayment shall be commenced within five years following the due date of the original cost report or the date of receipt of a complete cost report whichever is later. In the case of a fraudulent cost report, recovery of overpayment may be undertaken at any time. Court costs, including attorneys' fees, in connection with court or administrative proceedings shall be deemed allowable only when approved by the court or hearings officer.

(g) The amount of any overpayment constitutes a debt due the Department as of the date of initial request for payment and may be recovered from any person, party, transferee, or fiduciary who has benefited from the payment or a transfer of assets.

RULE VI REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES, FAIR HEARING PROCEDURES

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

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

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

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

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

(e) The hearings officer or board will provide copies of requests, notices and written decisions to the Department's Director, Audit Bureau, Medical Assistance Bureau, and Office of Legal Affairs.

(f) Within ten days of receipt of the request, the hearings officer shall notify the provider and other parties of the time and place for the prehearing conference, which shall be within 30 days of the receipt of the request. The

notice will state the purpose of the prehearing conference and the issues to be resolved, stipulated to, or excluded. The hearings officer may waive the prehearing conference.

(g) Within ten days after the prehearing conference or its waiver, the hearings officer shall notify the provider and other parties of the time and place for the hearing, which shall be within 60 days of the receipt of the request.

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

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

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

(k) The Board shall reduce its decision to writing and mail copies to the providers within ten days of completion of the hearing. The provider shall be notified of its right to judicial review under the provisions of Section 82-416, R.C.M. 1947.

(2) In the event the provider does not agree with any one specific audit adjustment contained in the schedule of adjustments and made for purposes of determining allowable costs and provided the amount of the individual adjustment in controversy is no less than $5,000.00 per prospective rate period, then and only then will the aforementioned fair hearing procedures apply.

5. The purpose of the proposed rules is to meet the requirements of Section 249 of Public Law 92-603 and 42 CFR 450 while treating the eligible recipient, the provider of services and the taxpayers of the State of Montana fairly and equitably. The rules are intended to prescribe payments reasonably adequate to reimburse the allowable costs of skilled and intermediate care facilities that are economically and efficiently operated.

6. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may be submitted to the Department of Social and Rehabilitation Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana 59601, any time before February 28, 1979.

7. Alternatives to the proposed six rules were considered. Reverting to the rules in effect prior to April

1, 1978, was rejected as being too costly and not supportive of both efficient and effective nursing care service. Continuation of the prospective rate rules, in effect since April 1, 1978, was rejected because of the present lack of information to adequately evaluate the rules continuing impact on nursing care services. With the information currently available, the proposed rules are considered to be the best approach in support of efficient and effective nursing care services. The Department is taking steps to gather additional information to enable the consideration of other reimbursement alternatives at a later date.

8. Barry L. Hjort, Attorney at Law, 3030 N. Montana Avenue, Helena, Montana, 59601, has been designated to preside over and conduct the hearing.

9. The authority of the Department to make the proposed rules is based on R.C.M., 1947, Sec. 71-1511. The implementing authority for the proposed rules is based on R.C.M., 1947, Sec. 71-1517.

Keith F. Wolz
Director, Social and Rehabilitation Services

Certified to the Secretary of State December 5, 1978

BEFORE THE STATE AUDITOR
AND EX OFFICIO COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

In the matter of the adoption of a rule relating to information which insurers must disclose to prospective purchasers of health insurance to supplement Medicare - 6-2.6(4)-S686	NOTICE OF ADOPTION OF A RULE PERTAINING TO DISCLOSURE STATEMENTS IN SALE OF MEDICARE SUPPLEMENTS

TO: ALL INTERESTED PERSONS:

1. On August 15, 1978, The Commissioner of Insurance published on page 1216 of the 1978 Montana Administrative Register, issue number 10, notice of public hearing for the adoption of a rule pertaining to disclosure statements to be made in the sale of Medicare supplements.

2. The proposed rule has been adopted, with the following changes:

INFORMATION TO BE FURNISHED PROSPECTIVE INSURED. An agent or insurer effecting a sale of an individual disability (health) insurance policy specifically designed to provide ~~providing~~ benefits that supplement federal Medicare insurance benefits shall deliver to the insured the form set forth as Exhibit I ~~to the insured~~ not later than the time of delivery of the policy. The agent or insurer shall complete and sign the prescribed form.

EXHIBIT I
SUMMARY OF MEDICARE BENEFITS AND INSURANCE

The State of Montana requires that an insurance company selling disability (health) insurance to an individual covered by Medicare ~~to~~ provide the following information. Please note that future changes in federal law may change Medicare benefits, with resulting changes in the insurance policy benefits.

MEDICARE (PART A)		INSURANCE POLICY PAYS BENEFITS
Inpatient Hospital Benefits		
First 60 days of Medicare benefit period	You pay 1st $_____. Medicare pays balance.	
Next 30 days of continuous confinement (61st to 90th day)	You pay 1st $___ per day. Medicare pays balance.	

MEDICARE (PART A) (Cont.)		INSURANCE POLICY ~~PAYS~~ BENEFITS
Inpatient Hospital Benefits (Cont.)		
Next 60 days, while one-time reserve lasts (91st to 150th day)	You pay $____ per day. Medicare pays balance.	
After 150 days of continuous confinement	You pay full amount Medicare pays nothing.	
Skilled Nursing Facility Benefits*		
(*Caution-- you should check whether the nursing facility qualifies for Medicare.)		
First 10 days of Medicare benefit period	You pay nothing. Medicare pays 100%.	
Next 80 days of continuous confinement (21st to 100th day)	You pay $____ per day. Medicare pays balance.	

MEDICARE (PART B)		INSURANCE POLICY BENEFITS
Medical Service Benefits		
Physician services, medical supplies, ambulance, prosthetic devices and other covered services.	You pay 1st $____ each calendar year. Medicare then pays 80% of further Medicare-approved charges and you pay the balance of charges.	

POLICY EXCLUSIONS, LIMITATIONS, and/or WAITING PERIODS:

(The space below may be used to describe insurance benefits not related to Medicare.)

MEDICARE (PART B)
(Cont.)

More Information:

1. This policy has been approved for sale in Montana as required by law. Such approval is in no way a recommendation or endorsement.

2. Physician fees and other medical services charges may exceed charges approved by Medicare. In such instances, you are obligated ~~for~~ to pay the difference.

3. Renewability provisions.

(a) If the policy is labeled "Guaranteed Renewable", the insurance company must continue the policy as long as you pay the premium. The company has the right to increase the premium, but not to make any changes in the policy.

(b) If the policy is labeled "Renewable at the Option of the Company", the insurance company may terminate the policy on any premium due date.

(CHECK YOUR POLICY CAREFULLY FOR DETAILS.)

4. Generally speaking, if the application you completed for your policy asks medical questions, pre-existing conditions are covered from the date the policy is issued. If no medical questions are asked, medical conditions you had prior to the application are not covered until the policy has been in force for the time required by the policy. (CHECK YOUR POLICY CAREFULLY FOR DETAILS.)

5. Generally, ~~neither~~ Medicare ~~nor~~ and/or private insurance will pay for necessary and customary charges only and will not pay for convenience items not necessary in the treatment of your medical condition.

The Insurance Commissioner makes the following recommendations:

1. Check with your local Social Security office to obtain more specific details of your Medicare benefits if you have further questions about Medicare. ~~The other side~~ This statement shows only a summary of the basic Medicare benefits. Some Medicare benefits are available that are not shown. Enrollment in both Part A and Part B of Medicare is required for you to receive both hospital and medical service benefits.

2. Buy one policy for your health insurance needs. You will generally save money by doing this rather than buying several limited policies. Be careful of buying more coverage than you need.

3. After you receive your policy, make sure you have the coverage you thought you bought. If not satisfied, return the policy to the company within 10 days (or as provided by the policy) for a full refund of premium directly from the company. Companies are required to make immediate refunds directly and not through their agents.

MEDICARE (PART B)
(Cont.)

This form is required by the Insurance Commissioner of the State of Montana to be delivered with any disability (health) insurance policy specifically designed to supplement Medicare benefits.

Date Summary Prepared: _____
Policy Form No: _____
Insurance Company Issuing Policy: _____
Summary Delivered by: _____
Agent ~~of Above Company~~ or Insurer

3. No adverse comments or testimony were received, although miscellaneous minor language changes were recommended. Some of these recommendations which helped clarify information to be provided in the disclosure statement were adopted and are reflected in the amended rule as set forth in this notice.

4. The Commissioner of Insurance has adopted the rule because elderly persons have special health care needs and consequently face particular health insurance problems. One of these is the potential for abuse in the solicitation and sale of excess or inadequate insurance to supplement Medicare benefits. This rule is designed to provide the potential purchaser with sufficient data to make a reasonably informed decision concerning the purchase of such insurance.

5. The adoption of this rule is to become effective June 1, 1979.

Josephine M. Driscoll
Chief Deputy Commissioner of Insurance

BY: James A. Cheetham
Asst. Chief Deputy

Certified to the Secretary of State December 1, 1978.

BEFORE THE STATE AUDITOR
AND EX OFFICIO COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

In the matter of the adoption of a rule relating to Unfair Discrimination on the Basis of Blindness or Partial Blindness - 6-2.6(11)-S871	NOTICE OF ADOPTION OF A RULE PERTAINING TO UNFAIR DISCRIMINATION

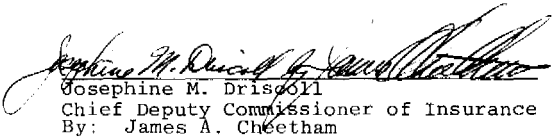
TO: ALL INTERESTED PERSONS

1. On August 15, 1978, the Commissioner of Insurance published on page 1215 of the 1978 Montana Administrative Register, issue number 10, notice of public hearing for the adoption of a rule pertaining to unfair discrimination on the basis of blindness or partial blindness.

2. The proposed rule has been adopted without alteration.

3. No adverse comments or testimony were received. The Commissioner of Insurance has adopted the rule because blind persons have been subject to unfair discrimination by insurers and need the protection provided by this rule.

4. The adoption of this rule is to become effective February 1, 1979.



Josephine M. Driscoll
Chief Deputy Commissioner of Insurance
By: James A. Cheetham
Asst. Chief Deputy

Certified to the Secretary of State December 1, 1978.

BEFORE THE STATE AUDITOR
AND EX OFFICIO COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

In the matter of the proposed adoption of a rule relating to unfair discrimination practices based upon sex or marital status) 6-2.6(11)-S872	NOTICE OF ADOPTION OF A RULE RELATING TO UNFAIR DISCRIMINATION ON THE BASIS OF SEX OR MARITAL STATUS.

TO: ALL INTERESTED PERSONS:

1. On August 15, 1978, The Commissioner of Insurance published on page 1220 of the 1978 Montana Administrative Register, issue number 10, notice of public hearing for the adoption of a rule relating to unfair discrimination on the basis of sex or marital status.

2. The proposed rule has been adopted as follows:

Section I - PURPOSE. The purpose of this rule is to eliminate ~~the act of denying~~ denial of benefits or coverage on the basis of sex or marital status in the terms and conditions of insurance contracts and in the underwriting criteria of insurance carriers.

Section II - DEFINITION. For the purpose of this rule, the term "contract" includes any insurance policy, plan, subscriber agreement, statement of coverage, binder, rider or endorsement offered by any insurance company, association, reciprocal or inter-insurance exchange, nonprofit health service corporation or plan, fraternal benefit society or beneficial association.

Section III - PROHIBITED PRACTICES. Availability shall not be denied to an insured or prospective insured on the basis of sex or marital status of the insured or prospective insured. The amount of benefits payable or any term, conditions or type of coverage shall not be restricted, modified, excluded or reduced on the basis of the sex or marital status of the insured or prospective insured except to the extent the amount of benefits, term, conditions or type of coverage vary as a result of the application of rate differentials permitted under the Montana Insurance Code. However, nothing in this regulation shall prohibit an insurer from taking marital status into account for the purpose of defining persons eligible for dependents coverage.

Specific examples of practices prohibited by this rule include but are not limited to the following:

(a) denying, cancelling or refusing to renew coverage, or providing coverage on different terms, because the insured or prospective insured is residing with another person or persons not related to him or her by blood or marriage;

(b) offering coverage to ~~males~~ members of one sex gainfully employed at home, employed part-time or employed by relatives while denying or offering reduced coverage to ~~females~~ those of the opposite sex similarly employed;

(c) reducing disability benefits for ~~females~~ members of one sex who become disabled while not gainfully employed full-time outside the home ~~when a~~ while not applying a similar reduction ~~is not applied~~ to ~~males~~; those of the opposite sex;

(d) denying ~~females~~ members of one sex waiver of premium provisions that are available to ~~males~~ those of the opposite sex or offering such provisions to ~~females~~ members of one sex only for contract limits that are ~~lower than~~ different from those available to ~~males~~ those of the opposite sex;

(e) refusing to offer maternity benefits to insureds or prospective insureds purchasing individual contracts when comparable family coverage contracts offer maternity benefits;

(f) denying, under group contracts, dependent's coverage to ~~husbands~~ spouses of ~~female~~ employees of one sex when dependent's coverage is available to ~~wives~~ spouses of ~~male~~ employees of the opposite sex;

(g) ~~offering~~ denying coverage to ~~males in certain occupations~~ employed members of one sex while ~~denying~~ offering coverage ~~or offering more limited coverage~~ to ~~females in the same occupational categories~~; those of the opposite sex similarly employed;

~~(h) offering males higher benefit levels and/or longer benefit periods than are offered to females in the same classifications;~~

~~(i)~~ (h) offering contracts containing different definitions of disability different benefit levels, or different benefit periods for ~~females and males~~ members of one sex than for those of the opposite sex in the same classifications;

~~(j)~~ (i) offering contracts containing different waiting and elimination periods for ~~females and males~~ members of one sex than for members of the opposite sex;

~~(k)~~ (j) requiring ~~female~~ applicants of one sex to submit to medical examinations while not requiring ~~males~~ those of the opposite sex to submit to such examinations for the same coverage;

~~(l)~~ (k) establishing different benefit options for ~~females and males~~; members of one sex than for those of the opposite sex;

~~(m) denying to divorced or single persons coverage available to married persons;~~

~~(n)~~ (l) denying or limiting the amount of coverage available to an insured or prospective insured based upon ~~his or her~~ marital status;

~~(o)~~ (m) denying employees of one sex insurance benefits that are offered to dependents who are of the same sex as the employees;

~~(p)~~ (n) denying a married or separated female the right to obtain coverage in her own name;

~~(q)~~ (o) establishing different issue age requirements for ~~females and males~~; members of one sex than for those of the opposite sex;

~~(r)--establishing-different-occupational-classifications for-females-and-males;~~

~~(s)~~ (p) refusing to continue coverage on a spouse or ex-spouse while continuing coverage on the other spouse or ex-spouse following separation or dissolution of a married couple previously covered under a family or household contract.

3. No adverse comments or testimony were received, although miscellaneous minor language changes were recommended. Some of these recommendations which helped clarify examples of prohibited practices were adopted and are reflected in the amended rule as set forth in this notice.

4. The Commissioner of Insurance has adopted the rule because of the existence of some insurance practices which unfairly discriminate against insureds or prospective insureds on the basis of sex or marital status. This rule is designed to prohibit such discrimination and assure that men and women, married or unmarried, will have equal access to insurance protection.

5. The adoption of this rule is to become effective February 1, 1979.

Josephine M. Driscoll
Chief Deputy Commissioner of
Insurance

BY: James A. Cheetham
Asst. Chief Deputy

Certified to the Secretary of State December 1, 1978.

BEFORE THE DEPARTMENT OF BUSINESS REGULATION
OF THE STATE OF MONTANA

In the matter of the adoption of Track II American National Standards Institute and Track III American National Standards Institute, standards for Electronic Funds Transfer Machines.	NOTICE OF THE ADOPTION OF A RULE.

TO: All Interested Persons.

1. On August 10, 1978, the Department of Business Regulation published a Notice of a proposed adoption of a rule, concerning the adoption of the American National Standards Institute standards for Track II and Track III encoding of plastic cards to facilitate mandatory sharing under the Electronic Funds Transfer Act. That Notice was published at page 1132 of the 1978 Montana Administrative Register, Issue No. 9.

2. The hearing was held on September 19, 1978 as scheduled and several comments were received with regard to the proposed rule. Upon due consideration, the agency has adopted the rule as follows:

8-2.6(14)-S6120. Magnetic Encoding and Card Standards.

In order to comply with the requirements of mandatory sharing of automated teller machines as provided in Chapter 17 of Title 5 of the Revised Codes of Montana, 1947, such automated teller machines as may be installed in compliance with that chapter shall comply at a minimum with the following magnetic encoding standards:

(a) The standards of the American National Standards Institute (ANSI) for Track II as provided in ANSI X4.16-1976, approved February 24, 1976; and,

(b) The standards of the American National Standards Institute for Track III as published in ANSI X9.A on September 1, 1977, (though not yet adopted in final form by ANSI).

In order to comply with the requirement of mandatory sharing in Chapter 17 of Title 5 of the Revised Codes of Montana, 1947, such automated teller machines as may be installed must, as a minimum, comply with both of the standards herein adopted by reference. While said standards refer to "credit" cards and "bank" cards, for the purpose of this rule they are intended to refer to the unique identification devices as described in Section 5-1718, R.C.M. 1947.

(c) The cards described in the ANSI standards herein adopted and used as a unique identification device as provided in Section 5-1718, R.C.M. 1947, shall comply with the standards established in ANSI X4.13-1971, approved April 1, 1971, relating to the physical specifications of embossed cards, the specifications for the embossed data, the type style(s) to be used for embossing the account number line, and an account numbering system.

Because of the length of such standards, they are not published here, but may be obtained by contacting the Department of Business Regulation, 805 North Main, Helena, Montana 59601.

Kent Kleinkopf

Kent Kleinkopf, Director
Department of Business Regulation

Certified to the Secretary of State December 5, 1978.

BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 12-2.22(1)-S22050 relating to elk feeding policy	NOTICE OF THE AMENDMENT OF RULE 12-2.22(1)-S22050

TO: All Interested Persons:

1. On September 28, 1978, the Fish and Game Commission published notice of a proposed amendment of a rule relating to elk feeding policy on page 1380 of the 1978 Montana Administrative Register, Issue No. 12.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The commission has amended the rule to provide guidelines for evaluating winter conditions affecting the Upper Gallatin elk herd and the condition of the animals themselves; and to provide a feeding plan that will minimize damage to the habitat during periods of crises.

Joseph J. Klabunde, Chairman
Montana Fish & Game Commission

Certified to Secretary of State November 29, 1978

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

In the matter of the Amendment of Rule ARM 16-2.14(1)-S14082, Standards of Performance for New Stationary Sources and Rule ARM 16-2.14(1)-S14084, Emission Standards for Hazardous Air Pollutants	NOTICE OF THE AMENDMENT OF RULE ARM 16-2.14(1)-S14082, Standards of Performance for New Stationary Sources and RULE ARM 16-2.14(1)-S14084, Emission Standards for Hazardous Air Pollutants

TO: All Interested Persons

1. On September 14, 1978, the Board of Health and Environmental Sciences published notice of proposed amendments to Rule ARM 16-2.14(1)-S14082, setting Standards of Performance for New Stationary Sources and Rule ARM 16-2.14(1)-S14084, setting Emission Standards for Hazardous Air Pollutants at page 1342 of the 1978 Montana Administrative Register, issue number 11.

2. The Board of Health and Environmental Sciences amended the rules as proposed.

3. No comments or testimony in opposition to the amendments were received. Comments regarding test methods did not require any changes to the proposed amendments. The Board of Health and Environmental Sciences has amended the rules in order to be delegated enforcement authority by the Environmental Protection Agency. Previously, the Board chose to adopt by reference the standards in the federal regulations and these amendments reflect the most recent changes in those regulations.

John W. Bartlett

JOHN W. BARTLETT, Chairman
Board of Health and Environmental Sciences

Certified to the Secretary of State December 5, 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 THE AMENDMENT AND TRANSFER OF ARM 16-2.26(1)-S2600: Quality Control of Alcohol Analysis.

To: All Interested Persons:

1. On October 26, 1978, the Department of Justice published notice of a proposed amendment of ARM 16-2.26(1)-S2600, which sets forth methods and procedures to ensure quality control of alcohol analysis in the criminal investigation laboratory, at page 1464 of the 1978 Montana Administrative Register, issue number 14.

2. The agency has amended the rule as proposed, and transferred it to 23-2.10C(1)-S1000.

3. No comments or testimony were received. The agency has amended the rule 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.

MIKE GREELY
Attorney General
State of Montana
Capitol Building
Helena, Montana 59601

Certified to the Secretary of State December 5, 1978.

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

IN THE MATTER OF THE ADOPTION OF THE RULES REGULATING THE CONDUCT OF PRIVATE EMPLOYMENT AGENCIES	))))	NOTICE OF THE ADOPTION OF RULES 24.15.000 through 24.15.013 (Regulating Private Employment Agencies)

TO: All Interested Persons:

1. On June 23, 1978, the Commissioner of the Department of Labor and Industry, State of Montana published notice of the proposed adoption of new rules regulating the conduct of private employment agencies. The purpose of the rules is to regulate the conduct of private employment agencies under the authority granted the Commissioner under Section 41-1423 R.C.M. 1947. (Page 840 1978 MAR, Issue 6, 6/23/78)

2. A formal hearing was held on July 27, 1978, and following the receipt of comments by various interested persons, the Commissioner has adopted the following rules:

Section 24.15.000 DEFINITIONS Division - means the Labor Standards Division of the Montana Department of Labor & Industry.

Administrator - means the Administrator of the Labor Standards Division.

Commissioner - means the Commissioner of Labor.

Exploratory Interview ~~or Exploratory Job Order~~ - means an interview agreed to by the employer even though there is no definite position open with the employer.

~~Job Referral Document---The document or copy of document given to the applicant in which the pertinent facts about the agency, the employer and the job are listed.~~

Scheduled Appointment - means a definite time and date of interview with a specific employer or employer representative arranged for by an agency.

Temporary Employment - means that employment lasting less than ninety (90) calendar days.

Permanent Employment - means that employment lasting ninety (90) calendar days or more.

Commission Employment - means that employment in which the applicant is paid on a commission basis.

~~Fee Paid---means a position in which under no circumstances is the applicant charged a deposit, retainer, or fee directly, or indirectly at any time in connection with such position, either by the agency or the employer.~~

Employer Paid Fee - means a position in which under no circumstances is the applicant charged a deposit, retainer, or fee directly, or indirectly at any time in connection with such position, either by the agency or the employer.

Applicant Paid Fee - means that fee will be charged the applicant by the agency in accordance with the rules, regulations and law governing private employment agencies and the contract between the applicant and the agency.

Advertising - means any material or means used by the employment agency for solicitation or promotion of business. This includes, but is not limited to, business cards, news papers, radio, television, brochures, pamphlets, gift items and signs, referral cards, invoices, letterheads, or other forms that may be used in combination with the solicitation and promotion of business.

License - means that license issued by the Labor Standards Division to private employment agencies.

One month - means 1/12th of a year or 4-1/3rd weeks.

Contract - means that agreement entered into by the applicant and the agency and in some cases the employer whereby the applicant is placed in a position with the employer and the payment of fees to the agency is agreed to.

Section 24.15.001 RECORD KEEPING REQUIREMENTS.

(1) Method of maintaining records. All records of the agency pertaining to a job referral, and/or placement of an applicant for employment shall be maintained together or adequately cross indexed for easy retrieval of all such records for the Labor Standards Division. This includes, but is not limited to, the application, contract, addendums to contracts, reference information (employment, personal or credit), and a copy of all job orders and job referral documents.

(2) A separate file shall be maintained for all applicants placed by the agency. This file shall be alphabetical or by adequate cross reference indexed for easy retrieval for the Labor Standards Division.

(3) An adequate log of job orders shall be maintained. Each job order shall have a log number assigned to it. The log will contain the date the job order was placed by the employer and the name of the employer placing the order. All job orders shall be recorded in numerical order and registered in the log. The log number will be used on any contracts, advertising, correspondence, and placements that are related to the job order. ~~If the agency wishes, it may maintain a separate log for "fee paid" orders~~. The log shall be preserved for three years.

(4) Each agency shall keep a record of receipt of all money received from each applicant in payment of a charge for service.

The ~~records~~ receipts shall be filed together or adequately cross-indexed for easy retrieval for the Labor Standards Division.

(5) Records must be maintained for a period of three years with the exception of job advertisements ~~in sub-section 3 of Sub-Chapter 6~~ which must be maintained for one (1) year.

Section 24.15.002 BONA FIDE JOB ORDER. (1) A bona fide order for employment may be considered to have been given by an employer to an employment agency under the following conditions:

(a) If the employer or his agent, in person, by telephone, telegram, or in writing, registered a request that the agency recruit, or gives permission to the agency to refer job applicants for employment who meet the specifications of the stated job.

(b) Such an order is valid for the referral of any qualified applicant until it is filled or cancelled by the employer and may serve as the basis for agency advertising. The agency is required to recontact the employer after every thirty days to insure that the position is still vacant prior to any additional advertising or referrals.

~~(c)--Exploratory-job-orders-or-interviews-will-not-be-used-by employment-agencys-in-situations-where-the-agency-has-a-"regular" job-order,-or-access-to-one.~~

(2) In the process of obtaining a job order the employment agency, in an introductory statement, shall identify itself to employers as an employment agency. This shall be done in all cases. If the agency is employer-fee paid only, the employer must be so advised during the initial contact.

(3) When accepting an "employer paid fee" ~~"fee-paid"~~ job order the employment agency will give the applicant notice in writing that the fee is "employer paid" and that the applicant is not responsible for any portion of the fee.

Section 24.15.003 JOB ORDER, INFORMATION TO BE CONTAINED IN. (1) Each job order shall contain all of the following information:

(a) The normal number of hours of work per ~~day~~ week and any exceptions.

(b) Weekend or night work required. ~~Specify-the number-of-hours-and-which-days.~~

(c) Whether fee is employer paid or applicant paid.

(d) The job title and classification if used by the employer.

(e) A list of special skills required to perform adequately on the job and the minimum performance or skill level required. Skills required means those skills which will be regularly and habitually required to gain the job, perform at a minimum level on the job and to retain the job.

(f) The log number of the job order.

(g) The date and time of day the job order was received.

(h) The salary, hourly pay rate or salary paid for the position. A salary or wage must be specified in terms of dollars and cents. If earnings are to be paid on a commission basis, the order must contain a statement as to whether or not any guaranteed salary or draws are involved.

(i) The name, address and telephone number of the company placing the job order.

(j) The name and title of the individual who placed the job order for the employer and the name and title of the individual who accepted the order for the employment agency.

(k) Whether or not union membership is required. ~~and the approximate cost to the applicant for any union fees and dues.~~

~~(i)--Whether or not the employer has any existant labor troubles.~~

~~(m)~~ (l) When a job order is filled by an agency the following information will be appended to the order, if not maintained elsewhere in the agency's records:

1. The true name, as it appears on the contract, of the individual who obtained the job.
2. The date the job was filled.
3. The amount of the fee charged for the service.
4. Whether the fee was employer paid or applicant paid.

~~(n)~~ (m) A list of established fringe benefits such as but not limited to holidays, sick leave, car allowances, expense allowances, room and board, medical and hospital insurance, vacations and the statement whether or not these benefits are paid for by the employer as indicated by the employer.

Section 24.15.004 JOB INTRODUCTION CARD (1) The job introduction card shall be assigned the same log number as the job order and shall contain the following information:

(a) Employment agency name and address.
(b) Applicant's full name.
(c) Name of person conducting the interview for the employer.
(d) Date and time of interview.
(e) Address of person conducting interview.
(f) A description of the job position applied for.
(g) Name of employment agency counselor making the referral.
(h) Notice to applicant if fee is employer paid.

Section 24.15.005 REBATE OF SERVICE CHARGES INTEREST AND/OR PLACEMENT FEES. (1) In all cases where employment lasts less than ninety (90) full calendar days, all interest, paid or required to be paid by an applicant to any private employment agency shall be allowed as a credit against any fees charged by the agency.

Section 24.15.006 ADVERTISING. (1) No employment agency shall knowingly publish or cause to be published any false, fraudulent or misleading information, representation, notice or advertisement. The following examples are of the types of advertising which are considered false or misleading:

(a) Ads worded so as to mislead the applicant regarding the nature of the position advertised.

(b) Using the phrase "lowest fee" or similar words where the agency's fee is not in fact the lowest fee rate in effect in the area in which the agency does business.

(2) The following standards must be used in all agency advertising:

(a) All advertising must be factual as to the job requirements. Sufficient information must be contained in each ad so as to indicate the nature of the position.

(b) No salary shall appear in an ad except that which appears in the actual job order as a starting salary. Where the top of the salary range is quoted, it must be preceded by the lowest of the salary range and the word "to".

(c) The word "open" or the symbol "$$$" or words and symbols of similar importance may not be used as a substitute for the salary of any position or positions in an ad.

(d) The symbol "+" or the word "plus" may be used in connection with a salary appearing in an ad only when it refers to an extra such as a car, bonus, commission or lodging which is provided in addition to the given salary. Such extras must be contained in the agency's job order for the position. The salary figure in the advertisement can only represent the amount of salary or draw as shown on the job order.

(e) The word "up" may be listed with a salary appearing in an ad only when the employer has made a definite commitment to the agency to pay a higher salary for a qualified employee. The commitment by the employer to pay a higher salary must be contained in the agency's job order for the position.

(f) If an advertised salary is based entirely or partially on a bonus and/or commission the ad must so state this fact.

(g) Whenever an employment agency advertises or states in its letters that employees of the agency are "certified", "registered", or "licensed" (other than by the Labor Standards Division) or uses other special terms conveying special qualifications or abilities, the advertising or letter must also set forth the identity of the governmental agency or other organization which has certified, registered or licensed such employees.

(h) Each job position that is advertised must contain the log number in the ad.

(i) An employment position will not be advertised on the same day under two or more different job descriptions.

Section 24.15.007 FEE SPLITTING. No arrangement can be made by agency and employer whereby applicant fees are split.

Section 24.15.008 TERMINATION AFTER THIRTY DAYS. When an applicant resigns, is laid off, or is discharged from his employment through his own fault, after thirty (30) calendar days from the starting date of employment, the agency shall upon request of the applicant or director meet and confer with the applicant about a refund within 15 days of the date of separation.

Section 24.15.009 COMMISSION EMPLOYMENT. In addition to the requirements of Section 24.15.007 and Section 24.15.008 the following clause ~~clauses~~ is ~~are~~ required ~~to be~~ as an addendum to all contracts between agencies and applicants for employment when placements are made or to be made on commission positions:

(1) "Should proof be presented after 90 days of employment that the estimates of total gross earnings were inaccurate, _____(agency)_____ shall refund to the applicant any excess fees paid by him, or the applicant shall pay to _____(agency)_____ any deficiency in fees."

Section 24.15.010 PERMISSIBLE CONTRACT CLAUSES. The following clauses or statements are not required to be in any contract between the employment agency and the applicant for employment who may be responsible for the agency's charge for service directly or indirectly but so long as consistent with other required or permissible clauses may be included in the contract between the employment agency and the applicant for employment:

(1) "One month equals 1/12th of a year or 4 1/3 weeks."

(2) "These service charges can be deducted for income tax purposes."

(3) "I will keep the agency informed about the results of all arranged interviews, and will advise the agency at once upon acceptance of employment, or if employment which has been accepted is terminated for any reason."

(4) "I hereby give permission for references to be checked for purposes of employment, and understand that upon request ___(agency)___ will divulge the content of same to me."

(5) "If the applicant fails to perform this contract, or to pay the agency's service charge provided herein, then the applicant agrees to pay _____(agency)_____ reasonable attorney's fees and other costs of collection as determined by a court."

(6) "There shall be no oral agreements or oral additions to this contract. Any further terms, conditions or understandings shall be in writing."

Section 24.15.011 REFUND. Whenever an agency receives notice from the applicant or the director that an applicant has terminated employment within the time which requires a refund of a portion or all of the agency's charge for services, the agency shall refund within seven days of such notice, by cash and not by goods or services, all sums due as a refund to the applicant. Contracts or agreements shall not contain statements or understandings concerning job replacement or other goods and services contrary to this rule.

Section 24.15.012 PAROL EVIDENCE RULE. There shall be no oral agreements or oral additions to any contract between the employment agency and the applicant for employment. Any terms, conditions or understandings between the employment agency and the applicant for employment shall be in writing.

Section 24.15.013 RENEWAL OF LICENSE. The annual license fee shall be assessed from July 1 of the existing year until June 30 of the following year. Licenses that are issued ~~renewed~~ at times different from the annual schedule shall run until the 30th of June, at which time that license shall expire and the renewal fee will be due and payable for the next year. A new license application and copy of the agency contract shall be sent in with the renewal fee.

3. On April 24, 1978 the Commissioner published a first set of proposed rules regulating private employment agencies. Interested parties, specifically, representatives of private employment agencies, presented oral and written comments on this first set of proposed rules.

As a result of this comment a second set of proposed rules regulating private employment agencies was published by the Commissioner on June 23, 1978.

On July 27, 1978, a public hearing was held on the second set of proposed rules. Testimony was presented by approximately a dozen representatives of employment agencies and from John Bell, attorney for the Private Employment Agencies Association. Written comments were also received on the proposed rules.

No objections were received to the adoption of rules regulating private employment agencies per se. Some objections were raised to specific sections and specific language. The majority of the objections and suggestions for changes have been accepted in whole or in part by the Commissioner and incorporated in the adopted rules.

An objection was raised to the "log number" required to be assigned to each job order. The Commissioner rejects this objection. A log number is necessary to provide an accurate means of tracking each job order. The costs associated with the log number will be minimal.

DAVID E. FULLER
Commissioner of the Department of Labor and Industry, State of Montana

Certified to the Secretary of State _____, 1978

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

In the Matter of Amendment of Rule ARM 36-2.8(18)-S8110 relating to Alternative Renewable Energy Source Grant Application Submittal Deadlines.	Notice of Amendment of Rules Relating to Alternative Renewable Energy Source Grants

TO: All Interested Persons

1. On October 26, 1978 the Department of Natural Resources and Conservation published notice of the proposed amendments to the rule relating to Alternative Renewable Energy Source Grant Submittal Deadlines. The Department is proposing the amendment to the rule in order to broaden the scope of the application process. Notice of the proposed amendment was published on page 1469 of the Montana Administrative Register, 1978, Issue No. 14.

2. No public hearing was contemplated and the Department did not receive a request for public hearing. No comments were received. The Department has adopted the proposed amendment.

3. The authority for the amendment is based on Section 84-7410, R.C.M. 1947.

Dated this 5th day of December, 1978.

Ted J. Doney

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

Certified to the Secretary of State 12-5-78.

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF ATHLETICS

In the matter of the Proposed) Amendment of 40-3.14(6)-S1430) Licensing Requirements, sub-) section (10))	NOTICE OF AMENDMENT OF ARM 40-3.14(6)-S1430 (10) LICENSING REQUIREMENTS

TO: All Interested Persons:

1. On October 26, 1978, the Board of Athletics published a notice of a proposed amendment to sub-section (10) of ARM 40-3.14(6)-S1430 concerning licensing requirements for individuals at page 1474-1475 of the 1978 Montana Administrative Register, issue number 14.

2. The Board has amended the rule as proposed.

3. No comments or testimony were received. The Board has amended the rule in response to a recommendation of the Legislative Council that the Board delete license fees for individuals as 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.

In the matter of the Proposed) Amendment of 40-3.14(6)-S1490) (6)(a) Contest Regulations)	NOTICE OF AMENDMENT OF ARM 40-3.14(6)-S1490 (6)(a) CONTEST REGULATIONS

TO: All Interested Persons:

1. On October 26, 1978, the Board of Athletics published a notice of proposed amendment to sub-section (6)(a) of ARM 40-3.14(6)-S1490 concerning the sale of refreshments at page 1474-1475 of the 1978 Montana Administrative Register, issue number 14.

2. The Board has amended the rule as proposed.

3. No comments or testimony were received. The Board has amended the rule because it is antiquated. The sale of refreshments has become a common practice at all sporting events.

ED CARNEY, DIRECTOR
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

Certified to the Secretary of State December 5, 1978.

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF REAL ESTATE

In the matter of the Adoption) of new rules regulating) franchising)	NOTICE OF ADOPTION OF RULE ARM 40-3.98(6)-S9885 SET AND APPROVE REQUIREMENTS AND STANDARDS - FRANCHISING

TO: All Interested Persons:

1. On June 23, 1978, the Board of Real Estate published a notice of hearing on the proposed adoption of a new rule concerning franchising at pages 863, 864 and 865, 1978 Administrative Register, issue number 6.

2. At the hearing, which was held on August 5, 1978, written testimony in support of the proposed rule was received from the Administrator of the Consumer Affairs Division, Department of Business Regulation; the Montana Association of Realtors, as presented orally by the Executive Vice-President thereof; an individual licensed broker from Hamilton, Montana; and informational material submitted by the State of Nevada concerning its successful defense in litigation under similar rules.

Three persons appeared orally, identifying themselves as neither in support or against the proposed rule. They represented franchisors and stated that while their agreements with the franchisees did not specify advertising space allocations, their advertising, in fact, was within the 50/50 requirement of the proposed rule.

Four persons appeared orally in opposition to the proposed rule. These persons represented one franchisor and its franchisees. The opposition centered around the argument that the 50/50 requirement under sub-section 2. "5.b." was not reasonably necessary to safeguard the public interest and that the contracted agreements between the franchisor and franchisee, which includes the obligation to adhere to the Realtors Code of Ethics, provides sufficient protection to the public.

The Administrative Code Committee by letter dated July 11, 1978 recommended rewriting sub-section 2. "5.d." so as to avoid any misapplication of the fee splitting prohibition to persons who were not engaged in the activity of broker. In a subsequent letter dated August 25, 1978, the Committee further objected to sub-section 2. "5.b." and "c.". The objection questioned the Board's authority to impose such a rule, questioned whether the rule itself contravened legislative intent, and questioned the need for the rule from a public protection perspective. The Committee thus objected to the adoption of the rule as proposed and suggested that should the Board wish to pursue public protection in the manner indicated, it should find its remedy through legislative amendment and directive.

3. Having considered all testimony, oral and written, and having further considered all issues raised and having secured advice of legal counsel as to all objections made, the Board of Real Estate answers said objections by making the following:

FINDINGS OF FACT

a. The Board has received numerous inquiries and comments from the public indicating that they are not apprised and do not know exactly with whom they are dealing when confronted with existing franchisor/ franchisee advertising. Where the name of the franchisor is given primary focus, the public tends to believe that the franchisor is the real estate licensee with whom they are dealing.

b. The Board further finds that as a result of such confusion, the public tends to expect obligations to be performed by the franchisor, only to find that the obligations and services are those of the licensee. The public further finds that it has no recourse to the franchisor, who is not regulated, when in fact decisions are made in reliance upon the expectations of performance from the franchisor.

c. The Board further finds that controversy between brokers under one franchisor has been encouraged where the public negotiated with more than one broker under an expectation they were dealing with the same persons in the name of the franchisor.

d. The Board finds that the United States District Court for the District of Nevada upheld rules of the Nevada Real Estate Commission similar to those proposed by the Board.

e. The Real Estate Commission of the State of Nebraska has proposed rules similar to those proposed by this Board.

f. The Board finds that there is a need to protect the buying and selling public by the adoption of the proposed franchise rules and that the adoption thereof with a reasonable time before the effective date of the rules for compliance will afford the needed protection.

CONCLUSIONS OF LAW

a. The Board of Real Estate is vested with express authority to "adopt rules to carry out the provisions of [the] act". (Title 66, Chapter 19, R.C.M. 1947, as amended, Section 66-1927)

b. A provision of the act prohibits the use of "inaccurate advertising...which advertising in any material particular or in any material way misrepresents any property, terms, values, policies or services of the business conducted;....."

c. That any advertising which incorporates the name of the franchisee in less than 50% of the surface area of the entire combined area of both the broker's name and the franchise name and any advertising which does not provide a statement to the effect that the franchisee's real estate brokerage office is independently

owned and operated is a type of conduct prohibited under Section 66-1937.

d. That Section 66-1937, as a provision of the act, is subject to being carried out by rule of the Board under Section 66-1927.

e. That the Board has express authority to adopt the proposed rule and said rule is reasonable, proper, and necessary to carry out the provisions of the act; that the act concerns itself with the prevention of misleading or inaccurate advertising and the proposed rule in specifying allocation of space and disclosure of identity, in all respects is a measure which prevents misleading or inaccurate information; that it clearly requires graphic identification of and distinction between the franchisor and the franchisee.

f. That the opinion of the United States District Court in the matter of Century 21 Real Estate Corporation et al v The Nevada Real Estate Advisory Commission et al, Civil No. 76-136 BRT applies equally as a conclusion to this Board's adoption of the proposed rule.

"Combating fraudulent or deceptive advertising in the real estate brokerage business is a matter of extensive and pecularily local concern. The regulation is appropriately aimed at providing consumers with more not less information. Whatever incidental burden [on the broker's rights] may exist we conclude that it is slight in comparison with the weighty state interest Nevada has in insuring that its citizens realize they must look to the local broker and not the franchisor for recompense in the event they are defrauded in a real estate transaction."

g. That there is a need to protect the buying and selling public by the adoption of the proposed franchise rules.

h. That the matters intended to be regulated by sub-section 2. "5.d." of the proposed rule are adequately addressed and regulated under Section 66-1925 (2) and Section 66-1936 (1), and that said subsection is deleted from the rule as proposed.

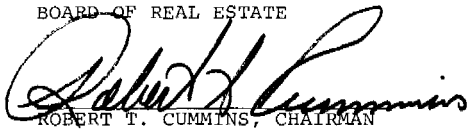
i. That an effective date of July 1, 1979, is a reasonable time for the effective date of operation of the franchise rules.

4. For the foregoing reasons, and with the exception of sub-section 2. "5.d.", the Board has adopted the rule as proposed.

5. The effective date of the operation of these rules as adopted is July 1, 1979, and all Montana Real Estate Licensees who are affected by this rule shall comply with the same from

and after that date.

BOARD OF REAL ESTATE



ROBERT T. CUMMINS, CHAIRMAN

ED CARNEY, DIRECTOR
DEPARTMENT OF PROFESSIONAL
AND OCCUPATIONAL LICENSING

Certified to the Secretary of State 12-5, 1978.

VOLUME NO. 37 OPINION NO. 165

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION - Grants to religious organizations;
PUBLIC FUNDS - Grants to religious organizations;
RELIGIOUS ORGANIZATIONS - Alternative renewable energy source grants;
MONTANA CONSTITUTION - Article II, section 5; Article X, section 6;
SECTIONS - 84-7407 to 84-7413, R.C.M. 1947;
ADMINISTRATIVE RULES OF MONTANA - 36-2.8(18)-58060 to S8170.

HELD: The Department of Natural Resources and Conservation may not award alternative renewable energy source grants to any church or to any school, academy, seminary, college, university, or other literary or scientific institution controlled in whole or in part by any church, sect, or denomination. If a religious organization that does not fall into any of these categories applies for a grant, the department may award the grant if it determines that:

(1) a substantial portion of the organization's functions are secular rather than religious, and

(2) the grant will be used for a secular rather than religious function.

25 October 1978

Donald MacIntyre
Chief Legal Counsel
Department of Natural Resources & Conservation
32 South Ewing
Helena, Montana 59601

Dear Mr. MacIntyre:

You have requested an opinion concerning the constitutionality of granting money to religious organizations for the research, development or demonstration of alternative renewable energy sources.

Pursuant to Section 84-7411, R.C.M. 1947, any person may apply for a grant to enable him to research, develop, or demonstrate alternative renewable energy sources. A person is defined as any natural person, corporation, partnership or other business entity, association, trust, foundation, any educational or scientific institution or any governmental unit. Section 84-7408(2), R.C.M. 1947. To the extent constitutionally permitted, a religious organization may qualify as a person and apply for an ARES grant through the Department of Natural Resources and Conservation. The grants awarded by the Department are paid by the state treasurer by warrants payable from the alternative energy research development and demonstration account within the earmarked revenue fund. Section 84-7409, R.C.M. 1947.

My opinion is that ARES grants to religious organizations are prohibited by both Article II, section 5 and Article X, section 6 of the Montana Constitution. Article II, Section 5 provides:

> The state shall make no law respecting an establishment of religion ....

This language is taken directly from the Establishment Clause contained in the First Amendment of the United States Constitution. The United States Supreme Court, in Wolman v. Walter, 97 S.Ct. 2593, 2599 (1977), said:

> The mode of analysis for Establishment Clause questions is defined by the three-part test that has emerged from the Court's decisions. In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion.

Granting money under the ARES program has a secular purpose. The ARES grants are intended to stimulate research, development and demonstration of energy sources which are harmonious with ecological stability by virtue of being renewable. Section 84-7407, R.C.M. 1947. "But the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State." Committee for Public Education v. Nyquist, 413 U.S. 756, 774 (1973).

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.

Hunt v. McNair, 413 U.S. 734, 743 (1973).

Nyquist involved a state statute authorizing direct payments to certain nonpublic elementary and secondary schools, virtually all of which were church related to be used for the "maintenance and repair of ... school facilities and equipment to ensure the health, welfare and safety of enrolled pupils." 413 U.S. at 762. The United States Supreme Court ruled that although the legislative purpose was secular, the provision was unconstitutional, and gave this explanation:

> The grants ... are given largely without restriction on usage. ...[I]t is possible for a sectarian elementary or secondary school to finance its entire "maintenance and repair" budget from state tax-raised funds. No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. Nothing in this statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.

Id. at 774.

The Supreme Court's reasoning applies also to Montana's ARES grants. Nothing in the statutes, Sections 84-7407-7413, R.C.M. 1947, nor in the Department's guidelines for implementation of the law, ARM 36-2.8(18)-S8060 - S8170, restricts the use of such grants to projects involving facilities used exclusively for secular functions, nor would it be possible to impose such restrictions within the context of organizations, a substantial portion of whose functions are subsumed in the religious mission. The Department may not, therefore, award an ARES grant to such religious organizations.

The United States Supreme Court has, however, recognized that some religious organizations perform functions that are secular in nature, and that are clearly distinguishable from the organization's religious functions. Aid to those organizations that is restricted to use in connection with secular functions only does not violate the Establishment Clause. For example, in Hunt v. McNair, supra, the Court approved a law authorizing the issuance of revenue bonds to benefit a Baptist-controlled college. The college's operations were not oriented significantly towards religious rather than secular education. And the law specifically disallowed the financing of any project encompassing:

> [A]ny facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination. S.C. Code Ann. §22-41.2(b)(Supp. 1971).

413 U.S. at 736-37.

Under Article II, section 5, then, grants may not be awarded to any religious organization unless a substantial portion of its functions are secular, and the grant is to be used for one of those secular functions. This means, for example, that a grant may not be used to heat a building that is used for religious meetings.

When the religious organization is a church or a school, academy, seminary, college, university, or other literary or scientific institution that is controlled in whole or in part by any church, sect, or denomination, the constitutional prohibition is even clearer. Under Article X, section 6(1) of the Montana Constitution, those organi-

zations may not be awarded ARES grants regardless of whether religion permeates the organization or whether the grant's intended use is purely secular.

Article X, section 6(1) states:

> The legislature ... shall not make any direct or indirect appropriation or payment from any public fund or monies ... for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect or denomination. (Emphasis supplied.)

The Montana Supreme Court has not discussed the scope of this provision in detail. I have, therefore, looked for guidance in reaching this conclusion to other states with similar constitutional provisions, see Yellowstone Pipeline Co. v. State Board of Equalization, 138 Mont. 603, 358 P.2d 55 (1960), and to the intent of the framers of our own constitution as reflected in the constitutional convention proceedings, see Keller v. Smith, 170 Mont. 399, 553 P.2d 1002 (1976); School District No. 12 Phillips County v. Hughes, 170 Mont. 267, 552 P.2d 328 (1976).

The Idaho Supreme Court discussed the nature of a constitutional provision almost identical to Article X, section 6 in Epeldi v. Engelking, 94 Ida. 390, 488 P.2d 860 (1971). The Idaho court was concerned with aid to parochial schools in the form of transportation of students by district school buses. Epeldi, concluding that the aid was unconstitutional, held that the framers of the Idaho constitution intended to more positively enunciate the separation between church and state than did the framers of the United States Constitution. Had that not been their intention there would have been no need for that particular provision, because the Idaho Constitution already contained language comparable to the Establishment Clause of the First Amendment of the United States Constitution. The test applied was whether the legislation involved would be in aid of and whether it would help support or sustain any church affiliated school. The Court stated:

> The requirements of this constitutional provision thus eliminate as a test for determination of the constitutionality of the statute ... whether the

> legislation has a "secular legislative purpose and a primary effect that neither advances nor inhibits religion."

488 P.2d at 865.

Other jurisdictions in accord with Idano are Nebraska and South Dakota. See Gaffney v. State Department of Education, 192 Neb. 358, 220 N.W.2d 550 (1974); McDonald v. School Board of Yankton, 246 N.W.2d 93 (1976).

The Montana Constitutional Convention Committee Report on Article X, section 6, at 20, shows the intent of the Montana framers to be identical to the holding in Epeldi:

> Although the Montana provision is more stringently prohibitive than is the federal First Amendment and provisions in some other states, this is within a state's prerogative. A state may prohibit forms of state aid which might be permissible under federal Supreme Court rulings.

Under Article X, section 6, then, the question is not whether the grant funds a religious activity, or whether religion permeates the organization being awarded the grant. Rather, the question is whether the grant aids the church or institution to whom it is awarded. It is clear that a grant would aid those organizations financially; the grant frees up funds that otherwise would have been used to carry out the program for which the grant is made. Thus, for example, a grant to a sectarian college for heating a swimming pool by adapting solar technology would aid that institution even though the activity being funded is not religious, and even though a substantial portion of the college's functions are not subsumed in the religious mission. Such a grant would, nonetheless, be prohibited by Article X, section 6.

THEREFORE, IT IS MY OPINION:

> The Department of Natural Resources and Conservation may not award alternative renewable energy source grants to any church or to any school, academy, seminary, college, university, or other literary or scientific institution controlled in whole or in part by any church, sect, or denomination. If a religious organization that does not fall into any of these categories applies for

a grant, the Department may award the grant if it determines that:

(1) a substantial portion of the organizations functions are secular rather than religious, and

(2) the grant will be used for a secular rather than religious function.

Very truly yours,

MIKE GREELY
Attorney General

MG/SKS/br

VOLUME NO. 37 OPINION NO. 169

ADMINISTRATIVE PROCEDURE - Validity of unwritten policies for minor subdivisions; authority to adopt regulations for minor subdivisions;
COUNTY COMMISSIONERS - Validity of unwritten policies for minor subdivisions; authority to adopt regulations for minor subdivisions; public park and playground dedication for subdivisions;
LAND USE - Minor subdivisions; public park and playground dedication for minor subdivisions;
RULES AND REGULATIONS - validity of unwritten policies for minor subdivisions; authority to adopt regulations for minor subdivisions;
SECTION 11-3859 et seq., R.C.M. 1947.

HELD: 1. A local governing body's unwritten blanket policy or practice of accepting cash donations in lieu of public park and playground dedication with respect to subdivisions of five or fewer parcels is invalid. Minor subdivisions may be exempted from public park and playground dedication requirements only on a case by case basis and only if they meet one of the statutory criteria for exemption under Section 11-3865, R.C.M. 1947

2. Where, pursuant to Section 11-3864(2), R.C.M. 1947, a cash donation is accepted in lieu of public park and playground land dedication, the amount of cash paid by the subdivider must be based upon the fair market value of the unimproved, unsubdivided land which is to be subdivided. Fair market value is the amount a willing buyer would pay and a willing seller accept for the land where neither buyer or seller is acting under duress.

20 November,1978

Douglas G. Harkin, Esq.
Ravalli County Attorney
115 Bedford Street
Hamilton, Montana 59840

Dear Mr. Harkin:

You have requested an opinion concerning the eligibility of twenty-six, four lot subdivisions for summary review under

Section 11-3866(6), R.C.M. 1947, of the Montana Subdivision and Platting Act. Each of the twenty-six subdivisions comprises approximately twenty acres and has been platted into four, approximately five acre lots. Twenty-one of the subdivisions lie within a two thousand acre ranch near the town of Stevensville which was previously subdivided in June 1977, into seventy parcels of twenty or more acres each. The five remaining subdivisions are adjacent to the ranch. Cumulatively, the subdivisions would create a total of one hundred four lots, comprising five hundred twenty total acres.

Additionally, you have requested an opinion regarding the amount of cash donation which must be paid by a subdivider under Section 11-3864(2), R.C.M. 1947, where, pursuant to that section, a governing body determines that dedication of land for parks and playgrounds is inappropriate.

A.

Initially, I declined to address your questions because of pending cases in the Supreme Court and the District Court of the Fourth Judicial District. It is my policy to avoid, where possible, issuing any opinion which might be construed as a comment upon or an attempt to influence pending litigation. However, after reviewing subsequent developments in each of the two cases, I have determined that the questions raised in your opinion request, with one exception, are beyond the scope of issues in either of those cases.

One case, Young v. Stillwater County, was recently decided by the Montana Supreme Court, 35 St. Rptr. 1099, 582 P.2d 353 (1978). The Court determined that minor subdivisions are not subject to public hearing requirements of the Montana Subdivision and Platting Act, at least where local regulations do not require a public hearing. The case did not consider minor subdivision eligibility requirements.

The second case, State ex rel. Florence-Carlton School District No. 15 v. Board of County Commissioners, et al, is presently on appeal to the Montana Supreme Court, No. 14365. The questions presented in that case, as they relate to the Montana Subdivision and Platting Act, are whether private easements can be considered "proper access" under Section 11-3866(6) and whether minor subdivisions are subject to public interest review under Section 11-3866(4), R.C.M. 1947. Although the case involves the same twenty-six subdivisions referred to in your opinion request, the parties stipulated for purposes of that action that each of the

twenty-six subdivisions is eligible for review as a minor subdivision if private easements satisfy the "proper access" requirement of Section 11-3866(6). A district court finding in its Order and Memorandum that the twenty-six subdivisions are eligible for summary review as minor subdivisions was related solely to the question of whether the subdivisions meet the "proper access" requirement for minor subdivision review:

> The issues in this litigation revolve around two questions of law.
>
> Memorandum
>
> First, whether a minor subdivision submitted for approval of a county governing body pursuant to Section 11-3866(6), R.C.M. 1947, is required to meet the public interest criteria of Section 11-3866(4), R.C.M. 1947, and second, whether a private easement furnishes "proper access" within the meaning of Section 11-3866(6), R.C.M. 1947. Since the second issue raises the initial question of whether the subdivisons involved herein are even eligible for review as minor subdivisions under Section 11-3866(6), the Court must address that issue as a threshold question. (Emphasis added.)

The district court did not consider whether the twenty-six subdivisions satisfy other prerequisites to treatment as minor subdivisions. However, the decision renders questions concerning the public access prerequisite beyond the scope of this opinion.

B.

Initially, it should be noted that the Montana Subdivision and Platting Act has spawned numerous questions and controversies. It is the subject of five recent Attorney General opinions. 37 OP. ATT'Y GEN. NO.'s 1, 38, 41, 74 and 88. Additionally, the Attorney General's office has received a large number of citizen complaints concerning uses of the various exceptions and exemptions to the Act. These issues and complaints have not arisen for lack of an expression of legislative purpose and intent. The purpose of the Act is express, providing:

> Statement of purpose. It is the purpose of this act to promote the public health, safety, and general welfare by regulating the subdivision of

> land; to prevent overcrowding of land, to lessen congestion in the streets and highways; to provide for adequate light, air, water supply, sewage disposal, parks and recreation areas, ingress and egress, and other public requirements; to require development in harmony with the natural environment; to require that whenever necessary the appropriate approval of subdivisions be contingent upon a written finding of public interest by the governing body; and to require uniform monumentation of land subdivisions and transferring interests in real property by reference to plat or certificate of survey.

Section 11-3860, R.C.M. 1947. A general statement of legislative purpose is no substitute for plain and clear statutory language, see In re Estate of Baier, ___ Mont. ___, 567 P.2d 943, 946 (1977), and serves only as a beacon in construing ambiguous provisions, see, Corwin v. Bieswanger, 126 Mont. 332, 340, 251 P.2d 232 (1952).

Although the legislature has generally provided for public review of subdivisions and the preparation of environmental impact statements and dedication of land for public parks and playgrounds, Sections 11-3862, 11-3864 and 11-3866, R.C.M. 1947, it has also provided for numerous exceptions to the requirements of the Act. One of those exceptions relates to "minor subdivisions," for which the legislature has established summary review procedures. Those summary review provisions are set forth in two separate sections. The first is Section 11-3863(5), which provides:

> (5) Local subdivision regulations shall include procedures for the summary review and approval of subdivision plats containing five (5) or fewer parcels where proper access to all lots is provided, where no land in the subdivision will be dedicated to public use for parks or playgrounds and which have been approved by the department of health and environmental sciences where such approval is required by sections 69-5001 through 69-5005; provided that reasonable local regulations may contain additional requirements for summary approval. (Emphasis added.)

The second is Section 11-3866(6), which provides:

> (6) Subdivisions containing five or fewer parcels where proper access to all lots is provided and in

which no land is to be dedicated to the public for parks or playgrounds are to be reviewed as follows:

(a) The governing body must approve, conditionally approve, or disapprove the first such subdivision from a tract of record within 35 days of the submission of an application for approval thereof;

(b) The governing body shall state in writing the conditions which must be met if the subdivision is conditionally approved or, if it disapproves the subdivision, what local regulations would not be met by the subdivision;

(c) The requirements for holding a public hearing and preparing an environmental assessment shall not apply to the first such subdivision created from a tract of record;

(d) Subsequent subdivisions from a tract of record shall be reviewed under section 11-3863(5) and regulations adopted pursuant to that section. (Emphasis added.)

Section 11-3863(5) was enacted in 1973. Section 11-3866(6) was enacted in 1977, Laws of Montana (1977), ch. 555, sec. 1, apparently to clarify the procedures and standards to be followed in reviewing first time minor subdivisions. Subsection (c) of Section 11-3866(6) expressly exempts the first minor subdivision created from a tract of record from public hearing and environmental assessment requirements which are otherwise required by Sections 11-3863(3) and 11-3866(3), R.C.M. 1947. Section 11-3863(5) allows imposition of more stringent requirements where subsequent divisions are involved, but only if those requirements are part of local regulations. Young v. Stillwater County, supra.

Summary treatment under Section 11-3863(5) and 11-3866(6) is expressly conditioned upon three things. First, the subdivision must consist of five or fewer lots; second, proper access must be provided to each of the lots; and, third, there can be no dedication of land for public parks and playgrounds. The first criteria is met with respect to each of the twenty-six subdivisions in question, assuming there is no common ownership of adjacent subdivisions, and the second criteria, as previously noted, is beyond the scope of the present opinion. With respect to the third criteria, the policies and practices of the Ravalli County Commissioners and Planning Board are invalid. It is my opinion

that each subdivision of five or fewer parcels which is submitted for review must be considered individually to determine whether it qualifies for an exemption from the dedication requirement.

The Commissioners and Planning Board have an unwritten policy or practice of waiving public park and playground dedication requirements, and extracting cash donations in lieu of dedication, for subdivisions of five or fewer parcels. Initially, you indicated that the practice amounted to a blanket exemption of all such subdivisions from dedication requirements. Subsequently you wrote and advised that the practice extended only to those subdivisions of five or fewer parcels having restrictive covenants which limit lot size to a minimum of five acres and buildings to single family residences. Because of the uncertainty as to the precise policy, at my request investigators of the Planning Division of the Department of Community Affairs recently reviewed records of the Ravalli County Clerk and Recorder, County Commissioners and Planning Board. They were unable to find a single recorded case during the past year in which Ravalli County has required and accepted dedication of land for public parks and playgrounds in conjunction with a subdivision of five or fewer parcels. Moreover, only six of twenty-six subdivisions of five or fewer parcels recorded in Ravalli County during the past year and scrutinized by DCA Investigators were subdivisions of lots of five or more acres. The other twenty-one consisted of lots less than five acres. This information contradicts statments that the commissioners practice or policy has been based upon the existence of restrictive covenants limiting minimum lot size and lot use. In any event, the practice of waiving land dedication and accepting cash donation with respect to subdivisions of five or fewer parcels is inconsistent with the Montana Subdivision and Platting Act, irrespective of whether the policy extends to all subdivisions of five or fewer parcels or is limited to such subdivisions having restrictive covenants.

First, the Subdivision and Platting Act contemplates written regulations adopted after notice and hearing. See Section 11-3863(1), R.C.M. 1947. The subdivision regulations of Ravalli County, Montana, heretofore adopted, do not authorize or establish a blanket policy for accepting cash in lieu of dedication of land with respect to minor subdivisions, nor does it appear that such a policy has been formally adopted after notice or hearing.

Second, the practice conflicts with express provisions governing waiver of public park and playground dedication. Any administrative regulation or practice which conflicts with a parent statute is void. See State ex rel. Swart v. Casne, ___ Mont. ___, 564 P.2d 983, 986 (1977).

The public park and playground dedication requirement was the subject of a prior Attorney General opinion found at 37 OP. ATT'Y GEN. NO. 1 (1977). That opinion specifically held the fact that a subdivision consisting of five or fewer parcels is an insufficient basis for waiving the requirement for public park and playground dedication.

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> The Montana Subdivision and Platting Act, at Section 11-3864, R.C.M. 1947, comprehensively provides for public dedication of lands in subdivisions for parks and playgrounds. Subsection (1) thereof requires generally that all plats of residential subdivisions contain a portion of the subdivision's lands permanently dedicated to public parks and playgrounds. Subsection (2) provides, however, that where, for good cause shown, the dedication of land to parks and playgrounds is undesirable because of "size, topography, shape, location, or other circumstances," the local governing body may accept a cash donation from the subdivider in lieu thereof, based upon the fair market value of the amount of land that otherwise would have been dedicated. Subsections (5), (6), and (7) of section 11-3864 allow the local governing body to waive these dedication and cash donation requirements in certain specific instances. None of these instances in which waiver is allowed is based upon the fact that the subdivision is a "minor subdivision."
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> * * *
>
> Section 11-3863(5) was clearly intended to provide a procedure for summary review, and not to add to or detract from the clear requirements as to parks and playgrounds found in Section 11-3864. When Sections 11-3863(5) and 11-3864 and the Department's Rule are construed together, it is clear that all subdivisions must comply with the requirements of Section 11-3864 relating to parks and playgrounds. There is simply no exemption in that section for minor subdivisions. If, however, a subdivision containing (5) or fewer parcels,

> with proper access provided to all lots, complies with Section 11-3864 by either making a cash donation in lieu of dedication and cash donation requirements pursuant to subsection (5), (6), or (7), then it is entitled to enjoy the summary review and approval procedures adopted by the local governing body pursuant to Section 11-3863(5). On the other hand, if a subdivision containing five (5) or fewer parcels complies with Section 11-3864 by actually dedicating land to public parks and playgrounds, then it is not eligible for summary review and approval under the local governing body's procedures adopted pursuant to Section 11-3863(5).

Opinion No. 1 was issued on February 2, 1977, prior to the enactment of Section 11-3866(6) by the 1977 Montana Legislature. However, the reasoning and holdings of Opinion No. 1 are equally applicable to proceedings under Section 11-3866(6), since the new section has identical eligibility requirements with respect to dedication requirements as those of Section 11-3863(5). A blanket practice of accepting cash in lieu of public park and playground dedication with respect to subdivisions of five or fewer parcels is contrary to the express holding of Opinion No. 1.

Such a practice is invalid even if it is linked to the existence of restrictive covenants. Section 11-3864(5) is the sole authority for waiving dedication requirements based upon restrictive covenants limiting parcel and types of buildings. That section provides:

> (5) The local governing body may waive dedication and cash donation requirements where all of the parcels in a subdivision are five (5) acres or more in size and where the subdivider enters a covenant to run with the land and revocable only by mutual consent of the governing body and the property owner that the parcels in the subdivision will never be subdivided into parcels of less than five (5) acres and that all parcels in the subdivision will be used for single family dwellings. (Emphasis supplied.)

The express mention of a particular power or authority implies the exclusion of any nondescribed power or authority. State ex rel. Jones v. Giles, 168 Mont. 130, 133, 541 P.2d 355 (1975). Thus, the criteria of Section 11-3864(5) are exclusive as to consideration of restrictive covenants as a basis for waiving dedication requirements.

Moreover, a restrictive covenant limiting lot size or types of buildings is not a circumstance permitting a blanket policy of accepting cash in lieu of dedication under subsection (2) of Section 11-3864. That subsection provides:

> (2) Where, because of size, topography, shape, location, or other circumstances, the dedication of land for parks or playgrounds is undesirable, the governing body may, for good cause shown, make an order to be endorsed and certified on the plat accepting a cash donation in lieu of the dedication of land and equal to the fair market value of the amount of land that would have been dedicated. For the purpose of this section, the fair market value is the value of the unsubdivided, unimproved land. Such cash donation shall be paid into the park fund to be used for the purchase of additional lands or for the initial development of parks and playgrounds. [Emphasis added.]

In defining the "other circumstances" which may be considered by local governing bodies under subsection (2), reference must be made to the enumeration of specific items which precede the general term. The statutory construction doctrine of ejusdem generis is applicable. "The doctrine of ejusdem generis is one of construction and means 'that where an enumeration of specific things is followed by some more general word or phrase, such general phrase is held to refer to things of the same kind and those enumerated.'" Burke v. Sullivan, 127 Mont. 374, 378, 265 P.2d 203 (1954). The specific things enumerated in subsection (2) are physical characteristics of subdivided land. "Other circumstances" must therefore refer to such other physical characteristics of the subdivided land which may be relevant to whether a cash donation in lieu of dedication of land is appropriate. The criteria for waiver under subsection (2) can only be applied on a case by case or subdivision by subdivision basis.

C.

Your second question concerns computation of the amount of cash donation assessed in lieu of public park and playground land dedication in those cases under Section 11-3864(2) in which dedication of land is determined to be undesirable. Section 11-3864(2) expressly provides that the amount of cash donation shall be "equal to the fair market value of the amount of land that would have been dedicated." "Fair market value" has an accepted legal meaning, being the

amount a willing buyer would pay and a willing seller would accept for a particular piece of property where neither buyer or seller is acting under duress. State Highway Commission v. Metcalf, 160 Mont. 164, 173, 500 P.2d 951 (1972). An additional provision in subsection (2) that the fair market value be of the "unsubdivided, unimproved land" requires that the land be valued at the price a willing buyer would pay and a willing seller accept for the unimproved land prior to its subdivision. The additional provision eliminates payments based upon any increase in value of the land which may be due to its subdivision or improvement.

The amount of cash donation is computed by multiplying the fair market value of the unsubdivided parcel by the percentage of land which would otherwise be dedicated for public parks and playgrounds. That percentage is fixed in Section 11-3864(1), which requires dedication of one-ninth of the combined area of lots of five acres or less and one-twelfth of the combined areas of lots greater than five acres. Thus, in cases of subdivisions creating lots of greater than five acres, the cash donation would be one-twelfth of the amount a willing buyer would pay and a willing seller accept for the land in an unsubdivided and unimproved condition. In the case of subdivisions creating lots of less than five acres, the cash in lieu payment would be one-ninth of the amount a willing buyer would pay and a willing seller accept for the land in an unsubdivided and unimproved condition.

The Ravalli County Commissioners and Planning Board have apparently been applying an improper standard for assessing cash in lieu of donation. DCA investigators found that during the past year the value placed upon land within minor subdivisions for cash in lieu purposes ranged from $9.32 to $896.77 per acre, and averaged $108.01 per acre. Information received by this office indicates that the valued amounts are far less than the market value of unimproved, unsubdivided acreage in Ravalli County, and Planning Board personnel advised the DCA investigators that until recently the Board of County Commissioners had been using the "assessed" value of the land for cash donation purposes. In the case of agricultural land, the difference between the assessed value and its fair market value may be substantial. See Section 84-402(5), R.C.M. 1947. Since the statutory standard for valuing land for purposes of Section 11-3864(2) is clear and express, the Board must apply that standard.

THEREFORE, IT IS MY OPINION:

1. A local governing body's unwritten blanket policy or practice of accepting cash donations in lieu of public park and playground dedication with respect to subdivisions of five or fewer parcels is invalid. Minor subdivisions may be exempted from public park and playground dedication requirements only on a case by case basis and only if they meet one of the statutory criteria for exemption under Section 11-3864, R.C.M. 1947.

2. Where, pursuant to Section 11-3864(2), R.C.M. 1947, a cash donation is accepted in lieu of public park and playground land dedication, the amount of cash paid by the subdivider must be based upon the fair market value of the unimproved, unsubdivided land which is to be subdivided. Fair market value is the amount a willing buyer would pay and a willing seller accept for the land where neither buyer or seller is acting under duress.

Very truly yours,

MIKE GREELY
Attorney General

MG/MMcC/br

VOLUME 37 OPINION NO. 170

RIGHT TO KNOW - Constitutional right, individual privacy, public disclosure;
OPEN MEETING LAW - Right to know, individual privacy, public disclosure;
CONSTITUTION OF MONTANA - Article II, Section 9; Article II, Section 10;
SECTION - 82-3402, R.C.M. 1947.

HELD: A public body may close a meeting under Section 82-3402 when the matter discussed relates to individual privacy and the demand for individual privacy clearly exceeds the merits of public disclosure.

27 November, 1978

Harold F. Hanser, Esq.
Yellowstone County Attorney
Yellowstone County Courthouse
Billings, Montana 59101

Dear Mr. Hanser:

You have requested my opinion on the following question:

> Can a public body close a meeting under the collective bargaining exception to the Open Meeting Law when the matter discussed relates to wages, but not the wages of the bargaining unit?

The material accompanying your letter indicates that during the pendency of contract negotiations between the city and the police union, the city council closed a portion of its regular meeting while discussing wage increases to be given to non-union police supervisory personnel. The material also indicates that the discussion involved personal and private matters relating to the individual supervisory personnel involved.

The answer to your question must begin with an examination of Article II, Section 9 of the Montana Constitution, which provides:

> Right to Know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of

> state government and its subdivision, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

This constitutional provision provides public access to governmental documents and operations. However, this right to know is not absolute. When the demands of individual privacy clearly exceed the merits of public disclosure, government documents and operations are not subject to public disclosure. The Constitutional Convention Bill of Rights proposal on the right to know proclaimed:

> The committee intends by this provision that the right to know not be absolute. The right of individual privacy is to be fully respected in any statutory embellishment of the provision as well as the court decisions that will interpret it. To the extent that a violation of individual privacy outweighs the public right to know, the right to know does not apply. Montana Constitutional Convention, Bill of Rights Proposal, No. VIII, p.23. (Emphasis supplied).

The right of individual privacy is recognized by Article II, Section 10, Constitution of Montana 1972, as follows:

> The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

The 1972 Montana Constitution applies a balancing test between the public's right to know and the demands of individual privacy when concerned with public accessibility issues.

This test is found in our Open Meeting Law, Section 82-3402, R.C.M. 1947, which requires all meetings of public and governmental bodies to be open to the public. As Section 82-3402 states in part:

> ...Provided, however, the presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy, and then, if, and only if, the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure.

The history of this statutory provision indicates that the legislature has repeatedly broadened its coverage, even though it is not yet coextensive with the rights granted by Article II, Section 9 of the Constitution.

To the extent quoted, the open meeting statute is coextensive with the constitutional right to know. Both allow closing a meeting where there is an interest in individual privacy which outweighs the merits of public disclosure. While it is not the function of an Attorney General's opinion to find and determine facts, it is apparent that the meeting which is the subject of your inquiry involved matters of individual privacy. Therefore, the privacy provisions of both the Constitution and the open meeting statutes are triggered and the meeting was properly subject to closure to the extent that matters of individual privacy were discussed, and to the extent that the privacy aspect of those matters outweighed the merits of public disclosure.

A proper application of this balancing test involves the following steps: (1) determining whether a matter of individual privacy is involved, (2) determining the demands of that privacy and the merits of publicly disclosing the information at issue, and (3) deciding whether the demand of individual privacy clearly outweighs the demand of public disclosure. This balancing test and the extent and applicability of claims to individual privacy are more fully explored in 37 OP. ATT'Y GEN. NO. 107. The test must be made and the decision to close a meeting with the reasons therefore must be made publicly prior to closing a meeting.

The open-meeting statute purports to go beyond the interests of individual privacy by providing (Section 82-2302):

> However, a meeting may be closed to discuss a strategy to be followed with respect to collective bargaining or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public agency.

Article II, Section 9 of the Constitution contains no such provision. On its face, Section 82-3402 would allow an agency to close a meeting to the public which Article II, Section 9 would require to be open.

While it is beyond the scope of this opinion to question the constitutionality of Section 82- 3402, the patent conflict

between the statute and the constitution is unavoidable. If such a conflict is found by a court to exist, the constitutional provision must prevail and the meeting must be open to allow the public "to observe the deliberations." When there is an overlap between collective bargaining or litigation strategy and matters of individual privacy, the balancing test in both Article II, Section 9 and 82-3402 can be utilized to determine whether the meeting should be closed. It is clear, however, that the mere presence of discussions relating to collective bargaining or litigation strategy without more is insufficient to allow a meeting to be closed under Article II, Section 9.

This conflict between Article II, Section 9 and Section 82-3402 has caused a great deal of confusion for public bodies, the press and interested citizens. These persons are unsure, on the one hand, of when they can close meetings and, on the other, of whether meetings that are closed have been lawfully closed. The legislature should remedy this situation by either amending the open-meeting statute, Section 82-3402, to conform with Article II, Section 9, or taking steps to amend Article II, Section 9 to allow closure in instances other than matters of individual privacy. This choice between these alternatives is one for the legislature or the people to make, but it must be made.

THEREFORE, IT IS MY OPINION:

> A public body may close a meeting under Section 82-3402 when the matter discussed relates to individual privacy and the demand for individual privacy clearly exceeds the merits of public disclosure.

Very truly yours,

MIKE GREELY
Attorney General
MG/ABC/ar

VOLUME NO. 37 OPINION NO. 171

COUNTIES - Liability for actions of county officers and employees;
COUNTY ATTORNEYS - Defense of county officers;
COUNTY OFFICERS AND EMPLOYEES - Compensation for legal fees; indemnification when action against is brought in federal court; suits against;
PUBLIC OFFICERS - Compensation for legal fees; indemnification when action against is brought in federal court; suits against.
SECTIONS - 16-1126, 16-3101, 16-3102, 16-3105, 82-4302, 82-4322.1, 82-4323, R.C.M. 1947; 42 U.S.C. § 1983.

HELD: 1. The county attorney is not responsible for defending lawsuits brought against a county official in his individual capacity.

2. Pursuant to Section 82-4323(3), R.C.M. 1947, the county must indemnify its officials for costs, attorney fees and personal liability resulting from actions taken by these officials unless the conduct upon which the claim is brought did not arise out of the course and scope of employment or is an intentional tort or felonious act.

3. "Other actionable conduct" as the term is used in Section 82-4323(1), R.C.M. 1947, may include actions taken "under color of state law" as the term is used in 42 U.S.C. §1983. Nevertheless, the requirement of Section 82-4323(1) that the governmental entity employer shall be made a party in an action brought against its employee does not apply to actions brought under Section 1983.

29 November 1978

Mr. John C. McKeon
Deputy County Attorney
Phillips County
P.O. Box 40
Malta, Montana 59538

Dear Mr. McKeon:

You have requested my opinion on the following questions:

1. Whether the county attorney is responsible for defending lawsuits brought against a county official in his individual capacity.

2. If not, whether the county can agree to indemnify county officials for costs, attorney fees and personal liability resulting from actions taken by said county against officials "under color of state law."

3. Whether "other actionable conduct" as said term is used in Section 82-4323(1), R.C.M. 1947, includes actions taken "under color of state law" as the term is used in 42 U.S.C. §1983.

Your questions relate to a civil suit against a county official brought in federal district court under 42 U.S.C. §1983. This opinion addresses the defense and indemnification of a county official in the context of such an action. While the opinion in some respects may be applicable to other actions as well, the responsibilities of a county when one of its officials is sued necessarily vary with the nature of the action and the remedy sought.

Question 1:

Can the county attorney defend a lawsuit against a county official in his individual capacity?

There is no statutory authority for requiring a county attorney to defend a county official sued in his individual capacity. Section 16-3101, R.C.M. 1947, provides in part that the county attorney "must ... defend all suits brought against ... his county," and under Section 16-3102, R.C.M. 1947, the county attorney "must attend and oppose all claims and accounts against the county which are unjust or illegal."

Section 16-3105, R.C.M. 1947, provides further that "[t]he county attorney must perform such other duties as are prescribed by law." The law is silent as to any duty on the part of the county attorney to defend a lawsuit brought against a county official in his individual capacity.

Under Section 16-1126, R.C.M. 1947, the board of county commissioners of a second, third or fourth class county has the power to employ, or authorize the county attorney to

employ special counsel "to represent said county in any civil action in which such county is a party." By its own terms, Section 16-1126 limits a county's power to employ special counsel to actions in which the county itself is a party.

It is not necessary to sue a county official in his official capacity under Section 1983. Nor is the question of whether the county is a real party in interest necessarily an issue. A county official may be sued in his individual capacity, alone, and the county is not then a party. Thus, when a Section 1983 suit is brought against a county official individually and the county is not a party, neither the county attorney nor "special counsel" hired by the county commissioners is authorized to defend.

Question 2:

Can the county agree to indemnify a county official when the official's liability results from action taken "under color of state law?"

The Montana Comprehensive State Insurance Plan and Tort Claims Act, Title 82, chapter 43, R.C.M. 1947, as amended, provides for the immunization and indemnification of public officers and employees sued for their actions, other than intentional torts or felonious acts, taken within the course and scope of their employment. Section 82-4322.1, R.C.M. 1947. The indemnification provision that is relevant here is set forth in Section 82-4323(3), R.C.M. 1947.

> In any action in which a governmental entity employee is a party defendant, the employee shall be indemnified by the governmental entity employer for any money judgments or legal expenses to which he may be subject as a result of the suit unless the conduct upon which the claim is brought did not arise out of the course and scope of his employment or is an intentional tort or felonious act of the employee.

There is no question that county officials are "employees" for the purposes of chapter 43. Section 82-4302(4), R.C.M. 1947. If the conduct of the county official did in fact arise out of the course and scope of his employment, and was neither an intentional tort nor a felonious act, the county as the governmental entity employer must indemnify the official.

There is no statutory qualification of the indemnification provided by Section 82-4323(3), R.C.M. 1947, in terms of whether the official's actions were taken "under color of state law." Nor is this indemnification limited to officials sued in state court under chapter 43 of Title 82. Section 82-4323(3) expressly refers to any action; if the legislature had intended to indemnify only those governmental employees sued in an action predicated on state law, it could and would have done so.

There are no Montana cases construing Section 82-4323(3), R.C.M. 1947. In Williams v. Horvath, 129 Cal. Rptr. 453, 548 P.2d 1125 (1976), the California Supreme Court held that State's Tort Claims Act indemnification provisions apply whether liability is based on Section 1983 or the California Tort Claims Act itself. The California statute, like Section 82-4323(3), R.C.M. 1947, specifically referred to any claim or action in establishing the scope of indemnification. The Court found Section 1983 does not preclude a state from indemnifying its employees found liable under that section, and concluded such indemnification therefore was proper.

In construing a statute, the goal is to give effect to the purpose of the statute. Burritt and Safeway v. City of Butte, 161 Mont. 530, 535, 508 P.2d 563 (1973). Section 82-4323(3), R.C.M. 1947, is unequivocal in extending indemnification to governmental employees sued in any civil action, with the only qualifications relating to factual determinations of whether the employee's conduct arose out of the course and scope of his employment or was an intentional tort or felonious act. Therefore, it is my opinion that Section 82-4323(3) applies when a suit is brought against an individual county official alleging his actions were taken "under color of state law."

Question 3:

Your third question concerns the scope of Section 82-4323(1), R.C.M. 1947, which provides:

> In an action brought against any employee of a state, county, city, town or other governmental entity for a negligent act, error or omission, or other actionable conduct of the employee committed while acting within the course and scope of his office or employment, the governmental entity employer shall be made a party defendant to the action.

You ask whether "other actionable conduct" as that term is used in Section 82-4323(1), R.C.M. 1947, includes actions taken "under color of state law" as the term is used in 42 U.S.C. §1983. It is my opinion that such "other actionable conduct" may include actions taken "under color of state law."

The federal statute, 42 U.S.C. §1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 provides for a civil action for deprivation of federal constitutional and statutory rights resulting from a "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Monroe v. Pape, 365 U.S. 167, 187 (1960). Whether or not the conduct was authorized, even if proscribed by state law, the wrongdoer may be said to have been clothed with authority of state law. Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962). In any Section 1983 action, whether a wrongdoer was acting "under color of state law" is a federal issue, and the focus is on the nature of the wrongdoer's action.

The purpose of Section 82-4323(1), R.C.M. 1947, is to direct an action brought against a governmental employee to the attention of the governmental entity employer by requiring that the employer must be made a party to the action. The reference to "other actionable conduct" reflects an intent to include all suits arising from conduct of a governmental employee committed within the course and scope of his employment within this requirement.

A cause of action brought under Section 1983, on the other hand, may be directed to the governmental employee alone. Traditionally, a governmental entity could not be sued directly under Section 1983 because such an entity was not a "person" under that section. Monroe v. Pape, 365 U.S. 167 (1960); Dodd v. Spokane County, 393 F.2d 330 (9th Cir. 1968). Even if a Section 1983 plaintiff wanted to join a governmental entity employer, he was precluded from doing so because the federal court had no independent jurisdiction

over the governmental entity. Aldinger v. Howard, 427 U.S. 1 (1976).

In Monell v. Dept. of Social Services of the City of New York, 98 S.Ct. 2018 (1978), the Supreme Court held governmental entities may be responsible under Section 1983. It is now possible that a governmental entity could be joined as a party defendant in such an action. Nevertheless, Section 82-4323(1), R.C.M. 1947, cannot be invoked to compel joinder of a governmental entity employer in such an action. If the application of a state statutory requirement has the effect of qualifying a federally-created right, the requirement fails. Willis v. Reddin, 418 F.2d 702 (9th Cir. 1969). Furthermore, remedies or procedures for the vindication of the federal right created in Section 1983 are exclusively a federal concern. A state's procedural scheme to enforce its statutory system of liability and immunity does not apply to civil rights actions brought under Section 1983. Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970).

THEREFORE IT IS MY OPINION:

1. The county attorney is not responsible for defending lawsuits brought against a county official in his individual capacity.

2. Pursuant to Section 82-4323(3), R.C.M. 1947, the county must indemnify its officials for costs, attorney fees and personal liability resulting from actions taken by those officials unless the conduct upon which the claim is brought did not arise out of the course and scope of employment or is an intentional tort or felonious act.

3. "Other actionable conduct" as the term is used in Section 82-4323(1), R.C.M. 1947, may include actions taken "under color of state law" as the term is used in 42 U.S.C. §1983. Nevertheless, the requirement of Section 82-4323(1) that the governmental entity employer shall be made a party in an action brought against its employee does not apply to actions brought under Section 1983.

Very truly yours,

MIKE GREELY
Attorney General
MG/RL/dc