RESERVE

MONTANA ADMINISTRATIVE REGISTER

1979 ISSUE NO. 14
PAGES 761 — 830

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

Arrangements have been made to place the July 1978 through June 1979 Montana Administrative Registers on jacketing. Notice will be published when this is accomplished.

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 14

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BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption of a rule pertaining to pipeline crossings of department lands	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION OF RULE (pipeline crossings on department lands)

TO: All Interested Persons:

1. On Aug.15, 1979 at9:30 a.m., a public hearing will be held in the Commission Room, Department of Fish, Wildlife, and Parks, 1420 East 6 Avenue, Helena, Montana, to consider the proposed adoption of a rule pertaining to pipeline crossings of department lands.

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

RULE I PIPELINE CROSSINGS OF DEPARTMENT OWNED, CONTROLLED, OR ADMINISTERED LAND The Montana Fish and Game Commission establishes department policy for pipeline crossings of department owned, controlled, or administered land, as follows:

(1) No pipeline easements or permits for access may be granted or otherwise issued by the department over, under, or through lands under its ownership, control, or administration, and used for the purpose of (a) fish hatcheries or (b) bird farms.

(2) Pipeline easements or permits for access will be evaluated on a case-by-case basis for the lands listed in this subsection. Where pipeline easements or permits for access are granted, restrictions shall be included to ensure compensation for the wildlife, natural resources, and recreational values present; and further, that the contours and vegetation of the subject land be retained as closely as possible to the surrounding contours and vegetation:

(a) big game areas,
(b) fishing access sites,
(c) small game areas and river bottoms,
(d) all park areas including state parks, recreation areas, monuments, etc.,
(e) administrative sites.

(3) For waterfowl areas, no oil pipelines may be permitted. Gas pipelines will be evaluated on a case-by-case basis as with big game areas.

(4) For stream crossings, the department shall continue to act as required by statute. The action shall be determined by whether the stream crossing is contemplated by a public agency or by a private entity. The crossing by a public

agency shall be reviewed under Part 5, Chapter 5, Title 87. Crossings by private entities shall be reviewed under authority of Part 1, Chapter 7, Title 75.

5. In each and every instance where pipeline easement or permit for access is sought across, over, or under lands owned, controlled, or administered by the department, a preliminary environmental review shall be prepared by the department at the expense of the applicant.

3. The commission is proposing this rule in fulfillment of its responsibility for establishment of department policy because pipeline crossings are causing concern among those who value fish and wildlife resources and the lands set aside for recreational purposes. The department has statutory responsibility for the supervision, protection, and preservation of the wildlife of the state; responsibility for the conservation of scenic, historic, archeologic, scientific, and recreational resources; and authority for and control over lands upon which the state's wildlife resources may be found. This rule will assist in carrying out this authority and responsibility.

4. 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 Robert F. Wambach, Director, Department of Fish, Wildlife, and Parks, 1420 E. 6 Avenue, Helena, Montana 59601, any time before August 24, 1979.

5. F. Woodside Wright, Staff Attorney, has been designated to preside over and conduct the hearing.

6. The authority of the Fish and Game Commission to make the proposed rule is based on Sections 87-1-301, MCA (26-103.1, R.C.M. 1947), 87-1-201(1)(2), MCA (26-104, R.C.M. 1947), 87-1-201(7), MCA (26-202.4, R.C.M. 1947), 87-1-210, MCA (26-104.7, R.C.M. 1947), 87-1-221(3), MCA (26-104.4, R.C.M. 1947), and 75-7-102, MCA (26-1511, R.C.M. 1947).

Joseph J. Klabunde, Chairman
Montana Fish & Game Commission

Certified to Secretary of State July 16, 1979

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

In the matter of the repeal of Rules 16-2.2(2)-P2000 through P2080 pertaining to the implementation of the Montana Environmental Policy Act; and the adoption of new rules I through X implementing MEPA	NOTICE OF PUBLIC HEARING FOR THE REPEAL OF THE PRESENT RULES IMPLEMENTING THE MONTANA ENVIRONMENTAL POLICY ACT; AND ADOPTION OF REVISED RULES IMPLEMENTING MEPA

TO: All Interested Persons

1. On August 30, 1979, at 9:30 a.m. a public hearing will be held in the Senate Chambers, State Capitol Building, Helena, Montana, to consider repeal of the present rules (with the exception of 16-2.2(2)-P2060, the fee bill rule) implementing the Montana Environmental Policy Act, Chapter 1, Title 75, MCA, hereinafter referred to as "MEPA", and adoption of new rules pertaining to MEPA.

2. Although the new rules are similar in many respects to the present rules, the new format and many changes dictate that they be published as new rules. Except for the change indicated below, the text of these proposed rules is set forth in the Department of State Lands' MAR Notice No. 26-2-26 as published in issue no. 14 of the Montana Administrative Register: The words "department" and "board" as used in the Department of State Lands' proposed rules shall mean "Department of Health and Environmental Sciences" for these proposed rules.

3. The new rules are being proposed to streamline the MEPA process, standardize the MEPA process among executive agencies, provide for more public participation in the EIS process, and to make other numerous changes in the implementation of MEPA. The proposed new rules are being proposed for adoption by several other executive agencies, and the hearing will be a joint hearing by all agencies proposing adoption.

4. Any person may submit data, views, or comments concerning the proposed new rules either orally or in writing at the hearing. Written data, views, or arguments may be submitted to Robert Solomon, Department of Health and Environmental Sciences, Room 234, Cogswell Building, Helena, Montana 59601, any time before September 14, 1979. To be considered, mailed comments must be postmarked on or before September 14, 1979.

5. John F. North, Chief Counsel, Department of State Lands, has been designated to preside over and conduct the hearing.

6. The authority of the department to repeal and adopt is section 2-4-201 MCA and section 2-15-112. The code provisions implemented are Part 1, Chapter 1, Title 75 and section 75-1-201.

A. C. KNIGHT, M.D., Director

By JOHN W. BARTLETT, Deputy Director

Certified to the Secretary of State July 17, 1979 .

BEFORE THE DEPARTMENT OF INSTITUTIONS
OF THE STATE OF MONTANA

In the matter of the Adoption of New Rules 1 through 10 implementing MEPA as noticed by the Department of State Lands	))))))	NOTICE OF PUBLIC HEARING FOR THE ADOPTION OF REVISED RULES IMPLEMENTING MEPA AS PRESCRIBED BY THE DEPARTMENT OF STATE LANDS

TO: All Interested Persons

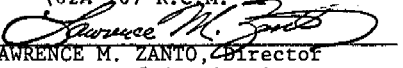
1. On August 30, 1979, at 9:30 a.m. a public hearing will be held in the Senate Chambers, State Capitol Building, Helena, Montana, to consider the repeal of the present rules (with the exception of 26-2.2(18) - P2010, the fee bill rule) implementing the Montana Environmental Protection Act, Chapter 1, Title 75, MCA, hereinafter referred to as "MEPA", and adoption of new rules pertaining to MEPA as prescribed by the Department of State Lands. The Department of State Lands has filed their intent of this public hearing and the repeal of certain rules and adoption of others in notice No. 26-2-26 Department of State Lands.

2. Although the proposed new rules of the Department of State Lands are similar in many respects to their present rules, the new format and many changes dictate that they be published as new rules. The new rules, as proposed for adoption by the Department of State Lands are spelled out in their Notice 26-2-26.

3. The Department of Institutions of the State of Montana is required by law to enact similar rules has decided to adopt the proposed text of the rules as published by the Department of State Lands and makes reference thereto to their proposed notice and rules.

4. Any person may submit data, views, or comments concerning the proposed new rules either orally or in writing at the hearing. Written data, views or arguments which affect in addition to the Department of State Lands the proposed rules of the Department of Institutions, may be submitted to John F. North, Chief Counsel, Department of State Lands, Capitol Station, Helena, Montana 59601 prior to September 14, 1979. To be considered, mailed comments must be postmarked on or before the September 14, 1979. A copy of these written comments shall also be sent to Nick A. Rotering, Chief Counsel, Department of Institutions, 1539 11th Avenue, Helena, Montana 59601.

5. The authority of the Department of Institutions to adopt the proposed rules as listed by the Department of State Lands is Section 2-15-112 MCA and the particular code provisions implementing MEPA as found in Part 1, Chapter 1, Title 75 and section 75-1-201 MCA. (82A-107 R.C.M. - 1 R.C.M.)



LAWRENCE M. ZANTO, Director
Department of Institutions

Certified to the Secretary of State July 17, 1979.

BEFORE THE BOARD OF COUNTY PRINTING
STATE OF MONTANA

in the matter of the amendment of Rule 22-3.10(6)-S1050 increasing fees; deleting certain items from the fee schedule; and altering the schedule format.	NOTICE OF PUBLIC HEARING FOR AMENDMENT OF RULE 22-3.10(6) - S1050 (Schedule of Prices)

TO: All Interested Persons

1. On August 17, 1979 at 9:00 a.m., a public hearing will be held in the Agate Room of the Yogo Inn: in Lewistown, Montana, to consider proposed amendments of Rule 22-3.10(6)-S1050 relating to the fees to be charged for all county printing and legal advertising.

2. The proposed amendments are for the purpose of reviewing and revising maximum printing fees; deleting certain items from the fee schedule; and altering the schedule format.

3. The proposed revisions, deletions, and alterations of the schedule may be obtained by requesting a copy from:

Daniel J. Worsdell, Administrator
Centralized Services Division
Department of Community Affairs
1424 Ninth Avenue
Helena, MT 59601

4. Interested parties may present their views, whether orally or in writing, at the hearing or by submitting their views in writing to the address provided above in paragraph 3.

5. Wayne Croskrey, Chairman of the County Printing Board, is designated to preside over and conduct the hearing.

6. The authority for the County Printing Board to adopt the proposed schedule is based on and implements Sections 7-5-2404, and 7-5-2405,MCA.

Daniel J. Worsdell
Administrative Officer
Montana Board of County Printing

Certified to the Secretary of State July 10, 1979

BEFORE THE DEPARTMENT OF STATE LANDS
AND THE BOARD OF LAND COMMISSIONERS OF
THE STATE OF MONTANA

In the matter of the repeal of) Rules 26-2.2(18)-P250 through) P2000 pertaining to the imple-) mentation of the Montana) Environmental Policy Act; and) the adoption of new rules I) through X implementing MEPA)	NOTICE OF PUBLIC HEARING FOR THE REPEAL OF THE PRESENT RULES IMPLEMENTING THE MONTANA ENVIRONMENTAL POLICY ACT; AND ADOPTION OF REVISED RULES IMPLEMENTING MEPA

TO: All Interested Persons

1. On August 30, 1979, at 9:30 a.m. a public hearing will be held in the Senate Chambers, State Capitol Building, Helena, Montana, to consider repeal of the present rules (with the exception of 26-2.2(18)-P2010, the fee bill rule) implementing the Montana Environmental Policy Act, Chapter 1, Title 75, MCA, hereinafter referred to as "MEPA", and adoption of new rules pertaining to MEPA.

2. Although the new rules are similar in many respects to the present rules, the new format and many changes dictate that they be published as new rules. The new rules, as proposed for adoption, and as follows:

RULE I POLICY STATEMENT CONCERNING MEPA RULES The purpose of these rules is to implement Chapter I, Title 75, MCA, the Montana Environmental Policy Act (MEPA), through the establishment of administrative procedures. In order to fulfill the stated policy of that act, the Department of State Lands shall conform to the following rules prior to reaching a final decision on actions covered by MEPA. It must be noted that the act requires that state agencies comply with its terms "to the fullest extent possible."

RULE II DEFINITION OF MEPA TERMS (1) "Emergency actions" include, but are not limited to:

(a) projects undertaken, carried out, or approved by the Department of State Lands to repair or restore property or facilities damaged or destroyed as a result of a disaster when a disaster has been declared by the Governor or other appropriate government entity;

(b) emergency repairs to public service facilities necessary to maintain service; or

(c) projects, whether public or private, undertaken to prevent or mitigate immediate threats to public health, safety, welfare, or the environment.

(2) "Human environment" includes, but is not limited to biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment.

(3) "Lead agency" means the state agency that has primary authority for committing the government to a course of action having significant environmental impact, or the agency designated by the Governor to supervise the preparation of a joint environmental impact statement.

(4) "Environmental impact statement" (EIS) means the detailed written statement required by section 75-1-201, which may take several different forms:

(a) "Draft environmental impact statement" means a detailed written statement prepared to the fullest extent possible in accordance with section 75-1-201(2)(c), and Rule V(1).

(b) "Final environmental impact statement" means a written statement prepared to the fullest extent possible in accordance with section 75-1-201 and Rule V and which responds to substantive comments received on the draft environmental impact statement.

(c) "Joint environmental impact statement" means an EIS prepared jointly by more than one agency, either state or federal, when the agencies are involved in the same or closely related proposed action.

(5) "Preliminary environmental review" (PER) means a brief written statement on a proposed action to determine whether the action will significantly affect the quality of the human environment and therefore requires a draft environmental impact statement.

(6) "Programmatic review" is a general analysis of related agency-initiated actions, programs or policies, or the continuance of a broad policy or program which may involve a series of future actions.

(7) "Cumulative impact" means the impact on the environment which results from the incremental impact of the action when added to other past and present actions, and feasible and reasonably foreseeable future actions.

(8) "Environmental Quality Council" (EQC) means the council established pursuant to Title 75, Chapter 1.

(9) "State agency" or "agency" means an office, commission, committee, board, department, council, division, bureau, or section of the executive branch of state government.

RULE III DETERMINATION OF NECESSITY FOR ENVIRONMENTAL IMPACT STATEMENT (1) In determining whether to prepare an EIS, the Department of State Lands shall:

(a) determine under subsection (6) below whether the proposal is one which:

(i) normally requires an EIS,

(ii) normally does not require either an EIS or a PER; or

(b) if the proposed action is not covered by paragraph (a) above or subsection (4) below, prepare a PER; or

(c) if the proposed action is in category (1)(a)(i) above, but it appears that there are special circumstances which may obviate the necessity for an EIS, prepare a PER.

(2) If the proposed action is in category (1)(a)(ii) but it appears that there are special circumstances, the Department of State Lands may prepare a PER.

(3) The following are categories of actions which normally require the preparation of an EIS:

(a) actions which may significantly affect environmental attributes recognized as being endangered, fragile, or in severely short supply;

(b) actions which may be either significantly growth inducing or growth inhibiting;

(c) actions which may substantially alter environmental conditions in terms of quality or availability; or

(d) actions which will result in substantial cumulative impacts.

(4) An EIS is not required for the following actions:

(a) administrative actions: routine, clerical or similar functions of the Department of State Lands, including but not limited to administrative procurements, contracts for consulting services, and personnel actions;

(b) existing facilities: minor repairs, operations or maintenance of existing equipment or facilities;

(c) investigation and enforcement: data collection, inspection of facilities, or enforcement of environmental standards;

(d) non-discretionary actions: actions in which the agency exercises no discretion, but rather acts upon a given state of facts in a prescribed manner.

(e) rule-making: rules promulgated pursuant to law.

(5) If the PER shows a significant impact on the human environment, an EIS shall be prepared on that action.

(6) The Department of State Lands shall maintain a list of those activities or functions that fall within paragraphs (1) (a)(i) and (1)(a)(ii) above. The list shall be maintained as a public document. Copies of the list and any subsequent revisions shall be sent to the EQC and any person who has requested a copy. The EQC or any person may recommend additions to or deletions from the list in accordance with rule-making procedures provided by the Montana Administrative Procedure Act (Chapter 4, Title 2).

RULE IV PREPARATION OF PRELIMINARY ENVIRONMENTAL REVIEW (1) A PER shall include:

(a) an adequate description of the proposed action, including maps and graphs, if appropriate;

(b) an evaluation of the immediate and cumulative impact on the physical environment, through the use of checklist and a brief narrative, including where appropriate: terrestrial and aquatic life and habitats; water quality, quantity, and distribution; geology; soil quality, stability, and moisture; vegetation cover, quantity and quality; aesthetics; air quality; unique, endangered, fragile, or limited environmental resources; historical and archaeological sites; and demands on environmental resources of land, water, air and energy;

(c) an evaluation of the immediate and cumulative impact on human population in the area to be affected by the proposed action, through the use of a checklist and brief narrative, including where appropriate: social structures and mores, cultural uniqueness and diversity, access to and quality of recreational and wilderness activities, local and state tax base and tax revenues, agricultural or industrial production, human health, quantity and distribution of community and personal income, transportation networks and traffic flows, quantity and distribution of employment, distribution and density of population and housing, demands for government services, industrial and commercial activity, and locally adopted environmental plans and goals;

(d) a listing of other agencies or groups that have been contacted or which may have overlapping jurisdiction;

(e) the names of those individuals or groups contributing to and responsible for compiling the PER.

(2) A PER is a public document and may be inspected upon request by any person. Any person may obtain a copy of a PER by making a request to the Department of State Lands. The Department of State Lands may give public notice of the availability of the PER and may distribute it. The Department of State Lands shall submit a copy of each completed PER to the EQC.

RULE V PREPARATION, CONTENT, AND DISTRIBUTION OF ENVIRONMENTAL IMPACT STATEMENTS (1) Preparation and contents of draft EIS. If required by Rule III or Rule IV, the Department of State Lands shall prepare a draft environmental impact statement which shall include:

(a) a description of the nature and objectives of the proposed action;

(b) a description of the current environmental conditions in the area significantly affected by the proposed action, including maps and charts, where appropriate;

(c) a description of the impacts on the human environment of the proposed action including:

(i) the factors listed in Rule IV(1)(b) and (c), where appropriate:

(ii) primary, secondary, and cumulative impacts;

(iii) potential growth inducing or growth inhibiting impacts;

(iv) irreversible and irretrievable commitments of environmental resources, including land, air, water and energy;

(v) economic and environmental benefits and costs of the proposed action (if a benefit-cost analysis is considered for the proposed action, it shall be incorporated by reference or appended to the statement to aid in evaluating the environmental consequences);

(vi) the relationship between local short-term uses of man's environment with the effects on maintenance and enhancement of the long-term productivity of the environment;

(vii) additional or secondary impacts at the local or area level, if any;

(d) a description of reasonable alternative actions that could be taken by the Department of State Lands;

(e) the proposed agency decision on the proposed action, if appropriate;

(f) source material used in the preparation of the draft EIS; and

(g) the names of those individuals or groups responsible for compiling the draft EIS and the names of those individuals or groups contributing to the EIS.

(2) Distribution of Draft EIS. Following preparation of the draft EIS in accordance with subsection (1) of this rule, the Department of State Lands shall distribute copies to the Governor, EQC, appropriate local, state and federal agencies, the applicant whose project is being evaluated by the EIS, and those members of the public who request it. The Department of State Lands shall send a copy of only the summary to persons who request it only. For purposes of distribution to the public, the Department of State Lands shall maintain a mailing list of any persons or groups who have requested to be placed on the list for receipt of either the EIS or summary.

(a) Depending upon the nature and number of substantive comments received in response to the draft environmental impact statement, the draft statement may suffice. In this case, the Department of State Lands shall submit one copy of all comments or a summary of a representative sample of comments received in response to the draft statement to the Governor, EQC, the applicant whose project is being evaluated in the EIS, and all commentators.

(b) If the Department of State Lands determines that a final EIS is not necessary, it may make a final decision

on the proposed action no sooner than fifteen (15) days after complying with paragraph (2)(a) above. The Department of State Lands shall also include with the comments notice of its decision not to prepare a final EIS and a statement describing its proposed course of action. The applicant whose project is being evaluated in the EIS may request an extension of this fifteen (15) day period in order to respond to the written comments that have been received.

(3) Preparation and contents of final EIS. A final environmental impact statement shall include:

(a) a summary of major conclusions and supporting information from the draft EIS and the responses to substantive comments received on the draft EIS, stating specifically where such conclusions and information were changed from those which appeared in the draft;

(b) a list of all sources of written and oral comments on the draft EIS, including those obtained at public hearings, and, unless impractical, the text of comments received by the Department of State Lands (in all cases, a representative sample of comments shall be included);

(c) the Department of State Lands' responses to substantive comments (these responses shall include an evaluation of the comments received and a disposition of the issues involved);

(d) data, information, and explanations obtained subsequent to circulation of the draft;

(e) the final agency decision on the proposed action, where appropriate;

(4) time limits and distribution requirements of environmental impact statements.

(a) Following preparation of a final EIS, the Department of State Lands shall distribute copies to the Governor, EQC, appropriate state and federal agencies, the applicant, persons who submitted comments on or received a copy of the draft EIS, and other members of the public, upon request.

(b) The listed transmittal date to the Governor and the EQC shall not be earlier than the date that the draft EIS is mailed to other agencies, organizations, and individuals. The Department of State Lands shall allow 30 days for reply; provided that the Department of State Lands may extend this period by 30 days and for an additional reasonable period of time for good cause. No extension which is otherwise prohibited by law may be granted.

(c) After the time period for comment on the draft EIS has expired, a copy of all written comments received by the Department of State Lands shall be sent to the applicant whose project is being evaluated in the EIS. The applicant shall be advised that he has a reasonable time to respond in writing to the comments received by the Department of State

Lands on the draft EIS and that the applicant's written response must be received before a final EIS can be prepared and circulated. The applicant may waive his right to respond to the comments on the draft EIS.

(d) No action which requires the preparation of a final EIS shall be taken sooner than 45 days after the transmittal date of the draft EIS to the Governor and EQC.

(e) Except as provided in paragraph (2)(b) of this rule, a final decision may be made on the proposed action being evaluated in the EIS after 15 days have expired from the date of transmittal of the final EIS to the Governor and EQC. The listed transmittal date to the Governor and EQC shall not be earlier than the date that the final EIS is mailed to other agencies, organizations, and individuals.

(5) Record of Decision. At the time of its decision, the Department of State Lands shall make a written record of the decision stating how the final EIS was considered and used in its decision making.

(6) Availability of written comments. All written comments received on an EIS, including written responses received from the applicant shall be made available to the public upon request.

(7) Limitations on actions. Until an agency reaches its final decision on the proposed action, no action concerning the proposal shall be taken which would:

(a) have an adverse environmental impact; or

(b) limit the choice of reasonable alternatives, including the no-action alternative.

(8) Supplements.

(a) The Department of State Lands shall prepare supplements to either draft or final environmental impact statements if:

(i) the Department of State Lands or the applicant makes substantial changes in the proposed action; or

(ii) there are significant new circumstances, including information bearing on the proposed action or its impacts.

(b) The same time periods applicable to draft a final EIS specified in Rule V apply to the circulation and review of supplements.

(9) Incorporation by reference and adoption.

(a) The Department of State Lands shall adopt and incorporate by reference as part of a draft EIS all or any part of the information, conclusions, comments, and responses to comments contained in an existing EIS which has been previously or is being contemporaneously prepared pursuant to the Montana Environmental Policy Act or the National Environmental Policy Act if:

(i) the Department of State Lands determines that the existing EIS covers an action paralleling or closely related to the action proposed by the Department of State Lands or the applicant; and

(ii) the Department of State Lands determines, on the basis of its own independent evaluation, that the information contained in the existing EIS has been accurately presented; and

(iii) the Department of State Lands determines that the information contained in the existing EIS is applicable to the action currently being considered.

(b) The existing EIS, or portion adopted or incorporated by reference, shall be circulated as a part of the EIS and treated as part of the draft EIS for all purposes, including, if required, preparation of a final EIS. However, where reproduction of the adopted or incorporated portions of a previously prepared EIS would be prohibitively expensive because of the volume of the material involved, the Department of State Lands may summarize the content of the adopted or incorporated information if the previous EIS has been circulated and the agency lists the places where the full text of the adopted or incorporated EIS is available for inspection. Furthermore, the Department of State Lands shall not be required to send copies of the existing EIS to persons who have previously received the adopted or incorporated EIS from the Department of State Lands or from any other state or federal agency which prepared the existing EIS.

(c) If the incorporated EIS does not adequately assess all of the impacts of a proposed action as required by these rules, an addendum shall be prepared in compliance with this rule.

(d) If all or any part of an existing EIS is adopted or incorporated by reference, the Department of State Lands shall prepare an addendum as part of the draft EIS. The addendum shall include as a minimum:

(i) a description of the specific action to be taken; and

(ii) any impacts, alternatives, or other items that were not covered in the original statement.

(e) The Department of State Lands shall take full responsibility for the contents of the previous EIS. If the Department of State Lands disagrees with certain portions of the previous EIS, the points of disagreement shall be specifically discussed in the addendum.

(f) No material may be adopted or incorporated by reference unless it is reasonably available for inspection by interested persons within the time allowed for comment.

(10) Length, format and summary.

(a) The recommended maximum length of the text of

either a draft or final EIS is 150 pages. For an EIS on a complex proposal the recommended maximum length is 300 pages.

(b) An EIS shall be written in plain and concise language.

(c) If the EIS is long and complex, the Department of State Lands shall prepare with the draft or final EIS a brief summary which shall be available for distribution separate from the EIS. If a summary is prepared, it shall describe:

(i) the proposed action being evaluated by the EIS, the impacts, and the alternatives;

(ii) areas of controversy and major conclusions; and

(iii) the Department of State Lands' proposed decision, when appropriate.

RULE VI JOINT ENVIRONMENTAL IMPACT STATEMENTS (1) Lead agency. If another state agency also has jurisdiction over a project, proposal, or major state action which may have a significant impact on the human environment and is clearly the lead agency, the Department of State Lands shall cooperate with the lead agency in the preparation of a joint EIS. If the Department of State Lands is clearly the lead agency, it shall be responsible for coordinating the preparation of the EIS as required by this rule. When two or more agencies have jurisdiction over the same project, proposal or major state action and lead agency status cannot be resolved, the Department of State Lands shall request a determination from the Governor.

(2) Participation. When it is lead agency, the Department of State Lands may request the participation of other state agencies which have special expertise in areas which should be addressed in the EIS. When participation of the Department of State Lands is requested under this rule, it shall make a good-faith effort to participate in the EIS as requested, with its expenses for participation in the EIS paid by the agency collecting the MEPA fee if one is collected.

(3) Federal and local agencies. The Department of State Lands shall cooperate with federal and local agencies in preparing EIS's. This cooperation may include:

(a) joint environmental research studies,

(b) joint public hearings, or

(c) joint environmental impact statements. (When federal laws have EIS requirements, the Department of State Lands may cooperate in fulfilling the requirements of the federal as well as the state laws so that one document will comply with all applicable laws).

RULE VII PREPARATION, CONTENT AND DISTRIBUTION OF A PROGRAMMATIC REVIEW (1) If the Department of State Lands is contemplating a series of agency-initiated actions,

programs, or policies which in part or in total will constitute a major state action significantly affecting the human environment, the Department of State Lands may prepare a programmatic review discussing the impacts of the series of actions.

(2) The programmatic review shall include, as a minimum, a concise, analytical discussion of alternatives and the cumulative environmental effects of these alternatives.

(3) The time limits specified for public comment in Rule V(5) apply to the distribution of programmatic reviews.

(4) While work on a programmatic EIS is in progress, the Department of State Lands may not take major state actions covered by the program in that interim period unless such action:

(a) is part of an ongoing program;

(b) is justified independently of the program; or

(c) will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or foreclose reasonable alternatives.

(5) Actions taken under this subsection (4) shall be accompanied by an EIS, if required.

Rule VIII. SPECIAL RULES APPLICABLE TO CERTAIN MEPA SITUATIONS (1) Emergencies. The Department of State Lands may take or permit action having a significant impact on the human environment in an emergency situation without preparing an EIS. Within 30 days following initiation of the action, the Department of State Lands shall notify the Governor and the EQC as to the need for such action and the impacts and results of it. Emergency actions shall be limited to those actions necessary to control the immediate impacts of the emergency.

(2) Confidentiality. Information declared confidential by state law or by an order of a court shall be excluded from a PER and EIS. The agency shall briefly state the general topic of the confidential information excluded.

(3) Resolution of statutory conflicts. If conflicting provisions of other state laws prevent the Department of State Lands from fully complying with these rules, the Department of State Lands shall notify the Governor of the nature of the conflict and shall suggest a proposed course of action that will enable the Department of State Lands to comply to the fullest extent possible with the provisions of MEPA and be prepared within 45 days of decision on the project, proposal, or major state action.

(4) Disclosure. No person who has a financial interest in the outcome of the project may contract with the Department of State Lands for the preparation of an EIS or any portion thereof. Persons contracting with the Department of State

Lands in the preparation of an EIS must execute a disclosure statement, in affidavit form prepared by the Department of State Lands demonstrating compliance with this prohibition.

RULE IX PUBLIC HEARINGS (1) When a public hearing is held on an EIS, the Department of State Lands shall advise the applicant whose project is being evaluated in the EIS, persons who have submitted comments on the draft EIS, and persons who received a copy of the draft EIS of the date and location of the hearing and that the applicant shall have an opportunity to respond to all oral comments received at the hearing. The applicant may respond orally at the conclusion of the hearing and in writing at a later date. The hearing shall be held after the draft EIS has been circulated and prior to preparation of the final EIS.

(2) The Department of State Lands shall hold a public hearing when requested by either:

(a) 10% or 25, whichever is less, of the persons who will be directly affected by the proposed action, or

(b) by another agency which has jurisdiction over the action, or

(c) an association having not less than 25 members who will be directly affected.

Instances of doubt shall be resolved in favor of holding a public hearing.

RULE X RETROACTIVE APPLICATION OF THE MEPA RULES The rules adopted to implement MEPA apply to all applications pending at the time these rules are adopted by the department, provided that the procedures outlined herein may not be used to delay the preparation of an EIS in preparation at the time the rules are adopted.

3. The new rules are being proposed to streamline the MEPA process, standardize the MEPA process among executive agencies, provide for more public participation in the EIS process, and to make other numerous changes in the implementation of MEPA. The proposed new rules are being proposed for adoption by several other executive agencies, and the hearing will be a joint hearing by all agencies proposing adoption.

4. Any person may submit data, views, or comments concerning the proposed new rules either orally or in writing at the hearing. Written data, views, or arguments may be submitted to John F. North, Chief Counsel, Department of State Lands, Capitol Station, Helena, Montana 59601, any time before September 14, 1979. To be considered, mailed comments must be postmarked on or before September 14, 1979.

5. John F. North, Chief Counsel, Department of State Lands, has been designated to preside over and conduct the hearing.

6. The authority of the board and department to repeal and adopt is contained in sections 2-4-201 and 2-15-112 MCA. The code provisions implemented are Part 1, Chapter 1, Title 75 and section 75-1-201. **(82-4203(1)(a) and (b) R.C.M. 1947; 82A-107 R.C.M. 1947; Chapter 65, Title 69, R.C.M. 1947; 69-6504 R.C.M. 1947.)**

Leo Berry, Jr., Commissioner
Department of State Lands

Certified to the Secretary of State July 17, 1979.

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

In the matter of the repeal of Rules 36-2.2(6)-P200 through P280 pertaining to the implementation of the Montana Environmental Policy Act; and the adoption of new rules I through X implementing MEPA	NOTICE OF PUBLIC HEARING FOR THE REPEAL OF THE PRESENT RULES IMPLEMENTING THE MONTANA ENVIRONMENTAL POLICY ACT; AND ADOPTION OF REVISED RULES IMPLEMENTING MEPA

TO: All Interested Persons

1. On August 30, 1979 at 9:30 a.m. a public hearing will be held in the Senate Chambers, State Capitol Building, Helena, Montana, to consider repeal of the present rules (with the exception of 36-2.2(6)-P260, the fee bill rule) implementing the Montana Environmental Policy Act, Chapter 1, Title 75, MCA, hereinafter referred to as "MEPA", and adoption of new rules pertaining to MEPA.

2. Although the new rules are similar in many respects to the present rules, the new format and many changes dictate that they be published as new rules. The new rules, as proposed for adoption, are as follows:

RULE I POLICY STATEMENT CONCERNING MEPA RULES The purpose of these rules is to implement Chapter I, Title 75, MCA, the Montana Environmental Policy Act (MEPA), through the establishment of administrative procedures. In order to fulfill the stated policy of that act, the Board and Department of Natural Resources and Conservation shall conform to the following rules prior to reaching a final decision on actions covered by MEPA. It must be noted that the act requires that state agencies comply with its terms "to the fullest extent possible."

RULE II DEFINITION OF MEPA TERMS (1) "Emergency actions" include, but are not limited to:

(a) projects undertaken, carried out, or approved by the Board or Department to repair or restore property or facilities damaged or destroyed as a result of a disaster when a disaster has been declared by the Governor or other appropriate government entity;

(b) emergency repairs to public service facilities necessary to maintain service; or

(c) projects, whether public or private, undertaken to prevent or mitigate immediate threats to public health, safety, welfare, or the environment.

(2) "Human environment" includes, but is not limited to biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment.

(3) "Lead agency" means the state agency that has primary

authority for committing the government to a course of action having significant environmental impact, or the agency designated by the Governor to supervise the preparation of a joint environmental impact statement.

(4) "Environmental impact statement" (EIS) means the detailed written statement required by section 75-1-201, which may take several different forms:

(a) "Draft environmental impact statement" means a detailed written statement prepared to the fullest extent possible in accordance with section 75-1-201(2)(c), and Rule V(1).

(b) "Final environmental impact statement" means a written statement prepared to the fullest extent possible in accordance with section 75-1-201 and Rule V and which responds to substantive comments received on the draft environmental impact statement.

(c) "Joint environmental impact statement" means an EIS prepared jointly by more than one agency, either state or federal, when the agencies are involved in the same or closely related proposed action.

(5) "Preliminary environmental review" (PER) means a brief written statement on a proposed action to determine whether the action will significantly affect the quality of the human environment and therefore requires a draft environmental impact statement.

(6) "Programmatic review" is a general analysis of related agency-initiated actions, programs or policies, or the continuance of a broad policy or program which may involve a series of future actions.

(7) "Cumulative impact" means the impact on the environment which results from the incremental impact of the action when added to other past and present actions, and feasible and reasonably foreseeable future actions.

(8) "Environmental Quality Council" (EQC) means the council established pursuant to Title 75, Chapter 1.

(9) "State agency" or "agency" means an office, commission, committee, board, department, council, division, bureau, or section of the executive branch of state government.

(10) "Board" means the Board of Natural Resources and Conservation.

(11) "Department" means the Department of Natural Resources and Conservation.

RULE III DETERMINATION OF NECESSITY FOR ENVIRONMENTAL IMPACT STATEMENT (1) In determining whether to prepare an EIS, the Department shall:

(a) determine under subsection (6) below whether the proposal is one which

(i) normally requires an EIS,

(ii) normally does not require either an EIS or a PER; or

(b) if the proposed action is not covered by paragraph (a) above or subsection (4) below, prepare a PER; or

(c) if the proposed action is in category (1)(a)(i) above, but it appears that there are special circumstances, which may ob-

viate the necessity for an EIS, prepare a PER.

(2) If the proposed action is in category (1)(a)(ii) but it appears that there are special circumstances, the Department may prepare a PER.

(3) The following are categories of actions which normally require the preparation of an EIS:

(a) actions which may significantly affect environmental attributes recognized as being endangered, fragile, or in severely short supply;

(b) actions which may be either significantly growth inducing or growth inhibiting;

(c) actions which may substantially alter environmental conditions in terms of quality or availability; or

(d) actions which will result in substantial cumulative impacts.

(4) An EIS is not required for the following actions:

(a) administrative actions: routine, clerical or similar functions of the Board of Department, including but not limited to administrative procurements, contracts for consulting services, and personnel actions;

(b) existing facilities: minor repairs, operations or maintenance of existing equipment or facilities;

(c) investigation and enforcement: data collection, inspection of facilities, or enforcement of environmental standards;

(d) non-discretionary actions: actions in which the agency exercises no discretion, but rather acts upon a given state of facts in a prescribed manner.

(e) rule-making: rules promulgated pursuant to law.

(5) If the PER shows a significant impact on the human environment, an EIS shall be prepared on that action.

(6) The Department shall maintain a list of those activities or functions that fall within paragraphs (1)(a)(i) and (1)(a)(ii) above. The list shall be maintained as a public document. Copies of the list and any subsequent revisions shall be sent to the EQC and any person who has requested a copy. The EQC or any person may recommend additions to or deletions from the list in accordance with rule-making procedures provided by the Montana Administrative Procedure Act (Chapter 4, Title 2).

RULE IV PREPARATION OF PRELIMINARY ENVIRONMENTAL REVIEW

(1) A PER shall include:

(a) an adequate description of the proposed action, including maps and graphs, if appropriate;

(b) an evaluation of the immediate and cumulative impact on the physical environment, through the use of checklist and a brief narrative, including where appropriate: terrestrial and aquatic life and habitats; water quality, quantity, and distribution; geology; soil quality, stability, and moisture; vegetation cover, quantity and quality; aesthetics; air quality; unique, endangered, fragile, or limited environmental resources; historical and archaeological sites; and demands on environmental resources of land, water, air and energy;

(c) an evaluation of the immediate and cumulative impact on human population in the area to be affected by the proposed

action, through the use of a checklist and brief narrative, including where appropriate: social structures and mores, cultural uniqueness and diversity, access to and quality of recreational and wilderness activities, local and state tax base and tax revenues, agricultural or industrial production, human health, quantity and distribution of community and personal income, transportation networks and traffic flows, quantity and distribution of employment, distribution and density of population and housing, demands for government services, industrial and commercial activity, and locally adopted environmental plans and goals;

(d) a listing of other agencies or groups that have been contacted or which may have overlapping jurisdiction;

(e) the names of those individuals or groups contributing to and responsible for compiling the PER.

(2) A PER is a public document and may be inspected upon request by any person. Any person may obtain a copy of a PER by making a request to the Department. The Department may give public notice of the availability of the PER and may distribute it. The Department shall submit a copy of each completed PER to the EQC.

RULE V PREPARATION, CONTENT, AND DISTRIBUTION OF ENVIRONMENTAL IMPACT STATEMENTS (1) Preparation and contents of draft EIS. If required by Rule III or Rule IV, the Department shall prepare a draft environmental impact statement which shall include:

(a) a description of the nature and objectives of the proposed action;

(b) a description of the current environmental conditions in the area significantly affected by the proposed action, including maps and charts, where appropriate;

(c) a description of the impacts on the human environment of the proposed action including:

(i) the factors listed in Rule IV(1)(b) and (c), where appropriate:

(ii) primary, secondary, and cumulative impacts;

(iii) potential growth inducing or growth inhibiting impacts;

(iv) irreversible and irretrievable commitments of environmental resources, including land, air, water and energy;

(v) economic and environmental benefits and costs of the proposed action (if a benefit-cost analysis is considered for the proposed action, it shall be incorporated by reference or appended to the statement to aid in evaluating the environmental consequences);

(vi) the relationship between local short-term uses of man's environment with the effects on maintenance and enhancement of the long-term productivity of the environment;

(vii) addition or secondary impacts at the local or area level, if any;

(d) a description of reasonable alternative actions

that could be taken by the Department;

(e) the proposed agency decision on the proposed action, if appropriate;

(f) source material used in the preparation of the draft EIS; and

(g) the names of those individuals or groups responsible for compiling the draft EIS and the names of those individuals or groups contributing to the EIS.

(2) Distribution of Draft EIS. Following preparation of the draft EIS in accordance with subsection (1) of this rule, the Department shall distribute copies to the Governor, EQC, appropriate local, state and federal agencies, the applicant whose project is being evaluated by the EIS, and those members of the public who request it. The Department shall send a copy of only the summary to persons who request it only. For purposes of distribution to the public, the Department shall maintain a mailing list of any persons or groups who have requested to be placed on the list for receipt of either the EIS or summary.

(a) Depending upon the nature and number of substantive comments received in response to the draft environmental impact statement, the draft statement may suffice. In this case the Department shall submit one copy of all comments or a summary of a representative sample of comments received in response to the draft statement to the Governor, EQC, the applicant whose project is being evaluated in the EIS, and all commentators.

(b) If the Department determines that a final EIS is not necessary, it may make a final decision on the proposed action no sooner than fifteen (15) days after complying with paragraph (2)(a) above. The Department shall also include with the comments notice of its decision not to prepare a final EIS and a statement describing its proposed course of action. The applicant whose project is being evaluated in the EIS may request an extension of this fifteen (15) day period in order to respond to the written comments that have been received.

(3) Preparation and contents of final EIS. A final environmental impact statement shall include:

(a) a summary of major conclusions and supporting information from the draft EIS and the responses to substantive comments received on the draft EIS, stating specifically where such conclusions and information were changed from those which appeared in the draft;

(b) a list of all sources of written and oral comments on the draft EIS, including those obtained at public hearings, and, unless impractical, the text of comments received by the Department (in all cases, a representative sample of comments shall be included);

(c) The Department's responses to substantive comments (these responses shall include an evaluation of the comments received and a disposition of the issues involved);

(d) data, information, and explanations obtained subsequent to circulation of the draft;

(e) the final agency decision on the proposed action,

where appropriate;

(4) time limits and distribution requirements of environmental impact statements.

(a) Following preparation of a final EIS, the Department shall distribute copies to the Governor, EQC, appropriate state and federal agencies, the applicant, persons who submitted comments on or received a copy of the draft EIS, and other members of the public, upon request.

(b) The listed transmittal date to the Governor and the EQC shall not be earlier than the date that the draft EIS is mailed to other agencies, organizations, and individuals. The Department shall allow 30 days for reply; provided that the Department may extend this period by 30 days and for an additional reasonable period of time for good cause. No extension which is otherwise prohibited by law may be granted.

(c) After the time period for comment on the draft EIS has expired, a copy of all written comments received by the Department shall be sent to the applicant whose project is being evaluated in the EIS. The applicant shall be advised that he has a reasonable time to respond in writing to the comments received by the Department on the draft EIS and that the applicant's written response must be received before a final EIS can be prepared and circulated. The applicant may waive his right to respond to the comments on the draft EIS.

(d) No action which requires the preparation of a final EIS shall be taken sooner than 45 days after the transmittal date of the draft EIS to the Governor and EQC.

(e) Except as provided in paragraph (2)(b) of this rule, a final decision may be made on the proposed action being evaluated in the EIS after 15 days have expired from the date of transmittal of the final EIS to the Governor and EQC. The listed transmittal date to the Governor and EQC shall not be earlier than the date that the final EIS is mailed to other agencies, organizations, and individuals.

(5) Record of Decision. At the time of its decision, the Department shall make a written record of the decision stating how the final EIS was considered and used in its decision making.

(6) Availability of written comments. All written comments received on an EIS, including written responses received from the applicant shall be made available to the public upon request.

(7) Limitations on actions. Until an agency reaches its final decision on the proposed action, no action concerning the proposal shall be taken which would:

(a) have an adverse environmental impact; or

(b) limit the choice of reasonable alternatives, including the no-action alternative.

(8) Supplements.

(a) The Department shall prepare supplements to either draft or final environmental impact statements if:

(i) The Department or the applicant makes substantial changes in the proposed action; or

(ii) there are significant new circumstances, including

information bearing on the proposed action or its impacts.

(b) The same time periods applicable to draft a final EIS specified in Rule V apply to the circulation and review of supplements.

(9) Incorporation by reference and adoption.

(a) The Department shall adopt and incorporate by reference as part of a draft EIS all or any part of the information, conclusions, comments, and responses to comments contained in an existing EIS which has been previously or is being contemporaneously prepared pursuant to the Montana Environmental Policy Act or the National Environmental Policy Act if:

(i) The Department determines that the existing EIS covers an action paralleling or closely related to the action proposed by the Department or the applicant; and

(ii) The Department determines, on the basis of its own independent evaluation, that the information contained in the existing EIS has been accurately presented; and

(iii) The Department determines that the information contained in the existing EIS is applicable to the action currently being considered.

(b) The existing EIS, or portion adopted or incorporated by reference, shall be circulated as a part of the EIS and treated as part of the draft EIS for all purposes, including, if required, preparation of a final EIS. However, where reproduction of the adopted or incorporated portions of a previously prepared EIS would be prohibitively expensive because of the volume of the material involved, the Department may summarize the content of the adopted or incorporated information if the previous EIS has been circulated and the agency lists the places where the full text of the adopted or incorporated EIS is available for inspection. Furthermore, the Department shall not be required to send copies of the existing EIS to persons who have previously received the adopted or incorporated EIS from the Department or from any other state or federal agency which prepared the existing EIS.

(c) If the incorporated EIS does not adequately assess all of the impacts of a proposed action as required by these rules, an addendum shall be prepared in compliance with this rule.

(d) If all or any part of an existing EIS is adopted or incorporated by reference, the Department shall prepare an addendum as part of the draft EIS. The addendum shall include as a minimum:

(i) a description of the specific action to be taken; and

(ii) any impacts, alternatives, or other items that were not covered in the original statement.

(e) The Department shall take full responsibility for the contents of the previous EIS. If the Department disagrees with certain portions of the previous EIS, the points of disagreement shall be specifically discussed in the addendum.

(f) No material may be adopted or incorporated by reference unless it is reasonably available for inspection by interested persons within the time allowed for comment.

(10) Length, format and summary.

(a) The recommended maximum length of the text of either a draft or final EIS is 150 pages. For an EIS on a complex proposal the recommended maximum length is 300 pages.

(b) An EIS shall be written in plain and concise language.

(c) If the EIS is long and complex, the Department shall prepare with the draft or final EIS a brief summary which shall be available for distribution separate from the EIS. If a summary is prepared, it shall describe:

(i) the proposed action being evaluated by the EIS, the impacts, and the alternatives;

(ii) areas of controversy and major conclusions; and

(iii) the Department's proposed decision, when appropriate.

RULE VI JOINT ENVIRONMENTAL IMPACT STATEMENTS (1) Lead agency. If another state agency also has jurisdiction over a project, proposal, or major state action which may have a significant impact on the human environment and is clearly the lead agency, the Department shall cooperate with the lead agency in the preparation of a joint EIS. If the Department is clearly the lead agency, it shall be responsible for coordinating the preparation of the EIS as required by this rule. When two or more agencies have jurisdiction over the same project, proposal or major state action and lead agency status cannot be resolved, the Department shall request a determination from the Governor.

(2) Participation. When it is lead agency, the Department may request the participation of other state agencies which have special expertise in areas which should be addressed in the EIS. When participation of the Department is requested under this rule, it shall make a good-faith effort to participate in the EIS as requested, with its expenses for participation in the EIS paid by the agency collecting the MEPA fee if one is collected.

(3) Federal and local agencies. The Department shall cooperate with federal and local agencies in preparing EIS's. This cooperation may include:

(a) joint environmental research studies,

(b) joint public hearings, or

(c) joint environmental impact statements. (When federal laws have EIS requirements, the Department may cooperate in fulfilling the requirements of the federal as well as the state laws so that one document will comply with all applicable laws).

RULE VII PREPARATION, CONTENT AND DISTRIBUTION OF A PROGRAMMATIC REVIEW (1) If the Department is contemplating a series of agency-initiated actions, programs, or policies which in part or in total will constitute a major state action significantly affecting the human environment, the Department may prepare a programmatic review discussing the impacts of the series of actions.

(2) The programmatic review shall include, as a minimum, a concise, analytical discussion of alternatives and the cumulative environmental effects of these alternatives.

(3) The time limits specified for public comment in Rule V(5) apply to the distribution of programmatic reviews.

(4) While work on a programmatic EIS is in progress, the Department may not take major state actions covered by the program in that interim period unless such action:

(a) is part of an ongoing program;

(b) is justified independently of the program; or

(c) will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or foreclose reasonable alternatives.

(5) Actions taken under this subsection (4) shall be accompanied by an EIS, if required.

RULE VIII SPECIAL RULES APPLICABLE TO CERTAIN MEPA SITUATIONS (1) Emergencies. The Department may take or permit action having a significant impact on the human environment in an emergency situation without preparing an EIS. Within 30 days following initiation of the action, the Department shall notify the Governor and the EQC as to the need for such action and the impacts and results of it. Emergency actions shall be limited to those actions necessary to control the immediate impacts of the emergency.

(2) Confidentiality. Information declared confidential by state law or by an order of a court shall be excluded from a PER and EIS. The agency shall briefly state the general topic of the confidential information excluded.

(3) Resolution of statutory conflicts. If conflicting provisions of other state laws prevent the Department from fully complying with these rules, the Department shall notify the Governor of the nature of the conflict and shall suggest a proposed course of action that will enable the Department to comply to the fullest extent possible with the provisions of MEPA and be prepared within 45 days of decision on the project, proposal, or major state action.

(4) Disclosure. No person who has a financial interest in the outcome of the project may contract with the Department for the preparation of an EIS or any portion thereof. Persons contracting with the Department in the preparation of an EIS must execute a disclosure statement, in affidavit form prepared by the Department demonstrating compliance with this prohibition.

RULE IX PUBLIC HEARINGS (1) When a public hearing is held on an EIS, the Department shall advise the applicant whose project is being evaluated in the EIS, persons who have submitted comments on the draft EIS, and persons who received a copy of the draft EIS of the date and location of the hearing and that the applicant shall have an opportunity to respond to all oral comments received at the hearing. The applicant may respond orally

at the conclusion of the hearing and in writing at a later date. The hearing shall be held after the draft EIS has been circulated and prior to preparation of the final EIS.

(2) The Department shall hold a public hearing when requested by either:

(a) Ten percent or 25, whichever is less, of the persons who will be directly affected by the proposed action, or

(b) by another agency which has jurisdiction over the action, or

(c) an association having not less than 25 members who will be directly affected. Instances of doubt shall be resolved in favor of holding a public hearing.

RULE X RETROACTIVE APPLICATION OF THE MEPA RULES

The rules adopted to implement MEPA apply to all applications pending at the time these rules are adopted by the Department, provided that the procedures outlined herein may not be used to delay the preparation of an EIS in preparation at the time the rules are adopted.

3. The new rules are being proposed to streamline the MEPA process, standardize the MEPA process among executive agencies, provide for more public participation in the EIS process, and to make other numerous changes in the implementation of MEPA. The proposed new rules are being proposed by adoption by several other executive agencies, and the hearing will be a joint hearing by all agencies proposing adoption.

4. Any person may submit data, views, or comments concerning the proposed new rules either orally or in writing at the hearing. Written data, views, or arguments may be submitted to John F. North, Chief Counsel, Department of State Lands, Capitol Station, Helena, Montana 59601, any time before September 14, 1979. To be considered, mailed comments must be postmarked on or before September 14, 1979.

5. John F. North, Chief Counsel, Department of State Lands, has been designated to preside over and conduct the hearing.

6. The authority of the board and department to repeal and adopt is Section 2-4-201, MCA, and Section 2-15-112. The code provisions implemented are Part 1, Chapter 1, Title 75 and Section 75-1-201 (69-6504, R.C.M. 1947) (2-4-201, MCA, 82-4203(1)(a)(1)(b), R.C.M. 1947; 2-15-112, MCA, 82A-107, R.C.M. 1947)

Ted J. Doney, Director
Department of Natural Resources
and Conservation

By: Richard T. Munger, Deputy Director

Certified to the Secretary of State July 17, 1979.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rule I for Accounting Control of Cigarette Distribution)	NOTICE OF PUBLIC HEARING OF ADOPTION OF RULE I Regarding Accounting Control of Cigarette Distribution.

TO: All Interested Persons:

(1) On August 15, 1979, at 1:30 p.m., a public hearing will be held in the Fourth Floor Conference Room of the Mitchell Building, Helena, Montana, to consider the adoption of a rule regarding accounting control of cigarette distribution.

(2) The proposed rule provides as follows:

"ACCOUNTING CONTROL OF CIGARETTE DISTRIBUTION. (1) Each wholesaler will prepare forms CT-205, together with supporting forms CT-206, and file with the Department of Revenue on or before the fifteenth day of the month covering the preceding month's activities. Form CT-205 will indicate the purchase and distribution of cigarettes and the consumption of cigarette tax indicia.

"(2) Sales of unstamped cigarettes must be itemized on Form CT-206 which is then used as a supporting document for Form CT-205."

(3) The public hearing on this rule has been requested by the Montana Tobacco and Candy Distributors' Association. This rule is proposed as a result of the amendments made to Sections 16-11-113, 16-11-131, 16-11-132 and 16-11-133, MCA, by Chapter 382, Montana Laws 1979 (H.B. 486). This legislation allows the sale of unstamped cigarettes to unlicensed parties who furnish documentary evidence that they are exempt from state cigarette taxation, and sign a receipt as such.

IN THE MATTER OF THE ADOPTION of Rule II for Sales of Unstamped Cigarettes	NOTICE OF PUBLIC HEARING OF ADOPTION OF RULE II Regarding Sales of Unstamped Cigarettes

TO: All Interested Persons:

(1) On August 15, 1979, at 1:30 p.m., a public hearing will be held in the Fourth Floor Conference Room of the Mitchell Building, Helena, Montana, to consider adoption of a rule regarding sales of unstamped cigarettes.

(2) The proposed rule provides as follows:

"SALES OF UNSTAMPED CIGARETTES. Any person who purchases unstamped cigarettes, claiming that the State of Montana lacks jurisdiction over his cigarette sales activities must be fully identified by name, address of residence, address and location of business, social security number, tribal enrollment number, name of tribe. Information must also be furnished to the wholesaler indicating that he has received authority to conduct a cigarette sales activity within the external boundaries of an

Indian Reservation. The required information will be entered on Form CT-206 which will also be a receipt requiring the signature of the person purchasing the cigarettes to acknowledge the purchase and physical possession of the unstamped cigarettes item-thereon."

(3) The public hearing on this rule has been requested by the Montana Tobacco and Candy Distributors' Association. This rule is proposed as a result of the amendments made to Section 16-11-113, 16-11-131, 16-11-132 and 16-11-133, MCA, by Chapter 382, Laws of Montana 1979 (H.B. 486). This legislation allows the sale of unstamped cigarettes to unlicensed parties who furnish documentary evidence that they are exempt from state cigarette taxation and sign a receipt as such.

(4) The Department will receive written comments up to and including August 23, 1979. Written comments should be directed to:

R. Bruce McGinnis
Tax Counsel
Department of Revenue
Mitchell Building
Helena, Montana 59601

(5) Mr. Ross Cannon has been designated to preside over and conduct the hearing.

(6) The authority of the Department to make the proposed amendment is based on Section 15-1-201, MCA. (84-708.1, R.C.M. 1947) Implementing Section 16-11-132, MCA (84-S606.9, R.C.M. 1947).

DEPARTMENT OF REVENUE

Mary L. Craig
By John M. Clark

MARY L. CRAIG, Director

Certified to the Secretary of State July 17, 1979

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of Rule 42-2.12(6)-S12055 on Schedule of License Application Processing Fees-Payment	NOTICE OF PROPOSED AMENDMENT OF RULE 42-2.12(6)-S12055 on Schedule of License Application Processing Fees-Payment NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

(1) On August 27, 1979, the Department of Revenue proposes to amend Rule 42-2.12(6)-S12055, which provides the fees to be charged for processing applications for new licenses.

(2) The Rule, as proposed to be amended provides as follows (stricken material is interlined, new material is underlined):

"Section 42-2.12(6)-S12055. Schedule of License Application Processing Fees - Payment. (1) The following are the fees to be charged for processing applications for new licenses ~~or transfers of licenses~~:

~~Processing fee for new license application:~~

All-beverage license (including Veterans' or Fraternal)	$100.00
Catering endorsement (for use with existing all-beverage license)	50.00
All-beverage with catering endorsement	100.00
Retail beer license (including Veterans' or Fraternal)	100.00
Wine amendment (for use with existing retail beer license)	50.00
Retail beer license and wine amendment (when applied for concurrently)	100.00
Retail beer license for off-premises consumption	100.00
Retail table wine license for off-premises consumption	100.00
Retail beer and table wine for off-premises consumption	100.00
Wholesale beer license	100.00
Wholesale beer sub-warehouse license	50.00
Wholesale table wine license	100.00
Wholesale table wine sub-warehouse	50.00
Wholesale beer and table wine license	100.00
Brewers license	100.00
Resort all-beverage license	100.00
Resort retail beer license	100.00

~~The processing fee for application for transfer of ownership and for location of license:~~

~~Processing Fee for Application for Transfer of Ownership and/or Location of License:~~

~~All-Beverage License~~	~~$100.00~~
~~Retail Beer License~~	~~75.00~~
~~Retail Beer License and Wine Amendment~~	~~75.00~~
~~Retail Beer License for Off-Premises Consumption~~	~~75.00~~

~~Wholesale Beer License 100.00~~
~~Brewer's License 100.00~~

(2) The processing fee for determination of resort area shall be $250.00.

(3) The processing fee for the transfer of any license issued by the department shall be $100.00.

~~(2)~~ (4) Then applying for a new license, the license fee and applicable processing fee must accompany the application. The processing fee for an application for transfer of a license must be remitted at the time of application. Processing fees are not refundable.

~~(3)~~ (5) Each winery or importer desiring to ship table wines to licensed wholesalers located within the state shall submit an application for registration to the Department of Revenue as specified under Section 3, Initiative 81. Each application shall be accompanied by a $25.00 processing fee and a copy of each product label the winery or importer intends to ship into the state.

No table wines may be shipped into the state until such registration is granted by the department.

(6) Fees for addition or deletion of a mortgage are set forth in MAC 42-2.12(6)-S12023 and fees for registration of agents are set forth in MAC 42-2.12(6)-S1210 and are not included in this schedule."

(3) This Rule is being amended for three reasons. The first is that on May 22, 1979, pursuant to Chapt. 699, Laws 1979, the Department adopted temporary rules governing the fees for wine licenses. It is now the intention of the Department to make these permanent rules. The second reasons for the amendment is that the Legislature has passed legislation allowing a catering amendment to be added to "All-beverage licenses". Finally, it required that the issuance and transfer of all licenses now be published requiring the increase of fees.

IN THE MATTER OF THE AMENDMENT of Rule 42-2.12(6)-S12060 Beer Wholesalers-Wholesale Beer License	))))	NOTICE OF PROPOSED AMENDMENT OF RULE 42-2.12(6)-S12060 Beer Wholesalers-Wholesale Beer License NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

(1) On August 27, 1979, the Department of Revenue proposes to amend Rule 42-2.12(6)-S12060, which provides for the licensing of wholesalers.

(2) The Rule, as proposed to be amended provides as follows (stricken material is interlined, new material is underlined):

"42-2.12(6)-S12060 BEER WHOLESALERS-WHOLESALE BEER LICENSE. (1) In cases where beer, or table wine is held in

storage in wholesaling or jobbing quantities at a fixed place of business and deliveries made or orders filled therefrom by the person in charge or his employee, the Department will treat same as carrying on the business of ~~wholesaling beer~~ wholesaler, requiring such person to have a wholesale license for such place of business.

"(2) Every wholesale beer, or table wine dealer must have a principal place of business in the state of Montana with ~~facilities for the~~ proper storage ~~of beer~~ facilities. All deliveries in the state must be made from such principal place of business or from a sub-warehouse and all books, records and duplicate invoices of sales must be kept at the principal place of business within the state, subject to inspection by the Department or its authorized representative. No wholesale ~~beer~~ license will be issued to any corporation or individual unless such corporation or individual has the qualifications and facilities specified in Section ~~4-4-103~~, ~~R.C.M. 1947~~ 16-4-102 and 16-6-104, MCA. (History: Sec. 4-4-103, R.C.M. 1947; Eff. 11/3/75.)"

(3) On May 22, 1979, the Department of Revenue adopted the above amendments as temporary pursuant to the authority contained in Chapt. 699, Laws 1979. It is now the intention of the Department to make the amendments permanent. These changes are necessary to implement the wine initiative and its amendments contained in Chapt. 699, Laws 1979.

IN THE MATTER OF THE AMENDMENT of Rule 42-2.12(6)-S12065 on Sub-Warehouse License-Brewer's Storage Depot	NOTICE OF PROPOSED AMENDMENT OF RULE 42-2.12(6)-S12065 on Sub-Warehouse License-Brewer's Storage Depot NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

(1) On August 27, 1979, the Department of Revenue proposes to amend Rule 42-2.14(6)-S12065, which provides the licensing of sub-warehouses.

(2) The Rule, as proposed to be amended provides as follows (Stricken material is interlined, new material is underlined):

"42-2.12(6)-S12065 SUB-WAREHOUSE LICENSE-BREWER'S STORAGE DEPOT. (1) Each wholesale beer and/or table wine licensee shall be entitled to a duplicate license for one warehouse other than his designated principal place of business, which license shall be designated a sub-warehouse license. Brewers may establish storage depots as provided in Section 4-4-102, R.C.M. 1947. (History: Sec. 4-4-102, R.C.M. 1947; Eff. 11/3/75.)"

(3) On May 22, 1979, the Department of Revenue adopted the above amendments as temporary pursuant to the authority contained in Chapt. 699, Laws 1979. It is now the intention of the Department to make the amendments permanent. These changes are necessary to implement the wine initiative and its amendments contained in Chapt. 699, Laws 1979.

IN THE MATTER OF THE AMENDMENT of Rule 42-2.12(6)-S12080 on Off-Premise License-Grocery Store	))))	NOTICE OF PROPOSED AMENDMENT OF RULE 42-2.12(6)-S12080 on Off-Premise License-Grocery Store NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

(1) On August 27, 1979, the Department of Revenue proposes to amend Rule 42-2.12(6)-S12080 which provides for the licensing of premises for off-premises consumption of beer and table wine.

(2) The Rule, as proposed to be amended provides as follows (stricken material is interlined, new material is underlined):

"42-2.12(6)-S12080 OFF-PREMISE LICENSE-GROCERY STORE. (1) A retail license to sell beer or table wine in the original packages for off-premise consumption only may be issued to any person, firm or corporation who shall be approved by the Department as a fit and proper person, firm or corporation to sell beer or table wine and whose premises proposed for licensing are operated as a bona fide grocery store or a drugstore licensed as a pharmacy.

(2) (Remains the same.)"

(3) On May 22, 1979, the Department of Revenue adopted the above amendments as temporary pursuant to the authority contained in Chapt. 699, Laws 1979. It is now the intention of the Department to make the amendments permanent. These changes are necessary to implement the wine initiative and its amendments contained in Chapt. 699, Laws 1979.

(4) Interested parties may submit their data, views or arguments concerning the proposed amendments in writing to R. Bruce McGinnis, Tax Counsel, Department of Revenue, Mitchell Building, Helena, Montana 59601, no later than August 27, 1979.

(5) The authority of the Department to make these proposed amendments is based upon Section 16-1-303(K). Implementing Section 16-1-303(K) (Section 4-1-303, R.C.M., 1947).

DEPARTMENT OF REVENUE

Mary L Craig
by John W Clark
MARY L. CRAIG, Director

Certified to the Secretary of State July 17, 1979

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

In the matter of the amendment of rule 46-2.10(18)-S11465 pertaining to medical assistance, temporary prohibition of certain provider fee increases.	)))))))))	NOTICE OF PROPOSED AMENDMENT OF RULE 46-2.10(18)-S11465 pertaining to medical assistance temporary prohibition of certain provider fee increases. NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On August 27, 1979, the Department of Social and Rehabilitation Services proposes to amend rule 46-2.10(18)-S11465 which pertains to medical assistance, temporary prohibition of certain provider fee increases.

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

46-2.10(18)-S11465 MEDICAL ASSISTANCE, TEMPORARY PROHIBITION OF CERTAIN PROVIDER FEE INCREASES (1) From the effective date of this rule ~~until July 1, 1979,~~ no fee increases to Medicaid providers are allowed, except as provided in ~~subsection~~ subsections (2) and (3) of this section.

(2) When it is demonstrated by a professional organization, ten (10) members or 25% of the medical specialty group affected by the fee prohibition, that current Medicaid rates are adversely affecting the program, fee increases shall be granted within legislative budget contraints to any provider group so demonstrating an adverse affect.

~~(2)~~ (3) This prohibition does not apply to any fee increase ~~required by federal Medicaid law or regulations, including but not limited to federally required fee increases~~ for nursing home care providers and hospital providers.

~~(3)~~ (4) This rule, for its effective duration, takes precedence over any other rules in this Title which are in conflict, including but not limited to 46-2.10(18)-S11460.

3. Fee increases to certain Medicaid providers have been prohibited since October of 1977. The proposed rule would continue the prohibition on provider fee increase until it is demonstrated by a professional organization, ten (10) members or 25% of the medical specialty group affected that a fee increase is needed.

The promulgation of this rule is necessary in order to allow for the development of equitable reimbursement plans for providers covered by the current prohibition. The Medicaid program is governed by federal laws and regulations. These laws and regulations prohibit the department from paying more than that paid by Medicare or from paying more than the amount the provider charges his private pay clients, whichever amount is less. The department is aware that providers have incurred increased costs in energy, supplies, and labor. Also, it is known that providers have increased their fees to the general public. The proposed rule will allow the department to verify that any fee increase will be within federal guidelines and within the department's budget.

If the prohibitions were allowed to expire, provider reimbursement rates would increase inequitably and beyond budgetary guidelines. This would precipitate the need to curtail essential medical services. Therefore, the department found that there was imminent peril to public health, safety and welfare which required the department to amend the rule as an emergency rule on June 28, 1979.

4. Interested parties may submit their data, views, and arguments concerning the proposed amendment to the Office of Legal Affairs of the Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59601 no later than August 24, 1979.

5. The authority of the agency to make the proposed amendment is based upon Section 53-6-113, MCA (71-1511(6), R.C.M.). The implementing authority is 53-6-111, MCA (71-1511, R.C.M.) and 53-6-141, MCA (71-1517, R.C.M.).

Keith P. Colbo
Director, Social and Rehabilitation Services

Certified to the Secretary of State July 17, 1979.

BEFORE THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA

In the matter of the adoption of procedural rules of the Workers' Compensation Court	))))	NOTICE OF ADOPTION OF THE PROCEDURAL RULES OF THE WORKERS' COMPENSATION COURT

TO: All Interested Persons.

1. On June 14, 1979 the Workers' Compensation Court published a Notice of the Proposed Adoption of the Procedural Rules of the Workers' Compensation Court at pages 504 through 512 inclusive, Montana Administrative Register, Issue No. 11 of 1979.

2. The Workers' Compensation Court has adopted the rules as proposed with the following changes:

Rule I (2-3.40(2)-P4010); Rule II (2-3.40(2)-P4020); Rule III (2-3.40(2)-P4030); Rule IV (2-3.40(2)-P4040); Rule V (2-3.40(2)-P4050); Rule VI (2-3.40(2)-P4060); Rule VII (2-3.40(2)-P4070); Rule VIII (2-3.40(2)-P4080); Rule IX (2-3.40(2)-P4090); Rule XI (2-3.40(2)-P40020); Rule XII (2-3.40(2)-P40030); Rule XIII (2-3.40(2)-P40040); Rule XIV (2-3.40(2)-P40050); Rule XV (2-3.40-P40060); Rule XVI (2-3.40(2)-P40070); Rule XVII (2-3.40(2)-P40080); Rule XVIII (2-3.40(2)-P40090); Rule XIX (2-3.40(2)-P4100); Rule XX (2-3.40(2)-P40110); Rule XXI (2-3.40(2)-P40120) and Rule ~~XII~~ XXII (2-3.40(2)-P40130). Rule X (2-3.40(2)-P40010) Medical Reports has been changed as follows:

MEDICAL REPORTS. (1) There must be an exchange of medical reports and medical information between the parties to the dispute prior to any scheduled hearing. Medical reports may be submitted as evidence by stipulation between parties ~~at the time of pretrial or at the time of trial,~~ or by the laying of proper foundation at the time of trial.

3. No comments or testimony were received. These rules are adopted to enable the Court to carry out the mandate of the legislature, to give guidance to interested and involved parties of Court procedures and to allow all parties who appear before the Court to have their claim judically considered and decided.

4. The authority of the Court to make these rules is based on sections 2-4-201 MCA and 39-71-2903 MCA. These rules implement section 2-4-201 and Title 71, Chapter 39, Part 29.

William E. Hunt
JUDGE

July 16, 1979
CERTIFIED TO THE SECRETARY
OF STATE

BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the amend-	)	NOTICE OF AMENDMENT OF
ment of Rule 12-2.6(1)-S650	)	RULE 12-2.6(1)-S650
relating to priorities for	)	(special permits -
special permits	)	priorities)

TO: All Interested Persons:

1. On December 14, 1978, the Fish and Game Commission published notice of a public hearing on a proposed amendment of a rule relating to priorities for special permits at page 1565 of the 1978 Montana Administrative Register, issue no. 17.

2. The commission has amended the rule to provide opportunity for nonpreference holders to obtain special licenses and to minimize high costs of operating the preference system and to make the possibility of obtaining a special license for subject species to be more likely than under the previous rule.

3. Formal hearings were held and comments were received from over 200 individuals. The record of these comments and the commission proceedings in relation to this rule are available for examination at the department's Helena office. Upon due consideration, the commission has amended the rule 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, Wildlife, and Parks, Helena, Montana 59601.

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.

For the license year beginning May 1, 1980 and each succeeding year thereafter, the number of special licenses to be made available for

hunting moose, mountain sheep, and mountain goat under this rule shall be allocated as follows:

(a) 75% of the number of licenses available for a species in each hunting district shall be allocated to applicants with preference for that species under this rule or building such preference under this rule;

(b) 25% of the number of licenses available for a species in each hunting district shall be allocated to applicants who do not hold preference for that species under this rule. Applicants for a special license for a species under this subsection by electing to apply for a special license from the 25% available under the provisions of this subsection forfeit any and all preference previously obtained under provisions of this rule; and further, failure to obtain a license under this subsection may not be counted toward building preference under this rule.

(c) the 10% limitation applicable to non-residents shall be determined from the total number of special licenses available for a species in a hunting district.

Joseph J. Klabunde, Chairman
Fish and Game Commission

Certified to Secretary of State July 3, 1979

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

In the matter of the Amendment of ARM 40-3.54(6)-S54010, subsection (2) concerning examination fees.	NOTICE OF AMENDMENT OF ARM 40-3.54(6)-S54010 (2) EXAMINATIONS

TO: All Interested Persons:

1. On June 14, 1979, the Board of Medical Examiners published a notice of proposed amendment to ARM 40-3.54(6)-S54010, subsection (2) concerning examinations at page 535 Montana Administrative Register, Issue no. 11.

2. The board has amended the rule exactly as proposed. However, it should be noted that in the notice the implementation section was cited as 37-3-308 (1)[66-1031 R.C.M. 1947]. This should have been cited as section 37-3-308 (1)(a) MCA (66-1031 R.C.M. 1947).

3. No comments or testimony were received, other than a telephone call from the Administrative Code Committee to bring to the attention of the Board the above correction. The Board proposed the amendment as the examination service (FLEX) raised their fees on July 1, 1979 to $90 per examination. The Board requested $100, the additional $10 to cover the administrative costs.

BOARD OF MEDICAL EXAMINERS
JOHN C. SEIDENSTICKER, M.D.
PRESIDENT

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

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE Amendment of Rule 42-2.22(2)-S22010 Assessment of Livestock	))))	NOTICE OF AMENDMENT OF RULE 42-2.22(2)-S22010 Regarding Assessment of Livestock

TO: All Interested Persons:

(1) On June 14, 1979, the Department of Revenue published Notice of a Proposed Amendment to the Rule regarding the assessment of livestock at page 539-540 of the 1979 Montana Administrative Register, Issue Number 11.

(2) The Department has adopted the rule as originally noticed with the following change:

"(1) (a) The average market value for blooded or registered cattle shall be thirty percent (30%) more than the average market value for stock cattle. The average market value for registered or purebred cattle shall apply only to those animals used to reproduce registered or purebred animals."

(3) The Montana Stockgrowers' Association appeared at the public hearing on July 10, 1979. The Stockgrowers presented an amendment to Subsection (1)(a). The purpose of this amendment was to clear up confusion as to which animals should be assessed as purebred animals or should be assessed as common stock animals. The Department adopted the amendment as proposed.

(4) No other written or oral comments were received at the hearing or otherwise.

DEPARTMENT OF REVENUE

Mary L. Craig
by John M. Clark

MARY L. CRAIG, Director

Certified to the Secretary of State July 17, 1979

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

In the matter of the amendment of Rules 46-2.10(38)-S101960 and 46-2.10(38)-S101970 pertaining to application for county medical certification and county residency.	))))	NOTICE OF AMENDMENT OF RULES 46-2.10(38)-S101960 AND 46-2.10(38)-S101970

TO: All Interested Persons

1. On June 14, 1979, the Department of Social and Rehabilitation Services published notice of a proposed amendment to rules 46-2.10(38)-S101960 and 46-2.10(38)-S101970 pertaining to application for county medical certification and county residency at page 562 of the 1979 Montana Administrative Register, issue number 11.

2. The agency has amended the rules as proposed.

3. No comments or testimony were received. The agency has amended the rules to conform with Section 2, Chpt. 450, L 1979 that was passed by the Montana Legislature and which will become effective July 1, 1979. The new law removes the one year residency requirement for county liability when a recipient of public assistance moves to another county.

Keith L. Colbo
Director, Social and Rehabilitation Services

Certified to the Secretary of State July 17, 1979.

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

In the matter of the amendment of rule 46-2.10(14)-S11121(1), (1)(a), and (1)(b) pertaining to the table of assistance standards for AFDC	))))	NOTICE OF AMENDMENT OF RULE 46-2.10(14)-S11121

TO: All Interested Persons

1. On June 14, 1979, the Department of Social and Rehabilitation Services published notice of a proposed amendment to rule 46-2.10(14)-S11121(1), (1)(a), and (1)(b) pertaining to the table of assistance standards for AFDC at page 557 of the 1979 Montana Administrative Register, issue number 11.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule to set new payment standards for those individuals and families receiving assistance.

Keith P. Cobb
Director, Social and Rehabilitation Services

Certified to the Secretary of State July 17, 1979.

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

In the matter of the adoption of Rule 46-2.10(22)-S11751 pertaining to the Food Stamp Program and repeal of Rules 46-2.10(22)-S11500 through 46-2.10(22)-S11750.	))))))	NOTICE OF ADOPTION OF RULE 46-2.10(22)-S11751 AND REPEAL OF RULES 46-2.10(22)-S11500 THROUGH 46-2.10(22)-S11750

TO: All Interested Persons

1. On June 14, 1979, the Department of Social and Rehabilitation Services published notice of a proposed adoption to Rule 46-2.10(22)-S11751 and repeal of 46-2.10(22)-S11500 through 46-2.10(22)-S11750 pertaining to the Food Stamp program at page 560 of the 1979 Montana Administrative Register, issue number 11.

2. The agency has adopted and repealed the rules as proposed.

3. No comments or testimony were received. The Department of Social and Rehabilitation Services administers the Food Stamp program and acts as agent on behalf of the United States Department of Agriculture, Food and Nutrition Service. See 53-2-206, MCA (71-211(1), R.C.M.). The rules as adopted by the Department of Agriculture, Food and Nutrition Service, implement the Food Stamp Act of 1977 and are binding upon the state. The United States Department of Agriculture received extensive comment on their rules. The new federal rules have substantially revised and changed the Food Stamp program. Major aspects of the Food Stamp program include the issuance of allotments at no cost, eligibility criteria, certification and issuance procedures, and fraud disqualification. The changes are intended to tighten eligibility criteria, to facilitate participation by eligible households, to strengthen program administration, and to reduce program fraud and abuse.

Keith P. Colbo
Director, Social and Rehabilitation Services

Certified to the Secretary of State July 17, 1979.

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

In the matter of the amendment of Rule 46-2.10(14)-S11050 pertaining to AFDC reporting period.	)))	NOTICE OF AMENDMENT OF RULE 46-2.10(14)-S11050

TO: All Interested Persons

1. On June 14, 1979, the Department of Social and Rehabilitation Services published notice of a proposed amendment to rule 46-2.10(14)-S11050 pertaining to AFDC reporting period at page 564 of the 1979 Montana Administrative Register, issue number 11.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received. The agency has amended the rule pursuant to Section 1, Chapter 257, Laws 1979 which requires recipients to report income not previously declared.

Keith L. Colbo
Director, Social and Rehabilitation Services

Certified to the Secretary of State July 17, 1979.

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

In the matter of the amendment of Rule 46-2.10(18)-S11451D pertaining to reimbursement of skilled nursing and intermediate care services, reimbursement method and procedures.	)))))	NOTICE OF AMENDMENT OF RULE 46-2.10(18)-S11451D

TO: All Interested Persons

1. On May 10, 1979, the Department of Social and Rehabilitation Services published notice of a proposed amendment to rule 46-2.10(18)-S11451D pertaining to reimbursement for skilled nursing and intermediate care services, reimbursement method and procedures at page 434 of the 1979 Montana Administrative Register, issue number 9.

2. The agency has amended subsections (2), (2)(f), and (2)(g) as proposed. Subsection (2) has also been further amended and can be referred to in MAR Notice No. 46-2-183.

3. Although adverse comment was received by the Department regarding implementation of this amendment, overall Medicaid financial impact information was provided with the agreement and to the satisfaction of the commentator. Further response to similar comments is incorporated in the Notice of Adoption of Amendment of Rule 46-2.10(18)-S11451D as originally proposed in MAR Notice No. 46-2-183.

Keith P. Colbo
Director, Social and Rehabilitation Services

Certified to the Secretary of State July 17, 1979.

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

In the matter of the amendment of Rule 46-2.10(18)-S11451D(2) and (6) pertaining to reimbursement for skilled nursing and intermediate care services, reimbursement method and procedures.	))))	NOTICE OF AMENDMENT OF RULE 46-2.10(18)-S11451D

TO: All Interested Persons

1. On June 14, 1979, the Department of Social and Rehabilitation Services published notice of a proposed amendment to rule 46-2.10(18)-S11451D pertaining to reimbursement for skilled nursing and intermediate care services, reimbursement method and procedures at page 568 of the 1979 Montana Administrative Register, issue number 11.

2. The agency has amended the rule as proposed.

3. The Department has thoroughly considered all written commentary received subsequent to the original notice date and responds to those comments as follows:

Comment: The proposed regulations will reinstate a form of the cost-plus reimbursement system by guaranteeing a profit to Montana nursing homes; such a system is not only illegal but also rewarding to inefficient, high-cost providers.

Response: Although the profit component of the alternative rate review system reinstitutes a form of cost-plus reimbursement, it does not have a negative effect on cost containment efforts. To the contrary, SRS will conduct an efficiency and effectiveness review in each applicant facility and will determine allowable cost on that basis. Profit in this instance does not stimulate costs but is only a reasonable return on reasonable cost.

Federal regulations 42 CFR Sections 405.460(a) and 447.273 do not preclude profit as a component of reimbursement. The phrase "reasonable cost-related basis" means that reimbursement will be reasonably related to historical cost patterns. Included in the amount "necessary for efficient delivery of needed health services" can be profit or other incentive amounts; otherwise, participation of profit motivated providers would be excluded.

Comment: The standard for review of the need for non-formula rates is vague at best and allows for review upon the receipt of self-serving statements by providers. In addition, the proposed amendment places no ceiling on profits the department will allow in addition to a nursing home's operating costs.

Response: The amended rule allows for a provider to call into question the adequacy of the formula generated rate. In its place can be substituted a budget review approach through which the facility's proposed expenditures are evaluated with regard to its efficiency and effectiveness in delivering

services. Such evaluation will depend on the health status of the patients in the facility as well as the method of operating the facility. This is a highly subjective process that will depend on the expertise of those making the judgments. SRS is retaining a team of consultants who possess the requisite qualifications to make reasonable judgments in this area. From this base of information, the budget will be reviewed and funded only to the level required to operate efficiently and effectively. The profit that is initially being allowed is 5.1% of allowable costs up to a limit of $1.50 per patient day.

Comment: There is no requirement that interim prospective rates be established on a reasonable cost-related basis.

Response: The interim prospective rate is tied to a reasonable cost-related basis by virtue of the fact that the rate review process will include the time period covered by the interim prospective rate and all but personnel costs are subject to recovery based on that review. In addition, the interim prospective rate will be allowed only after the staffing level has been tested for consistency with past staffing patterns for the applicant facility to preclude additions that may not be reasonably cost related. When rate review has been completed, necessary staffing levels will have been determined and reimbursement will be on that basis from the date of the completed review forward.

Comment: The department should explain the source of additional money (allegedly needed to fund budget review generated rates) and what effect the proposed amendment will have on overall Medicaid budget, particularly optional services.

Response: The funds budgeted for the rate review process are included in the amounts budgeted for nursing home reimbursement and are not in addition to the amounts budgeted for the biennium. There is absolutely no intention to fund the costs associated with rate review from administrative funding or optional program amounts.

Comment: Budget review amendments tend to placate a resistant industry and are not in the best interests of nursing home residents and recipients of optional Medicaid services.

Response: The addition of the rate review process as an alternative to the formula approach for establishing rates maintains the Department's role as primary determiner of allowable costs for nursing home care. This alternative has been established in recognition of the fact that there may be mitigating circumstances for which a formula based rate may not be able to adjust. The rate review process allows indepth review of a facility's situation to determine a fair rate on a case by case basis.

Keith P. Colbo
Director, Social and Rehabilitation Services

Certified to the Secretary of State July 17, 1979.

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

In the matter of the amendment of Rule 46-2.10(18)-S11451E(5)(e) pertaining to reimbursement of skilled nursing and intermediate care services, cost reporting.	))))	NOTICE OF AMENDMENT OF RULE 46-2.10(18)-S11451E (5)(e)

TO: All Interested Persons

1. On June 14, 1979, the Department of Social and Rehabilitation Services published notice of a proposed amendment to rule 46-2.10(18)-S11451E(5)(e) pertaining to reimbursement for skilled nursing and intermediate care services, cost reporting at page 567 of the 1979 Montana Administrative Register, issue number 11.

2. The agency has amended the rule as proposed.

3. The Department has thoroughly considered all written commentary received subsequent to the original notice date and responds to those comments as follows:

Comment: The proposed amendment is proper in that Rule 46-2.10(18)-S11451E(5)(e) should be considered ultra vires and removed from the regulations.

Response: The Department agrees and has issued a declaratory ruling invalidating the language due to its conflict with and contradiction of express statutory authority.

Comment: The rule as written is proper and removal will allow for the violation of Medicaid provider rights.

Response: Cost reporting information which has been received by a state agency in connection with the transaction of official business and preserved for informational value of evidence of a transaction becomes a matter of public record (2-6-202, MCA). Montana citizens have the right of access to public writings and records in the custody of public offices (2-6-102(1), MCA).

Keith L. Colbo
Director, Social and Rehabilitation Services

Certified to the Secretary of the State July 17, 1979.

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

In the matter of the amendment of Rules 46-2.2(2)-P211 through 46-2.2(2)-P340 pertaining to appeal procedures available to skilled nursing facilities and intermediate care facilities whose participation in the Medicaid program is being denied, terminated or not renewed.	)))))))	NOTICE OF AMENDMENT OF RULES 46-2.2(2)-P211 THROUGH 46-2.2(2)-P340

TO: All Interested Persons

1. On June 14, 1979, the Department of Social and Rehabilitation Services published notice of a proposed amendment to rules 46-2.2(2)-P211 through 46-2.2(2)-P340 pertaining to appeal procedures available to skilled nursing facilities and intermediate care facilities whose participation in the Medicaid program is being denied, terminated or not renewed at page 565 of the 1979 Montana Administrative Register, issue number 11.

2. The agency has amended the rules as proposed.

3. Comment: Written comment was received from Montana Legal Services supporting the promulgation of the proposed amendment and requesting that the amendments extend the requirements for notice and hearing to the patients and residents of nursing homes whose participation in the Medicaid program is being terminated or not renewed by the state.

Response: This comment is rejected because it is outside the scope of the notice and beyond the requirements for fair hearings as mandated by the federal government. See 44 Federal Register 17932; 42 CFR 431.200.

Keith P. Colbo
Director, Social and Rehabilitation Services

Certified to the Secretary of State July 17, 1979.

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

In the matter of the adoption of Rules 46-2.6(6)-S6351, 46-2.6(6)-S6352, 46-2.6(6)-S6353, 46-2.6(6)-S6354, 46-2.6(6)-S6355, and 46-2.6(6)-S6356 pertaining to guidelines, criteria and procedures for the applications of and receipt of grants of grant money to battered spouses and domestic violence programs.	NOTICE OF ADOPTION OF RULES 46-2.6(6)-S6351, 46-2.6(6)-S6352, 46-2.6(6)-S6353, 46-2.6(6)-S6354, 46-2.6(6)-S6355 and 46-2.6(6)-S6356

TO: All Interested Persons

1. On June 14, 1979, the Department of Social and Rehabilitation Services published notice of a proposed adoption to Rules 46-2.6(6)-S6351, 46-2.6(6)-S6352, 46-2.6(6)-S6353, 46-2.6(6)-S6354, 46-2.6(6)-S6355, and 46-2.6(6)-S6356 pertaining to guidelines, criteria and procedures for the application of and receipt of grants of grant money to battered spouses and domestic violence programs at page 551 of the 1979 Montana Administrative Register, issue number 11.

2. The agency has adopted the proposed rules except for the following changes:

46-2.6(6)-S6351 (RULE I) DEFINITIONS "Department" means the Department of Social and Rehabilitation Services.

(1) "Grant application" means a written application to the Department under the terms of Chapter 677, Laws 1979 and these rules.

(2) "Domestic violence" means any act or threatened act of violence, including any forceful detention of an individual, which results or threatens to result in physical injury; and is committed by a person ~~eighteen years of age or older~~ against another person to whom such person is or was ~~related, or by a person of any age against another person of the opposite sex~~ married or with whom the assaulted person cohabits or formerly cohabited. "Spouse abuse" is included within the definition of "domestic violence."

(3) "Local battered spouse and domestic violence program" means a community-based program directed at the problems of domestic violence which may include but is not limited to providing direct services to victims of domestic violence.

(4) "Shelter" means a permanent facility that offers emergency, short term shelter to victims of domestic violence and may provide other support services such as crisis counseling and referral to appropriate community services.

(5) "Safe homes" means private homes available to provide emergency short term shelter to victims of domestic violence when needed.

(6) "Local contribution" means the twenty percent of the operational costs of the program in the form of cash or in-kind contributions generated from the community to be served.

(7) "In-kind contributions" means program support other than direct funding and may include such things as volunteer time, donated space and donated supplies.

(8) "Local control unit" means a community-based body which may be a governmental entity or non-profit board, agency or committee which is responsible and accountable for the administration and execution of the program.

(9) "Counseling" means crisis or longer term individual or group counseling by professionals or trained volunteers for victims and others involved in domestic violence situations.

(10) "Advocacy programs" means programs that assist or act on behalf of victims in obtaining such things as services and information.

(11) "Educational programs" means programs related to battered spouses and domestic violence which may be designed for the community at large or specialized groups such as hospital personnel and law enforcement officials.

46-2.6(6)-S6352 (RULE II) DEPARTMENT ADMINISTRATIVE POLICIES AND RESPONSIBILITIES (1) The goal of the Department is to develop a coordinated, comprehensive, statewide network of local domestic violence programs. In keeping with this goal, grants will be allocated for:

(a) expansion or maintenance of existing programs;

(b) new programs; and

(c) innovative programs with the potential for replication. ~~Equity will be sought through geographic distribution and individual access to programs.~~

(2) The Department reserves the right to fund all or part of a program or to reject a grant application.

(3) The Director of the Department shall appoint a Domestic Violence Advisory Committee consisting of five members, one member from each of the Department's five administrative regions. Each member shall have experience in an area related to the problems of domestic violence.

(a) The Advisory Committee will review the grant applications and make recommendations for grant awards.

(b) The Department will make the final decisions on grant awards.

(4) Grants will be awarded annually for a maximum of twelve months. Applications for renewal will be evaluated in the same manner as new applications.

(5) Applications for grant awards are to be received by the Social Services Bureau of the Department by May 15. Decisions for grant awards will be made on or before June 15 with awards to be made on July 1. For the first program year, applications are to be received by August 15, 1979, decisions will be made on or before September 15 with awards made on October 1.

(6) ~~Grant awards~~ The Department shall ~~be made~~ award grants to locally controlled units such as a non-profit board or administrative body that shall be responsible and accountable to the Department under an agreement based on the grant application.

(7) ~~The grant award agreement~~ The Department shall require quarterly progress and final reports.

(8) The Department shall require expense records and reports. Funds granted shall be used only for the purposes outlined and described in the application and approved by the Department. ~~Expense records and reports will be required.~~ Programs awarded grants are subject to audit by the Office of the Legislative Auditor and the Department.

(9) ~~Programs receiving grants will be monitored by the~~ Social Services Bureau of the Department~~:~~ will monitor programs awarded grants.

(10) Applications submitted to the Department become government documents subject to public scrutiny. Names of individuals or information about facilities that require confidentiality protection will not be disclosed.

46-2.6(6)-S6353 (RULE III) AWARDING GRANTS -- CRITERIA

(1) Grants will be awarded on the basis of these rules and the following criteria:

(a) Demonstrated need as documented by such sources as data from the community involving incidence of the ~~problem~~ domestic violence needs assessments, inadequacy of resources to meet needs, ~~needs assessments~~ and community letters of support.

(b) Project merit which will include factors such as cost benefit and clear meeting of identified needs.

(c) Administrative design which includes method of evaluation, program organizational structure such as staff and board of directors if applicable, and relationships with other community organizations and agencies.

(d) Efficiency of administration including the maximum use of other resources and the capability to sustain programs without grant money.

46-2.6(6)-S6354 (RULE IV) GRANT APPLICATION ELIGIBILITY REQUIREMENTS (1) "Local control" by a community-based body must be documented through a description of that body and names and addresses of key individuals who will be responsible and accountable for the program.

(2) There shall be no residency requirement for persons served by programs to which grants are awarded.

(3) Shelters must be licensed by the State Department of Health and Environmental Sciences as a "rooming house" in order to be eligible for a grant award.

(4) Programs which include any payments to safe homes must document that the homes carry home owners liability and fire insurance.

(5) Programs which include funding for counseling services must demonstrate that the counseling is directed towards assisting the victim and others involved to be free from violent situations.

(6) Programs that include funding for advocacy services must keep records that document results in assisting victims.

(7) Programs that include funding for educational programs must define clear objectives and include an evaluation design.

46-2.6(6)-S6355 (RULE V) GRANT APPLICATIONS -- GENERAL REQUIREMENTS (1) Six copies of the grant application should be sent to the Domestic Violence Grant Program, Social Services Bureau, Montana Department of Social and Rehabilitation Services, Box 4210, Helena, MT 59601.

(2) Although not required, it is suggested that applications meet the following requirements:

(a) The application should be typed, printed or otherwise legibly reproduced on 8] x 11" paper.

(b) All pages in an application should be consecutively numbered.

(3) The application should state the name, title, telephone number and post office address of the person to whom communication in regard to the application should be made.

(4) The Department will review the application to determine compliance with these rules. If the Department determines that the application does not comply, the Department will reject the application, notifying the applicant in writing and listing the application deficiencies~~.~~ within two weeks of receiving the application. The application may be corrected and re-submitted ~~if corrections are made before~~ but must be received by the final submittal deadline.

(5) After an application is filed, the applicant should submit supplemental material upon request or as soon as possible after it becomes available.

(6) There is no form adopted by the Department for use in making an application.

46-2.6(6)-S6356 (RULE VI) GRANT APPLICATION CONTENT REQUIREMENTS (1) Each grant application must include:

(a) Project title.

(b) Applicant's name, title, address, and phone number.

(c) Statement demonstrating compliance with 46-2.6(6)-S6354 eligibility requirements.

~~(c)~~ (d) Amount requested.

~~(d)~~ (e) Amount of match -- cash, in-kind and total.

~~(e)~~ (f) Signature(s) of responsible person(s).

~~(f)~~ (g) Statements regarding protection of rights for confidentiality and nondiscrimination.

~~(g)~~ (h) Budget balance sheet and budget justification.

(2) The application must also include brief program narrative which shall consist of but is not limited to the following specific areas:

(a) A general statement of the scope and purpose of the program, including services to be offered.

(b) Demonstrated need -- documentation of the need for the program including any available needs assessment pertinent to the program.

(c) Administration -- description of the responsible local body; organization chart or outline showing lines of authority, responsibility and accountability; staff and job descriptions, including volunteers.

(d) Program objectives -- clearly stated objectives relevant to the services to be provided and number of clients served. The objectives should be measurable so the evaluation of a program can be based on actual performance of a program in relation to stated objectives.

(e) Community support including documentation of twenty percent local contribution for operating costs and letters of support.

(f) Geographic area to be served including outreach activity and linkages with other agencies and organizations.

(g) Maintenance of effort -- if an ongoing program, describe stability and community commitment through a maintenance and expansion of programmatic and fiscal effort, describe other funding sources explored.

(h) Evaluation design.

(i) Desired method of payment.

3. No comments or testimony were received. Chapter 677, Laws 1979 establishes a grant program within the Department of Social and Rehabilitation Services for the allocation of grant money to local battered spouses and domestic violence programs. The purpose of the rules are to provide guidelines, criteria and procedures for application of and for receipt of grants authorized by the law.

Keith L. Colo
Director, Social and Rehabilitation Services

Certified to the Secretary of State July 17, 1979.

VOLUME NO.38 OPINION NO. 26

CONSTITUTIONAL LAW - School district attendance units on Hutterite colony premises;
RELIGIOUS ORGANIZATIONS - Establishment of school district attendance units on property owned by;
SCHOOL BOARDS - Closure of attendance units, contracts for attendance unit financing: applicability of state law to; lease of school facilities from Hutterite colony;
SCHOOL DISTRICTS - Attendance units: applicability of state law to, establishment of on Hutterite colony premises;
CONSTITUTION OF MONTANA (1972) - Article II, Section 5, Article V, Section 11, Article X, Section 6;
MONTANA CODES ANNOTATED - Sections 20-6-502, 20-6-509, 20-6-625, Title 20, chapter 9, part 1, 20-9-113.

HELD: 1. A school district board of trustees may establish a separate attendance unit on the premises of a Hutterite colony located in the district.

2. Closure of an attendance unit on the premises of a Hutterite colony is a matter within the discretion of the board of trustees of the school district involved and the trustees have no authority to make an agreement to the contrary.

3. Since operational costs of an attendance unit on the premises of a Hutterite colony must be budgeted and financed in the manner provided by law, any agreement between the trustees of the school district and the colony for private financing of any part of those costs would be unenforceable.

6 July 1979

John V. Potter, Jr., Esq.
Meagher County Attorney
Meagher County Courthouse
White Sulphur Springs, Montana 59645

Dear Mr. Potter:

You have requested my opinion concerning a proposal to establish a separate attendance unit of White Sulphur Springs School District No. 8 on the premises of a Hutterite colony located in the district. You have asked whether the proposed separate attendance unit would be barred from receiving public funds on constitutional grounds. The board

of trustees of the school district has asked whether such an attendance unit may be established for a one year trial period, subject to termination by either the board or the colony at the end of the school year, and whether the board and the colony may agree that the colony will pay the difference, if any, between the cost of operating the attendance unit and the amount the district receives under the foundation program which is attributable to the number of students enrolled at the attendance unit.

There is no question that the Hutterite colony involved is a religious organization and as you have noted, Montana's constitution makes clear that virtually any form of public aid to church related schools would be improper. See Article II, Section 5; Article V, Section 11, and especially Article X, Section 6, Constitution of Montana (1972). The last provision expressly prohibits state aid to sectarian schools and is essentially the same as Article XI, Section 8 of the 1889 Montana Constitution. In State ex rel. Chambers v. School District No. 10, 155 Mont. 422, 437, 472 P.2d 1013 (1970), the Supreme Court found that Article XI, Section 8 of the former constitution:

> States in no uncertain terms that no school district can directly or indirectly appropriate or pay from public funds to aid the support of any school controlled in whole or in part by any church, sect or denomination.

In Chambers the court held the levy and use of public funds to pay salaries of parochial school teachers at Anaconda Central High School was barred by the constitutional prohibition then embodied in Article XI, Section 8. Since the present constitution is no less restrictive it may be assumed the Supreme Court would reach the same conclusion now if it was presented with a similar factual situation.

The situation you describe, however, is fundamentally different from Chambers because the proposed attendance unit in all respects would be a public school operated by the district, not a private school operated by a religious organization. It appears that the attendance unit would be staffed by a certified teacher hired and paid by the school district and that the school's curriculum would be the same as that offered at any other public school of similar size. It does not appear that the colony would exert control or supervision over the teacher or inject sectarian dogma or influence into the course of study. Furthermore, while the attendance unit would be located on colony premises, it

would be open to children without regard to their religious affiliation. Under these circumstances it cannot be said that the attendance unit would be church controlled.

An element of the proposal which might implicate a constitutional issue is the fact that the colony would provide a building to the district for school purposes during school hours at a nominal or no rental cost. However, neither Chambers nor any other state or federal court decision of which I am aware has held as a matter of constitutional law that a public school governing body may not contract for the lease of property solely because the property is owned by a sectarian rather than a secular organization. Under section 20-6-625, MCA (75-8209, R.C.M. 1947), the school trustees are authorized to lease suitable buildings from any person when it is in the best interests of the district to do so.

It is true that if it established a separate attendance unit on colony premises the school board would be accommodating the Hutterites to some extent. Nevertheless, both the school board and the colony have an interest in assuring that school-age Hutterite children are given the opportunity to receive a basic secular education. Where the interests of the state and religion incidentally coincide accommodation is not precluded on constitutional grounds unless the state thereby becomes excessively entangled in the affairs of religion. See, Lemon v. Kurtzman, 403 U.S. 602 (1971). There is no indication the attendance unit would require special scrutiny on the part of the school board to determine whether the teacher's role or performance is exclusively secular. Nor does it appear that the relationship between the school board and the colony would be essentially different from a relationship between the board and any other lessor of school facilities. In my opinion the proposal you describe would not necessarily result in an impermissible church-state entanglement which would violate the state or federal constitutions.

Turning to the questions which have been raised with respect to the implementation of the proposal, it should be noted that state laws apply with the same force and effect whether the attendance unit is located on or off colony premises. Therefore, the opening of the proposed school is governed by section 20-6-502, MCA (75-6602, R.C.M. 1947). Nothing in that statute expressly prohibits or allows the operation of a school on a "trial basis" subject to termination at the request of the school trustees or the residents of the affected area. Section 20-6-509, MCA (75-6607, R.C.M. 1947), however, provides that the trustees alone have the authority

to close a district school, "when it is in the best interest of the pupils affected." An agreement whereby the colony could unilaterally close the school would contravene the express and exclusive authority granted the trustees in this regard and would therefore be unenforceable. A law established for a public reason cannot be compromised by private agreement. Section 1-3-2104, MCA (49-105, R.C.M. 1947); State ex rel Neiss v. District Court, 162 Mont. 324, 328, 511 P.2d 979 (1973).

Of course, if the lease agreement was for one year and the colony chose not to renew it, the colony may effectively close the separate attendance unit if no similar space were available for its continued operation.

Your final question concerns the propriety of an agreement between the school district and the colony to the effect that if operational costs of the attendance unit exceed foundation program monies attributable to the average number belonging at the attendance unit the colony will pay the excess expenses.

Operational costs of all district schools must be budgeted in accordance with the provisions of Title 20, Chapter 9, Part 1, MCA (Title 75, Chapter 67, R.C.M. 1947). The trustees of a district may exceed the district's foundation program amount in adopting the general fund budget, but they may do so only in the manner permitted by law. Section 20-9-113, MCA (75-6707). Nothing in the applicable statutes permits a school board to adopt a separate budget for one of the district's schools and to pass along any part of the school's operational expenses to a private organization, by agreement or otherwise.

In addition, equalized school financing would be impossible if every school in the state could derive support on the basis of funding agreements between local residents and individual school boards. Any such agreement would defeat the purpose of the comprehensive scheme the legislature has enacted to provide for the state-wide equalization of school financing.

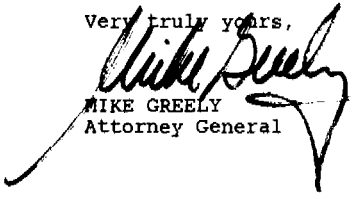
THEREFORE, IT IS MY OPINION:

1. A school district board of trustees may establish a separate attendance unit on the premises of a Hutterite colony located in the district.

2. Closure of an attendance unit on the premises of a Hutterite colony is a matter within the discretion of the board of trustees of the school district involved and the trustees have no authority to make an agreement to the contrary.

3. Since operational costs of an attendance unit on the premises of a Hutterite colony must be budgeted and financed in the manner provided by law, any agreement between the trustees of the school district and the colony for private financing of any part of those costs would be unenforceable.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 38 OPINION NO. 27

WORKERS' COMPENSATION JUDGE - Employees;
STATE CLASSIFICATION AND PAY PLAN - Exemption for office of workers' compensation judge;
STATE EMPLOYEES - Classification and pay plan; judicial exemption;
MONTANA CODES ANNOTATED - Sections 2-18-103(3), 2-15-1014, 39-71-2901 et. seq.

HELD: The employees of the Office of Workers' Compensation Judge are exempt from the State Classification and Pay Plan.

13 July 1979

David M. Lewis, Director
Department of Administration
Mitchell Building
Helena, Montana 59601

Dear Mr. Lewis:

You have requested my opinion on the following question:

> Are the employees of the Office of the Workers' Compensation Judge exempt from the State Classification Plan, Title 2, Chapter 18, MCA?

The answer depends upon whether or not the Office of Workers' Compensation Judge is a part of the judicial branch or the executive branch of State government, the former being exempt, and the latter being subject to the State classification plan. Title 2, Chapter 18, MCA.

Title 2, Chapter 18, Parts 1 and 2, MCA, require all State positions to be classified and establishes the procedures and guidelines for implementing the plan. The judicial branch is exempted by section 2-18-103(3) which provides:

> Parts 1 and 2 do not apply to the following positions in state government....
> (3) judges and employees of the judicial branch.

Article V, section 1 of the Montana Constitution empowers the Legislature to establish new courts:

> The judicial power is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law.

The Office of the Workers' Compensation Judge was created by the Legislature in 1975 (Chapter 537, Laws of 1975) and was assigned to the Department of Administration for administrative purposes only, section 2-15-1014, MCA. While the legislature did not expressly provide that the Office was part of the judicial branch there are a number of factors supporting that conclusion.

The powers and procedures in the Office of Workers' Compensation Judge are similar to other state courts. The judge's salary is identical to the salary of a district judge. Section 2-15-1014(4), MCA. The qualifications for office are the same as a district judge. Section 2-15-1014(3)(a), MCA. The Workers' Compensation judge is selected by the judicial nomination commission in the same manner as district judges. Section 2-15-1014(2), MCA. The provisions for expenses and other benefits are the same as those for district judges. Cf. sections 39-71-2902 and 3-5-213, MCA. Significantly, judicial review of decisions of the Office of Workers' Compensation Judge must be brought directly to the Supreme Court, paralleling the procedure for an appeal from district court, section 39-71-2904, MCA. Appeals from administrative agency decisions must be filed at the district court level. See section 2-4-702, MCA. Generally, the department which is assigned an agency for administrative purposes only must provide the agency with staff, section 2-15-121(2)(d), MCA. However the Office of Workers' Compensation Judge has authority to hire all employees necessary to carry out its duties, section 39-71-2902, MCA.

The statutory provisions regarding the Workers' Compensation Judge are codified in Title 39, Chapter 71, Part 29, MCA, and make clear that the Office of Worker's Compensation Judge is a judicial function. Under the provisions of section 39-71-2905, MCA, the Court is assigned the duty of making a final determination of any dispute raised by petition of a claimant, employer, or an insurer. The Court may deny or determine the amount of any benefits to be received by a claimant. The Court has authority to make findings as to whether an award has been unreasonably delayed or refused, and to alter or amend that award, 39-71-2907, MCA. All compromise settlements are subject to the Court's approval, 39-71-2908, MCA.

In addition, the statutes consistently refer to the agency as the Office of Workers' Compensation Judge and the hearing officer as a judge. The term "judge" has been defined as "an officer so named in his commission, who presides in some court; a public officer appointed to preside and administer the law in a court of justice..." Todd v. United States, 15 S.Ct. 889, 158 U.S. 278 (1895). In construing statutes words must be defined in the light of their ordinary and common usage. State ex rel. Hoffman v. District Court, 154 Mont. 201, 461 P.2d 847 (1969). Judges are ordinarily members of the judiciary.

The only viable alternative to finding the Office of Workers' Compensation Judge as part of the judiciary is to declare it to be an administrative agency which possesses quasi-judicial powers. However, as pointed out above, there are numerous factors which distinguish the position from other administrative agencies and indicates the legislature intended to grant more than quasi-judicial authority.

A helpful tool in determining legislative intent is the history of the times and circumstances which necessitated passage of a statute, especially when particular provisions are ambiguous. State ex rel. Williams v. Kemp, 106 Mont. 444, 78 P.2d 585 (1938). A thorough review of the legislative history and committee minutes indicates a concern over the impartiality and integrity of the hearings conducted by the worker's compensation division. The committee minutes show an intent on the part of the legislature to create a truly independent and impartial office for the purpose of adjudicating workers' compensation disputes. Those purposes are best served by holding that the office is part of the judical branch of government. A statute cannot be interpreted to defeat its evident purpose since the objects sought to be achieved by the legislation are of prime consideration. Doull v. Wohlschlager, 141 Mont. 354, 377 P.2d 758 (1963).

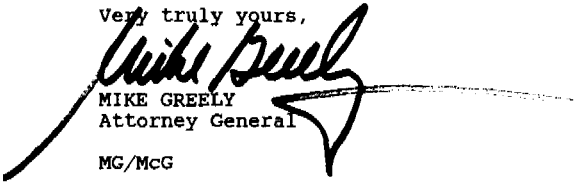
It is my opinion the legislature intended to create a new court of special limited jurisdiction in enacting the Office of Workers' Compensation Judge, and the court and all of its employees are members of the judicial branch of government. Judicial review of his decisions is in the Supreme Court. The qualifications, salary and method of providing expenses are identical to those of a district judge. While most executive agencies assigned to a department for administrative purposes only must employ staff provided by the department, the Workers' Compensation Judge has authority to hire

his own personnel. The office performs a judicial function and the Legislature's desire to create an independent agency is best served if the agency is part of the judicial branch.

THEREFORE, IT IS MY OPINION:

The employees of the Office of Workers' Compensation Judge are employees of the judicial branch and thereby exempt from the State classification plan.

Very truly yours,



MIKE GREELY
Attorney General

MG/McG

VOLUME NO. 38 OPINION NO. 28

COUNTY OFFICERS AND EMPLOYEES - Terms of city-county planning board members;
LAND USE - Terms of city-county planning board members;
MUNICIPAL CORPORATIONS - Terms of city-county planning board members;
STATUTES - When retroactive;
MONTANA CODE ANNOTATED - 1-2-109, 76-1-101, 76-1-201, 76-1-203;
REVISED CODES OF MONTANA, 1947 - 11-3801, 11-3810(1)(a), 11-3810(3), 12-201.

HELD: Amended residence requirements of section 76-1-201, MCA (11-3810(1)(a), R.C.M. 1947), apply to appointments of new members of city-county planning boards which are made on or after July 1, 1979. City-county planning board members appointed prior to July 1, 1979, remain qualified to serve out the terms of their appointment.

13 July 1979

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

Michael G. Barer, Esq.
Deputy County Attorney
Cascade County Courthouse
Great Falls, Montana 59401

Gentlemen:

You have requested my opinion on the following question:

> Do the residence requirements of section 76-1-201, MCA, as amended by House Bill No. 391, apply retroactively to disqualify previously appointed members of a city-county planning board?

The legislature has authorized cities, towns and counties to organize planning boards in order to promote orderly develop-

ment of their governmental units and environs. Section 76-1-101, MCA (11-3801, R.C.M. 1947).

Once a city-county planning board has been established pursuant to the provisions of Title 76, Chapter 1, Part 1, MCA, a nine-member board must be appointed as provided in section 76-1-201, MCA (11-3810(1)(a), R.C.M. 1947). Prior to July 1, 1979, this section required (1) "two official members who reside outside the city limits to be appointed by the board of county commissioners..." House Bill No. 391, enacted by the 1979 legislature amended this subsection, effective July 1, 1979, to provide for "two official members who reside outside the city limits but within the jurisdictional area of the city-county planning board to be appointed by the board of county commissioners..." Your question concerns the application of this amendment, specifically whether planning board members appointed prior to July 1, 1979, must meet the new residence requirement or lose their seats on the board.

Unquestionably, the legislature may impose reasonable restrictions on public office holders. For example, the Arizona Supreme Court has said:

> First, it must be recognized that the right to vote and the right to be a candidate for and hold office are separate matters, and the state may require that a citizen meet more strict requirements to hold office than he does to vote for those offices.

Triano v. Massion, 513 P.2d 935, 937 (1973).

However, it is my opinion that the general rule against retroactive applications of newly enacted statutes precludes any application of the new residency requirement to previously appointed members of a planning board who are currently serving out the remainder of their terms of appointment. The general rule against retroactive application is set out in section 1-2-109, MCA (12-201, R.C.M. 1947), which provides, "No law contained in any of the codes or other statutes of Montana is retroactive unless expressly so declared."

A retroactive application is defined in Butte and Superior Mining Co. v. McIntyre, 71 Mont. 254, 263, 229 Pac. 730 (1924):

> A statute which takes away or impairs vested rights acquired under existing laws or attaches a new disability, in respect to transactions already past ... is deemed retroactive.

Qualifications for an appointive office are determined at the time of appointment, Chappelle v. Greater Baton Rouge District, 329 So.2d 810 (La. App. 1976), and at the time of their appointments current members of planning boards presumably met the residence requirements then required by section 76-1-203, MCA (11-3810(3), R.C.M. 1947). Under section 76-1-203, MCA, their appointments were for specific terms. Thus, an application of the amended residence requirements to current board members whose terms extend beyond July 1, 1979, would take away the affected board members' right to serve out their statutorily specified terms. Such application would amount to a retroactive application of law. Since the legislature did not expressly provide for such retroactivity, the terms of House Bill No. 391 have only prospective application to planning board appointments made on or after July 1, 1979.

THEREFORE IT IS MY OPINION:

> Amended residence requirements of section 76-1-201, MCA (11-3810(1)(a), R.C.M. 1947), apply to appointments of new members of city-county planning boards which are made on or after July 1, 1979. City-county planning board members appointed prior to July 1, 1979, remain qualified to serve out the terms of their appointment.

Very truly yours,

MIKE GREELY
Attorney General

MG/MMcC/br