MONTANA ADMINISTRATIVE REGISTER

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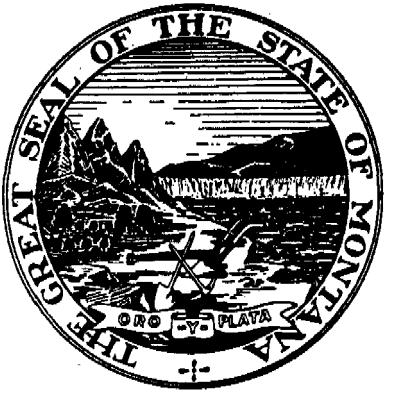

NOTICE

Information Relating to
New Subscriptions to the

ADMINISTRATIVE RULES OF MONTANA

The Administrative Rules of Montana are being recodified and will be available in September, 1980. A set is comprised of the rules of the executive agencies of Montana which have been designated by the Montana Administrative Procedure Act for inclusion in the code. There are 17 loose leaf binders to a set housing approximately 7000 pages. Cost, per set, is $175.00. An additional charge of $15.00 will be made for the September and December 1980 replacement pages to the recodified set. If you are interested in purchasing a set please use the order blank below and submit prior to June 1, 1980.

Price of replacement pages for 1981 will be set and billed approximately December 15, 1980.

This information is for new subscribers only. Current subscribers will receive information on replacement pages by mail.

To: FRANK MURRAY
Secretary of State
Capitol Bldg, Rm 202
Helena, MT 59601

Please place my order for Administrative Rules of Montana as indicated below. I understand a statement for this order will be sent July 15, 1980, and must be paid before my order will be shipped in September, 1980.

Administrative Rules of Montana ___ set(s) @ $175.00 = $_____

September and December pages ___ set(s) @ $ 15.00 = $_____

Name _____

Address _____

City, State & Zip Code _____

10-5/29/80

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

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

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with existing or proposed rules. The address is Room 138, State Capitol, Helena, Montana 59601.

NOTICE: The July 1977 through June 1979 Montana Administrative Registers have been placed on microfiche. For information, please contact the Secretary of State, Room 202, Capitol Building, Helena, Montana, 59601.

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 10

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

In the matter of the repeal of rule 16-2.18(10)-S18050, setting standards for school immunization programs	))))	NOTICE OF PROPOSED REPEAL OF RULE 16-2.18(10)-S18050 (School District Immunization Program) NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On July 1, 1980, the Department of Health and Environmental Sciences proposes to repeal rule 16-2.18(10)-S18050, setting standards for school immunization programs.

2. The rule proposed to be repealed is on pages 16-446 through 16-446B of the Administrative Rules of Montana.

3. The agency proposes to repeal this rule because it was enacted pursuant to Section 20-5-401, MCA, which was repealed by the 1979 legislature, effective August 1, 1980, and because it will be replaced by new rules 16-2.18(10)-S18070 through 16-2.18(10)-S18082 on August 2, 1980.

4. Interested parties may submit their data, views or arguments concerning the proposed repeal in writing to Robert L. Solomon, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana, 59601, no later than June 30, 1980.

5. The authority of the department to make the proposed rule is based on section 20-5-401, MCA, and the rule implements section 20-5-401, MCA.

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

By John W. Bartlett

Certified to the Secretary of State May 20, 1980

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

In the matter of the adoption of a rule establishing a state plan for administration of a supplemental food program for pregnant women, infants, and children.	NOTICE OF PUBLIC HEARING FOR ADOPTION OF A RULE FOR A STATE PLAN ESTABLISHING A FOOD PROGRAM FOR WOMEN, INFANTS, AND CHILDREN.

TO: All Interested Persons

1. On June 23, 1980, at 9:00 a.m., or as soon thereafter as it may be heard, a public hearing will be held in the auditorium of the Highway Department Building, 2701 Prospect, Helena, Montana, to consider the adoption of a rule which establishes a state plan for administration of a special food supplement program for at-risk pregnant women, infants and children.

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

3. In summary, the proposed rule provides the details concerning the department's plan for administration of the U.S.D.A's special food supplement program for pregnant women, infants and children (WIC) from October 1, 1980, through September 30, 1981, including the following:

(a) an affirmative action plan to provide the greatest assistance to counties containing the largest numbers of pregnant women, infants and children whose health is felt to be at risk (e.g. migrants, Indians, etc.);

(b) an outreach and expansion program to inform public agencies how they can start a WIC program and to inform potential recipients of their eligibility;

(c) eligibility criteria.

A copy of the entire proposed rule may be obtained by contacting Mary Ellen Holverson, Maternal and Child Health Services Bureau, Department of Health and Environmental Sciences, St. John's Hospital, Helena, Montana 59601 (phone: 449-2554).

4. The department is proposing this rule in order to meet the requirements of 7 CFR Part 246 so that Montana may receive federal funds to administer a supplemental food program directed at ensuring adequate nutrition for pregnant women, infants and children whose health is particularly at risk.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Robert L. Solomon, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59601, no later than June 28, 1980.

6. Robert L. Solomon, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59601, has been designated to preside over and conduct the hearing.

7. The authority of the department to make the proposed rule is based on section 50-1-202(9), MCA, and the rule implements section 50-1-202(9), MCA.

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

By

Certified to the Secretary of State May 20, 1980

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

In the matter of the adoption of a rule establishing a state plan for administration of a child nutrition program.	) NOTICE OF PUBLIC HEARING) FOR ADOPTION OF A RULE) FOR A STATE PLAN FOR A) CHILD NUTRITION PROGRAM

TO: All Interested Persons

1. On June 23, 1980, at 9:00 a.m., or as soon thereafter as it may be heard, a public hearing will be held in the auditorium of the Highway Department Building, 2701 Prospect, Helena, Montana, to consider the adoption of a rule which establishes a state plan for administration of a statewide child nutrition program for day care facilities for the year from October 1, 1980, through September 30, 1981.

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

3. In summary, the proposed rule provides the details concerning the department's plan for administration of the United States Department of Agriculture's child nutrition program within Montana from October 1, 1980, through September 30, 1981, including the following:

(a) a description of the outreach program intended to draw child care facilities into participation in available food programs;

(b) the degree of training, technical assistance and nutrition consultation which will be made available to all participants;

(c) conditions under which start-up payments may be received by a day-care facility;

(d) circumstances under which day-care facilities may receive advance payments;

(e) criteria for granting food service equipment assistance;

(f) the system for administrative review and audit;

(g) an appeal procedure.

A copy of the entire proposed rule may be obtained by contacting Mary Musil, Child Nutrition Unit, Maternal and Child Health Services Bureau, Department of Health and Environmental Sciences, St. John's Hospital, Helena, Montana 59601 (phone: 449-2554).

4. The department is proposing this rule in order to meet the requirements of 7 CFR Part 226 so that Montana may receive federal funds to administer a nutrition program aimed at ensuring adequate nutrition for children in day care homes and centers.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Robert L. Solomon, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59601, no later than June 28, 1980.

6. Robert L. Solomon, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59601, has been designated to preside over and conduct the hearing.

7. The authority of the department to make the proposed rule is based on section 50-1-202(9), MCA, and the rule implements section 50-1-202(9), MCA.

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

By John W Bartlett

Certified to the Secretary of State May 20, 1980

BEFORE THE DEPARTMENT OF HIGHWAYS
OF THE STATE OF MONTANA

In the matter of the ADOPTION OF RULE for the movement of Triple Trailer Vehicle Combinations and other Special Vehicle Combinations	))))	NOTICE OF PUBLIC HEARING FOR PROPOSED ADOPTION OF A RULE for the Movement of Triple Trailer Combinations

TO: All Interested Persons

1. On June 20, 1980 at 9:00 A.M., a public hearing will be held in the highway auditorium of the Department of Highways building, to consider the adoption of a rule for the movement of Triple Trailer Vehicle Combinations and other Special Vehicle Combinations.

2. The rule as proposed provides as follows:

Rule I. MOVEMENT OF TRIPLE TRAILER VEHICLE COMBINATIONS AND OTHER SPECIAL VEHICLE COMBINATIONS (1) The following multiple trailer combinations may be operated on a trip basis by a Special Permit issued by the Department of Highways:

(a) A truck-tractor and three trailers, the trailers of approximately equal length, having an overall combined length not to exceed 105 feet.

(b) A truck and two trailers, the trailers of approximately equal length, having an overall combined length not to exceed 95 feet.

(c) A truck-tractor and two trailers of approximately equal length, having an overall combined length not to exceed 105 feet.

(d) An auto transporter combination consisting of a truck and two stinger steered semi-trailers not to exceed 105 feet in vehicle length and 110 feet in load length.

(2) Travel is authorized only on the Interstate Highway System, completed and uncompleted, and on adjacent roads subject to approval by the Department of Highways to allow for local pick-up and delivery. Local is defined as a distance not to exceed 10 miles one way from point of entrance or exit from an Interstate Highway.

(3) Travel is authorized 24 hours per day, including weekends and holidays, during the period of Daylight Savings Time in each calendar year.

(4) A sign stating "Long Load - Pass with Care" shall be displayed on the rear of each combination. Letters must be a minimum of 6 inches in height and of a reflectorized type material.

(5) Maximum speed may not exceed posted speed limits at any time. Speed or any hazardous moving violation will subject the Permittee to revocation of special permit privileges.

(6) Maximum weight may not exceed that allowed by Section 61-10-107, MCA, which is 20,000 pounds per single axle, 34,000 pounds per tandem axle, and total gross weight of 105,500 pounds.

(7) The combinations may not be dispatched or operated when hazardous conditions such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke adversely affect visibility or traction. When adverse conditions are encountered on the road, speed shall be reduced and if conditions become sufficiently dangerous, the operation of the combination shall be discontinued until safe operation can be resumed. During severe conditions, in the interest of safety for the public and combination, the driver may proceed to the first safe place where the unit may be removed from the highway.

(8) The following regulations shall apply regarding equipment:

(a) All trucks and tractor trucks shall be powered to provide adequate acceleration ability and hill climbing ability under normal operating conditions, and to operate on level grades at speeds compatible with other traffic. The ability to maintain a minimum speed of 20 mph under normal operating conditions on any grade over which the combination is operated is required.

(b) All trucks and tractor trucks shall have adequate traction to maintain a minimum speed of 20 mph under normal operating conditions on any grade over which the combination is operated and to be able to resume a speed of 20 mph after stopping on any such grade and, except in extreme road or weather conditions, to negotiate at any speed all grades encountered.

(c) Conventional 12 ply tires which give a "hard" ride are recommended. The use of so-called low pressure or extra width tires are prohibited unless approved by the Department of Highways.

(d) A heavy duty fifth wheel is required. All fifth wheels must be clean and lubricated with a light duty grease prior to each trip. The fifth wheel must be located in a position which provides adequate stability.

(e) Pick-up plates must be of equal strength to the fifth wheel.

(f) The king pin must be of a solid type and permanently fastened. Screw out or folding type king pins are prohibited.

(g) All hitch connections must be of a no-slack type, preferably air actuated ram. Air actuated hitches which are isolated from the primary air transmission system are recommended.

(h) The drawbar length should be the practical minimum consistent with the clearances required between trailers for turning and backing maneuvers.

(i) Axles must be those designed for the width of the body.

(j) All braking systems must comply with state and federal requirements. In addition, fast air transmission and release valves must be provided on all trailer, semitrailer and converter dolly axles. A brake force limiting valve, sometimes called a "slippery road" valve may be provided on the steering axle. Indiscriminate use of engine retarder brakes is prohibited.

(k) Anti-sail mud flaps are required.

(l) All mutiple trailer combinations must be stable at all times during normal braking and normal operation. A multiple trailer combination when traveling on a level, smooth, paved surface must follow in the path of the towing vehicle without shifting or swerving more than three inches to either side when the towing vehicle is moving in a straight line.

(m) In no case shall any trailer or semitrailer be placed ahead of another trailer or semitrailer which carries an appreciably heavier load. The heaviest trailer or semi-trailer should be placed in front and the lightest at the rear.

(9) The following requirements shall apply to drivers:

(a) A driver must have had at least eight years of experience driving truck trailer combinations, five years of which must have been in driving multiple trailer combinations such as doubles or triples.

(b) The driver may have had no moving traffic convictions during the past three years while driving a truck.

(c) The driver must fully comply with the driver's requirements set forth in the Motor Carrier Safety Regulations of the U. S. Department of Transportation.

(d) The driver must have had special instruction and training in the operation of any multiple trailer combination prior to operating any such combination on a highway.

(e) The driver must be a paid employee of the Company holding the Special Permit and under direct supervision and responsibility of the Company.

(f) The responsibility for strict compliance with the driver requirements shown in this section shall be borne equally by both the Driver and the Company.

(10) Notwithstanding other state and federal requirements for reporting motor vehicle accidents, all reportable accidents involving a multiple trailer combination operated under a special permit must be reported to the Gross Vehicle Weight Division of the Department of Highways within ten days of the date of the accident.

(11) In lieu of Special Permit, G.V.W. Form 32, companies intending to use in excess of five permits per day will be authorized to proceed in the following manner:

(a) Secure a letter from the Department of Highways for the operation of the vehicle combinations.

(b) Place a photo copy of the letter in each power unit utilized.

(c) Record the number of round trips made each month and forward this information, accompanied by a check equal to $6.00 times the number of trips, to the Gross Vehicle Weight Division within 10 days following the end of each month.

(12) Violations of any rules and regulations may result in the Highway Commission's revocation, cancellation or suspension of permits without refund pursuant to Section 61-10-143, MCA.

3. The rule is proposed to respond to a petition for its adoption filed by the Montana Motor Carrier's Association, 1727 Eleventh Avenue, Helena, Montana 59601. The petition sets forth reasons why the operation of Triples Trailers should be allowed, primarily for conservation of fuel. Copies of the petition are available from the Department of Highways.

4. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing or may submit the data, views or arguments in writing to Ronald P. Richards, Director, Department of Highways, 2701 Prospect Avenue, Helena, Montana 59601, not later than June 28, 1980.

5. Jack A. Holstrum, Department of Highways, 2701 Prospect Avenue, Helena, Montana 59601, has been designated to preside over and conduct the hearing.

6. The authority of the Department to adopt the proposed rule is based on Section 61-10-122, MCA, and the rule implements Section 61-10-121, MCA.

By: Ronald P. Richards
Director of Highways

Certified to the Secretary of State May 19, 1980.

BEFORE THE DEARTMENT OF COMMUNITY AFFAIRS
OF THE STATE OF MONTANA

In the matter of the adoption of rules implementing the public participation provisions of state law.	NOTICE OF PROPOSED ADOPTION OF RULES (Public Participation) NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On July 1, 1980 the Department of Community Affairs proposes to adopt rules providing for, encouraging, and assisting the participation of the public to the fullest extent practicable.

2. The proposed rules provide as follows:

RULE I POLICY (1) The department recognizes that there are governmental actions taken by it which are not covered by the provisions of the Montana Administrative Procedures Act but which are of significant interest to the public. It is therefore the policy of the department to provide for, encourage, and assist to the fullest extent practicable the participation of the public in decisions and actions which affect them.

(2) The major objectives of this policy are to provide for greater responsiveness of departmental actions to public concerns and improved public understanding of the department's functions.

RULE II PUBLIC NOTICE (1) Prior to taking any action which is of significant public interest, the department shall give adequate notice that the action is to be taken and inform the public how it may participate in making the decision to take the action.

(2) Notice to the public may be accomplished by means of legal advertisement, news release, or other method of publication through the news media.

(3) The notice shall include a sufficiently detailed description of the action to be taken, the reasons for the action, and the name of the person within the department primarily responsible for the action.

RULE III DETERMINATION OF SIGNIFICANT PUBLIC INTEREST (1) The significance of decisions other than those made pursuant to a procedure provided by statute shall be determined by the following considerations:

(a) whether the decision regards a matter which is obviously controversial;

(b) the number of persons who may be affected by the decision;

(c) the fiscal impact of the decision;

(d) the level of interest displayed by the public in connection with similar actions.

RULE IV MEANS OF PUBLIC PARTICIPATION (1) If it is deter-

mined that significant public interest is shown in an issue the department shall:

(a) hold a duly noticed public hearing either in Helena or, if the issue is regional in nature, in any convenient location in the state; or

(b) give notice to the public that they may submit their views in writing.

RULE V APPOINTMENTS WITH THE DIRECTOR OR DIVISION ADMINISTRATOR (1) Any individual or group of individuals may make appointments to meet with the director or division administrators regarding a matter of their concern and under the responsibility of the department. Appointments may be arranged by contacting the director's office in Helena at 449-3494.

3. The new rules are being proposed to implement the provisions of Section 2-3-103, MCA, which require the notice to and participation of the public in decisions of significant interest.

4. Any person may submit data, views, or comments in writing to Harold A. Fryslie, Director, Department of Community Affairs, 1424 9th Avenue, Helena, Montana, 59601.

5. The authority of the department to adopt these rules is Sections 2-4-201, 2-15-112, MCA. These rules implement Section 2-3-103, MCA.

Harold A. Fryslie
HAROLD A. FRYSLIE

Certified to the Secretary of State 5-7-, 1980.

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

IN THE MATTER of the Proposed Adoption of New Rules for Prohibition of Master Meters for Electricity In New Buildings.	NOTICE OF PUBLIC HEARING ON NEW RULES REGARDING MASTER METERS IN NEW BUILDINGS

TO: All Interested Persons

1. On July 22, 1980, in the Senate Chambers, State Capitol Building, Helena, Montana at 10:00 a.m., a public hearing will be held to consider the proposed adoption of new rules for prohibition of master metering of electricity in new buildings.

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

3. The proposed rules provide as follows:

Rule I. DEFINITIONS (1) For purposes of this rule:

(a) "New building" means any building for which commencement of construction began after the effective date of these rules.

(b) "Commencement of construction" is the time at which physical labor involved with the erection of the building has begun.

(c) "Affected electric utilities" are all electric utilities subject to the jurisdiction of this Commission.

Rule II. PROHIBITION OF MASTER METERS (1) All electricity delivered to a new building at which units of such premises are separately rented, leased, or owned shall be sold by the electric utility on the basis of individual meter measurement for each occupancy unit, except for:

(a) Hotels, motels, and other similar transient lodging.

(b) Buildings where a central space and/or water heating facility serves the entire complex.

(c) Where the individual contractor or owner establishes in writing, to the utility, before commencement of construction of the new building that the costs of purchasing and installing separate meters for each unit in the building exceed the long run benefits.

Rule III. UTILITIES TO ASSURE COMPLIANCE-APPEAL TO COMMISSION (1) The affected electric utilities shall assure compliance with Rule II and shall not furnish service to a new building that does not comply with the rule. If a dispute arises between the utility and the builder or owner of a new building, either party may petition the Commission to make a determination on the appropriateness of requiring individual meters for the building.

4. Rationale. The Commission is proposing these rules to implement the requirements of the federal Public Utilities Regulatory Policies Act and to encourage the conservation of electrical energy.

5. Interested persons may submit their data, views, or arguments concerning the proposed adoption at the hearing or in

writing to Eileen E. Shore, 1227 11th Avenue, Helena, Montana 59601, no later than July 22, 1980.

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

7. Authority for the Commission to make these rules is based on Section 2-4-303 and 69-3-103, MCA. IMP, Section 69-3-102, MCA.

GORDON E. BOLLINGER, Chairman

CERTIFIED TO THE SECRETARY OF STATE MAY 20, 1980.

BEFORE THE DEPARTMENT OF REVENUE

OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT OF RULE 42-2.12(6)-S12015, relating to compliance with laws and rules by liquor licensees.	)))))	NOTICE OF PROPOSED AMENDMENT OF RULE 42-2.12(6)-S12015, relating to compliance with laws and rules by liquor licensees. NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On July 7, 1980, the Department of Revenue proposes to amend Rule 42-2.12(6)-S12015, relating to compliance with laws and rules by liquor licensees.

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

42-2.12(6)-S12015 COMPLIANCE WITH LAWS AND REGULATIONS REQUIRED (1) All licensees, their agents and employees, must abide by all provisions of the laws of the state of Montana and of the United States and city or town ordinances relating to alcoholic beverages and must also abide by all rules and regulations of the Department relating to alcoholic beverages; in addition, all licensees must conduct the licensed premises in compliance with the rules and regulations of the state department of health and environmental sciences, the department of administration, and the department of justice. Proof of violation by a licensee or his agent or employee of any of the provisions of the above laws, ordinances, rules or regulations shall be sufficient grounds for the revocation or suspension of the license of such licensee.

3. When the rule was originally drafted in 1975, the Building Codes Division was located in the Department of Justice. Today, however, the Division is located within the Department of Administration. Consequently, the rule is proposed for amendment to reflect this change in organizational structure of the various state departments.

4. Interested persons may submit their data, views, or arguments concerning the proposed amendment in writing no later than June 30, 1980, to:

Laurence Weinberg
Legal Division
Department of Revenue
Mitchell Building
Helena, Montana 59601

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

orally or in writing at a public hearing, he must make written request for a hearing and submit that request along with any written comments he has to Laurence Weinberg at the address given in paragraph 4 above no later than June 30, 1980.

6. If the department receives request for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons directly affected; from the Revenue Oversight Committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who are directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been estimated to be 25 based upon the number of persons licensed under the liquor laws.

7. The authority of the department to make the proposed amendment is based on 16-1-303, MCA. The proposed amendment implements 16-1-303 and 16-4-406, MCA.

Mary L. Craig
by John M. Clark

MARY L. CRAIG, Director
Department of Revenue

Certified to the Secretary of State 5/19/80

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of rules pertaining to the regulation of travel expenses	NOTICE OF THE AMENDMENT OF ARM 2-2.4(1)-S4110

TO: All Interested Persons

1. On April 10, 1980, the Department of Administration published a notice of proposed amendment to the above rule concerning the reimbursement of, and accounting for travel expenses at page 1123 of the 1980 Montana Administrative Register, issue number 7.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received.

David M. Lewis, Director
Department of Administration

Certified to the Secretary of State May 20, 1980

BEFORE THE BOARD OF LIVESTOCK
STATE OF MONTANA

In the matter of the proposed repeal of ARM 32-2.6A(26)-S6055, 32-2.6A(42)-S6200, 32-2.6A(42)-S6210, 32-2.6A(46)-S6240, 32-2.6A(50)-S6250, 32-2.6A(54)-S6270, 32-2.6A(58)-S6280, 32-2.6A(66)-S6300, 32-2.6A(70)-S6300, 32-2.6A(86)-S6350 relating to animal disease control	NOTICE OF THE REPEAL RULES 32-2.6A(26)-S6055, 32-2.6A(42)-S6200, 32-2.6A(42)-S6210, 32-2.6A(46)-S6240, 32-2.6A(50)-S6250, 32-2.6A(54)-S6270, 32-2.6A(58)-S6280, 32-2.6A(66)-S6300, 32-2.6A(70)-S6300, 32-2.6A(86)-S6350

TO: All Interested Persons

1. On December 27, 1979 the Department of Livestock published notice of the proposed repeal of rules 32-2.6A(26)-S6055, 32-2.6A(42)-S6200, 32-2.6A(42)-S6210, 32-2.6A(46)-S6240, 32-2.6A(50)-S6250, 32-2.6A(54)-S6270, 32-2.6A(58)-S6280, 32-2.6A(66)-S6300, 32-2.6A(70)-S6300, 32-2.6A(86)-S6350 relating to animal disease control on page 1615 of the 1980 Montana Administrative Register, Issue No. 24.

2. The agency has repealed the rules as proposed.

3. No comments or testimony were received.

In the matter of the amendment of ARM 32-2.6B(2)-S610 relative to pasteurization plant code numbers	NOTICE OF AMENDMENT OF RULE 32-2.6B(2)-S610

TO: All Interested Persons

1. On April 10, 1980 the Department of Livestock published notice of a proposed amendment to rule 32-2.6B(2)-S610 concerning pasteurization plant code numbers on page 1139 of the 1980 Montana Administrative Register, Issue No. 7.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received.

In the matter of the repeal of rules 32-2.6BI(1)-S600 through S6070 and the adoption of new rules related to Grade	NOTICE OF REPEAL OF RULES 32-2.6BI(1)-S600 THROUGH S6070 AND THE ADOPTION OF

A milk production and processing.) NEW RULES.

TO: All Interested Persons

1. On April 10, 1980 the Department of Livestock published notice of a proposed adoption of new rules and the repeal of rules 32-2.6BI(1)-S600 through S6070 concerning grade A milk production and processing on page 1143 of the 1980 Montana Administrative Register, Issue No. 7.

2. The agency has repealed the rules as proposed and has adopted the new rules as proposed which are 32.8.101 ADOPTION OF GRADE A PASTEURIZED MILK ORDINANCE AND ASSOCIATED DOCUMENTS; 32.8.102 MILK AND MILK PRODUCTS WHICH MAY BE SOLD; and 32.8.103 CIRCUMSTANCES UNDER WHICH RAW MILK MAY BE SOLD FOR HUMAN CONSUMPTION.

3. Although a hearing was called for and held, no comments or testimony were received.

4. The actions of repeal and adoption set forth in this portion of this notice are effective July 1, 1980.

ROBERT G. BARTHELMESS
Chairman, Board of Livestock

BY:
JAMES W. GLOSSER, D.V.M.
Administrator & State Veterinarian

Certified to the Secretary of State May 20, 1980.

STATE OF MONTANA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING

In the matter of the Repeal of ARM 40-2.3(6)-S30070 License - Surety Bond	NOTICE OF REPEAL OF ARM 40-2.3(6)-S30070 LICENSE - SURETY BOND

TO: All Interested Persons:

1. On April 10, 1980 the Department of Professional and Occupational Licensing published a notice of proposed repeal of ARM 40-2.3(6)-S30070 at page 1146, Montana Administrative Register, issue number 7.

2. The department has repealed the rule exactly as proposed.

3. No comments or testimony were received.

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF PUBLIC ACCOUNTANTS

In the matter of the adoption of a new rule 40-3.94(2)-P9415 relating to public participation in board decision making functions	NOTICE OF ADOPTION OF 40-3.94(2)-P9415 PUBLIC PARTICIPATION RULES

TO: All Interested Persons:

1. On April 10, 1980, the Board of Public Accountants published a notice of proposed adoption of a new rule 40-3.94(2)-P9415 relating to public participation in board decision making functions, at pages 1147 and 1148, Montana Administrative Register, issue number 7.

2. The board has adopted the rule exactly as proposed.

3. No comments or testimony were received.

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF RADIOLOGIC TECHNOLOGISTS

In the matter of the Amendment of ARM 40-3.96(6)-S9675 concerning permits	NOTICE OF AMENDMENT OF ARM 40-3.96(6)-S9675 PERMITS

TO: All Interested Persons:

1. On April 10, 1980, the Board of Radiologic Technologists published a notice of proposed amendment of ARM 40-3.96(6)-S9675 concerning permits at pages 1149 and 1150, Montana Administrative Register, issue number 7.

2. The board has amended the rule exactly as proposed.

3. No comments or testimony were received.

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING
BEFORE THE BOARD OF SPEECH PATHOLOGISTS AND AUDIOLOGISTS

In the matter of the amendment) of ARM 40-3.101(6)-S101000) concerning fees)	NOTICE OF AMENDMENT OF ARM 40-3.101(6)-S101000 FEES

TO: All Interested Persons.

1. On April 10, 1980, the Board of Speech Pathologists and Audiologists published a notice of proposed amendment of ARM 40-3.101(6)-S101000 concerning fees at page 1151, Montana Administrative Register, issue number 7.

2. The board has amended the rule exactly as proposed.

3. No comments or testimony were received.

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

Certified to the Secretary of State, May 20, 1980.

BEFORE THE DEPARTMENT OF REVENUE

OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT OF RULES RELATING TO THE ASSESSMENT AND TAXATION OF INTERSTATE AND INTERCOUNTY PROPERTY.	)))))	NOTICE OF AMENDMENT OF RULE 42-2.22(46)-S22940, EQUALIZATION AND APPORTIONMENT.

TO: All Interested Persons:

1. On December 27, 1979, the Department of Revenue published notice of the proposed amendment of rules relating to the assessment and taxation of interstate and intercounty property, commonly referred to as centrally assessed property, at pages 1641 through 1644 of the 1979 Montana Administrative Register, issue no. 24. On March 27, 1980, the Department published notice of the amendment of rules 42-2.22(46)-S22890, S-22900, S22910, and S22930, either as proposed or with changes, and the adoption of a new rule, relating to motor vehicles and mobile equipment, at pages 1091 through 1093 of the 1980 Montana Administrative Register, issue no. 6. At the same time the Department announced the amendment of rule 42-2.22(46)-S22940, relating to equalization and apportionment, on an interim basis.

2. The Department has amended rule 42-2.22(46)-S22940 on a permanent basis with the following changes from the version first published in the 1979 MAR, issue no. 24 (deletions interlined and additions underlined and capitalized):

42-2.22(46)-S22940 ~~EQUALIZATION AND~~ APPORTIONMENT (1) and (2): No changes from proposal.

(3) The Montana situs property value is apportioned to the taxing units in which the property is situated ~~by use of a factor based on installed cost. The factor is the ratio of the installed cost within the taxing unit to the total installed cost of situs property in Montana.~~ TO ACCOMPLISH THIS, THE TOTAL INSTALLED COST OF SITUS PROPERTY IN EACH TAXING UNIT IS MULTIPLIED BY THE PERCENTAGE COMPUTED BY DIVIDING THE MSPV DEVELOPED IN SUBSECTION (1)(C) BY THE TOTAL INSTALLED COST OF MONTANA SITUS PROPERTY. Recognizing the difficulty in generating installed cost data, the department will, upon written request, grant an extension until December 31, ~~1980~~ 1981, to any centrally assessed company in order to enable the company to provide the necessary cost information. If an extension is granted, the company is required to assist the department in developing an acceptable method of apportioning the 1980 valuation.

3. The only change from the interim amendment is the change of "1980" to "1981" in subsection (3). The Department had proposed to the hearings officer to make this change to accomodate those companies that felt they had a problem in accumulating the

data needed for apportionment based on original cost. At the request of the Revenue Oversight Committee, the Department delayed making this change in order to give the Committee an opportunity to study the change. This delay was accomplished by means of the interim amendment. The Department has determined that the extension to 1981 is equitable and has therefore determined that the change from 1980 to 1981 should be made. The rule is amended accordingly.

Mary L. Craig
by John McClark

MARY L. CRAIG, Director
Department of Revenue

Certified to the Secretary of State 5/19/80.

BEFORE THE OFFICE OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the amendment of Rule ARM 48-2.18(18)-S18270 to determine the composition of Child Study Teams.	)))))	NOTICE OF THE AMENDMENT OF RULE 48-2.18(18)-S18270 PERTAINING TO THE COMPOSITION OF CHILD STUDY TEAMS.

TO: All Interested Persons:

1. On February 14, 1980, the superintendent of public instruction published notice of a proposed amendment to rule ARM 48-2.18(18)-S18270 concerning the composition of Child Study Teams at page 532 of the 1980 Montana Administrative Register, issue number 3.

2. The agency has amended the rule with the following changes:

48-2.18(18)-S18270 COMPOSITION OF A CHILD STUDY TEAM.

(1) same as proposed amendment.

(1)(a) If the school district employs a principal or administrative staff, the school principal, designee or other representative of the school district administration who has authority to provide or supervise the provision of special education services.

(1)(b) through (1)(f)(ii)(B) same as proposed amendment.

(1)(g) Other individuals as required by 48-2.18(18)-~~S18270,-ARM~~ S18290, ARM.

(2) same as proposed amendment.

3. The following comments were received at the hearing.

COMMENT. The Board of Trustees does not have the authority to decide who shall be active participants on the Child Study Team because the individuals are already members of the team by reason of their rights under federal law.

RESPONSE. Federal regulations do not specifically address the concept of a Child Study Team. However, the proposed amendment requires the same members for a Child Study Team as are required by federal regulations for individual education program meetings. The Board of Trustees or its designee is required to appoint the members listed in the proposed amendment. The Board of Trustees or its designee has authority to name particular persons, but those persons must be within the class listed.

COMMENT. If the Board of Trustees is given power to appoint members, this places one team member in authority over the others, and could result in there being a chairman who could conceivably attempt to control the meeting.

RESPONSE. The office does not concur. Members are appointed on an equal basis, and each member contributes to the Child Study Team process based on his/her area of expertise or specialization. The rule as written does not state or imply that one team member will have authority over another team member. The rule does not state or imply that the Board will

appoint a chairman. If the members of a Child Study Team want a chairman to conduct the meeting, the members may select one.

COMMENT. The proposed amendment is inadequate because the representative of the public agency must be one who is qualified to supervise the provision of special education. This person needs to be a representative of the special education department who can authorize the delivery of services.

RESPONSE. The office concurs in part and the rule has been changed to require that the administrative Child Study Team member be a person who has authority to provide or supervise the provision of special education services. The office does not agree that the member must be a special education representative, because to do so would eliminate the possibility of allowing the principal or the principal's staff from being members. Additionally, requiring a special education administrator would, in effect, require a Cooperative Special Education Director to attend all Child Study Teams in his/her service area. This requirement would severely delay the Child Study Team meetings in many locations and thereby prevent appropriate delivery of services to handicapped children.

COMMENT. If the child has more than one regular teacher, the intent of the federal law is clear in stating that each teacher shall be included.

RESPONSE. Federal regulations specify who shall be members at an individual education program meeting. In 1977 the office, through the special education regulations, instituted a formal Child Study Team as well as an individual education program process. The purpose of the Child Study Team is to (1) verify comprehensive evaluation, (2) summarize all assessment information, (3) determine eligibility for special education, and (4) recommend special education services, if appropriate. The office has concluded that representation by one teacher with a required written status summary by other teachers of the child will meet the purpose of the Child Study Team and the intent of federal law.

COMMENT. Under rule ARM 48-2.18(18)-S18270(1)(d) the word "refuse" implies and assumes that parents as a group are and will be disinterested in the welfare of their child and uncooperative. The word "refuse" used here and in (f)(ii) should be changed to the word "unable." Parents should also be given ample notice of scheduled meetings at times convenient to the parent.

RESPONSE. The office does not agree that the word "refuse" should be changed to "unable." If the parents are unable to attend they can still participate as stated in rule ARM 48-2.18(18)-S18370. The intent of the amended rule is to require procedures to document refusal, not inability to attend by parents. The office does not agree that the word "refuse" implies or assumes that parents as a group are and will be disinterested in the welfare of their children.

The scheduling of meetings at times convenient to the parties is required under rule ARM 48-2.18(18)-S18370, so it is not necessary to repeat the requirements in the amended rule.

COMMENT. The word "consultive" in rule ARM 48-2.18-S18270 should be eliminated because it does not comply with federal regulations.

RESPONSE. The office does not concur. As stated in prior responses the federal regulations are concerned with individual education program meetings. The office included the term "consultive" for two reasons. (1) Child Study Team members should have access to special assistance; for example, another parent familiar with the special education process who is able to assist the parents on the Child Study Team. (2) Under the prior Child Study Team regulation the members were not listed and the Child Study Team process was abused. Attempts were made by various parties to "pack" a meeting, or non-productive arguments as to who should or should not be a member of the team took place. The intent of the amended rule is to stop such practices. The use of consultants at the discretion of team members will insure the availability of specialized assistance and also help prevent past abuses of the Child Study Team process.

COMMENT. School psychologists and speech pathologists should be included on every Child Study Team due to their skills in valid group decision-making processes, valid assessment techniques in diagnosis, and in valid individual education program evaluation techniques.

RESPONSE. The office recognizes the value of speech pathologists' and school psychologists' expertise, but due to the wide variety of handicapping conditions evaluated by individual Child Study Teams it would not be productive for speech pathologists and school psychologists to be required members of every Child Study Team. When specialized professional expertise is required, members will be appointed under rule ARM 48-2.18(18)-S18290.

COMMENT. School board members should not be members of the Child Study Team.

RESPONSE. The office concurs, and points out that the amended rule does not require or imply that school board members are to be Child Study Team members. Responsibility for appointing the Child Study Team lies with the school board, but the rule does not say that school board members will be Child Study Team members. If a school board member is the parent of a child being evaluated he/she will be a Child Study Team member.

COMMENT. 48-2.18(18)-S18270(1)(b)(i) should be changed to say that status summaries "may be made available" rather than "shall be made available."

RESPONSE. The office does not concur. To perform an adequate evaluation, the Child Study Team should have access to summaries from all the child's teachers.

COMMENT. The Child Study Team as a group rather than individual members should invite other people to participate. This change will discourage having teachers inviting persons who may not have a legitimate right to have access to all of the confidential information to be reviewed.

RESPONSE. The office does not concur. The purpose of allowing other participants on a consultive basis is to assist individual members whether they are school administrators, teachers or parents. If a confidentiality problem arises the Child Study Team can hear the comments and advice of the invited person without confidential information being disclosed.

COMMENT. Rule ARM 48-2.18(18)-S18270(1)(b)(ii), particularly for preschool students or the severely retarded, is not very clear.

RESPONSE. The regular teacher on the Child Study Team must be a person who teaches grades or subjects appropriate to the child's age. In the case of a preschool child, if the school does not have a regular preschool teacher, then a regular teacher does not have to be appointed. In the case of a severely handicapped child, if a teacher were to be excused from the Child Study Team because of the child's presumed retardation, then in effect a preliminary evaluation would preceed the Child Study Team evaluation.

COMMENT. The examples given in rule ARM 48-2.18(18)-S18270(2)(d)(i) and (ii) should be omitted because people tend to interpret examples as if they are requirements.

RESPONSE. The office agrees that some people might interpret examples as requirements. However, the office believes it is better to provide examples of an adequate record rather than either having no examples which might encourage a person to not maintain any records, or to require a rigid procedure which might not fit particular situations.

COMMENT. Parents must be allowed to take part in the education of their child or children as they have the most influence on that child's life during the early stages of development. Do not exclude parents from the Child Study Team.

RESPONSE. The office concurs. Rule ARM 48-2.18(18)-S18270(d) requires participation by parents as Child Study Team members.

COMMENT. For secondary school children the counselor rather than the teacher should be on the Child Study Team.

RESPONSE. The office does not concur. In some instances counselors may have more knowledge about a child's requirements than a teacher. In other instances the teacher may have more knowledge. Since a teacher is required by federal law to help develop the individual education program, it is better to have a teacher on the Child Study Team. Counselors may be invited to participate under rule ARM 48-2.18(18)-S18270(2).

COMMENT. Subsection (1)(a) proposes that an administrator be a member of the team. The evaluation is to determine the child's handicap and the nature and extent of special education services that a child needs. Many administrators have no knowledge of handicapping conditions or the nature or extent of services that a child needs.

RESPONSE. The office concurs that the purpose of the Child Study Team is to determine if a child is educationally handicapped and to recommend appropriate special education and related service. However, the office feels that the inclusion

of an administrator is appropriate in that only an administrator has the authority to commit resources that may be needed to meet the child's needs, and to supervise the provision of such services.

COMMENT. Subsection (1)(g) is confusing.

RESPONSE. The office concurs and the proposed amendment has been changed to clarify it.

COMMENT. The term consultive should be defined, particularly as to what is the status of a consultant as opposed to members.

RESPONSE. The office does not concur. The proposed amendment requires members to carry out the function of the Child Study Team. Consultive is used in the regulation according to its ordinary dictionary defintion; "to ask the advice of, to seek the opinion of." See also the sixth response which states why the division was made between members and consultants.

BY: Georgia Rice
GEORGIA RICE
Superintendent of Public Instruction

Certified to the Secretary of State 5-14-80, 1980.

VOLUME NO. 38 OPINION NO. 80

COURTS, CITY - Town council designation of city judge;
JUDGES - City judge selection by town council;
JUSTICES OF THE PEACE - Town council designation to act as city judge;
MUNICIPAL CORPORATIONS - City judge selection by town council.
MONTANA CODE ANNOTATED - Sections 3-11-101, 3-11-102, 3-11-103, 3-11-205, 7-1-4111, 7-4-4101(1)(c), 7-4-4101(2), 7-4-4102(1)(c), 7-4-4102(2), 7-4-4102(3), 7-4-4103(1), 7-4-4103(3)(c);
LAWS OF MONTANA - 1975 Mont. L., Ch. 420, Section 1;
OPINIONS OF ATTORNEY GENERAL - 37 OP. ATT'Y GEN. NO. 42 (1977); 37 OP. ATT'Y GEN. NO. 62 (1977).
MONTANA CONSTITUTION - Article XI, section 4(2).

HELD: A town may not select a city judge who is not a justice of the peace. The city judge for the town must be a justice of the peace of the county in which the town is situated and must be designated by the town council to act as city judge.

2 May 1980

Joseph E. Mudd, Esq.
Bridger City Attorney
117 South Main
Bridger, Montana 59014

Dear Mr. Mudd:

You have asked for my opinion on the following question:

> May a town select a city judge who is not a justice of the peace?

In my opinion a town does not have the power to select a city judge who is not a justice of the peace.

Section 3-11-101, MCA, establishes a city court in each city or town in the state. The city court has concurrent jurisdiction with the justice's court over certain misdemeanors, applications for search warrants, and complaints charging the commission of a felony. Section 3-11-102, MCA. In addition, the city court has exclusive jurisdiction over violations of city or town ordinances, certain actions

involving the city or town where the amount in controversy does not exceed $300, and actions for the collection of a city or town license fee. Section 3-11-103, MCA. See generally 37 OP. ATT'Y GEN. NO. 42 (1977); and 37 OP. ATT'Y GEN. NO. 62 (1977).

The manner of selecting a city judge depends on the classification of the incorporated municipality for which he or she is judge, which in turn depends on the population of that municipal corporation. A municipal corporation with a population of 10,000 or more is a city of the first class; one with a population between 5,000 and 10,000 is a city of the second class; one with a population between 1,000 and 5,000 is a city of the third class; and one with a population between 300 and 1,000 is a town. Section 7-1-4111, MCA. Included as an officer of a city of the first, second, or third class is the city judge. Sections 7-4-4101 (1)(c) and 7-4-4102(1)(c), MCA. In a city of the first or second class, the city judge must be elected. Sections 7-4-4101(2) and 7-4-4102(2), MCA. In a city of the third class, the governing body of the city may by ordinance determine whether the office of city judge shall be filled by appointment by the governing body or by election. Section 7-4-4102(3), MCA.

The question you have asked, however, concerns towns. The statutes concerning the selection of a city judge for a town stand in stark contrast to those I have discussed concerning cities. Section 7-4-4103(1), MCA provides that the officers of a town consist of a mayor and two aldermen from each ward. No mention is made of a city judge.

Section 7-4-4103(3)(c), MCA authorizes the mayor, with the advice and consent of the council, to appoint "any other officers necessary to carry out the provisions of ... title [7]," concerning local government. The standard to be used in construing this provision is set forth in article XI, section 4(2) of the Montana Constitution, which states: "The powers of incorporated cities and towns and counties shall be liberally construed." Even under that standard, I find that section 7-4-4103(3)(c), MCA cannot be construed to authorize the appointment of a city judge in a town. If the provisions concerning city courts were contained in title 7, then the constitutional rule of liberal construction would require that section 7-4-4103(3)(c) be interpreted to authorize the appointment of a city judge. But even the rule of liberal construction does not allow me to ignore the limitation of that subsection to "officers necessary to

carry out the provisions of...title [7]." My research has revealed no provision of Title 7 that requires the appointment of a city judge by a town in order to implement it. Title 7 relates chiefly to the executive, legislative, and administrative powers of local governments, while the establishment of city courts is governed by Title 3. Therefore a town is not authorized to appoint a city judge by section 7-4-4103(3)(c).

Instead, the law provides:

> In a town, the council may designate a justice of the peace of the county in which the town is situated to act as city judge and may by ordinance fix the compensation for his services. The justice of the peace so designated may act as city judge in all cases arising out of violations of ordinances in which the town is a party. If the justice of the peace must travel from his place of residence to hold court, he shall be paid his actual and necessary travel expenses...by the town in which the court is held.

Section 3-11-205, MCA. See also Grant v. Williams, 54 Mont. 246, 253, 169 P. 286, 287 (1917); and State ex rel. Streit v. Justice Court, 45 Mont. 375, 380, 123 P. 405, 406 (1912).

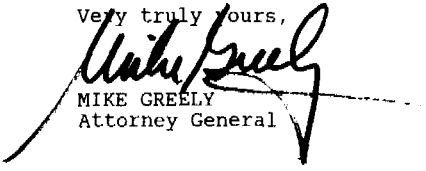
Prior to 1975, this statute stated that "[t]he justices of the peace so designated must act as a police judge in all cases arising out of a violation of ordinances where the town is a party." (Emphasis added). See § 11-727, R.C.M. 1947; 1975 Mont. Laws, Ch. 420, § 1. It has been argued that the change from "must" to "may" authorizes a town to appoint a city judge who is not a justice of the peace. However, that change simply provides a designated justice of the peace with some discretion in the performance of his or her duty as city judge for a town, where formerly the duty was mandatory. Cf. State ex rel. McCabe v. District Court, 106 Mont. 272, 277-79, 76 P.2d 634, 637 (1938). The statute does not authorize the appointment of a city judge who is not a justice of the peace.

THEREFORE, IT IS MY OPINION:

> A town may not select a city judge who is not a justice of the peace. The city judge for the town must be a justice of the peace of the county in which the town is

situated and must be designated by the town council to act as city judge.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 38 OPINION NO. 81

DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES - Review of certificates of survey; Sanitation in Subdivisions Act: Review authority regarding certificates of survey;
LAND USE - Sanitation in Subdivisions Act: Review of certificates of survey by Department of Health and Environmental Sciences;
SEWAGE - Sanitation in Subdivisions Act: Review of certificates of survey;
SURVEYS - Certificate review by Department of Health and Environmental Sciences; MONTANA CODE ANNOTATED - Sections 76-3-201, 76-3-204, 76-4-125.

HELD: The Department of Health and Environmental Sciences has authority under Title 76, chapter 4, part 1, MCA, to review certificates of survey.

12 May 1980

James C. Nelson, Esq.
Glacier County Attorney
P.O. Box 1244
Cut Bank, Montana 59427

Dear Mr. Nelson:

You have asked whether the Department of Health and Environmental Sciences has authority under the Sanitation in Subdivisions Act, Title 76, chapter 4, part 1, MCA, to review certificates of survey before they are filed with a county clerk and recorder.

The Montana Supreme Court in State ex rel. Dept. of Health and Environmental Sciences v. LaSorte, ___ Mont. ___, 596 P.2d 477 (1979), ruled that the department did not have such authority under the Act's statutory scheme existing prior to July 1, 1977. The court stated, however, that amendments to the Act which became effective July 1, 1977, would "eliminate the problems involved" in that case. The court determined that those amendments provided the review authority the court found lacking in the prior law. Your question indicates that this authority remains unclear, even if the 1977 amendments are taken into account.

In my opinion the Legislature meant to give the department the review authority in question, with certain limitations,

and accordingly I believe the court's assessment of the 1977 amendments is substantially correct.

The LaSorte case contains a discussion of the history of the Act through the adoption of certain amendments in 1975. The opinion focused on former section 69-5003, R.C.M. 1947, which granted the department authority to review "subdivision plats" (subsection 1) and "plans and specifications" of certain subdivisions which were excluded from the provisions of the Subdivision and Platting Act (subsection 3). According to the court, neither subsection (1) nor subsection (3) of 69-5003 gave the department authority to review certificates of survey.

The 1977 Legislature amended former section 69-5003, R.C.M. 1947, twice. Section 12, chapter 140, Laws of 1977, was merely a "housekeeping" measure. In chapter 554, however, the Legislature promulgated substantial changes in the statute. Among those changes were the redesignation of subsection (3) as subsection (8), and the addition of subsection (10). Subsections (8) and (10) of 69-5003 were subsequently recodified as subsections (1) and (2), respectively, of section 76-4-125, MCA. The key to your question is 76-4-125(2), the amendatory provision the Supreme Court alluded to in LaSorte. Section 76-4-125(2), MCA, states:

> A subdivision excluded from the provisions of chapter 3 [the Subdivision and Platting Act] shall be submitted for review by the department according to the provisions of this part, except that the following divisions are not subject to review by the department:
>
> (a) the exclusions cited in 76-3-201 and 76-3-204;
>
> (b) divisions made for the purpose of acquiring additional land to become part of an approved parcel, provided that no dwelling or structure requiring water or sewage disposal is to be erected on the additional acquired parcel; and
>
> (c) divisions made for purposes other than the construction of water supply or sewage and solid waste disposal facilities as the department specifies by rule.

(Bracketed material added.)

Subsection (2) of 76-4-125, MCA, applies to subdivisions that are "excluded" from the provisions of the Subdivision

and Platting Act. Since portions of that Act refer to divisions for which a certificate of survey must be filed, it has been suggested that such divisions are included in the Act and therefore are not within the purview of 76-4-125(2).

Virtually all divisions are included in either the Act's substantive provisions or its specific exemptions. In this sense, virtually no divisions are categorically excluded from the Act. Therefore, if "exclusion" is to be determined in the manner suggested, section 76-4-125(2), MCA, relates to a meaningless class of divisions. Such construction is unacceptable because it must be presumed the Legislature intended to make some change in existing law by adopting 76-4-125(2), and the provision should be construed to give it effect. State ex rel. Dick Irvin, Inc. v. Anderson, 164 Mont. 513, 524-5, 525 P.2d 564 (1974).

I note also that the Legislature, in expressly exempting certain divisions from the limited review required under section 76-4-125(2), MCA, referred to "the exclusions cited in 76-3-201 and 76-3-204" as one such exemption. See, subsection (2)(a) of 76-4-125. It can be assumed that if the Legislature had intended to exempt other exclusions cited in part 2 of section 4, such as divisions for which a certificate of survey must be filed, it would have done so.

In light of the factors discussed above, I conclude that the Legislature intended section 76-4-125(2), MCA, to apply to divisions that are excluded from the substantive provisions of the Subdivision and Platting Act, such as platting, dedication and public review requirements. Divisions for which a certificate of survey must be filed that are within that category are therefore subject to the department's review in accordance with the Sanitation in Subdivisions Act.

THEREFORE, IT IS MY OPINION:

The Department of Health and Environmental Sciences has authority under Title 76, chapter 4, part 1, MCA, to review certificates of survey.

Very truly yours,

MIKE GREELY
Attorney General