RESERVE

MONTANA ADMINISTRATIVE REGISTER

1980 ISSUE NO. 18
PAGES 2613-2683

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 1980 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. 18

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BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment) of Rule 10.57.403, regarding) the Class 3 Administrative) Certificate.)	NOTICE OF PROPOSED AMENDMENT OF RULE 10.57.403 NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On July 1, 1983, the board of public education proposes to amend Rule 10.57.403, Class 3 Administrative Certificate.

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

10.57.403 CLASS 3 ADMINISTRATIVE CERTIFICATE (1) Term: 5 years - renewable.

(2) Basic education: Master's degree in administration or a related instructional field.

(3) Experience: 3 years teaching or the equivalent.

(4) Renewal: Verification of one year of successful experience or the equivalent in the area of endorsement.

(5) Reinstatement: 6 quarter (4 semester) credits or one year experience or the equivalent earned within the 5-year period preceding application. (See guidelines for reinstatement of certificates allowed to lapse 15 years or more.)

(6) Superintendent endorsement: Eligibility for the class 1 or class 2 teaching certificate; and at least 24 graduate quarter (16 semester) credits or the equivalent in education, including the following:

(a) at least 12 graduate quarter (8 semester) credits, or the equivalent, in elementary education if the applicant does not qualify for elementary endorsement on the class 1 or class 2 teaching certificate; or, at least 12 graduate quarter (8 semester) credits, or the equivalent, in secondary education if the applicant does not qualify for secondary endorsement on the class 1 or class 2 teaching certificate; and,

(b) one or more graduate courses, or the equivalent, in each of the following: school finance, general school administration, school curriculum, ~~and~~ school supervision, and school law; and,

(c) a course in guidance or counseling, or the equivalent.

(7) Elementary principal endorsement: Eligibility for the class 1 or class 2 teaching certificate with elementary endorsement; and, at least 15 quarter (10 semester) credits, or the equivalent, in education, including the following:

(a) at least 8 graduate quarter (6 semester) credits, or the equivalent in elementary education; and,

(b) one or more graduate courses, or the equivalent, in general school administration, ~~and~~ elementary school administration and school law; and

(c) at least one graduate course, or the equivalent, in elementary school curriculum or school supervision; and,

(d) a course in guidance or counseling, or the equivalent.

(8) Secondary principal endorsement: Eligibility for the class 1 or class 2 teaching certificate with secondary endorsement; and at least 15 quarter (10 semester) credits, or the equivalent in education, including the following:

(a) at least 8 graduate quarter (6 semester) credits, or the equivalent in secondary education; and,

(b) one or more graduate courses, or the equivalent, in general school administration, and secondary school administration and school law; and

(c) at least one graduate course, or the equivalent, in secondary school curriculum or school supervision; and,

(d) a course in guidance or counseling, or the equivalent.

(9) Supervisor endorsement: This administrative endorsement is issued in specific fields such as math, music, special education, and guidance and counseling, or in general areas such as elementary education, secondary education and curriculum development. This endorsement may be issued to applicants who submit acceptable evidence of successful completion, at an accredited institution of higher learning, of a master's degree or the appropriate professional programs for the general area endorsement. The applicant must meet eligibility requirements for a class 1 or class 2 teaching certificate endorsed in the field of specialization. The professional training required for this endorsement must include a graduate course in school law and 15 graduate quarter (10 semester) credits in supervision, curriculum and methods in the fields to be endorsed. The recommendation of the appropriate official(s) is required.

3. The rule is proposed to be amended to ensure that administrators have a background in school law before assuming their duties in the school districts of Montana. The proposed amendment is noticed early to allow administrative personnel working on this certificate ample time to fulfill this requirement.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to Chairman Marjorie W. King, Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59601, at any time prior to October 23, 1980.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Chairman Marjorie W. King, Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59601, no later than October 23, 1980.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be 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 determined to be 135 persons based on 1,352 class 3 administrative certificate holders.

7. The authority of the agency to make the proposed amendment is based on Sections 20-4-102, MCA, and the rule implements Sections 20-4-106 and 20-4-108, MCA.

MARJORIE W. KING, CHAIRMAN
BOARD OF PUBLIC EDUCATION

BY: _____
Assistant to the Board

CERTIFIED TO THE SECRETARY OF STATE SEPTEMBER 16, 1980

BEFORE THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS
OF THE STATE OF MONTANA

In the matter of the adoption of a rule relating to the sale of outdated bird licenses and bird art stamps	)))))	NOTICE OF A PROPOSED ADOPTION OF A RULE -- SALE OF OUTDATED BIRD LICENSES AND BIRD ART STAMPS NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On October 27, 1980, the Department of Fish, Wildlife, and Parks proposes to adopt a rule allowing collectors to purchase outdated bird licenses and bird art stamps.

2. The proposed rule is as follows:

Rule I. SALE OF OUTDATED BIRD LICENSES AND BIRD ART STAMPS (1) The 1978 and 1979 game bird licenses and the 1980 bird art stamps shall be available for sale to collectors.

(2) These licenses and stamps shall be sold at a price of $2.00 each and shall be available for purchase only at the Helena office of the department, 1420 E. 6 Avenue, Helena, Montana.

(3) Sales of these licenses and stamps may continue as long as they are available.

(4) These licenses and stamps are not valid as a hunting license.

3. The rule is proposed to respond to demand by collectors for the artwork formerly made a part of the game bird licenses and selected through the bird stamp artwork contest.

4. Interested parties may submit their data, views, or arguments concerning the proposed adoption in writing to the Office of the Director, Department of Fish, Wildlife, and Parks, 1420 E. 6 Avenue, Helena, Montana 59601. Written comments in order to be considered must be received no later than October 24, 1980.

5. If a person who is directly affected wishes to express his data, views, and arguments orally or in writing at a public hearing, he must make a written request for a hearing and submit this request along with any written comments he has to the Office of the Director at the above-stated address no later than October 24, 1980

6. If the department receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be 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 determined to be 25.

7. The authority of the department to make the proposed adoption is based on Sec. 87-1-201(7), MCA, and the rule implements Sec. 87-1-201(5), MCA.

Keith L. Colbo, Director
Department of Fish, Wildlife & Parks

Certified to Secretary of State September 12, 1980.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 12.8.301 (12-2.26(1)-S2601) relating to Montana State Golden Years Pass	NOTICE OF PROPOSED AMENDMENT OF RULE 12.8.301 (12-2.26(1)-S2601) - MONTANA STATE GOLDEN YEARS PASS -- NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On October 27, 1980, the Department of Fish, Wildlife, and Parks proposes to amend a rule relating to the Montana State Golden Years Pass.

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

12.8.301 MONTANA STATE GOLDEN YEARS PASS (1) Use of pass by someone other than the recipient:

(a) The Montana state golden years pass may be used only by the person to whom the pass is issued.

(b) Any person who camps overnight in a state administered fee camping recreation area, state park, or fishing access site after having entered in a vehicle bearing a Montana state golden years pass shall obtain an overnight camping permit if the recipient of the golden years pass is not a passenger or driver of that vehicle.

(2) Replacement of pass and additional purchase:

(a) Any person who has been issued a Montana state golden years pass for display on a vehicle which is subsequently sold or disposed of, or where the decal is otherwise required to be replaced, may be issued a substitute decal upon surrendering the remainder of the original decal to the department or its authorized representative.

(b) Any ~~person-who-qualifies-for-such-a-Montana-state golden-years-pass~~ Montana resident, as defined in 87-2-102, MCA, 65 years of age or older may purchase such a pass for each motor vehicle of which he is the legal or registered owner.

3. The department is proposing to amend the rule to set forth the qualifications for holders of this pass as stated in 23-1-105, MCA, but not defined in this ARM rule.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendment in writing to F. Woodside Wright, Department of Fish, Wildlife, and Parks, 1420 East 6 Avenue, Helena, Montana 59601, no later than October 24, 1980.

5. If a person who is directly affected by the proposed amendment of Rule 12.8.301 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 to Mr. Wright at the above address no later than October 24, 1980.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons directly affected; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be 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 determined to be 25.

7. The authority of the agency to make the proposed amendment is based on section 23-1-106, MCA, and implements section 23-1-105, MCA.

Keith L. Colbo

Keith L. Colbo, Director
Dept. of Fish, Wildlife & Parks

Certified to Secretary of State September 12, 1980

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

In the matter of the adoption of NEW RULES relating to seismographic permits	)))	NOTICE OF PROPOSED ADOPTION OF RULES RELATING TO SEISMOGRAPHIC PERMITS

TO: All Interested Persons:

1. On November 17, 1980, the Board of Land Commissioners and Department of State Lands proposes to adopt new rules relating to seismographic permits.

2. The new rules as proposed provide as follows:

Rule I APPLICATION FOR SEISMOGRAPHIC PERMIT A person wishing to prospect for oil and gas by geophysical methods on state lands for which it does not hold an oil and gas lease is required to sign and submit two executed copies of a seismographic exploration permit application, on forms provided by the department, with a $10.00 fee, to the mineral leasing bureau of the department.

Rule II PROCEDURE FOR ISSUANCE OF SEISMOGRAPHIC PERMIT (1) In order to obtain a permit the applicant shall:

(a) be qualified to do business in the state as shown by records of the secretary of state;

(b) file a surety bond, as required, with the secretary of state;

(c) furnish proof that it has notified the surface owner or lessee of the approximate time schedule of activities on the land;

(d) provide the name and permanent address of the geophysical exploration firm which will be doing the actual work on the land, and the name and address of any designated agent of the geophysical exploration firm;

(e) provide a legal description of the surface areas where geophysical activity will take place; and

(f) provide written or oral notification from the oil and gas lessee of permission to conduct exploration on lands covered by an oil and gase lease.

(2) A permit is valid for one calendar year from the date it is granted.

(3) The permit does not grant any rights to an oil and gas lease on or any interests of any kind in the land covered by the permit.

Rule III SURFACE LIMITATIONS FOR SEISMOGRAPHIC PERMIT (1) The permittee shall confine all activity to improved roads during periods when the land surface is wet or is in such a condition that it may be damaged from travel by heavy vehicles or trucks. During all other periods, the permittee shall

confine all activity to existing trails and terrain which is easily accessible to normal four-wheel drive travel without winching or other artificial means. The permittee shall not conduct any type of road construction activity, including but not limited to, blading and dozing existing roads and trails, constructing stream crossings, or removal of brush and trees, without the written permission of the commissioner of state lands. The department may grant such permission only after the permittee has submitted evidence of conditions which require such road construction and a plan for the road construction which protects the land surface as much as practicable. The department may impose requirements on such construction in order to protect the land surface from erosion or other damage.

(2) The permittee shall not conduct any type of geophysical testing or measuring within 300 feet of any springs, streams, lakes, water wells, or water storage facilities. The permittee shall not conduct any drilling or blasting activities within 1320 feet of any building, structure, water well or spring or within 660 feet of any reservoir dam without the written consent of the department. The department may impose further restrictions when the particular situation warrants other precautions.

(3) In all operations on the lands covered by the permit, the permittee shall interfere as little as practical with the use of the premises for any other purpose to which the same may have been leased or sold by the state. All necessary precautions shall be taken to avoid any damage other than normal wear and tear to gates, bridges, roads, cattle guards, fences, dams and other improvements.

Rule IV OPERATIONS PURSUANT TO A SEISMOGRAPHIC PERMIT

(1) Exploration operations shall be conducted in compliance with all federal, state, and local laws, and all ordinances, rules and regulations which are applicable to such operations. Particularly, permittee shall comply with the oil and gas rules on state lands, lease stipulations on those lands, and the bonding requirements before commencing operations.

(2) The permittee shall take such measures for the prevention and suppression of fire on the permit area and other adjacent lands used or traversed by the permittee as are required by applicable laws and regulations. When in the opinion of the department weather and other conditions affecting fire incidence and control make special precautions necessary to protect the area, the permittee shall take such additional or other fire prevention and control measures as may be required by the department.

(3) The permittee shall obtain appropriate permission to use water necessary for the exploration activities. This normally will require a permit from the owner of the water right.

(4) The permittee shall make satisfactory adjustment of any damages sustained by the owner to the surface of the lands or sustained by the surface lessee to his leasehold interest in connection with operations by the permittee. The surface lessee should not receive damages over and above his annual rental unless special circumstances are demonstrated.

Rule V. SEISMOGRAPH PLUGGING AND ABANDONMENT (1) Except as hereinafter provided, all seismic holes shall be plugged as soon after being utilized as reasonably practicable; however, in no event shall they remain unplugged for a period of more than 120 days after being drilled and shot.

(2) The permittee shall notify the department, in writing, of its intent to plug and abandon, including the date such activities are expected to commence, the location by section, township, and range of the holes to be plugged and the name and telephone number of the person in charge of the plugging operations.

(3) All seismic shot holes shall be plugged in accordance with the board of oil and gas conservation rules. All cuttings not placed in the hole shall be spread out over the surrounding area at a depth not to exceed 1 inch.

(4) If an artesian water flow is encountered in any of the drill holes located on state land, the permittee shall immediately notify the department so that a decision can be made by the department as to whether the well will be developed. If the well is not developed, it is the permittee's responsibility to plug the hole with cement of sufficient density to contain the waters to their native strata as required by the board of oil and gas conservation rules. If a nonflowing aquifer is encountered in any of the drill holes on state land, the permittee shall notify the department in writing of the location and depth.

(5) The permittee shall leave the land covered by the permit in as nearly the same condition as it was prior to the effective date of the permit as is practically possible. All refuse, including, but not limited to, oil cans, shot wire, powder boxes, flagging, cement or mud sacks, stakes, and primacord shall be removed from the lands and shall be properly disposed of by the permittee.

(6) A seismic shot hole may be left unplugged at the request of the surface lessee or owner for conversion to a fresh water well provided the surface lessee or owner executes a release on a form provided by the department relieving the

permittee from any liability for damages that may thereafter result from the hole remaining unplugged.

Rule IV CANCELLATION OF SEISMOGRAPHIC PERMIT If the department determines that any person has violated any of the provisions of these rules or the permit, the department shall take the necessary action to assure compliance, including cancellation of the permit. Such cancellation is not a waiver of other remedies available to the state.

Rule VII SEISMOGRAPHIC PERMIT CHARGES Charges for exploration purposes on state lands on which the state owns the surface shall be paid to the department at the rate of at least $50.00 per hole or $100.00 per mile for vibroseis, surface charges or other surface activity, depending on the exploration procedures used.

Rule VIII REPORT UPON TERMINATION OF SEISMOGRAPHIC PERMIT (1) Upon termination of a permit, the permittee shall submit to the department an affidavit setting forth the following:

(a) The nature of the tests conducted;

(b) a narrative description of or a map showing the number and location of sites where tests were conducted; and

(c) the location and depth of any geologic formations which may be capable of producing water in usable quantities that are discovered in testing.

(2) The permittee shall maintain records (including receipts) of amounts paid, if any, to surface owners or lessees in settlement of damages. The permittee shall make the records available for the department's review upon requests of the department.

3. The rules are proposed to be adopted in order to specify procedures for issuing seismographic permits and specify the obligations of the permittees.

4. Interested parties may submit their data, views or arguments concerning the proposed rules to Leo Berry, Jr., commissioner, department of state lands, capitol station, Helena, Montana 59601 no later than October 28, 1980.

5. If a person who is directly affected, an association having members who are directly affected, or a governmental subdivision or agency wishes to express its data, views and arguments orally or in writing at a public hearing, he or it must make written requests for a hearing and submit this request to Leo Berry, Jr., commissioner, department of state lands, capitol station, Helena, Montana 59601 no later than October 28, 1980.

6. If the department receives requests for a public

hearing on the proposed rules from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed rules, from the administrative code committee of the legislature, or from an association having not less than 25 members who will be 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 determined to be 4 persons based on approximately 40 seismographic exploration firms.

7. The authority of the board and department to adopt the proposed rules is contained in section 77-3-402 MCA and the rules implement section 77-3-401 MCA.

By _____
Leo Berry, Jr., Commissioner
Department of State Lands

CERTIFIED TO THE SECRETARY OF STATE September 16, 1980.

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

In the Matter of the repeal of rules 26.3.218, 26.3.221 and 26.3.222 concerning oil and gas leasing	))))))	NOTICE OF PROPOSED REPEAL of ARM 26.3.218, 26.3.221 and 26.3.222 (oil and gas leasing) NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On November 17, 1980, the department of state lands and board of land commissioners propose to repeal rules 26.3.218 (26-2.6(1)-S6062), 26.3.221 (26-2.6(1)-S6065) and 26.3.222 (26-2.6(1)-S6066). These oil and gas related rules purport to place a lien on production, set nominal fees for issuing and assigning leases and provide for amendment of rules.

2. Those rules proposed to be repealed are on pages 26-29.3 and 26-29.4 of the administrative rules of Montana.

3. The rules are proposed to be repealed because they are of no force and effect or in the case of rule 26.3.221 because it is redundant.

4. Interested parties may submit their data, views and arguments concerning the proposed repeals in writing to Leo Berry, Jr., commissioner, department of state lands, capitol station, Helena, Montana 59601, no later than October 28, 1980.

5. If a person who is directly affected by the proposed repeal of the above rules 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 Leo Berry, Jr., commissioner, department of state lands, capitol station, Helena, Montana 59601, no later than October 28, 1980.

6. If the agency receives requests for a public hearing on the proposed repeal from either 10% or 25, whichever is less of the persons directly affected; from the administrative code committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be 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 determined to be more than 25 persons.

7. The authority to make and repeal the proposed rules is based upon section 77-3-402 MCA and the rules implement

section 77-3-401 MCA.

By _____
Leo Berry, Jr., Commissioner
Department of State Lands

CERTIFIED TO THE SECRETARY OF STATE September 16, 1980.

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

IN THE MATTER of the Proposed amendment of rules 40.52.402 concerning examinations; 40.52.403 concerning out-of-state candidates for examination; 40.52.404 concerning examination credit for out-of-state candidates; 40.52.405 concerning consecutive examination requirements; 40.52.407 concerning qualifications for registration as licensed public accountants; 40.52.408 concerning equivalent education; 40.52.409 concerning accounting experience requirements; 40.52.410 fee schedule; 40.52.411 concerning annual licenses to practice; proposed repeal of ARM 40.52.412 concerning registration of office/partnerships and professional corporations and 40.52.413 rules of professional conduct; and adoption of new rules concerning committees; reciprocity; previous applications in effect; rules of professional conduct; and continuing education.	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENTS OF ARM 40.52.402 EXAMINATIONS; 40.52.403 OUT-OF-STATE CANDIDATES FOR EXAMINATION; 40.52.404 EXAMINATION CREDITS - OUT-OF-STATE CANDIDATES; 40.52.405 CONSECUTIVE EXAMINATION REQUIREMENTS; 40.52.407 QUALIFICATIONS FOR REGISTRATION AS LICENSED PUBLIC ACCOUNTANT; 40.52.408 EQUIVALENT EDUCATION; 40.52.409 ACCOUNTING EXPERIENCE REQUIREMENTS; 40.52.410 FEE SCHEDULE; 40.52.411 ANNUAL LICENSES TO PRACTICE; PROPOSED REPEAL OF 40.52.412 REGISTRATION OF OFFICE/PARTNERSHIPS AND PROFESSIONAL CORPORATIONS; 40.52.413 RULES OF PROFESSIONAL CONDUCT; and PROPOSED ADOPTIONS OF NEW RULES CONCERNING COMMITTEES; RECIPROCITY; PREVIOUS APPLICATIONS IN EFFECT; PROFESSIONAL CONDUCT AND CONTINUING EDUCATION.

TO: All Interested Persons.

1. On September 11, 1980 the Board of Public Accountants published a notice of public hearing at pages 2553 through 2582. The notice stated the hearing would be held on Monday, November 3, 1980 in the Senate Chambers of the Capitol Building, Helena, Montana to consider the amendments, adoptions, and repeals referred to above. However, the time of the hearing was inadvertently left out. The hearing will be held at 10:00 a.m. on November 3, 1980.

2. Several corrections should be noted. On paragraph 15 the correct implementing section should be 37-50-204 MCA. In paragraph 16 there was a typographical error and the authority and implemention section should be stated as 37-50-203 MCA. In paragraph 4 the authority section should be 37-50-201 and 308 MCA, rather than 27-50-201 and 308 MCA. The remainder of the notice remains as published.

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

Certified to the Secretary of State, September 16, 1980.

BEFORE THE DEPARTMENT OF REVENUE

OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT OF RULE 42.15.321, relating to joint tax returns)	NOTICE OF PROPOSED AMENDMENT OF RULE 42.15.321, relating to joint tax returns.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On November 3, 1980, the Department of Revenue proposes to amend Rule 42.15.321, relating to joint tax returns, in order to delineate the conditions needed to receive department consent to amending a joint return to separate returns.

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

42.15.321 JOINT RETURNS (1) A joint return may be filed even though one of the spouses has no income or deductions. However, a joint return is not permitted if the husband and wife have different taxable years. A joint return must include all income and deductions of both spouses. Both the husband and the wife must sign the return, and both are jointly and severally liable for the tax.

(2)(a) If a joint return has been filed for a taxable year, the spouses may file separate returns for the same taxable year. If the time for filing for both spouses has not expired, department consent to the separate filing is not required. If the time for filing the return of either spouse has expired, department consent is required.

(b) In order for consent to be given, the following conditions must be met:

(i) Both spouses must agree to file separate returns.

(ii) All prior years tax liabilities must be paid.

(iii) The tax liability for the tax year for which a change is sought must be paid.

(c) If the above conditions are met, consent is considered granted if the department does not notify the taxpayers in writing of disapproval of the amended return or returns.

3. Under the provisions of Section 15-30-142, MCA, the Department is authorized to consent to the filing of separate returns for a tax year for which a joint return has been filed when the filing of the separate return (or returns) is made after the time for filing for either spouse has expired. The proposed amendment details the conditions that must be met in order to secure department approval for such a change in filing status. The proposed language is self-explanatory.

4. Interested persons may submit their data, views, or arguments concerning the proposed amendment in writing no later than October 27, 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 then October 27, 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 at least 25 based upon the number of persons filing joint returns.

7. The authority of the department to make the proposed amendment is based on 15-30-305, MCA. The proposed amendment implements 15-30-142, MCA.

MARY L. CRAIG, Director
Department of Revenue

Certified to the Secretary of State 9-15-80

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the adoption of a rule setting forth the form to be utilized when an agency incorporates by reference.	NOTICE OF PROPOSED ADOPTION OF A RULE - ADOPTION OF AN AGENCY RULE - INCORPORATION BY REFERENCE NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On October 27, 1980, the Office of the Secretary of State will adopt a rule setting forth the format to be followed when an agency adopts a rule by incorporation by reference.

2. The proposed rule provides as follows:

RULE I - ADOPTION OF AN AGENCY RULE BY INCORPORATION BY REFERENCE (1) All agencies adopting by reference any of those documents or types of rules specified in 2-4-307, MCA, shall utilize the following form in the Administrative Rules of Montana or the Montana Administrative Register when adopting by reference.

(2) The (department) hereby adopts and incorporates herein by reference (citation to federal agency rule, model code, like publication). (Citation to CFR, etc.) is a (federal agency rule, model code, like publication) setting forth the (substance of the rule). A copy of the (citation to federal agency rule, model code, like publication) may be obtained from the (department name and address).

(3) If there is more than one citation in the same rule to the same adoption by reference citation, then a reference back to the paragraph which includes this form will be necessary for each citation.

(4) The director or head of the department must submit a cover letter, addressed to the secretary of state, with their request and consent, to incorporate a document by reference.

3. This office is adopting this rule so that all rule-making agencies' procedure for adopting by reference will be consistent throughout the ARM or MAR. The cover letter will alert me that a rule incorporates by reference, thereby permitting me the opportunity to thoroughly review the rule to ensure compliance with Section 2-4-307, MCA.

4. Interested parties may submit their data, views or arguments concerning the proposed rule in writing to Leonard C. Larson, Chief Deputy, Office of the Secretary of State, Room 202, Capitol Building, Helena, Montana 59601, no later than October 23, 1980.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Leonard C. Larson, Chief Deputy, address given in paragraph 4, no later than October 23, 1980.

6. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be 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 determined to be three persons based on the 24 departments publishing in the ARM and MAR.

7. The authority to make the proposed rule is based on section 2-4-306, MCA, and the rule implements section 2-4-307, MCA.

Dated this 15th day of September, 1980.

Frank Murray

FRANK MURRAY
Secretary of State

BEFORE THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA

In the matter of the adoption of amendments to ARM 2.52.201, 2.52.203, 2.52.205, 2.52.208, 2.52.211, 2.52.212, 2.52.213, 2.52.214, 2.52.215, 2.52.217, 2.52.218, 2.52.220, 2.52.221, and 2.52.222.	)	NOTICE OF ADOPTION OF AMENDMENTS TO 2.52.201, 2.52.203, 2.52.205, 2.52.208, 2.52.211, 2.52.212, 2.52.213, 2.52.214, 2.52.215, 2.52.217, 2.52.218, 2.52.220, 2.52.221, and 2.52.222.

TO: All Interested Persons

1. On July 17, 1980 the Workers' Compensation Court published a Notice of Public Hearing on amendments of existing procedural rules of the Workers' Compensation Court at page 2159 of the 1980 Montana Administrative Register, Issue No. 13.

2. The Workers' Compensation Court has adopted the amendments to ARM rules as proposed with the following grammatical changes for clarity.

2.52.201 PETITION FOR TRIAL (1) All requests for ~~hearing~~ trial before the Workers' Compensation Court shall be in petition form signed by petitioner or his attorney. The petition shall include the following information:

(a) that the parties have made an effort to solve the dispute existing between the parties and that a solution of the dispute cannot be reached by them. A copy of the letter or document the petitioner relies upon as evidence that a solution to the dispute cannot be reached by the parties must be attached to the petition. If a letter or document cannot be obtained, then a paragraph in the petition should state what the petitioner has done to resolve the dispute and circumstances surrounding the failure to reach a resolution.

(b) reference to every particular section of the Montana Code Annotated or the rules in the Administrative Rules of Montana that are involved in the dispute.

(c) a short and plain statement of the ~~matters asserted~~ contentions asserted and ~~every~~ the disputed issues ~~that~~ the petitioner wishes the Court to make a determination of after a ~~hearing~~ trial.

(d) a description of the accident, including the county where it took place.

(e) a statement that the petitioner has freely exchanged all available medical reports with the defendant, and pursuant to ARM 2.52.212 will continue to do so. Medical reports are not to be attached to the petition.

~~(f) The signature of the petitioner or his attorney.~~

(2) Same as existing rule.

2.52.203 SERVICE (1) The Court will serve the furnished copies of the petition upon defendants~~, employers,~~ and others as designated in the claimant's instructions, by mailing them at Helena, Montana, with first class postage prepaid. The petitioner is responsible for providing correct names and addresses.

(2) All pleadings subsequent to the original petition, every written motion, ~~paper relating to discovery,~~ or any other document ~~which is~~ described in Rule 5, M.R.Civ.P. (1979) shall be ~~served and~~ accompanied by proof of service as provided in Rule 5, M.R.Civ.P. (1979) when submitted for filing with the Court. The clerk will not accept any document offered for filing which has not been served as required under this rule, and may either return or destroy any such document.

(3) Whenever a party has the right or is required to do some act ~~or take some proceedings~~ within a prescribed period of time after the service of a notice or other paper upon him and the notice or paper is served by mail, three days shall be added to the prescribed period.

2.52.205 AMENDING PLEADING (1) Petitions for ~~hearing~~ trial and answers to petitions may be amended within 20 days of receipt by the Court of the petition or answer. The Court may, in its discretion, allow parties at any time to amend petitions or answers prior to a ~~hearing~~ trial or at a ~~hearing~~ trial. Parties may respond to amended petitions and answers within 10 days of receipt of an amended petition or answer and shall respond to amended petitions and answers when requested by the Court. Normally amendments are considered at the pretrial and are contained in the Pretrial Order.

2.52.208 TIME AND PLACE OF ~~HEARING~~ TRIAL GENERALLY

(1) For the purposes of setting trials, the Court uses the fiscal year of July 1 to June 30, and has divided the year into four terms of three months each, ~~and has~~ designated ~~them~~ as the July term, October term, January term and April term.

(2) ~~In addition,~~ The Court has divided the state into nine geographic areas ~~made up of the several counties~~ (subsection (5) of this rule). Except for emergency ~~hearings~~ trials (ARM 2.52.209) or upon stipulation of all ~~the~~ parties and consent of the Court ~~for hearings~~ to hold trials elsewhere, ~~hearings~~ trials will be held at the time and in the place designated in subsections (3) ~~through~~ and (4) of this rule.

(3) Court will be in session at the call of the Court. Cases will be heard during the October and April terms in the area cities (except as indicated) at the following times, subject to any exceptions the Court may make:

(a) Kalispell area, the first week
(b) Missoula area, the second week
(c) Butte area (in Helena), the third week
(d) Bozeman area (in Helena), the fourth week
(e) Billings area, the fifth week
(f) Miles City area (in Billings), the sixth week
(g) Glasgow area, the seventh week
(h) Great Falls area (in Helena), the eighth week
(i) Helena area, the ninth week

~~Unless the Court decides otherwise, this schedule will be followed for setting the hearings to be held in Helena during the January and July terms.~~ During the January and July terms all trials will be held in Helena, subject to any exceptions the Court may make. The same weekly schedule listed above will apply for setting the trials which will be heard in Helena, i.e., Kalispell area cases will be heard during the first week of the term, Missoula area cases will be heard during the second week, etc.

(4) Court will normally convene at 9:30 a.m. It will be in session or recess at the convenience of the Court. If all matters before the Court are not completed on the first day scheduled for trials, the Court will reconvene on the following and as many days thereafter as is necessary to complete the docket.

(5) Each of the nine areas designated for trial schedule purposes is named for the principal city in the counties making up the area as follows:

Subsections (a) through ~~(iii)~~ (i) same as existing rule.

(6) Upon receipt of a petition meeting the requirements of these rules, the Court will set a trial for the area where the accident occurred and at a time that will allow 30 days notice to be given of the trial. However, the Court may, for good cause, hold a trial over to the next regular trial date in or for the area. Any petition filed less than 30 days before the beginning of a week designated for trials in that area, but filed early enough so that at least 10 days notice of a pretrial conference can be given to the defendant, will be scheduled for pretrial conference during the setting for that area.

2.52.211 WITNESS LIST (1) A party may demand a list of all witnesses the opposing party ~~will~~ intends to call at a trial ~~or the court may demand a witness list from any party~~. Such a demand can only be made after a trial date has been set, and such a demand must be complied with by the time of the pretrial conference. A complete list of witnesses shall be included in the pretrial order. A witness may not be called by a party at a trial if the name of the witness was not timely given to the opposing party upon demand ~~or by the court~~ as stated above. However, the Court may, in its discretion and for good cause, waive the provisions of this rule at a trial.

2.52.212 MEDICAL REPORTS (1) Prior to any scheduled trial, there must be an exchange between the parties to the dispute of medical reports and other medical information based upon examination of the claimant ~~between the parties to the dispute prior to any scheduled trial~~. Medical reports may be submitted as evidence by stipulation between parties.

2.52.213 PRETRIAL CONFERENCE (1) A pretrial conference shall precede every trial unless otherwise ordered by the Court.

(2) The Court shall make an order which recites the action taken at the conference and shall set forth the following:

(a) statement of jurisdiction pursuant to the appropriate statutes and rules;

(b) motions ~~of~~ made by either party;

(c) uncontested facts ~~which the parties may agree are true and which will require no proof~~;

(d) petitioner's and defendant's issues of fact and law;

(e) exhibits which may be introduced;

(f) witnesses which may be called ~~with~~ and a brief summary of their testimony;

(g) pretrial discovery desired, e.g., depositions~~,~~ and interrogatories;

(h) estimated length of trial~~,~~ and the time and place for trial; and

(i) such other matters as may aid in the disposition of the matter.

2.52.214 DEPOSITIONS (1) Depositions of witnesses who cannot be available at the time of the trial may be taken prior to trial in accordance with the procedures set forth in Rule 30, M.R.Civ.P. (1979), or depositions may be taken subsequent to a trial with the approval of the Court. The cost of the depositions shall be borne by the party requesting the depositions. Rule 32 (a)(3), M.R.Civ.P. (1979), is not applicable to actions in the Workers' Compensation Court, and the deposition of a witness, whether or not a party, may be used by any party for any purpose if the Court finds that the interests of justice would be served thereby.

(2) Objections (other than as to form) to questions or answers in a deposition shall be made by motion at the outset of the trial.

2.52.215 INTERROGATORIES (1) Same as existing rule.

(2) Same as existing rule.

(3) If a party fails to answer an interrogatory, the ~~discovering~~ party seeking discovery may move for an order compelling an answer. An evasive or incomplete answer is to

be treated as a failure to answer. The Court shall hear the arguments for and against the motion and award the prevailing party attorney's fees and reasonable expenses incurred~~, including attorney's fees,~~ in obtaining the order or in opposing the motion.

2.52.217 VACATING ~~OR CONTINUING~~ AND RESETTING PRETRIAL CONFERENCE OR TRIAL (1) No pretrial conference or trial may be vacated ~~or continued~~ and reset without consent of the Court. Counsel may at the time of the pretrial conference request that the matter be vacated and ~~continued~~ reset. The Judge or hearing examiner, for good cause shown, may grant this request. After a matter has been vacated ~~or continued~~ and reset once, any subsequent requests ~~for continuance~~ to vacate and reset shall be accompanied by a statement in writing of the party or counsel setting forth the reasons for ~~the continuance~~ not being able to proceed as scheduled.

2.52.218 CONDUCT OF TRIAL (1) Trials will be held in courtrooms when available or any other designated place.

(2) The trial will be conducted in the same manner as a trial without a jury. The trial shall proceed in the following order unless the Court, for good cause and special reasons, otherwise directs:

(a) The party on whom rests the burden of the issues may briefly state his case and the evidence by which he expects to sustain it.

(b) The adverse party may then~~, or at the beginning of his case,~~ briefly state his defense and the evidence he expects to offer in support of it, or he may wait and do this at the beginning of his case in chief.

(c) The party on whom rests the burden of the issues must produce his evidence; the adverse party will then ~~produce~~ follow with his evidence.

(d) The parties will then be confined to ~~rebutting~~ rebuttal evidence, unless the Court, for good reasons~~,~~ and in the furtherance of justice, permits ~~them~~ either party to offer further evidence in ~~their original~~ support of its case in chief.

2.52.220 FINDINGS OF FACT AND CONCLUSIONS OF LAW AND BRIEFS (1) The Court may require briefs or other documents to be filed by ~~a party~~ either or both parties.

(2) The Court may require either or both parties to file findings of fact and conclusions of law.

(3) Briefs~~,~~ and findings of fact and conclusions of law will be filed at a ~~subsequent~~ date set by the Judge or hearing examiner.

(4) If parties are directed to file simultaneously by a certain date, any documents ~~briefs, findings, or conclusions~~ reaching the Court more than ~~3~~ three days after the deadline

or mailed after the deadline will not be accepted or filed.

2.52.221 MASTERS AND EXAMINERS--RECOMMENDATIONS FOR BENCH ORDERS (1) The Court shall appoint masters or examiners when, in the judgment of the Court, justice will be served. Masters will be appointed and serve pursuant to Rule 53 M.R.Civ.P. (1979). Examiners will be appointed and serve pursuant to 2-4-611, MCA (1979).

(2) An examiner may during or at the conclusion of a trial or a pretrial conference, advise the parties that an interlocutory order for payment of benefits or other relief to a party appears to be justified and such an order will be forthwith drawn up for approval by the Judge.

2.52.222 REHEARING (1) Same as existing rule.

(2) If a request for a rehearing is filed, the parties requesting rehearing shall set forth specifically and in full detail the grounds upon which the party considers the order to be incorrect. If the Court denies the request for rehearing, the original order issued by the Court shall be considered the final decision of the Court as of the day the rehearing is denied. If a rehearing is granted, the matter will be set for ~~hearing~~ trial. The matter will be determined by the testimony taken at the initial ~~hearing~~ trial and at the rehearing. After the rehearing, the Court will issue ~~an~~ the final order setting forth the court's ~~final~~ determination of the disputed issues.

(3) Same as existing rule.

(4) A proposal for decision by hearing examiner will be given preliminary approval by the Court and reviewed at the motion of a party as provided in this section. Conclusions of law and interpretations of statutes or rules written by a hearing examiner may be reconsidered by ~~a~~ the Court upon its own motion or at the request of a party. Findings of fact made by a hearing examiner will not be rejected or revised unless the Court first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

3. The Court has thoroughly considered the oral comments made at the public hearing on August 19, 1980 and all written commentary received subsequent to the original notice date. These comments and the Court's responses follow:

Comment: The parties involved in a workers' compensation case should be required to exchange all exhibits at the time the witness lists are exchanged.

Response: A rule requiring the exchange of all exhibits would be subject to so many exceptions that it would not be practical. Parties seeking to discover exhibits can do so by using Rule 2.52.216 Motions to Produce.

Comment: A penalty should be imposed if a Pretrial Order is not prepared by the time of the pretrial conference.

Response: Often an attorney's services are sought a short time before the pretrial conference and in such cases it is often impossible for the attorney to come to the pretrial conference with a fully prepared Pretrial Order.

Comment: Hearing examiners should not write findings of fact and conclusions of law unless they have heard the cases.

Response: The Court agrees with this comment. It is not necessary to state this in a rule.

Comment: The Montana Rules of Civil Procedure regarding discovery should be incorporated by reference into the Workers' Compensation Court's rules.

Response: Not all of the Montana Rules of Civil Procedure regarding discovery are appropriate for the Workers' Compensation Court system. The Workers' Compensation Court must choose only those rules which are appropriate for it.

Comment: The Court should not adopt any rules regarding discovery and thereby simplify its procedure.

Response: The Court feels that it is necessary to give guidance in this area and that it is in the best interest of all parties to adopt discovery rules.

Comment: The rule regarding the filing of findings of fact and conclusions of law and briefs is too harsh. A sentence should be added stating that additional time for filing will be granted if the Court in its discretion believes it is justified.

Response: Under ARM 2.52.224 Rules Compliance the Court in the interest of justice has the power to waive any irregularity and/or noncompliance with a rule. This section gives the Court authority to allow additional filing time if the Court believes justice would be served by doing so.

Comment: The Pretrial Order should be prepared and available at least ten days before the trial.

Response: A rule establishing such a requirement would be subject to so many exceptions that it would not be practical.

Comment: The Court should allow depositions of "parties" to be taken as well as depositions of "witnesses."

Response: While the Court has assumed that parties may be deposed under the present rule, the Court would like to change the rule in the interest of clarity. The Court will renotice the rule and add that depositions of "parties" may be taken.

Comment: Interrogatories should be limited to the discovery of supplemental material not available from the file of the Workers' Compensation Division.

Response: Any party unduly burdened by interrogatories should ask for relief under ARM 2.52.215(2) Interrogatories. A party who believes the opposing party has not examined the Workers' Compensation Division file should ask the Court under this rule to be relieved from the obligation of responding to the interrogatories.

Comment: No depositions or other discovery methods should be allowed after a trial except in emergency situations.

Response: It is the Court's practice to admit post trial depositions only for good cause. However, good cause arises in such a variety of situations that it is not appropriate to write a specific rule regarding this matter.

Comment: The Court should limit the number of interrogatories to twenty.

Response: The person offering this suggestion stated that such a rule was under consideration in other court systems. Before limiting the number of interrogatories allowed in workers' compensation cases, the Court will wait to see if the interrogatory process is abused. Anyone unduly burdened by interrogatories can ask the Court for relief under ARM 2.52.215(2) Interrogatories.

Comment: The Court should write a rule to cover class action suits.

Response: If and when this Court is confronted with multiple petitions from simiarly situated claimants, the Court can determine whether or not there is a need for such a rule.

Comments: (1) The Court should not appoint hearing examiners who are not attorneys. (2) The Court is not an agency and, therefore, should not appoint any hearing examiners. The Workers' Compensation Judge should hear and decide all cases.

Response: The Court is a hybrid entity, headed by an officer of the judical branch but also treated as an executive branch agency for limited purposes. The Court has sufficient relationship with the executive branch to appoint hearing examiners under 2-4-611 MCA (1979). There are no requirements in that section that hearing examiners be lawyers. The Judge retains the power to issue the final order and to grant rehearings in any cases heard by hearing examiners.

Comment: Neither twenty nor thiry days is adequate pretrial preparation time for defense attorneys.

Response: The primary consideration of the Court is prompt determination of claims. The Court feels that thirty days is adequate preparation time.

Comment: Exhibits not listed in the Pretrial Order should not be allowed to be introduced at trials except by stipulation of both parties.

Response: This suggestion is too inflexible. Given the short time ordinarily allowed for pretrial preparation due to the Court's policy of promptly deciding all claims, there will inevitably be instances when counsel will need to offer exhibits not previously contemplated.

Comment: The proposed amendment to ARM 2.52.212 could be interpreted to mean that only the medical reports stipulated to by both parties may be introduced into evidence. The rule should not be changed.

Response: The proposed amendment to this rule does not preclude the offering of exhibits in the Workers' Compensation Court if the proper foundation is laid.

Comment: The rule on depositions should include a provision allowing for objections to be made to depositions taken subsequent to trial.

Response: The Court agrees with this comment and will renotice the rule making the suggested change.

Comment: Under ARM 2.52.203 the clerk should not be allowed to destroy unacceptable documents but should be required to return them.

Response: The Court would like to remain flexible enough so that it has a choice in whether or not to return large mailings. In practice most documents will be returned.

Comment: Not all of the trials during the January and July term should be held in Helena.

Response: Due to budget restrictions and time limitations, the Court is not able to travel to the extent it traveled in the past.

Comment: Rule 37(a) of the Montana Rules of Civil Procedure should be adopted and incorporated into ARM 2.52.215 Interrogatories so that if justice requires the Court can deny the award of expenses to the prevailing party.

Response: Under ARM 2.52.224 Rules Compliance the Court has authority to waive any of the procedural rules in the interest of justice. This rule gives the Court authority to deny expenses to the prevailing party if justice would be served by doing so.

Comment: Closing arguments by attorneys should be allowed and the rule on trial conduct should not be amended.

Response: Because a trial is conducted as a trial without a jury and due to time restrictions, the Court does not believe there is a need for closing arguments.

Comment: ARM 2.52.220 should specify whether or not "trial briefs" are to be exchanged with the opposing party.

Response: The Court's policy is not to accept any ex parte documents.

William E. Hunt
JUDGE

CERTIFIED TO THE SECRETARY OF STATE 9-15-90

BEFORE THE WORKERS' COMPENSATION COURT
OF THE STATE OF MONTANA

In the matter of the adoption of procedural rules for appellate review and motions to produce.	))))	NOTICE OF ADOPTION OF PROCEDURAL RULES FOR APPELLATE REVIEW AND MOTIONS TO PRODUCE

TO: All Interested Persons

1. On July 17, 1980 the Workers' Compensation Court published a Notice of Public Hearing on the following proposed procedural rules: Appeals Regarding Crime Victims' Compensation, Occupational Disease Claims and Subrogation, Attorney Fees and Motions to Produce at page 2155 of the 1980 Montana Administrative Register, Issue No. 13.

2. The Workers' Compensation Court has adopted the rules for appellate review and motions to produce as follows:

Rule II (2.52.225 Appeals Regarding Crime Victims' Compensation, Occupational Disease Claims, and Subrogation) and Rule III (2.52.216 Motions to Produce).

Rule I, Attorney Fees, has been withdrawn.

3. The Court has thoroughly considered all written comments received subsequent to the original notice date and all oral comments received at the public hearing held on August 19, 1980 and responds to those comments as follows:

Comment: A number of attorneys objected to the proposed rule on attorney fees. The main objections are as follows:

1. The proposed rule interferes with the contract rights of attorneys and clients.

2. If the contingent fee agreement is not allowed, clients will be unable to get adequate legal representation.

3. The proposed rule will lead to evidentiary hearings on attorney fees.

4. The Court has the authority to make a determination of the amount of attorney fees the insurer is to pay but does not have the authority to determine the amount of the contingent fee agreed upon between the attorney and the claimant and approved by the Workers' Compensation Division.

5. If the amount of the attorney fees is based on an hourly rate, the skilled attorneys will be penalized.

Response: The Court is persuaded by these objections to withdraw the proposed rule at this time.

Comment: The Montana Rules of Civil Procedure regarding discovery should be incorporated by reference into the Workers' Compensation Court's rules.

Response: Not all of the Montana Rules of Civil Procedure regarding discovery are appropriate for the Workers' Compensation Court system. The Workers' Compensation Court must choose only those rules which are appropriate for the Court.

Comment: The Court should not adopt any rules regarding discovery and thereby simplify its procedures.

Response: The Court feels that it is necessary to give guidance in this area and that it is in the best interest of all parties to adopt discovery rules.

Comment: Motions to produce should be limited to the discovery of supplemental material not available from the file of the Division of Workers' Compensation.

Response: Any party unduly burdened by discovery requests should ask for relief under ARM 2.52.224 Rules Compliance. A party who believes opposing party has not examined the Division of Workers' Compensation file should ask the Court under this rule to be relieved from the obligation of responding.

William E. Hunt
JUDGE

CERTIFIED TO THE SECRETARY OF STATE 9-15-80

BEFORE THE DEPARTMENT OF AGRICULTURE

OF THE STATE OF MONTANA

In the matter of the repeal of Rules 4.2.070, 4.2.080, 4.2.090, 4.2.100, 4.2.110, 4.2.120, 4.2.140, 4.2.150 pertaining to the implementation of the Montana Environmental Policy Act; and the adoption of new Rules I through X implementing MEPA	NOTICE OF CORRECTION TO NOTICE OF 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 May 15, 1980, the Department of Agriculture published notice of a proposed repeal of rules 4.2.070, 4.2.080, 4.2.090, 4.2.100, 4.2.110, 4.2.120, 4.2.140, 4.2.150, of the then present rules implementing the Montana Environmental Policy Act; and the adoption of new rules I through X (4.2.301 through 4.2.310) implementing MEPA, at page 1292 of the 1980 Montana Administrative Register, issue number 9.

2. On June 26, 1980, the Department of Agriculture published "NOTICE OF REPEAL . . . AND ADOPTION OF REVISED RULES . . . " as above-captioned, at page 1698 of the 1980 Montana Administrative Register, issue number 12. In that notice, on page 1698 the Department erroneously transposed some explanatory imformation. The correct text of paragraph no. 1 is as follows: "On May 15, 1980, the Department of Agriculture published notice of a proposed repeal of rules 4.2.070, 4.2.080, 4.2.090, 4.2.100, 4.2.110, 4.2.120, 4.2.140, 4.2.150 being all of the present rules, except 4.2.130, implementing the Montana environmental Policy Act; and the adoption of Revised Rules I through X (4.2.301 through 4.2.310) implementing MEPA, at page 1292 of the 1980 Montana Administrative Register, issue number 9." The said notice in paragraph 3 on page 1698 erroneously stated that no comments or testimony were received. The said paragraph should be corrected to read "No public comments or testimony were received; however, the Legislative Council legal staff commented that a citation of authority, namely: 2-15-112 MCA, had been omitted from paragraph 6 of the NOTICE OF PUBLIC HEARING . . . published on May 15, 1980 at page 1292 of the 1980 Montana Administrative Register, issue number 9". The Department therefore submits this NOTICE OF CORRECTION for publication in the rule section of issue number 18, 1980 Montana Administrative Register.

W. Gordon McOmber, Director

Certified to the Secretary of State, September 12, 1980.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Rules 10.57.102, 10.57.105, 10.57.204, 10.57.301, 10.57.403, 10.57.404 and 10.57.405, concerning teacher certification and endorsements.	NOTICE OF THE AMENDMENT OF RULES 10.57.102, 10.57.105, 10.57.204, 10.57.301, 10.57.403, 10.57.404 and 10.57.405.

TO: All Interested Persons:

1. On July 17, 1980, the board of public education published notice of a proposed amendment to Rules 10.57.102, 10.57.105, 10.57.204, 10.57.301, 10.57.403, 10.57.404 and 10.57.405 concerning teacher certification and endorsements, at Page 2172 of the 1980 Montana Administrative Register, issue Number 13.

2. The agency has amended the rule as proposed.

3. The rule has been amended to comply with the request of the Administrative Code Committee.

Marjorie W. King
MARJORIE W. KING, CHAIRMAN
BOARD OF PUBLIC EDUCATION

CERTIFIED TO THE SECRETARY OF STATE 10/14/80

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Rules 10.57.601, 10.57.602, 10.57.603 and 10.57.604, regarding suspension and revocation of teacher certificate.	NOTICE OF THE AMENDMENT OF RULES 10.57.601, 10.57.602, 10.57.603 and 10.57.604.

TO: All Interested Persons

1. On July 17, 1980, the board of public education published notice of a proposed amendment to Rules 10.57.601, 10.57.602, 10.57.603 and 10.57.604, concerning suspension and revocation of teacher certificates, at Page 2182 of the 1980 Montana Administrative Register, issue Number 13.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received.

Marjorie W. King

MARJORIE W. KING, CHAIRMAN
BOARD OF PUBLIC EDUCATION

CERTIFIED TO THE SECRETARY OF STATE Sept. 16 1980

BOARD OF LIVESTOCK

EMERGENCY RULE TO AMEND

REASON FOR EMERGENCY AMENDMENT OF RULE 32.3.401

The purpose of this emergency rule is to adopt the use of a reduced dose of Brucella abortus strain 19 vaccine in cattle. This will result in a marked increase in the diagnosibility of bovine brucellosis; in the immunity in the individual animal and the herd and a marked decrease in the number of animals condemned due to vaccinal induced antibodies that confuse the testing procedure to detect field strain brucellosis. This program change will hasten the ultimate eradication of brucellosis as a threat to man and cattle in Montana.

Nature of the Disease. Brucellosis is a disease which can afflict higher types of mammals, including man. In Montana, it is most commonly found in cattle although it can be found in swine, goats, bison and other animals. It is an infectious disease causing abortions and sterility in animals, and under certain conditions it is highly contagious, and it can be fatal. While treatment of this disease is possible in both human beings and animals, it is economically unfeasible insofar as animals are concerned. For this reason, brucellosis control efforts with respect to animals are those which focus on eradication of the disease.

Brucellosis causes severe adverse economic effects in the livestock industry, particularly in the cattle industry at the cow-calf producer level, because it reduces fertility, conception and birth rates with an attendant reduction in size of calf crops.

Current Status of Brucellosis Control Efforts in Montana. Until recently, the Department has been able to rely upon the cooperation of livestock producers affected by the disease in its efforts to control brucellosis. They have:

(1) cooperated with the Department to the end of testing animals to determine whether or not brucellosis exists in their herds; (2) in the quarantining of herds determined to have animals infected with brucellosis; (3) in retesting of quarantined herds until determined to be brucellosis free; (4) in removal of brucellosis reactor animals from quarantined herds for immediate slaughter; and (5) complied with measures to control the movement and disposition of animals other than brucellosis reactors in herds under brucellosis quarantine including provisions for slaughter of certain of such animals if removed from the quarantined herd and quarantined premises.

Since 1974, 56 percent of the herds quarantined because of possible infection with brucellosis were proven to be problems with an overdose of Strain 19 vaccine. This resulted in 196 herds being quarantined unnecessarily, subjected to

repeated testings and a considerable number of cattle being condemned and slaughtered. The utilization of the reduced dose will eliminate most of this problem.

During the period, FY1976 through 1979, over 7½ million dollars have been expended in Montana by the cattle industry, state and federal governments to control and eradicate brucellosis. The adoption of the reduced dose of vaccine will virtually guarantee that all of the 1980 heifer calves will be vaccinated with this dose, thereby eliminating the continued problem with vaccine titers in the future.

32.3.401 DEFINITIONS (1) An "animal" is any quadruped of a species which can become infected with brucellosis. The term includes, but is not limited to a member of the bovine, porcine, canine, ovine, bison, caprine, or feline species, or the genus cervidae.

(2) "Brucellosis" is an infectious, transmissible disease of animals and man caused by Brucella abortus, Brucella suis or Brucella melitensis, which are referred to in these rules collectively as "Brucella organisms" or individually as a "Brucella organism".

(3) An "approved antigen" is a standardized suspension of Brucella organism approved by the United States department of agriculture used for testing for brucellosis.

(4) An "official test" is a test by a deputy state veterinarian or other person specifically trained to conduct such test approved by the state veterinarian, performed on animal blood, sera, secretions, excretions, discharges, tissues, fetal membranes, or fetuses designed to indicate the presence of brucellosis utilizing one or more of the following procedures: the standard plate test (SPT), the standard tube test (STT), the card test (CT), the rivanol test, the complement fixation (CF) test, the mercaptoethanol (ME) tube test, the rapid screening test (RST), brucellosis ring test (BRT), the heat inactivation test (HIT), the hemoagglutination (HA) test, or any other isolation test or procedure recommended for use in the diagnosis of brucellosis by the United States department of agriculture. To be considered official the procedure is to be performed in a facility approved by the department unless otherwise authorized by the state veterinarian. The determination of whether an animal is a reactor animal, a suspect animal, or a negative animal must be made from the official test by a veterinarian who is in the employ of the department or a designated brucellosis epidemiologist. Test results must be recorded on the official forms of the department for the recording of brucellosis test results.

(5) An "official vaccination" is the subcutaneous inoculation of a female bovine with a Brucella abortus

vaccine licensed and approved by the veterinary biologics division, United States department of agriculture, by a deputy state veterinarian, or other persons approved by the state veterinarian. The approved vaccine will contain 300 million to 3 billion live cells per dose. The female bovine animal ~~of a dairy breed~~ must be ~~2~~ 4 through 6 12 months (~~60~~ 120 to ~~179~~ 365 days) of age ~~or the female bovine animal of a beef breed shall be 2 through 10 months (60 to 299 days) of age~~ at the time of vaccination with licensed and approved Brucella abortus vaccine. An official vaccination shall include proper permanent identification of the animal at the time of vaccination and the issuance of a completed form SV-64.

(6) An "official vaccinate" is an animal, which has received an official vaccination, bearing proper permanent identification with a report of the official vaccination filed with the department.

(7) "Proper permanent identification" of officially vaccinated animals shall include the following forms of identification recorded on form SV-64.

(a) The United States registered "Shield and V" applied in the right ear of the animal. The "Shield and V" shall be preceded by a numeral indicating the quarter of the year and followed by the last digit of the year in which the official vaccination was performed; and

(b) The U.S.D.A. approved metal vaccination eartag placed in the right ear; or

(c) The breed registration tattoo applied in the left ear if the animal is officially registered as a member of a recognized breed.

(d) In the event that the right ear is of insufficient size to accommodate the tattoo and eartag, because of injury or identification ear marking, they may be placed in the left ear.

(8) A "reactor animal" is:

(a) An official vaccinate in which the first pair of permanent incisor teeth has erupted, or, not having the first pair of permanent incisor teeth, that is in the last trimester of pregnancy, parturient or post parturient that discloses sufficient reaction to an official test to indicate the presence of Brucella organisms, or which is found to be infected with Brucella organisms by other diagnositic procedures; or

(b) Any other animal that discloses sufficient reaction to an official test to indicate the presence of Brucella organisms, or which is found to be infected with Brucella organisms by other diagnostic procedures.

(9) "Suspect animal" is:

(a) An official vaccinate in which the first pair of

permanent incisor teeth has erupted, or, not having the first pair of permanent incisor teeth, that is in the last trimester of pregnancy, parturient or post parturient that is displaying equivocal results to an official test; or

(b) Any other animal disclosing equivocal results to an official test.

An "equivocal result" is one in which there is a reaction to an official test indicating the possible presence of Brucella organisms but which is insufficient to justify designating the tested animal as a reactor.

(10) A "negative animal" is:

(a) An official vaccinate in which the first pair of permanent incisor teeth has erupted, or, not having the first pair of permanent incisor teeth, that is in the last trimester of pregnancy, parturient or post parturient that displays negative results to an official test; or

(b) Any other animal which displays negative results to an official test.

(11) An "exposed animal" is any animal that is a part of a herd with brucellosis reactors, or an animal that has been in contact with brucellosis reactors on farms, ranches, in feedlots, in marketing channels or elsewhere for periods of time sufficient for transmission of the Brucella organism.

(12) A "herd" is:

(a) One or more animals of the same species owned or supervised by one or more persons and kept in a location that permits easy intermingling of animals unhindered by man-made or natural barriers; or

(b) Two or more groups of one or more animals of the same species kept geographically separated, but under common ownership or supervision in which there is an interchange or movement of animals between or among such groups without regard to health status.

(13) A "contact herd" is a herd of animals that is shown through epidemiological investigation to have come in contact with herds of known reactor animals, or exposed herds or animals through direct contact or through being in proximity to possible modes of transmission of the Brucella organisms.

(14) A "herd test" is an official test of all swine over 6 months of age in a herd, or an official test of all cattle in a herd over 8 months of age, except steers, spayed heifers, official vaccinates in which the first pair of permanent incisor teeth has not erupted, or, that are not in the third trimester, parturient or post parturient.

(15) "Department" is the Montana department of livestock, animal health division.

(16) "Person" is an individual, partnership, corporation, trust or any other entity capable of owning livestock.

(17) "Investment service" is a person who purchases and manages cattle for five or more separate persons whose primary occupations are not the production of livestock.

(18) "Ram epididymitis" is an infectious disease of sheep caused by a bacteria variously called Brucella ovis, Brucella melitensis ovis or ram epididymitis organism (R.E.O.).

(19) "Official vaccination" for ram epididymitis is the inoculation of the male sheep at weaning age or older, with a ram epididymitis organism vaccine approved by the Montana department of livestock, animal health division, by a deputy state veterinarian. Official vaccination includes permanent identification of the animal at the time of vaccination and the issuance of a completed vaccination form prescribed by the department. (History: Secs. 81-2-102, 81-2-103 MCA; IMP, Sec. 81-2-102 MCA; Eff. 12/31/72; EMERG, AMD, 11/4/75; AMD, Eff. 4/4/77; AMD, 1977 MAR p. 262, Eff. 8/26/77; AMD, 1978 MAR p. 1395, Eff. 9/29/78; AMD, 1980 MAR p. 582, Eff. 2/15/80.)

Robert G. Barthelmess
ROBERT G. BARTHELMESS
Chairman, Board of Livestock

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

Certified to the Secretary of State 1-7-81.

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

In the matter of the repeal of ARM 36.10.102 through 36.10.108, 36.10.116, and 36.10.117 (formerly ARM 36-2.10A(1)-S1000) pertaining to fire regulations on forest lands; and the adoption of new Rules I through XII revising the forest fire rules	NOTICE OF THE REPEAL OF THE PRESENT FOREST FIRE RULES; AND ADOPTION OF REVISED FOREST FIRE RULES

TO: All Interested Persons

1. On March 27, 1980, the Board of Natural Resources and Conservation (Board) published notice of hearings to consider the repeal of ARM 36.10.102 through 36.10.108, 36.10.116, and 36.10.117 found on pages 36-182 through 36-184 and page 36-195 of the Administrative Rules of Montana (ARM) (formerly ARM 36-2.10A(1)-S1000 found on pages 36-17 through 36-20 of the ARM before recodification) and the adoption of new rules pertaining to fire rules on forest lands at pages 1045 through 1049 of the 1980 Montana Administrative Register, issue number 6. Public hearings were held by the Department of Natural Resources and Conservation (Department) at which time oral and written testimony was taken on April 21, 1980, at Bozeman, on April 22, 1980, at Billings, on April 23, 1980, at Missoula, and on April 24, 1980, at Kalispell. Written testimony was accepted until May 10, 1980.

2. Effective on January 1, 1981, the Board has repealed the rules as proposed and has adopted the new rules as proposed except for Rules II, III, and V which the Board has adopted with the following indicated changes:

RULE II VEHICLE EXHAUST AND SPARK ARRESTER REQUIREMENTS. (1) All internal combustion engines operated on forested lands must be equipped with an approved and effective spark arresting device.

(2) Motorbikes, trail cycles, scooter and other vehicles of this type, all stationary and mobile power equipment, and heavy duty trucks of 23,000 GVW or greater must be equipped with spark arresting devices listed as approved in the U.S. Forest Service Spark Arrester Guide. Spark arresting devices must be plainly marked with the manufacturer's name and model number and must be properly installed and maintained in accordance with the guide. Heavy duty trucks may have a vertical stack exhaust system and muffler, provided the exhaust stack extends above the cab of the vehicle.

(3) Power saws must be equipped with a muffler and screen type spark arrester in accordance with the standards set forth

in the U.S. Forest Service Spark Arrester Guide. Power saws used in commercial activities and purchased after December 31, 1980, must also be equipped with a muffler system conforming to the Society of Automotive Engineers Standard J-335b, as set forth in the U.S. Forest Service Spark Arrester Guide.

(4) Exhaust driven turbochargers qualify as efficient spark arresters provided all exhaust gases pass through the turbine impeller. The turbine impeller must be turning at all times and there may be no exhaust bypass. A straight-mechanical-driven supercharger does not qualify.

(5) Automobiles and light trucks of GVW less than 23,000 with complete standard exhaust systems properly mounted and maintained, including a baffle-type muffler and tailpipe through which all exhaust gases pass, also qualify.

RULE III FIRE CACHE. All persons, firms, or corporations engaged in any commercial activity on forest lands shall have available for firefighting purposes a fire cache. The fire cache shall consist of one shovel (round pointed No. 0 or larger) and one Pulaski tool for each person employed at the site of the activity. All tools shall be in good condition and immediately accessible for firefighting purposes. The fire cache tools shall be enclosed in a separate box marked specifically "FOR FIRE USE ONLY".

RULE V FIRE CREW. On all crew operations of 10 or more employees on forest lands, all persons, firms, or corporations responsible for the operations shall designate, train, and equip a fire crew and crew boss ~~with the powers to act for his employer,~~ to take immediate initial action to suppress any fire starting on the operation area, and to report immediately all fires to the recognized agency. The designated crew boss must have the power to act for his employer during fire suppression activities.

3. The following are summaries of the comments received and the Department and Board's responses to those comments:

RULE I FIREFIGHTING EQUIPMENT REQUIRED. No comments received.

RULE II VEHICLE EXHAUST AND SPARK ARRESTER REQUIREMENTS. (1) COMMENT: Delete the phrase "spark arresting devices must be plainly marked with the manufacturer's name and model number, in accordance with the Guide." This phrase is redundant as Forest Service Standard 5100-1a already requires this. This standard could be referred to as a charter to the Spark Arrester Guide.

RESPONSE: Most individuals, including those State employees conducting the inspections, are not necessarily familiar with Forest Service Standard 5100-1a. The Spark Arrester Guide is the reference that is used in the field for determining compliance. Therefore, the redundancy is deemed necessary to ensure

that the intent of the rule is clearly understood. The comment is therefore rejected.

(2) COMMENT: We suggest adding the following requirement: "Power saws used in commercial activities and purchased after June 30, 1977, must be equipped with a muffler system conforming to the Society of Automotive Engineers Standard J-335b".

RESPONSE: We agree, except for the enforcement date. Saws already purchased should not be subject to the rule. Therefore, we will include the statement as follows: Power saws used in commercial activities and purchased after December 31, 1980, must also be equipped with a muffler system conforming to the Society of Automotive Engineers Standard J-335b, as set forth in the U. S. Forest Service Spark Arrester Guide.

RULE III FIRE CACHE (1) COMMENT: On U. S. Forest Service timber sales, the Forest Service requires a fire cache only if 20 or more persons are employed. The current State rule requires a cache for each 10 persons employed. The proposed change will require a cache for as few as one person. In addition, each vehicle must contain fire tools. For small crew operations, this will necessitate an unnecessary duplication of tools.

RESPONSE: Under proposed Rule I, fire tools will no longer be required in every vehicle, unless camp fires or warming fires are to be ignited. However, even in this case, the existence of a readily accessible fire cache would satisfy the requirement (except for the one gallon bucket). Also, the U. S. Forest Service normally modifies its fire tool requirements to correspond to State rules. Therefore, we feel that the duplication as described will, in fact, not be necessary. In addition, the existence of fire tools in a vehicle does not necessarily ensure that they will be readily available to a worker should a fire start. The comment is therefore rejected.

(2) COMMENT: Literally read, the rule would require a cache of tools to be kept for all persons employed by a company, even if they are not actually working on the land affected. We suggest the proposed rule be amended to require a fire cache ". . . for each person employed at the site of the activity."

RESPONSE: We agree. The rule will be so changed.

(3) COMMENT: Why is the requirement limited to "commercial activity"? If the object is to have the means of fire suppression at hand where people congregate, the limitation to "commercial" is discriminatory, in terms of the object of the regulation.

RESPONSE: Each forest fire rule is targeted at a specific activity or situation which has been shown in the past to have the potential to either lead to the ignition of a wildfire, or to promote the spread of a wildfire. The object of Rule III is not simply to ensure that the means of fire suppression are available where people congregate. The rule is targeted specifically at commercial woods operations, where State-wide large numbers of workers are employed on a daily basis. These type

of operations, which routinely involve the use of power equipment, including power saws, have historically been the cause of numerous wildfires and have been identified as high fire risk activities. The activities of the general public and non-commercial organizations (such as church camps), which can also be of a high fire risk nature, are specifically regulated under Rules I and II. The comment is therefore rejected.

(4) COMMENT: The reason for having twice as many tools available as there are people available to use them is not clear.

RESPONSE: Because of the considerable difference in forest fuel types, terrain, and ground surface conditions State-wide, one type of tool (for example a shovel) may not be an effective firefighting tool under all circumstances. However, there are few situations where either a shovel or a Pulaski will not suffice. For this reason, we feel that one of each type of tool should be readily available for each potential firefighter. This will ensure the optimum utility of each individual in suppressing wildfires under all types of conditions within the State.

RULE IV CORRECTION OF HAZARDS AND PATROLLING No comments received.

RULE V FIRE CREW (1) COMMENT: Define the word "train."

RESPONSE: We feel that our intent in using the word "train" is readily apparent in the proposed rule. However, in order to avoid any possible misunderstanding, we will reword Rule V as follows:

"On all crew operations of 10 or more employees on forest lands, all persons, firms, or corporations responsible for the operations shall designate, train, and equip a fire crew and fire boss to take immediate initial action to suppress any fire starting on the operating area, and to immediately report all fires to the recognized agency. The designated crew boss shall have the power to act for his employer during fire suppression activities.

(2) COMMENT: Why was the crew size dropped from 20 to 10?

RESPONSE: The crew size was lowered to 10 to reflect the current trend toward using smaller size crews on woods operations. The intent is to ensure that a fire suppression capability exists, even with the smaller size crews.

RULE VI SMOKING AND LUNCH FIRES No comments received.

RULE VII DEBRIS DISPOSAL No comments received.

RULE VIII POWERLINE INSPECTIONS (1) COMMENT: The Montana Power Company owns and operates a total of approximately 18,500 miles of electric transmission and distribution lines in Montana. We must question whether the cost of the inspections mandated by the rule bears any relation whatever to the supposed benefits to be derived therefrom, and recommend that the rule not be

adopted. Our transmission lines (over 33,000 volts) are inspected annually by air. While our distribution lines are not inspected on a formal basis every year, they are under a species of random continuous inspection because they are observed by our employees on a day-to-day basis in the course of other work. While a line may thus have been observed many times in a year by employees competent to note and discover hazardous conditions, it would not be possible to certify as a fact that each segment of such lines had been inspected, when, and by whom.

RESPONSE: The annual inspection being proposed should not increase the costs of inspection to any great extent. Transmission lines are already being inspected on an annual basis. We are simply asking that the individual responsible for the inspection be specifically instructed to look for fire hazards and risks during that inspection. We are assuming that the company would desire to remedy any hazards or risks that might be discovered whether this rule exists or not. In the case of distribution lines, it is not necessary to document who made the inspection or when. We are simply asking that the company ensure that all distribution lines have in fact been observed by a competent employee (as stated in the comment above) at least once prior to the beginning of each fire season; and that that employee is looking for fire hazards and risks during observation. The comment is therefore rejected.

(1) COMMENT: The blizzard of paper produced by an effort to document each line observation would swell our files and perhaps provide non-productive employment for a few platoons of record keepers, but would not add one iota to the safety of our operations. Therefore, to satisfy the proposed rule, a formal program of annual inspection would have to be instituted which would be essentially duplicative of what is done now.

RESPONSE: We disagree that the proposed rule would result in large increase in paperwork and record-keeping. Documentation of each line observation is not necessary. We are asking only that the company ensure that inspections are made. In fact, a report is only necessary if a problem is discovered and remedial action is taken. We believe that this requirement will add to the safety of operations since powerlines have caused forest and range fires in the past. Adding fire prevention to the existing inspection program should have positive effects in reducing such fires. Finally, the inspection mandated by the proposed rule will not require that an inspection program be initiated which would be a duplicate of an existing inspection program. We are asking that fire safety be included in the already existing inspection program, and that the existing program be expanded (if necessary) to include all transmission and distribution lines. The comment is therefore rejected.

(3) COMMENT: Inspection will not prevent problems. The principal cause of transmission and distribution line failures is the mindless use of insulators for target practice by the public. This occurs at all seasons of the year, and an inspection one day will not guarantee it will not happen the next.

Failures from the gradual deterioration of equipment are extremely rare. Secondly, although insulators do spontaneously fail at times, there is no known method of inspection which will reliably indicate the likelihood of failure in advance of the event. As to these failures, inspection will therefore disclose nothing.

RESPONSE: We disagree. Inspections will help prevent problems. As had been indicated, the destruction of insulators by the public is a recognized cause of line failures. Since such failures can and do lead to the ignition of wildfires, it seems reasonable that insulators should be checked prior to the start of the forest fire season. Granted, spontaneous or gradual insulator failure may be unlikely, and probably impossible to determine visually; however, if the principal cause of line failures is the destruction of insulators, a broken or shattered insulator should be easy to identify using a visual inspection procedure. Therefore, inspections would appear justified on the basis of insulator problems alone. However, there are also other circumstances which can result in powerline caused fires. For example, arcing distribution lines are a potential cause of wildfires. Other risks and hazards include fuel buildups in right-of-ways, unsafe powerline poles, dead or dying trees with the potential to fall into powerlines, too long of span lengths, and excess slack in lines. The comment is therefore rejected.

(4) COMMENT: Annual notification to each "recognized agency" that an inspection has been made, fire hazards and risks found, and remedial action accomplished is in keeping with the tradition of multiplying official reports, but we are unable to see any other purpose for it. We do not expect personnel in those agencies to have the expertise to judge whether an inspection or remedial action was adequate. If the purpose of these multiple reports is for us to certify that we have obeyed the law, then we oppose it as totally unnecesary.

RESPONSE: The intent of the reporting requirement appears to have been misunderstood. The rule correctly states that the requirement is simply to ". . . inform the recognized agency that necessary remedial actions have been accomplished." No multiple reports are called for, nor is an annual notification necessarily required. One notification that remedial actions have been taken on discovered fire hazards or risks to the Division of Forestry will suffice, as long as the location of the actions is identified. The intent of the reporting requirement is to determine whether or not fires are occurring in locations where remedial actions have taken place. The comment is therefore rejected.

(5) COMMENT: You must consider the effect of other law. Section 69-4-201, MCA, adopts the National Electric Safety Code as a standard. Section 214 of that code provides an inspection standard which differs from the proposed rule. There is a distinct possibility that a conflict between the proposed rule and the existing code would be decided in favor of the NESC.

RESPONSE: Section 69-4-201, MCA, sets construction standards for utility lines. The proposed rule requires an annual inspection of existing lines for fire hazards and risks peculiar to forested areas. We see no possible conflict between NESC construction standards and our proposed rule regarding existing powerlines. The comment is therefore rejected.

RULE IX FOREST ACTIVITY RESTRICTIONS. No comments received.

RULE X FOREST CLOSURE (1) COMMENT: Paragraph 3 of this rule should be modified to include utility business as exempt from the permit requirement. When a line does go down, a utility should not have to seek out the appropriate agency, convince it of a "real need", whatever that may be, and then secure a permit before investigating the cause of the event. The nature of the utility business requires us to be as expeditious as possible in eliminating any continuing hazard and restoring service.

RESPONSE: Permits are issued at the actual point of closure on the road leading to forested lands. A permit may thus be quickly and easily obtained by a repair crew with little delay or inconvenience. We wish to avoid attempting to identify all types of "real need" in the rule, since undoubtedly some legitimate needs would be left off. The intent of the rule is not to restrict entry to legitimate repair and service functions, but rather to limit access to those necessary activities. The written permit allows us to know who is in the closed areas and where, so that they can be located if their safety is threatened. The proposal is therefore rejected.

RULE XI REQUEST FOR REVIEW. No comments received.

RULE XII APPLICABILITY. No comments received.

(4) The new rules are assigned to the following numbers in the ARM: Rule I (36.10.109); Rule II (36.10.110); Rule III (36.10.111); Rule IV (36.10.112); Rule V (36.10.113); Rule VI (36.10.114); Rule VII (36.10.115); Rule VIII (36.10.118); Rule IX (36.10.119); Rule X (36.10.120); Rule XI (36.10.121); and, Rule XII (36.10.122).

(5) The authority of the Board to repeal and adopt is Section 76-13-109, MCA. The code provisions implemented are parts 1 and 2, Chapter 13, Title 76, MCA.

Cecil Weeding, Chairman
Board of Natural Resources and Conservation

Certified to the Secretary of State September 11, 1980.

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

In the matter of the repeal of ARM 36.11.204 (formerly ARM 36-2.10B(2)-S1070) pertaining to clearing rights-of-way and the amendment of 36.11.201, 36.11.202, 36.11.203, and 36.11.211 (formerly ARM 36-2.10B(2)-S1040, 36-2.10B(2)-S1050, 36-2.10B(20-S1060, and 36-2.10B(2)-S1080, respectively) pertaining to fire hazard reduction or management	NOTICE OF THE REPEAL OF ARM 36.11.204 and THE AMENDMENT OF ARM 36.11.201, 36.11.202, 36.11.203, and 36.11.211

To: All Interested Persons

1. On March 27, 1980, the Board of Natural Resources and Conservation (Board) published notice of hearings to consider the repeal of ARM 36.11.204 found on page 36-223 of the Administrative Rules of Montana (ARM) (formerly ARM 36-2.10B(2)-S1070 found on page 36-28 of the ARM before recodification) pertaining to clearing of rights-of-way and the amendment of ARM 36.11.201, 36.11.202, 36.11.203, and 36.11.211 found on pages 36-221 to 36-223 and page 36-227 of the ARM (formerly 36-2.10B(2)-S1040, 36-2.10B(2)-S1050, 36-2.10B(2)-S1060, and 36-2.10B(2)-S1080, respectively, found on pages 36-25 to 36-28 of the ARM before recodification) pertaining to the fire hazard reduction or management. This Notice is found at pages 1050 through 1053 of the 1980 Montana Administrative Register, issue number 6. Public hearings were held by the Department of Natural Resources and Conservation (Department) at which time oral and written testimony was taken on April 21, 1980, at Bozeman, on April 22, 1980, at Billings, on April 23, 1980, at Missoula, and on April 24, 1980 at Kalispell. Written testimony was accepted until May 10, 1980.

2. The Board has repealed ARM 36.11.204 (formerly 36-2.10B(2)-S1070) as proposed and has adopted the amendments as proposed except for ARM 36.11.202 (formerly ARM 36-2.10B(2)-S1050) which the Board has adopted with the following indicated change to the definition of "fire hazard reduction" and except for a change from the word "operator" to "contractor" in ARM 36.11.203(3) (formerly ARM 36-2.10B(2)-S1060(3)).

36.11.202 DEFINITIONS. Unless the context clearly requires otherwise, as used in this sub-chapter and the forms and procedures adopted hereunder:

. . .

(4) "Fire hazard reduction" means the treatment of the

fire hazard by methods such as lopping and scattering, hand or dozer piling, and burning, removal or chipping to the extent necessary for reasonable safety of the residual timber stand, future stands, and the property of others.

. . . .

36.11.203 CONTROL OF TIMBER SLASH AND DEBRIS

. . .

(3) If ~~an operator~~ a contractor does not perform the hazard reduction responsibilities as prescribed in the fire hazard reduction agreement reasonably concurrent with the creation of the fire hazard, i.e., cutting the tree, the department after 30 days following notice may assume the responsibilities to reduce or manage the hazard.

. . . .

3. The following are summaries of the comments received and the Department and Board's responses to those comments:

(1) COMMENT: What does the term "reasonably concurrent" really mean, and what happens if an individual does not reduce slash within 18 months?

RESPONSE: The term "reasonably concurrent" is defined in the definition section of the rule as 18 months, unless special circumstances warrant an extension from the Department. It is further defined in ARM 36.11.203(2) (formerly ARM 36-2.10B(2)-S1060(2)), as reasonably concurrent with the creation of the fire hazard, i.e., cutting the tree. The second part of this question is also answered in ARM 36.11.203(3) (formerly ARM 36-2.10B(2)-S1060(3)). If a contractor fails to do the work in the required time limit, he will be notified and following 30 days' notice, the Department may assume the responsibility to reduce or manage the hazard if necessary. Under Section 76-13-410, MCA, of the Hazard Reduction or Management Law, the Department can assess the cost of disposal plus 20% as a penalty.

(2) COMMENT: Within the guidelines are there any provisions for firewood gathering? Wouldn't 20 months be more appropriate?

RESPONSE: The use of slash for firewood is something that should be included in the timber sale contract. The Hazard Reduction Law does not address the issue. The Division should include the use of slash as firewood as a method of hazard reduction, but the firewood should be removed from piles or handled in some way within the 18-month time limit. The extension of time to 20 months is not necessary, as two months would not make that much difference anyway, and an extension for special circumstances is possible under the definition of "reasonably concurrent". Removal of the fire hazard was included in the definition of hazard reduction.

(3) COMMENT: The 18-month time limit would be insufficient under unusual circumstances such as long, dry, hot falls or air

pollution alerts. Would these conditions fall under the category of special circumstances warranting extensions?

RESPONSE: Yes, the Division cannot expect the contractor to burn during unsafe conditions or when an air pollution alert has been declared. However, there have been very few days when burning was restricted or when contractors could not burn because of fire danger. Therefore, we do not see these problems as major excuses for not completing the work in 18 months.

(4) COMMENT: Is it correct that under the definition of fire hazard reduction that if I do brush piling, I do not have to burn the piles?

RESPONSE: No, the definition of hazard reduction should read pile and burn. The guidelines the inspector uses to determine if you are in compliance is the prescription on the hazard reduction agreement. Those instructions are based on the hazard created, the type of equipment the contractor has available, and other factors or variables unique to the area in question. Generally, if piling is the method to be applied, burning is required as well. The definition of hazard reduction was changed due to this comment.

5. COMMENT: When will these changes to the rules go into effect.

RESPONSE: The new rules will go into effect after they are accepted by the Board and then submitted to the Secretary of State. The effective date of the rules will be the date the Notice of Adoption is published in the Montana Administrative Register.

4. The authority of the Board to repeal and to amend the rules is Section 76-13-403, MCA. The code provisions implemented are part 4, Chapter 13, Title 76, MCA.

Cecil Weeding, Chairman
Board of Natural Resources
and Conservation

Certified to the Secretary of State September 11, 1980.

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

In the matter of the amendment of ARM 40.4.407 concerning examinations	NOTICE OF AMENDMENT OF ARM 40.4.407 EXAMINATIONS

TO: All Interested Persons:

1. On August 14, 1980, the Board of Architects published a notice of proposed amendment of ARM 40.4.407 concerning examinations at pages 2343 and 2344, 1980 Montana Administrative Register, issue number 15.

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 DENTISTRY

In the matter of the Adoption of rules of professional conduct	NOTICE OF ADOPTION OF RULES OF PROFESSIONAL CONDUCT ARM 40.14.701 through 40.14.721

TO: All Interested Persons.

1. On August 14, 1980, the Board of Dentistry published a notice of adoption of rules of professional conduct at pages 2345 through 2350, 1980 Montana Administrative Register, issue number 15.

2. The board has adopted the rules 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, September 16, 1980.

BEFORE THE DEPARTMENT OF REVENUE

OF THE STATE OF MONTANA

IN THE MATTER OF THE REPEAL OF NUMEROUS RULES, relating to property tax.	)))	NOTICE OF REPEAL OF NUMEROUS RULES relating to property tax

TO: All Interested Persons:

1. On July 31, 1980, the Department of Revenue published repeal of numerous rules relating to property tax, at pages 2234 and 2235 of the 1980 Montana Administrative Register, issue no. 14.

2. The Department has repealed the rules as proposed.

3. No comments or testimony were received.

MARY L. CRAIG, Director
Department of Revenue

Certified to the Secretary of State 9-15-80

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

In the matter of the repeal of Rule 46.12.519 (46-2.10(18)-S11440(1)(p)) and the adoption of 46.12.520, 46.12.521, and 46.12.522 all pertaining to medical assistance, podiatry services.	)))))))	NOTICE OF THE REPEAL OF RULE 46.12.519 AND THE ADOPTION OF RULES 46.12.520, 46.12.521, AND 46.12.522 PERTAINING TO MEDICAL ASSISTANCE, PODIATRY SERVICES

TO: All Interested Persons

1. On August 14, 1980, the Department of Social and Rehabilitation Services published notice of a proposed repeal of Rule 46.12.519 and the adoption of Rules 46.12.520 PODIATRY SERVICES, DEFINITION, 46.12.521 PODIATRY SERVICES, REQUIREMENTS and 46.12.522 PODIATRY SERVICES, REIMBURSEMENT/GENERAL REQUIREMENTS AND MODIFIERS all pertaining to medical assistance, podiatry services at page 2353 of the 1980 Montana Administrative Register, issue number 15.

2. The agency has repealed 46.12.519 and adopted the three new rules as proposed.

3. All comments and testimony received were supportive of the proposed rules.

In the matter of the amendment of Rule 46.12.2002 pertaining to physician services, requirements (abortions)	)))	NOTICE OF THE AMENDMENT OF RULE 46.12.2002 PERTAINING TO MEDICAL SERVICES, ABORTION REQUIREMENTS

TO: All Interested Persons

1. On July 31, 1980, the Department of Social and Rehabilitation Services published notice of a proposed amendment of Rule 46.12.2002 pertaining to physician services, requirements (abortions) at page 2241 of the 1980 Montana Administrative Register, issue number 14.

2. The agency has amended the rule as proposed with the following change in subsection (1):

(1) Utilization and peer review of physician services shall be conducted by the designated ~~professional~~ review organization.

3. The Department has thoroughly considered all verbal and written commentary received. The commentary dealt primarily with "pro-life" and "pro-choice" issues.

The Department requested this hearing as part of its duty to give public notice of a tentative statewide change in Medicaid payments for abortion as required by 42 CFR 447.205, 42 CFR 431.211 and 2-4-302 MCA.

Currently the Department is required to cover all medically necessary abortions under Medicaid. The U.S. Congress has attempted to restrict appropriations for Medicaid abortions with the "Hyde Amendment."

These restrictions have been found to be constitutional by the U.S. Supreme Court in the case of Harris v. McRae. A petition for rehearing has been filed which will probably be heard after the Court's summer recess.

The Department anticipates that the Court will deny the petition for a rehearing and wish to have our current rule on Medicaid abortions revised to comport with the "Hyde Amendment." We will not finalize this Rule as amended until such time as the Court finally rules in this case. Therefore, the effective date of this amended rule will be the effective date of the U.S. Supreme Court's decision eliminating federal financial participation for some Medicaid abortions in the case of Harris v. McRae.

The "Hyde Amendment" does not rule out abortions paid by other than Federal funds. Some states opt to pay for abortions by using 100% State funds. This is not an option for us because of the clear legislature intent shown by 50-20-103 MCA. The Montana Legislature has further expressed its intent not to use 100% State funds for services in 53-6-102 MCA. Services can be more fully provided when they are matched with Federal funds.

Jon A. Meredith
Director, Social and Rehabilitation Services

Certified to the Secretary of State September 16, 1980.

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

In the matter of the amendment of Rule 46.10.108 (46-2.10(14)-S11070)) pertaining to AFDC overpayments and underpayments	)))))	NOTICE OF THE AMENDMENT OF RULE 46.10.108 (46-2.10(14)-S11070) PERTAINING TO AFDC OVERPAYMENTS AND UNDERPAYMENTS

TO: All Interested Persons

1. On July 31, 1980, the Department of Social and Rehabilitation Services published notice of a proposed amendment of Rule 46.10.108 (46-2.10(14)-S11070) pertaining to AFDC overpayments and underpayments at page 2236 of the 1980 Montana Administrative Register, issue number 14.

2. The agency has amended the rule as proposed.

3. The Department has thoroughly considered all verbal and written commentary received:

Comment: The proposed amendment is illegal as being inconsistent with the Social Security Act and applicable federal regulations, insofar as it permits the State to recoup 125% of an overpayment from current AFDC grants.

Response: The proposed amendment implements Section 53-2-108 MCA passed by the Montana Legislature in 1979. The rule as written allows the Department of Social and Rehabilitation Services the discretion as to whether to recoup overpayments from current assistance grants. Presently, it is not the Department's intention or practice to recoup overpayment when a recipient willfully withheld information until the compliance issue between U.S. Department of Health and Human Services and the State of Washington is finally resolved.

Jon A. Meredith
Director, Social and Rehabilitation Services

Certified to the Secretary of State September 16, 1980.

VOLUME NO. 38 OPINION NO. 103

CONFLICT OF INTEREST - Applicability of Code of Ethics to elected members of city councils;
LOCAL GOVERNMENT - Applicability of Code of Ethics to elected members of city councils;
MUNICIPAL GOVERNMENT - Applicability of Code of Ethics to elected members of city councils;
PUBLIC OFFICERS - Applicability of Code of Ethics to elected members of city councils.
MONTANA CONSTITUTION - Article XIII, section 4;
MONTANA CODE ANNOTATED - Sections 2-2-101, 102;
OP. ATT'Y GEN. - Vol. 37, No. 104; Vol. 38, No. 55.

HELD: The definition of "public officer" in section 2-2-102(6), MCA, includes an elected member of a city council.

4 September 1980

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

Dear Mr. Hanser:

You have requested my opinion concerning whether the definition of "public officer" in section 2-2-102(6), MCA, includes an elected member of a city council. I have concluded that the definition of "public officer" in section 2-2-102(6), MCA, does include an elected member of a city council.

Section 2-2-102(6), MCA, provides that the term "public officer" in the context of Title 2, chapter 2, part 1, MCA, otherwise known as the Code of Ethics, includes "any state officer except a legislator or member of the judiciary or any elected officer of any subdivision of the state." The ambiguity you have pointed out in this definition is that it is not clear at what point the prepositional phrase beginning with the word "except" concludes. Put another way, did the Legislature intend to except from the definition "legislators, members of the judiciary, and any elected officers of subdivisions of the state," or did it simply intend to except "legislators and members of the judiciary"? (Emphasis added.)

The Code of Ethics was enacted by the Legislature to implement the provisions of Article XIII, section 4, of the 1972 Montana Constitution:

> The legislature shall provide a code of ethics prohibiting conflict between public duty and private interest for members of the legislature and all state and local officers and employees. (Emphasis added.)

The title of the Act implementing this provision of the Constitution lends further support to the conclusion that "elected officers of subdivisions of the state" are to be included in the definition of "public officer."

> AN ACT IMPLEMENTING ARTICLE XIII, SECTION 4, OF THE 1972 MONTANA CONSTITUTION TO PROVIDE A CODE OF ETHICS PROHIBITING CONFLICT BETWEEN PUBLIC DUTY AND PRIVATE INTEREST FOR LEGISLATORS AND ALL STATE AND LOCAL OFFICERS AND EMPLOYEES EXCEPT MEMBERS OF THE JUDICIARY. 1977 Mont. Laws, Chapter 569.

The title of an act is presumed to indicate the Legislature's intent. Dept. of Revenue v. Puget Sound Power & Light, ___ Mont. ___, 587 P.2d 1282, 1286 (1978).

The purpose of the Code of Ethics is outlined in section 2-2-101, MCA:

> The purpose of this part is to set forth a code of ethics prohibiting conflict between public duty and private interest as required by the constitution of Montana. This code recognizes distinctions between legislators, other officers and employees of state government, and officers and employees of local government and prescribes some standards of conduct common to all categories and some standards of conduct adapted to each category. The provisions of this part recognize that some actions are conflicts per se between public duty and private interest while other actions may or may not pose such conflicts depending upon the surrounding circumstances.

Clearly, the Legislature intended the Code of Ethics to apply to officers of local governments. If this were not the case, the sections of the Code that are intended to

prescribe "some standards of conduct common to all categories," sections 2-2-103 and 2-2-104, MCA, would not apply to elected officers of local governments. Such a result would directly conflict with the above stated purpose of the Code of Ethics. A statute should be interpreted so as to avoid absurd results. Montana Power Co. v. Cremer, ___ Mont. ___, 596 P.2d 483, 485 (1979).

Moreover, the term "public officer" must be interpreted to include elected officers of subdivisions of the state in order to insure the coordination of all the sections within the act. Hostetter v. Inland Development Corporation of Montana, 172 Mont. 167, 561 P.2d 1323, 1326 (1977).

Finally, previous opinions of this office have implicitly recognized the application of the Code of Ethics to elected officers of subdivisions of the state. 37 OP. ATT'Y GEN. NO. 104 (1978), and 38 OP. ATT'Y GEN. NO. 55 (1979).

THEREFORE, IT IS MY OPINION:

The definition of "public officer" in section 2-2-102(6), MCA, includes an elected member of a city council.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 38 OPINION NO. 104

HIGHWAYS - School bus operation;
SCHOOL BUSES - Operation on highways; covering or concealing "school bus" markings;
MONTANA CODE ANNOTATED - Section 61-8-351(3).

HELD: "School bus" markings need not be covered or concealed where school buses are being utilized to transport children to or from school on school-sponsored field trips or in connection with school athletic events or other authorized activities.

9 September 1980

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

Dear Mr. Nelson:

You have requested my opinion on the following question:

> Whether section 61-8-351(3), MCA, requires "school bus" markings to be covered or concealed where school buses are being utilized on school-sponsored field trips or for transportation of school children to and from school athletic events or other authorized activities.

The statute in question, section 61-8-351(3), MCA, provides:

> When a school bus is being operated upon a highway for purposes other than the actual transportation of children either to or from school all markings thereon indicating "SCHOOL BUS" shall be covered or concealed.

Your question turns on whether the purposes you describe are "purposes other than the actual transportation of children either to or from school" as that phrase is used in section 61-8-351(3), MCA. In the Education title the term "transportation" has a specific meaning and is limited to the conveyance of a pupil between his legal residence and the school he attends. Section 20-10-101(1), MCA. Under section

1-2-107, MCA, this definition applies throughout the Code unless a contrary intention plainly appears. In my opinion such a contrary intention does appear. The two sections, 20-10-101(1) and 61-8-351(3), are not in pari materia; they govern different subjects. "Transportation to or from school" is plainly broader than conveyance between a legal residence and school. It has long been the rule that legislative intent governs the interpretation of a statute, and that such intent must, if possible, be determined from the plain meaning of the words used. Haker v. Southwestern Ry. Co., ___ Mont. ___, 578 P.2d 724, 727 (1978). In many cases, a child who is being transported on a school-sponsored field trip or to and from school athletic events or other authorized activities is being transported "to or from school" in connection with the activity. Accordingly, where school buses are being utilized for such purposes, their "school bus" markings need not be covered or concealed pursuant to section 61-8-351(3), MCA.

However, where school buses are being utilized for purposes that do not involve transporting children either to or from school, section 61-8-351(3), MCA, would apply. If a school bus is being used to transport a group of teachers, or an adult booster group to or from an athletic event or other activity, for example, the "school bus" markings must be covered or concealed. There may be circumstances in which a school bus is being used to transport children and the children are not being taken to or from school, such as where a civic group utilizes school buses as part of a recreational activity. Here too, "school bus" markings must be covered or concealed in accordance with 61-8-351(3). The particular facts of a given situation control.

THEREFORE, IT IS MY OPINION:

> "School bus" markings need not be covered or concealed where school buses are being utilized to transport children to or from school on school-sponsored field trips or in connection with school athletic events or other authorized activities.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 38 OPINION NO. 105

ELECTIONS - Drainage district and irrigation district commissioner elections: conduct of;
COUNTY OFFICERS AND EMPLOYEES - Election administrator: duty to conduct drainage and irrigation district elections;
DRAINAGE DISTRICTS - Commissioner elections: duty of election administrator;
IRRIGATION DISTRICTS - Commissioner elections: duty of election administrator;
MONTANA CODE ANNOTATED - Sections 13-1-101, 13-1-301, 85-7-1702, 85-7-1710, 85-8-302 and 85-8-306.

HELD: Commissioner elections in drainage and irrigation districts must be conducted by the county's election administrator.

10 September 1980

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

Dear Mr. Hanser:

You have requested my opinion on the following question:

> Must commissioner elections in drainage and irrigation districts be conducted by the election administrator in each county?

As part of its general revision of election laws, Laws of Montana (1979), ch. 571, the 1979 Legislature established the position of election administrator. A county's election administrator is the clerk and recorder unless the county governing body designates another official or appoints another individual to serve as election administrator. With regard to school elections the school district clerk is the election administrator. Sections 13-1-101(5) and 13-1-301(1), MCA.

The scope of the election administrator's responsibility is set out in section 13-1-301(2), MCA.

> The election administrator is responsible for the administration of all procedures relating to registration of electors and conduct of elections

and shall keep all records relating to elector registration and elections.

Section 13-1-101(5), MCA, states further that the election administrator "[is] responsible for all election administration duties." (Emphasis added.)

It is clear that these duties extend to the elections in question. The Legislature has defined "election" as: "[A] general, special or primary election held pursuant to the requirements of state law, regardless of the time and/or purpose." Section 13-1-101(4), MCA. "General election" includes "elections for officers of political subdivisions when the time of the election is set on the same date for all similar political subdivisions in the state." Section 13-1-101(8), MCA. "Political subdivision" includes special districts. Section 13-1-101(13), MCA.

While the creation and various aspects of the operation of drainage districts are matters within the jurisdiction of the district court, see, sections 85-8-101, 102, 111, 118, 119, 121 and 314 through 327, MCA, there is no indication that the court must administer commissioner elections. Nominating petitions for the office must be filed with the county election administrator, section 85-8-306, MCA, and the election itself "shall be held annually in accordance with 13-1-104." Section 85-8-302, MCA. Such elections are "general ... elections[s] held pursuant to the requirements of state law," and in my opinion therefore must be conducted by the election administrator pursuant to sections 13-1-101(5) and 13-1-301(2), MCA.

The situation with respect to irrigation district commissioner elections is much the same. Such elections are to be "held annually in accordance with 13-1-104." Section 85-7-1702, MCA. Except for matters relating to elector qualifications and the nature of voting rights, irrigation district commissioner elections "shall ... conform with the provisions of Title 13." Section 85-7-1710(3), MCA. Since these elections are within the definition of "election" in section 13-1-101(4), MCA, they are conducted by the county's election administrator.

THEREFORE, IT IS MY OPINION:

Commissioner elections in drainage and irrigation

VOLUME NO. 38 OPINION NO. 106

LAND - Conveyances, Subdivision and Platting Act;
SUBDIVISION AND PLATTING ACT - Deeds and contracts in violation of the Act;
SUBDIVISION AND PLATTING ACT - Procedure for correcting violations of the Act;
MONTANA CONSTITUTION - Article II, Section 3;
MONTANA CODE ANNOTATED - Sections 76-3-102, 76-3-301, 76-3-401 et seq., 76-3-601 et seq.

HELD: 1. Deeds and contracts that convey land in violation of the Montana Subdivision and Platting Act are voidable.

2. Deeds and contracts that convey land in violation of the Montana Subdivision and Platting Act, but with the unauthorized approval of the Board of County Commissioners, are voidable.

3. Violations of the Montana Subdivision and Platting Act may be corrected by the parties to the transaction by voiding the prior improper conveyance and conveying the land in accord with the Act.

12 September 1980

Keith D. Haker, Esq.
Custer County Attorney
1010 Main
Miles City, Montana 59301

Dear Mr. Haker:

You have asked for my opinion concerning 35 OP. ATT'Y GEN. NO. 65, at 156 (1974), and its effect on a particular transaction that occurred in your county. I render no decision on the particular transaction concerned, because such a decision requires factual findings. I have reviewed the legal questions you presented, stated as follows:

1. Are deeds and contracts that convey land in violation of the Montana Subdivision and Platting Act void?

2. Are deeds and contracts to convey land that are made in violation of the Montana Sub-

division and Platting Act but with the approval of the Board of County Commissioners void?

3. What is the proper procedure for correcting violations of the Montana Subdivision and Platting Act?

I. CONVEYANCES IN VIOLATION OF THE ACT.

The first question was answered in the affirmative by a former attorney general in 35 OP. ATT'Y GEN. NO. 65, at 156 (1974). That opinion, however, did not address the practical consequences of its holding. Therefore, I have reviewed it in light of your request.

Volume 35 OP. ATT'Y GEN. NO. 65 correctly states the general rule that conveyances of land in violation of statutory provisions are void. My research has revealed no decision of the Montana Supreme Court addressing the application of this rule to conveyances in violation of the Montana Subdivision and Platting Act. I have looked for authority to analogous cases involving other statutory limitations on the sale of land, and to other jurisdictions.

In Johnson v. Kaiser, 104 Mont. 261, 65 P.2d 1179 (1937), the Montana Supreme Court affirmed a judgment declaring certain deeds void, and cancelling those deeds. The land involved had been conveyed in violation of a statute prohibiting a bank officer from personally purchasing bank assets for a sum less than that appearing on the face of the obligations purchased. The bank officer had obtained the property and executed an oil and gas lease that produced gross royalties in excess of $5,500. One year after the conveyance the bank closed its doors and its assets and property were delivered into the hands of the Superintendent of Banks. The Superintendent, as liquidating officer of the bank, brought this action to cancel and set aside the deeds, and prevailed.

More recently, in Norman v. State, ___ Mont.___, 597 P.2d 715 (1979), the Montana Supreme Court again declared a deed to be void because the land had been conveyed in violation of Montana law. The Department of Highways had sold the property at a private sale, without first giving the statutorily required notice of sale and receiving bids. This effectively deprived the person who had originally owned the land when the Department obtained it of his statutory right to meet the highest bid received pursuant to the notice.

When the Department discovered its error, it took the position that the deed was void, and tendered to the purchaser of the land the purchase price received and the cost of a fence the purchaser had erected. The purchaser refused the tender, and brought this quiet title action. The Montana Supreme Court ruled in favor of the State, finding that the noncompliance with the statutory procedure for the sale of the land rendered the deed void.

In California, the courts have long held that noncompliance with statutory provisions for the sale of subdivided land renders a contract void. See, e.g., Longway v. Newberry, 13 Cal.2d 603, 91 P.2d 110, 112 (1939); Smith v. Bach, 183 Cal. 259, 191 P. 14, 15 (1920); Barrett v. Hammer Builders, Inc., 195 Cal. App.2d 305, 16 Cal. Rptr. 49, 51 (1961); Annot., 7/ A.L.R.3d 1058, §3 at 1060 (1977).

However, the term "void" is often used when, technically, the term "voidable" is meant. In Stevens v. Woodmen of the World, 105 Mont. 121, 136-37, 71 P.2d 898, 903 (1937), the Montana Supreme Court stated:

> When we say that a contract is void as a result of fraud--and many such expressions appear in the books--all that is meant by such term, according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract. In the case of Ewell v. Daggs, 108 U.S. 143..., it was said: "It is quite true that the usury statute referred to declares the contract of loan, so far as the whole interest is concerned, to be 'void and of no effect'. But these words are often used in statutes and legal documents, such as deeds, leases, bonds, mortgages, and others, in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it had never existed, incapable of giving rise to any rights or obligations under any circumstances. ... It is sometimes said that a deed obtained by fraud is void, meaning that the party defrauded may, at his election, treat it as void. All that can be meant by the term, according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of

> carrying into effect that which is prohibited by the law of the land."
>
> Our own court, in the case of Mutual Benefit Ins. Co. v. Winne, 20 Mont. 20, 49 P. 446,... said: "We must not be misled into giving to the words 'void' and 'invalid' too broad a meaning, for, as has been well observed by a learned court, deductions founded on the broadest meaning of the word 'void' would lead to greater errors than are found in the most erroneous cases, while those founded on its narrower and more usual meaning seldom err. [Citation omitted.]...."

The narrower interpretation of the term "void" is appropriate in the case of land transfers in violation of the Montana Subdivision and Platting Act. That interpretation is in accord with the common law treatment of illegal contracts generally. In 17 C.J.S. Contracts, §189 at 980-81 (1963), it is stated:

> The expression "void" as used [in connection with illegal contracts] has the meaning of not affording legal remedy rather than that of absolute nullity, since such contracts when executed may be indirectly effective in that no relief will be granted to either party. (Footnotes omitted.)

That interpretation of the term "void" is also the one adopted by the California courts which have considered contracts made in violation of subdivision laws. In more recent cases, some of those courts have in fact used the technically correct term "voidable" rather than "void". See e.g., Handeland v. California Department of Real Estate, 58 Cal. App.3d 513, 129 Cal. Rptr. 810, 812 (1976). My opinion is that deeds and contracts that convey land in violation of the Montana Subdivision and Platting Act are voidable. The effect of the voidability of such an illegal contract or deed varies depending on the circumstances of the case.

Courts have long refused to enforce an illegal contract that has not been fully executed. See, e.g., Builders Supply Co. v. City of Helena, 116 Mont. 368, 154 P.2d 270 (1944); McManus v. Fulton, 85 Mont. 170, 278 P. 126 (1929); State ex rel. Helena Water Co. v. City of Helena, 24 Mont. 521, 63 P. 99 (1900); State ex rel. Lambert v. Coad, 23 Mont. 131, 57 P. 1092 (1899); Lebeher v. Board of Commissioners, 9 Mont. 315, 23 P. 713 (1890); but see Perkins v. Sommers, 119 Cal. App.2d 89, 254 P.2d 913 (1953); State v. Dickerman, 16 Mont.

278, 40 P. 698 (1895). A court may, prior to full execution of an illegal contract, rescind the contract. Many of the California cases concerning contracts in violation of subdivision laws were actions brought by purchasers seeking rescission and recovery of their partial payments under the contracts. See, e.g., Longway v. Newberry, supra; Smith v. Bach, supra; Barrett v. Hammer Builders, Inc., supra; Annot. 77 A.L.R.3d 1058, §4(a) at 1062-63 (1977).

Once the contract has been fully executed, a court may still set aside the deed that has conveyed property in violation of the law. See Norman v. State, supra; Johnson v. Kaiser, supra. Unless such an adjudication is made, however, the deed may be indirectly effective.

> [W]here a deed is regarded as... voidable, it is good against everyone ... until it has been disaffirmed or set aside by a court of competent jurisdiction; and passes title to the grantee, of a defeasible character... .

26 C.J.S. Deeds, §68, at 787-88 (1956) (footnotes omitted). A court may also indirectly enforce an illegal deed by finding that it has conveyed title. Cf. McCoy v. Love, 382 So.2d 647, 649 (Fla. 1979) (deed that was voidable because of fraud conveyed a legal title); Bicknell v. Jones, 203 Kan. 196, 453 P.2d 127, 133 (1969) (a deed made in fraud of the grantor's rights is effective to pass the estate);

In summary, courts may set aside an illegal conveyance of land, whether the conveyance has been fully performed or not. On the other hand, courts will not enforce a contract for such a conveyance before it has been fully executed, but may indirectly enforce a fully executed deed of conveyance by finding that it has given good title. All of the actions that could be brought to establish the effect of a contract or deed for the conveyance of land in violation of the Montana Subdivision and Platting Act are actions that are governed by equitable principles. Suits to rescind contracts, cancel deeds, or quiet title are all suits in equity. See Warren v. Warren, 127 Mont. 259, 261 P.2d 364, 366 (1953) (quiet title); Dahlberg v. Lannen, 84 Mont. 68, 274 P. 151, 153 (1929) (quiet title); 12 C.J.S. Cancellation of Instruments, §2, at 943 (1938). The result in any particular case depends, therefore, on the facts. "Courts of equity are not bound by cast-iron rules. The rules by which they are governed are flexible, and adapt themselves to the exigencies of the particular case." Dutton v. Rocky

Mountain Phosphates, 151 Mont. 54, 438 P.2d 674 (1968). "Equity looks at the whole situation and grants or withholds relief as good conscience dictates." Rieckhoff v. Consolidated Gas Co., 123 Mont. 555, 217 P.2d 1076, 1083 (1950). Equitable actions are subject to equitable defenses such as laches, and estoppel. Seifert v. Seifert, 173 Mont. 501, 568 P.2d 155, 158 (1977) ("clean hands" and laches); See Rauser v. Toston Irrigation District, 172 Mont. 530, 565 P.2d 632, 638 (1977) (laches).

The effect of a violation of the Montana Subdivision and Platting Act on a particular disputed contract or deed must be determined by a court.

II. EFFECT OF APPROVAL BY THE BOARD OF COUNTY COMMISSIONERS.

Your letter describes a situation in which the vendor of subdivided land violated the Montana Subdivision and Platting Act by filing a certificate of survey under the survey requirements of sections 76-3-401, et seq., MCA for divisions of land other than a subdivision, rather than filing an approved subdivision plat under the requirements of sections 76-3-601 et seq., MCA. None of the subdivision procedures of the Act were satisfied. However, the vendor obtained the approval of the certificate of survey from the Board of County Commissioners prior to filing it. Your questions concern the effect of such approval on the conveyances involved.

It is my opinion that the illegality of a land transfer cannot be cured by an action of the Board that is taken without authority. While sections 76-3-601 et seq., MCA authorize the governing body of a local government to review and approve preliminary and final subdivision plats, I can find no corresponding authorization for review and approval of surveys of divisions of land that are not subdivisions. See §§76-3-401 et seq., MCA. Because the Board's actions were unauthorized, they cannot excuse the noncompliance with the Montana Subdivision and Platting Act.

Two recent opinions of the Montana Supreme Court have dealt with the effect of unauthorized or improper actions of a governmental agency or body in connection with land transactions. In Norman v. State, supra, the court said:

> We recognize it was the negligence of the State's agents that caused the situation which gave rise

> to this appeal. However, the interest we seek to protect is that of the citizens of this State to receive the highest value from the sale of the lands their State government holds in trust for them. Strict compliance with the constitutional and statutory provisions relating to those lands is the best mode to insure that protection.

597 P.2d at 719. And in Chennault v. Sageri, supra, the court said:

> Irrespective of the negligence of public employees and officials, however, the foremost consideration in our minds lies with the protection of the public interest. This countervailing public policy has taken on such importance that it is expressed in our Constitution. Where public lands are disposed of and there has been insufficient compliance with laws providing for their disposition, the public interest must be protected.

610 P.2d at 177. While the land involved in those cases was public land, and the land involved in the present case is private land, the public interest is involved in both circumstances. The purpose of the Montana Subdivision and Platting Act is:

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

§76-3-102, MCA. This purpose is in accord with the inalienable right of all Montanans to "a clean and healthful environment." Art. II, §3, Mont. Const. The unauthorized approval of the Board of County Commissioners cannot, by itself, overcome the strong public interest in compliance

with the provisions of the Montana Subdivision and Platting Act.

III. CORRECTION OF DEFICIENCIES.

Your final question concerns the proper procedure for correcting violations of the Montana Subdivision and Platting Act. If all parties to the improper transaction agree, they may void the transaction by rescinding the contract or disaffirming the deed involved, and start anew by filing the required subdivision plat. The subdivision must then go through the appropriate review procedure prior to approval. The governmental entities involved must then review the subdivisions as of the time of the filing of the correct subdivision plat, without being bound by any prior unauthorized approval. Merely filing the correct subdivision plat, while relying on the prior unauthorized approval, does not correct the problem. In Barrett v. Hammer Builders, Inc., 195 Cal. App.2d 305, 16 Cal. Rptr. 49, 51-52 (1961), the California Court of Appeals held that filing a subdivision report after a sale when the statute required the filing prior to offering the land for sale was not sufficient to "ratify" the prior sales. As in that case, it is clear that here the Montana legislature contemplated filing of subdivision plats and approval by the government prior to the transfer of property. §76-3-301, MCA. The legislative purpose of protecting the public would not be effectuated by permitting a subdivider to circumvent this legislative mandate.

THEREFORE, IT IS MY OPINION:

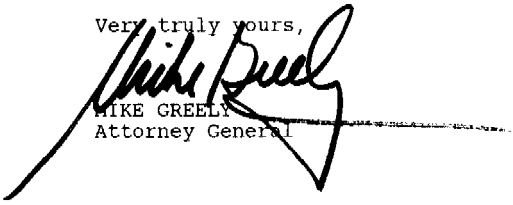
1. Deeds and contracts that convey land in violation of the Montana Subdivision and Platting Act are voidable.

2. Deeds and contracts that convey land in violation of the Montana Subdivision and Platting Act, but with the unauthorized approval of the Board of County Commissioners, are voidable.

3. Violations of the Montana Subdivision and Platting Act may be corrected by the parties to the transaction by voiding the prior improper conveyance

and conveying the land in accord with the Act.

Very truly yours,



MIKE GREELY
Attorney General