RESERVE

MONTANA ADMINISTRATIVE REGISTER

1980 ISSUE NO. 21
PAGES 2885-2949

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. 21

TABLE OF CONTENTS

NOTICE SECTION

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the REPEAL OF RULES relating to moving and relocation expenses for state employees.	)))	NOTICE OF PROPOSED REPEAL OF RULES RELATING TO MOVING AND RELOCATION EXPENSES FOR STATE EMPLOYEES

NO PUBLIC HEARING CONTEMPLATED.

TO: All Interested Persons:

1. On December 15, 1980 the Department of Administration proposes to repeal rules ARM 2.21.4901 and 2.21.4902, which pertain to moving and relocation expenses for state employees.

2. The rules proposed to be repealed are on page 2-1259 of the Administrative Rules of Montana.

3. The department proposes to repeal these rules because the department has proposed the adoption of new rules in the matter. The proposed new rules are found at pages 2319 through 2322 of the 1980 Montana Administrative Register, issue number 15.

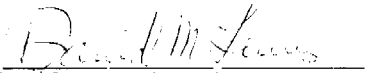
4. Interested parties may submit their data, views or arguments concerning the proposed repeal in writing no later than December 12, 1980, to:

Patricia Moore, Administrator
Personnel Division
Department of Administration
Room 130, Mitchell Building
Helena, Montana 59601

5. If a person who is directly affected by the proposed repeal of rules ARM 2.21.4901 and 2.21.4902 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: Patricia Moore, Administrator, Personnel Division, Department of Administration, Room 130, Mitchell Building, Helena, Montana 59601, no later than December 12, 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 25.

7. The authority of the agency to make the proposed repeal of these rules is based on section 2-18-102, MCA, and the section implements section 2-18-102, MCA.



David M. Lewis, Director
Department of Administration

Certified to the Secretary of State November 5, 1980.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 23.3.212 providing for suspension for possession of altered driver's license	)))))))	NOTICE OF PROPOSED AMENDMENT OF RULE 23.3.212 (Suspension for Possession of Altered Driver's License) NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 15, 1980 The Department of Justice proposes to amend rule 23.3.212, providing for the suspension of the license to operate motor vehicles on the highways of Montana for a person who possesses an altered driver's license document.

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

23.3.212 ALTERED DRIVER'S LICENSE A license received by the Division that indicates on its face that ~~the holder of the license has altered~~ the birthdate, license number, name, photograph, or expiration date has been altered shall ~~must~~ be suspended for ~~3~~ 6 months. A statement must be received indicating that the individual who picked up the license received it from the individual pictured and/or named on the license.

3. The rule is proposed to be amended to increase the suspension period from 3 to 6 months and to clarify that possession itself, irrespective of who altered the license, is sufficient to warrant suspension of the license privilege.

4. All interested parties may submit their data, views or arguments concerning the proposed amendment in writing to Assistant Attorney General Dennis J. Dunphy, State Capitol, Room 225, Helena, Montana 59601 no later than December 12, 1980.

5. If a person who is directly affected by the proposed amendment wishes to express data, views and arguments orally or in writing at a public hearing, he or she must make written request for a hearing and submit this request along with any written comments to Assistant Attorney General Dennis J. Dunphy, State Capitol, Room 225, Helena, Montana 59601 no later than December 12, 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 61,000 persons based on the 610,000 licensed drivers in Montana.

7. The authority of the agency to make the proposed amendment is based on section 44-1-103 MCA and the rule implements sections 61-5-105 and 61-5-206 MCA.

MIKE GREELY
Attorney General

Certified to the Secretary of State October 31, 1980.

BEFORE THE BOARD OF CRIME CONTROL
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 23.14.413	)	NOTICE OF PROPOSED AMENDMENT OF FULE 23.14.413 (Certification Requirements for Trainee Attendance and Performance) NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On December 15, 1980, the Board of Crime Control proposes to amend rule 23.14.413 which provides for the certification requirements for peace officer trainees attendance and performance at certified training courses.

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

23.14.413 CERTIFICATION REQUIREMENTS FOR TRAINEE ATTENDANCE AND PERFORMANCE

Sections (1) through (4) remain the same.

(5) The trainee enrolled in the basic course shall achieve a firing qualification score of not less than ~~65%~~ 70% out of a possible 100% to receive credit for certification. The trainees enrolled in all other courses which include range firing in the curriculum shall achieve a firing qualification score of not less than ~~70%~~ 75% out of a possible 100% to receive credit for certification.

3. The amended rule sets forth the firearms qualification score for the basic course and for all other courses where firearms qualification is required for certification purposes. At the time the original firearms qualification requirements were established, most of the firearms courses involved bullseye targets. The courses have now been upgraded to combat style exercises using silhouette targets and the scoring is different, thus necessitating an upgrading in the required scores. The various states with POST programs have upgraded the scoring requirements to the level we are proposing. The POST Advisory Council's objective is to maintain similar standards with the other states' programs whenever the courses are similar.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to Mr. Clayton Bain, Executive Director, P.O.S.T. Advisory Council, Board of Crime Control, 303 North Roberts, Helena, Montana 59601 no later than December 12, 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 Mr. Bain no later than December 12, 1980.

6. If the agency receives requests for a public hearing on the proposed amendment from more than 10% or 25 or more persons who are directly affected by the proposed amendment, or from the Administrative Code Committee of the legislature, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 40 persons based on the number of peace officers registered with the P.O.S.T. Advisory Council.

7. The authority to make the proposed amendment is based on Section 44-4-301 MCA, and the implementing section is the same.

(Administrator)

Certified to the Secretary of State on October 28, 1980

BEFORE THE BOARD OF PERSONNEL APPEALS
OF THE STATE OF MONTANA

In the matter of the ADOPTION OF A RULE TO PROVIDE FOR THE FULL DISCLOSURE OF POSITIONS IN CLASSIFICATION APPEALS	)))	NOTICE OF PUBLIC HEARING FOR ADOPTION OF A RULE TO PROVIDE FOR THE FULL DISCLOSURE OF POSITIONS IN CLASSIFICATION APPEALS

TO: All Interested Persons:

1. On August 28, 1980, the Board of Personnel Appeals published a NOTICE OF PROPOSED ADOPTION OF A RULE TO PROVIDE FOR THE FULL DISCLOSURE OF POSITIONS IN CLASSIFICATION APPEALS. The Board proposed the adoption of the rule on or about October 9, 1980. The Notice appeared at 1980 MAR p. 2478.

2. On September 29, 1980, the Board received a Request for Hearing from the Personnel Division of the Department of Administration requesting that a public hearing in the matter be held.

3. Pursuant to that request a hearing will be held on November 25, 1980, at 11:00 a.m. in the Conference Room of the Office of the Commissioner of Higher Education, 33 Last Chance Gulch, Helena, Montana. The hearing will be conducted by the Board at its monthly meeting.

4. The Board will continue to receive written comment on the adoption of the rule upto and including November 21, 1980.

5. The Board will review all testimony, written and oral at its November, 1980, meeting and will decide whether or not to adopt the rule at that time.

6. For a copy of the text of the rule, the authority to adopt the rule, and the rationale for adopting the rule, an interested party should consult MAR Notice No. 24-26-4, which was published at 1980 MAR p. 2478.

By: Brent Cromley
Brent Cromley, Chairman
Board of Personnel Appeals

Certified to the Secretary of State 11-3-80.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
DIVISION OF WORKERS' COMPENSATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM Rule 24.30.101(3)(a), (formerly Rule 24-3.18A(2)-S1810(3)(a), regarding minimum safety standards for logging departments and logging operations.	))))))	NOTICE OF PROPOSED AMENDMENT OF ARM RULE 24.30.101 (3)(a), (formerly Rule 24-3.18A(2)-S1810(3)(a)) NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On December 15, 1980, the division of workers' compensation proposes to amend rule 24.30.101(3)(a), formerly rule 24-3.18A(2)-S1810(3)(a), regarding minimum safety standards for logging departments and logging operations.

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

"24.30.101 ~~LOGGING, OIL, AND GAS~~ OIL AND GAS (1) Under section 2-4-307 MCA, the division of workers' compensation of the department of labor and industry, consents to the omission from publication in the code or register certain rules and standards which the division has determined, with the assent of the secretary of state, would be unduly cumbersome, expensive and otherwise inexpedient to publish.

(2) Because of the number and volume and the fact that the rules and standards are only significant to a specialized limited sector of the public, the division submits this rule for publication in the code in lieu of submitting and publishing the rules and standards in their entirety.

(3) A complete publication or copy of the rules listed hereunder may be obtained at no cost from the divison of workers' compensation, 815 Front Street, Helena, Montana 59601.

~~(a) Minimum safety standards for logging departments and logging operations.~~

~~(b)~~ (a) Oil and gas well drilling and servicing industry accident prevention regulations. (History: Sec. 50-71-311 MCA; IMP, Sec. 50-71-311 MCA; Eff. 12/31/72; AMD, Eff. 11/4/74.)"

3. The rule is proposed to be amended because the division is proposing to adopt new minimum safety standards for logging departments and logging operations in Montana, and will be holding a public hearing on December 4, 1980, regarding the proposed new safety standards. The division desires to have the oil and gas well drilling regulations remain in the ARM as they are at the present time, that is, adopted by reference.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendment in writing to the Division of Workers' Compensation, 815 Front Street, Helena, Montana 59601 no later than December 12, 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 the Division of Workers' Compensation, 815 Front Street, Helena, Montana 59601, no later than December 12, 1980.

6. If the division 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 25 persons based on the number of persons interested in logging departments or logging operations.

7. The authority of the division to make this proposed amendment is based on Section 50-71-311, Montana Code Annotated, and implements Sections 50-71-301 and 50-71-311, Montana Code Annotated.

DAVID E. FULLER, Commissioner
Department of Labor and Industry

Certified to the Secretary of State October 31, 1980

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
DIVISION OF WORKERS' COMPENSATION
OF THE STATE OF MONTANA

In the matter of the adoption of rules regarding minimum safety standards for logging departments and logging operations.	)))))	NOTICE OF PUBLIC HEARING FOR ADOPTION OF RULES REGARDING MINIMUM SAFETY STANDARDS FOR LOGGING DEPARTMENTS AND LOGGING OPERATIONS.

TO: All Interested Persons.

1. On December 4, 1980, at 10:00 a.m., a public hearing will be held in the old Highway Building Auditorium (Scott Hart Building), 6th and Roberts, Helena, Montana, to consider the proposed adoption of new rules relating to minimum safety standards for logging departments and logging operations. The division previously held a public hearing on July 14, 1980, to consider the adoption of new rules relating to minimum safety standards for logging departments and logging operations. This hearing was well attended by interested persons and the division subsequently received several comments and suggestions concerning the proposed new rules. The proposed new rules have been amended to accommodate the input by the various interested persons.

2. The new rules would replace in their entirety the present rules adopted by reference in ARM Rule 24.30.101(3)(a) concerning logging departments and logging operations.

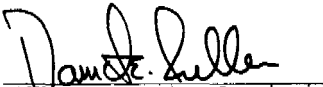
3. The division proposes to replace the current rules concerning logging departments and logging operations in order to update the rules on this subject. The rules relate to matters concerning the inspection and other matters related to the safe operation of logging departments and logging operations. A copy of the proposed rules may be obtained from the division of workers' compensation by contacting Mr. Max B. Salazar, Chief, Bureau of Safety and Health, Division of Workers' Compensation, 815 Front Street, Helena, Montana 59601.

4. Rationale: The reason the division is proposing to completely replace the present rules concerning logging departments and logging operations is that changes in technology have taken place which should be addressed through new rules, and it is believed a more modern and clearly understood set of rules is required for the safe operation of logging departments and logging operations in this state.

5. Interested persons may present their data, views and arguments either orally or in writing at the hearing. Written arguments, views or data may also be submitted to the Division of Workers' Compensation, 815 Front Street, Helena, Montana 59601, no later than December 12, 1980.

6. William R. Palmer has been designated to preside over and conduct the hearing.

7. The authority of the division to adopt the proposed new rules is based on Section 50-71-311, Montana Code Annotated, and implements Sections 50-71-201, 50-71-202, 50-71-203, 50-71-301 and 50-71-311, Montana Code Annotated.



DAVID E. FULLER, Commissioner
Department of Labor and Industry

Certified to the Secretary of State October 31, 1980

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

IN THE MATTER of the Proposed adoption of a new rule relating to public participation in board decision making functions.) NOTICE OF PROPOSED ADOPTION OF A NEW RULING RELATING TO PUBLIC PARTICIPATION) NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 14, 1980, the Board of Chiropractors proposes to adopt a new rule relating to public participation in board decision making functions.

2. The rule as proposed will incorporate as rules of the board the rules of the Department of Professional and Occupational Licensing as listed in Title 40, Chapter 2, Sub-Chapter 2, of the Administrative Rules of Montana.

3. The board is proposing the adoption because such action is mandated by section 2-3-103 MCA. That section requires all agencies to adopt rules which specify the means by which the public may participate in decision making functions. Rather than adopt its own set of rules and for the sake of expediency, the board has reviewed and approved the department rules and by this notice seeks to incorporate them as their own.

4. Interested parties may submit their data, views or arguments concerning the proposed new rules in writing to the Board of Chiropractors, Lalonde Building, Helena, Montana 59601 no later than December 12, 1980.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to the Board of Chiropractors, Lalonde Building, Helena, Montana 59601 no later than December 12, 1980.

6. If the board 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.

7. The authority of the board to make the adoption is based on section 37-12-201(3) MCA and implements section 2-3-103 MCA.

BOARD OF CHIROPRACTORS
JARL HOKLIN, D.C., CHAIRMAN

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

Certified to the Secretary of State, November 5, 1980.

BEFORE THE DEPARTMENT OF REVENUE

OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT OF RULE 42.21.122, relating to the valuation of livestock.	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULE 42.21.122, relating to the valuation of livestock.

TO: All Interested Persons:

1. On December 9, 1980, at 9:00 a.m. (and at 1:00 p.m. also, if necessary) a public hearing will be held in the Fourth Floor Conference Room in the Mitchell Building, Helena, Montana, to consider the amendment of Rule 42.21.122, relating to the valuation of livestock.

2. The proposed amendment replaces present rule 42.21.122 found in the Administrative Rules of Montana. The proposed amendment provides the basis for determining market value for livestock for the tax year beginning January 1, 1981.

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

42.21.122 LIVESTOCK (1)(a) The average market value for cattle shall be determined by multiplying the weighted average price per cwt. for ~~beef cattle~~ cows, marketed in Montana during the preceding 12-month period December through November as determined by the Montana crop and livestock reporting service, times established factors for each of the ~~seven~~ six categories of cattle. The established factors are:

Bulls - 9 months ~~thru 20 months~~ and older	15	
~~Bulls - 21 months and older~~	~~17.5~~	
Cattle - 9 months thru 20 months	~~5~~	6.5
Cattle - 21 months thru 32 months	~~6.25~~	8
Cows - 33 months and older	~~7.5~~	9
Steers - 33 months and older	~~10~~	12
Dairy Cows - 21 months and older	~~10~~	12

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

(2) The average market value for sheep shall be determined by multiplying the average price per cwt. for slaughter lambs, marketed in Montana during the preceding 12-month period December through November, times established factors for each of the four categories of sheep. The established factors are:

Registered Bucks - 9 months and older	2.6
Stock Bucks - 9 months and older	2

Sheep - 9 months thru 70 months	.7
Sheep - 71 months and older	.2

(3)(a) The average market value for swine shall be determined pursuant to 15-24-931, MCA.

(b) The most recent 5-year average U.S.D.A. Omaha quotation prices are: Grades 1 to 3 at 200 to 240 pounds $40.68; sows 270 to 330 pounds $34.51.

(4) This rule would be effective for tax years beginning after December 31, ~~1978~~ 1980.

4. The proposed amendment is offered in response to a petition of the Montana Stockgrowers' Association. A copy of the correspondence from the Association can be examined at the Legal Division, Department of Revenue, Mitchell Building, Helena, Montana. The Association has made the proposal as representing a more equitable manner of valuing livestock. The proposal groups the existing two categories of bulls into a single category and uses the reported price for cows rather than a general beef cattle price for determining market value. The multipliers are also adjusted.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted no later than December 14, 1980, to:

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

6. Ross Cannon has been designated to preside over and conduct the hearing.

7. Authority of the Department to make the proposed amendment is based on Section 15-1-201, MCA. The proposed amendment implements Section 15-6-137, MCA.

MARY L. CRAIG, Director
Department of Revenue

Certified to the Secretary of State 11-5-80

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the repeal of rules 2.21.101 through 2.21.120 (2-2.14(20)-S14250 through 2-2.14(20)-S14460 and 2-2.14(28)-S14510 through 2-2.14(28)-S14550) and the adoption of rules 2.21.121, 2.21.122, 2.21.132 through 2.21.143 and 2.21.155	)	NOTICE OF THE REPEAL OF RULES ARM 2.21.101 THROUGH 2.21.120 (ARM 2-2.14(20)-S14250 THROUGH 2-2.14(20)-S14460 AND 2-2.14(28)-S14510 THROUGH 2-2.14(28)-S14550) AND THE ADOPTION OF RULES 2.21.121, 2.21.122, 2.21.132 THROUGH 2.21.143 AND 2.21.155

TO: All Interested Persons:

1. On August 14, 1980, the Department of Administration published notice of proposed repeal of rules 2.21.101 through 2.21.120 (2-2.14(20)-S14250 through 2-2.14(20)-S14460) relating to the administration of sick leave and the adoption of new rules in the matter at pages 2305 through 2311 of the 1980 Montana Administrative Register, issue number 15. On September 11, 1980, the Department of Administration published notice of the repeal of additional rules 2-2.14(28)-S14510 through 2-2.14(28)-S14550 relating to maternity leave at pages 2528 and 2529 of the 1980 Montana Administrative Register, issue number 17.

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

3. No comments or testimony were received.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the repeal of rules 2.21.201 through 2.21.214 (2-2.14(14)-S14090 through 2-2.14(14)-S14240) and the adoption of rules 2.21.215, 2.21.216, 2.21.221 through 2.21.234 and 2.21.241	)	NOTICE OF THE REPEAL OF RULES 2.21.201 THROUGH 2.21.214 (2-2.14(14)-S14090 THROUGH 2-2.14(14)-S14240) AND THE ADOPTION OF RULES 2.21.215, 2.21.216, 2.21.221 THROUGH 2.21.234 AND 2.21.241

TO: All Interested Persons:

1. On August 14, 1980, the Department of Administration published notice of proposed repeal of rules 2.21.201 through 2.21.214 (2-2.14(14)-S14090 through 2-2.14(14)-S14240) relating to the administration of annual vacation leave and the adoption of new rules in the matter at pages 2312 through 2318 of the 1980 Montana Administrative Register, issue number 15.

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

3. No comments or testimony were received.

David M. Lewis, Director
Department of Administration

Certified to the Secretary of State November 5, 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 relating to Montana State Golden Years Pass	NOTICE OF AMENDMENT OF RULE 12.8.301

TO: All Interested Persons.

1. On September 25, 1980, the Department of Fish, Wildlife, and Parks published notice of a proposed amendment of a rule relating to Montana State Golden Years Pass at page 2618 of the 1980 Montana Administrative Register, issue No. 18.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received.

In the matter of the adoption of Rule 12.3.301 relating to the sale of outdated bird licenses and bird art stamps	NOTICE OF ADOPTION OF RULE 12.3.301

TO: All Interested Persons.

1. On September 25, 1980, the Department of Fish, Wildlife, and Parks published notice of a proposed adoption of a rule relating to the sale of outdated bird licenses and bird art stamps at page 2616 of the 1980 Montana Administrative Register, issue No. 18.

2. The agency has adopted the rule as proposed.

3. No comments or testimony were received.

Keith L. Colbo

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

Certified to Secretary of State October 29, 1980

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

In the matter of the repeal of rules 16.14.590, 16.14.591, 16.14.592, 16.14.593, 16.14.594, and 16.14.595 and the adoption of rules relating to hazardous waste	NOTICE OF REPEAL OF ARM 16.14.590 THROUGH 16.14.595 AND ADOPTION OF RULES RELATING TO HAZARDOUS WASTE

TO: All Interested Persons

1. On August 28, 1980, the Department of Health and Environmental Sciences published notice of a proposed repeal of ARM 16.14.590, 16.14.591, 16.14.592, 16.14,593, 16.14.594 and 16.14.595, and the adoption of new rules relating to hazardous waste at page 2446 of the 1980 Montana Administrative Register, issue no. 16.

2. The department has repealed 16.14.590, 16.14.591, 16.14.592, 16.14.593, 16.14.594 and 16.14.595. The department has adopted the proposed new rules relating to hazardous waste with the following changes:

16.44.202 DEFINITIONS [NOTE: Re-numbering of the definitions is necessary in order to insert additional definitions and to reserve space for anticipated additions. Therefore, interlined numbers refer to the numbers assigned in the notice published August 28, 1980; underscored numbered are new assignments and are effective November 15, 1980.]

(1) - (7) Same as proposed rule.

(8) "Constituent" or "hazardous waste constituent" means ~~a constituent which caused EPA to list the hazardous waste in 40 CFR Part 261, Subpart B, or~~ a constituent listed in Table 1 of ARM 16.44.324 or a constituent which caused the hazardous waste to be listed in ARM 16.44.330 through 16.44.333.

(9) Same as proposed rule.

(10) [reserved]

~~(10)~~ (11) Same as proposed rule.

~~(11)~~ (12) "Designated facility" means a hazardous waste treatment, storage, or disposal facility which has received an EPA permit ~~(or a facility with interim status) in accordance with the requirements of 40 CFR Parts 122 and 124~~, a license from the department pursuant to sub-chapter 6 of this chapter, or a permit from another state authorized by ~~the~~ EPA ~~under 40 CFR Part 123~~, that has been designated on the manifest by the generator as required by ARM 16.44.405.

~~(12)---(18)~~ (13) - (19) Same as proposed rule.

(20) [reserved]

~~(19)~~ (21) "Existing hazardous waste management facility" or "existing facility" means a facility which was in operation, or for which construction had commenced, on or before November ~~1~~ 19, 1980. Construction had commenced if:

(a) Same as proposed rule.

(i) Same as proposed rule.

(ii) Same as proposed rule.

~~(20)---(27)~~ (22) - (29) Same as proposed rule.

(30) [reserved]

~~(28)~~ (31) Same as proposed rule.

~~(29)~~ (32) "Incompatible waste" means a hazardous waste which is unsuitable for:

(a) placement in a particular device or facility because it may cause corrosion or decay of containment materials (e.g., container inner liners or tank walls); or

(b) commingling with another waste or material under uncontrolled conditions because the commingling might produce heat or pressure, fire or explosion, violent reaction, toxic dusts, mists, fumes, or gases, or flammable fumes or gases. ~~(See 40 CFR Part 265, Appendix V for examples.)~~

~~(30)---(36)~~ (33) - (39) Same as proposed rule.

(40) [reserved]

~~(37)---(43)~~ (41) - (47) Same as proposed rule.

(48) "Municipality" means a city, town, county, district, association, or other public body created by or pursuant to law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes.

~~(44)~~ (49) "New hazardous waste management facility" or "new facility" means a facility which began operation or for which construction commenced after November ~~1~~ 19, 1980. (See also "existing hazardous waste management facility.")

(50) [reserved]

~~(45)---(48)~~ (51) - (54) Same as proposed rule.

~~(49)~~ (55) "Partial closure" means the closure of a discrete part of a facility in accordance with the applicable closure requirements of ~~40 CFR Part 265~~ sub-chapter 6 of this chapter. For example, partial closure may include the closure of a trench, a unit operation, a landfill cell, or a pit, while other parts of the same facility continue in operation or will be placed in operation in the future.

~~(50)~~ (56) "Personnel" or "facility personnel" means all persons who work at, or oversee the operations of, a hazardous waste facility, and whose actions or failure to act may result in noncompliance with the requirements of ~~40 CFR Part 265~~ sub-chapter 6 of this chapter.

~~(51)---(52)~~ (57) - (58) Same as proposed rule.

~~(53)~~ (59) "Publicly owned treatment works" or "POTW" means any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a "state" or "municipality" ~~(as-defined-by-section-502(4)-of-the-clean water-act-amendments-of-1977)~~. This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

(60) [reserved]

~~(54)~~ (61) "RCRA" means the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. section 6901 et seq. The department does not intend to incorporate by reference the provisions of RCRA.

~~(55)---(59)~~ (62) - (66) Same as proposed rule.

(67) "State" means any of the several states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

~~(60)---(61)~~ (68) - (69) Same as proposed rule.

(70) [reserved]

~~(62)---(70)~~ (71) - (79) Same as proposed rule.

16.44.301 POLICY This sub-chapter identifies only some of the materials which are hazardous wastes under the act and this chapter. A material which is not a hazardous waste identified in this sub-chapter is still a hazardous waste for purposes of the act if, ~~in-the-case-of~~ during an inspection under section 75-10-205, MCA, the department has reason to believe that the material may be a hazardous waste within the meaning of section 75-10-203, MCA.

16.44.302 DEFINITION OF WASTE

(1) - (3) Same as proposed rule

(a) A material is "discarded" if it is not used, reused, reclaimed or recycled and is abandoned by being:

(i) disposed of as defined in section 75-10-203(3), MCA;

(ii) Same as proposed rule.

(iii) Same as proposed rule.

(b) Same as proposed rule.

16.44.303 DEFINITION OF HAZARDOUS WASTE

(1) - (3) Same as proposed rule.

(4) Any waste described in ARM 16.44.303(3) is not a hazardous waste if:

(a) it does not exhibit any of the characteristics of hazardous waste identified in ARM 16.44.320 through 16.44.324; and

~~(b) if it is a waste generated from the treatment, storage or disposal of a hazardous waste listed in ARM 16.44.331 through 16.44.333, it does not meet any of the criteria in ARM 16.44.311.~~

(b) in the case of a waste which is listed in ARM 16.44.330 through 16.44.333, contains a waste listed in ARM 16.44.330 through 16.44.333, or is derived from a waste listed in ARM 16.44.330 through 16.44.333, it also has been delisted by EPA in accordance with 40 CFR 260.20 and 260.22.

16.44.304 EXCLUSIONS ~~(1) The following materials are not hazardous wastes:~~

~~(a) household waste, including household waste that has been collected, transported, stored, treated, disposed of, recovered such as refuse derived fuel, or reused. "Household waste" means any waste material, including garbage, trash and sanitary wastes in septic tanks, derived from households including single and multiple residences, hotels and motels.~~

~~(b) wastes generated by either of the following and which are returned to the soil as fertilizers:~~

~~(i) the growing and harvesting of agricultural crops; or~~

~~(ii) the raising of animals including animal manure.~~

~~(c) mining overburden returned to the mine site.~~

~~(d) fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.~~

~~(e) drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy.~~

~~(2) The following materials are not wastes for the purposes of this chapter but may be subject to regulation under the provisions of ARM Title 16, Chapter 14:~~

~~(a) domestic sewage and any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly owned treatment works for treatment. Domestic sewage means untreated sanitary wastes that pass through a sewer system.~~

~~(b) industrial wastewater discharges that are point source discharges subject to regulation under Title 75, Chapter 5, MCA, and rules implementing that chapter.~~

~~(c) irrigation return flows.~~

~~(d) source, special nuclear or byproduct material as defined by Title 75, Chapter 3, MCA, and rules implementing that chapter.~~

~~(e) materials subjected to in situ mining techniques which are not removed from the ground as part of the extraction process.~~

16.44.304 EXCLUSIONS (1) The following are not subject to regulation under this chapter:

(a) wastes generated by either of the following and which are returned to the soil as fertilizers:

(i) the growing and harvesting of agricultural crops; or

(ii) the raising of animals including animal manure.

(b) irrigation return flows.

(c) source, special nuclear or byproduct material as defined by Title 75, Chapter 3, MCA, and rules implementing that chapter.

(d) materials subjected to in-situ mining techniques which are not removed from the ground as part of the extraction process.

(e) mining overburden returned to the mine site.

(f) domestic sewage and any mixture of domestic sewage and other wastes that passes through a sewer system to a publicly owned treatment works for treatment. Domestic sewage means untreated sanitary wastes that pass through a sewer system.

(g) industrial wastewater discharges that are point source discharges subject to regulation under Title 75, Chapter 5, MCA, and rules implementing that chapter.

(2) The following are not subject to regulation under this chapter but may be subject to regulation under the provisions of ARM Title 16, Chapter 14:

(a) household waste, including household waste that has been collected, transported, stored, treated, disposed of, recovered such as refuse-derived fuel, or reused. "Household waste" means any waste material, including garbage, trash and sanitary wastes in septic tanks, derived from households including single and multiple residences, hotels and motels.

(b) fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.

(c) drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy.

16.44.305 Same as proposed rule.

16.44.306 SPECIAL REQUIREMENTS FOR HAZARDOUS WASTE WHICH IS USED, REUSED, RECYCLED OR RECLAIMED

(1) Same as proposed rule.

(2) A hazardous waste which is a sludge, or which is listed in ARM 16.44.330 through 16.44.333, or which contains one or more hazardous wastes listed in ARM 16.44.330 through

16.44.333; and which is transported or stored prior to being used, reused, recycled or reclaimed is subject to the requirements of sub-chapters 4 and 5 of this chapter and Subparts A, B, C, D, E, G, H, I, J, and L of Part 265, Title 40, CFR, and ~~any subsequent amendments thereto~~, with respect to such transportation or storage.

(3) The department hereby adopts and incorporates herein by reference 40 CFR Part 265, Subparts A, B, C, D, E, G, H, I, J, and L. Subparts A, B, C, D, E, G, H, I, J, and L of 40 CFR Part 265 are federal agency rules. These subparts contain, respectively, the purpose, scope and applicability of Part 265 (A), general facility standards (B), requirements for preparedness and prevention (C), requirements for contingency plan and emergency procedures (D), manifest system requirements, recordkeeping and reporting requirements (E), closure and post-closure requirements (G), financial requirements (H), use and management of containers (I), requirements for tanks (J), and requirements for waste piles (L). A copy of Subparts A, B, C, D, E, G, H, I, J, and L of 40 CFR Part 265, or any portion thereof, may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

16.44.310 - 16.44.311 Same as proposed rules.

16.44.320 CHARACTERISTICS OF HAZARDOUS WASTE -- GENERAL (1) - (2) Same as proposed rule.

(3) For purposes of ARM 16.44.320 through 16.44.324, the department will consider a sample obtained using any of the applicable sampling methods specified in or approved under ARM 16.44.351 to be a representative sample.

16.44.321 CHARACTERISTIC OF IGNITABILITY (1) A waste exhibits the characteristic of ignitability if a representative sample of the waste has any of the following properties:

(a) It is a liquid, other than an aqueous solution containing less than 24 percent alcohol by volume, and has a flash point less than 60°C. (140°F.), as determined by a Pensky-Martens closed cup tester, using the test method specified in ASTM Standard D-93-79, or a Setaflash closed cup tester, using the test method specified in ASTM Standard D-3278-78. The department hereby adopts and incorporates by reference ASTM Standard D-93-79 and ASTM Standard D-3278-78. ASTM Standard D-93-79 is a like publication setting forth standard test methods for determination of flash point by Pensky-Martens closed cup tester. ASTM Standard D-3278-78 is a like publication setting forth standard test methods for

the determination of the flash point of liquids by Setaflash closed tester. A copy of these standards may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

(b) Same as proposed rule

(c) It is an ignitable compressed gas as defined in 49 CFR 173.300 ~~and any subsequent amendments thereto~~ and as determined by the test methods described in that regulation. The department hereby adopts and incorporates herein by reference 49 CFR 173.300 and any subsequent amendments thereto. 49 CFR 173.300 is a federal agency rule setting forth the definitions of compressed gas, flammable compressed gas, non-liquefied compressed gas, liquefied compressed gas, compressed gas in solution, flammable range, filling density, and service pressure. A copy of 49 CFR 173.300 may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

(d) It is an oxidizer ~~as defined in 49 CFR 173.151 and any subsequent amendments thereto~~ which is a substance, such as a chlorate, permanganate, inorganic peroxide, nitro carbo nitrate, or a nitrate, that yields oxygen readily to stimulate the combustion of organic matter.

(2) Same as proposed rule.

16.44.322 CHARACTERISTIC OF CORROSIVITY (1) A waste exhibits the characteristic of corrosivity if a representative sample of the waste has either of the following properties:

(a) It is aqueous and has a pH less than or equal to 2 or greater than or equal to 12.5, as determined by a pH meter using ~~the~~ tTest mMethod 5.2 specified in ~~the~~ "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods."

(b) It is a liquid and corrodes steel (SAE 1020) at a rate greater than 6.35 mm (0.250 inch) per year at a test temperature of 55°C. (130° F.) as determined by ~~the~~ tTest mMethod 5.3 specified in ~~NACE (National Association of Corrosion Engineers) Standard TM-01-69 as standardized in~~ "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods."

(c) The department hereby adopts and incorporates herein by reference Test Methods 5.2 and 5.3 in "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods" published by EPA. "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods" is a like publication setting forth EPA's standard test methods for determination of hazard waste characteristics of solid waste; Test Method 5.2 sets forth pH measurement and Test Method 5.3 sets forth

measurement of corrosivity towards steel. A copy of Test Methods 5.2 and 5.3 may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Helena, Montana.

(2) Same as proposed rule.

16.44.323 CHARACTERISTIC OF REACTIVITY

(1)(a) through (g) Same as proposed rule.

(h) It is a forbidden explosive as defined in 49 CFR 173.51, or a Class A explosive as defined in 49 CFR 173.53, or a Class B explosive as defined in 49 CFR 173.88 ~~and any subsequent amendments thereto~~.

(2) The department hereby adopts and incorporates herein by reference 49 CFR 173.51, 49 CFR 173.53, and 49 CFR 173.88. 49 CFR 173.51, 173.53 and 173.88 are federal agency rules setting forth, respectively, a description of those explosives classified as forbidden explosives, the definition of a Class A explosive, and the definition of a Class B explosive. A copy of 49 CFR 173.51, 173.53 and 173.88 may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

~~(2)~~ (3) Same as proposed rule.

16.44.324 through 16.44.330 Same as proposed rules.

16.44.331 HAZARDOUS WASTE FROM NONSPECIFIC SOURCES ~~For the purposes of this chapter, the department adopts as hazardous wastes those hazardous wastes from nonspecific sources listed in 40 CFR 261.31 and any subsequent amendments thereto.~~ The department hereby adopts and incorporates herein by reference 40 CFR 261.31 and any subsequent amendments thereto. 40 CFR 261.31 is a federal agency rule setting forth a list of hazardous wastes from non-specific sources. A copy of 40 CFR 261.31 may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

16.44.332 HAZARDOUS WASTE FROM SPECIFIC SOURCES ~~For the purposes of this chapter, the department adopts as hazardous wastes those hazardous wastes from specific sources listed in 40 CFR 261.32 and any subsequent amendments thereto.~~ The department hereby adopts and incorporates herein by reference 40 CFR 261.32 and any subsequent amendments thereto. 40 CFR 261.32 is a federal agency rule setting forth a list of hazardous wastes from specific sources. A copy of 40 CFR 261.32 may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

16.44.333 DISCARDED COMMERCIAL CHEMICAL PRODUCTS, OFF-SPECIFICATION SPECIES, CONTAINERS, AND SPILL RESIDUES THEREOF

(1) - (4) Same as proposed rule.

(5) The commercial chemical products or manufacturing chemical intermediates, referred to in subsections (1) through (4) of this rule are identified as acute hazardous wastes (H) and are subject to the small quantity exclusion defined in ARM 16.44.305(3). These wastes and their corresponding EPA hazardous waste numbers are those wastes listed in 40 CFR 261.33(3).

(6) The commercial chemical products or manufacturing chemical intermediates, referred to in subsections (1), (2), and (4) of this rule are identified as toxic wastes (T) unless otherwise designated and are subject to the small quantity exclusion defined in ARM 16.44.305(1) and (2). These wastes and their corresponding EPA hazardous waste numbers are those wastes listed in 40 CFR 261.33(f).

(a) The department hereby adopts and incorporates by reference the lists of substances and hazardous waste numbers in 40 CFR 261.33(e) and (f) and any subsequent amendments thereto. 40 CFR 261.33(e) and (f) is a federal agency rule setting forth those commercial chemical products and manufacturing chemical intermediates which are, in (e), acute hazardous wastes and, in (f), toxic wastes. A copy of 40 CFR 261.33(e) and (f) may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

16.44.351 REPRESENTATIVE SAMPLING METHODS ~~The department adopts as its representative sampling methods these representative sampling methods described in Title 40 of the Code of Federal Regulations, Part 261, Appendix I, and any subsequent amendments thereto.~~ (1) For the purposes of this chapter, the department hereby adopts and incorporates herein by reference Appendix I of 40 CFR Part 261. Appendix I of 40 CFR Part 261 is an appendix to a

federal agency rule setting forth the sampling protocols for the collection of samples of hazardous waste which will be considered by the department to be representative of the waste. A copy of Appendix I of 40 CFR Part 261 may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

(2) A person desiring to use an alternative sampling method shall submit to the department a written request for approval of the proposed method.

16.44.352 ~~EP TOXICITY TEST PROCEDURES -- The department adopts as its EP toxicity test procedures those EP toxicity test procedures described in Title 40 of the Code of Federal Regulations, Part 261, Appendix II and any subsequent amendments thereto.~~

EP TOXICITY TEST PROCEDURES--CHEMICAL ANALYSIS TEST METHODS--BASIS FOR LISTING--HAZARDOUS CONSTITUENTS For the purposes of this chapter, the department hereby adopts and incorporates herein by reference the following:

(1) Appendix II of 40 CFR Part 261 and any subsequent amendments thereto. Appendix II of 40 CFR Part 261 is an appendix to a federal agency rule setting forth the test procedure for EP toxicity.

(2) Appendix III of 40 CFR Part 261 and any subsequent amendments thereto. Appendix III of 40 CFR Part 261 is an appendix to a federal agency rule setting forth the appropriate analytical procedures to be used in determining whether a waste contains a particular toxic constituent.

(3) Appendix VII of 40 CFR Part 261 and any subsequent amendments thereto. Appendix VII of 40 CFR Part 261 is an appendix to a federal agency rule setting forth the basis for listing hazardous waste.

(4) Appendix VIII of 40 CFR Part 261 and any subsequent amendments thereto. Appendix VIII of 40 CFR Part 261 is an appendix to a federal agency rule setting forth a list of hazardous constituents.

(a) A copy of Appendices II, III, VII and VIII of 40 CFR Part 261 may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

~~16.44.353 CHEMICAL ANALYSIS TEST METHODS -- The department adopts as its chemical analysis test methods those chemical analysis test methods described in Title 40 of the Code of Federal Regulations, Part 261, Appendix III and any subsequent amendments thereto.~~

~~16.44.357 BASIS FOR LISTING -- The basis for listing hazardous waste for the purposes of this chapter is the basis for listing hazardous wastes contained in Title 40 of the Code of Federal Regulations, Part 261, Appendix VII and any subsequent amendments thereto.~~

~~16.44.358 HAZARDOUS CONSTITUENTS -- The list of hazardous constituents for the purposes of this chapter is the list of hazardous constituents contained in Title 40 of the Code of Federal Regulations, Part 261, Appendix VIII and any subsequent amendments thereto.~~

16.44.401 - 16.44.405 Same as proposed rules.

16.44.406 REQUIRED INFORMATION ON MANIFEST

(1)(a) - (d) Same as proposed rule.

(e) the description of the waste as required by the U.S. Department of Transportation in 49 CFR ~~172.101~~, 172.202 and 172.203~~, and any subsequent amendments thereto~~; and

(f) Same as proposed rule.

(2) The department hereby adopts and incorporates herein by reference 49 CFR 172.202 and 172.203.

49 CFR 172.202 and 172.203 are federal agency rules setting forth the necessary information that must be included in a description of a hazardous material on a shipping paper. A copy of 49 CFR 172.202 and 172.203 may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

~~(2)~~ (3) Same as proposed rule.

16.44.407 - 16.44.408 Same as proposed rules.

16.44.415 ACCUMULATION TIME (1) A generator may accumulate hazardous waste on-site without a license for 90 days or less, provided that the following requirements are met:

(a) All such waste is shipped off-site in 90 days or less~~.~~;

~~(b) The waste is placed in containers which meet the standards of 40 CFR 262.30 and any subsequent amendments thereto, and are managed in accordance with 40 CFR 265.174 and 265.176 and any subsequent amendments thereto, or in tanks, provided the generator complies with the requirements of Subpart J of 40 CFR, Part 265 except Section 265.193 and any subsequent amendments thereto;~~

(b) The waste is placed in either containers or tanks.

(i) If the waste is placed in containers, the container must meet the applicable Department of Transportation regulations on containers under 49 CFR Parts 173, 178 and 179. The owner or operator must inspect areas where containers are stored, at least weekly, looking for leaks and for deterioration caused by corrosion or other factors. Containers holding ignitable or reactive waste must be located at least 15 meters (50 feet) from the facility's property line.

(ii) If the waste is placed in tanks, the generator must comply with the requirements of 40 CFR Part 265, Subpart J, except 40 CFR 265.193.

(c) The date upon which each period of accumulation begins is clearly marked and visible for inspection on each container, or tank.

(d) Each container is properly labeled and marked ~~according to 40 CFR 262.31 and 262.32 and any subsequent amendments thereto; and~~ in accordance with the applicable Department of Transportation regulations on hazardous materials under 49 CFR Part 172, Subparts D and E. In addition, each container of 110 gallons or less must be marked with the following words:

HAZARDOUS WASTE -- Federal Law Prohibits Improper Disposal. If found, contact the nearest police or public safety authority or the U.S. Environmental Protection Agency.
Generator's Name and Address
Manifest Document Number

(e) The generator complies with the requirements for owners or operators in ~~Subparts C and D in~~ 40 CFR, Part 265 Subparts C and D and with 40 CFR 265.16 ~~and any subsequent amendments thereto~~.

(2) The department hereby adopts and incorporates by reference 49 CFR Part 172, Subparts D and E, 49 CFR Parts 173, 178 and 179; 40 CFR Part 265, Subparts C and D; and 40 CFR Part 265, Subpart J except 40 CFR 265.193.

(a) 49 CFR Part 172, Subparts D and E are federal agency rules setting forth marking and labeling requirements for hazardous materials offered for transportation.

(b) 49 CFR Part 173 are federal agency rules setting forth general requirements for shipment and packaging of hazardous materials including explosives and blasting agents; flammable, combustible and pyrophoric liquids; flammable solids, oxidizers and organic peroxides; corrosive materials; compressed gases; poisonous materials, etiologic agents and radioactive materials; and other regulated material preparation requirements.

(c) 49 CFR Part 178 are federal agency rules setting forth shipping container specifications including specifications for carboys, jugs in tubs; rubber drums; inside con-

tainers and linings; cylinders; metal barrels, drums, kegs, cases, trunks, and boxes; wooden barrels, kegs, boxes, kits and drums; fiberboard boxes, drums and mailing tubes; cloth, burlap, paper or plastic bags; portable tanks; and containers for motor vehicle transportation.

(d) 49 CFR Part 179 are federal agency rules setting forth specifications for tank cars including approvals and reports; general design requirements; and specifications for pressure tank car tanks, nonpressure tank car tanks, multi-unit tank car tanks, liquefied hydrogen tank car tanks and seamless steel tanks.

(e) 40 CFR Part 265, Subparts C and D are federal agency rules setting forth requirements for handling emergencies including preparedness, prevention, contingency plans, and emergency procedures for facilities that treat, store or dispose of hazardous wastes.

(f) 40 CFR Part 265, Subpart J, except 265.193, are federal agency rules setting forth requirements for owners or operators of facilities that use tanks to treat or store hazardous wastes including general operating requirements, inspections, closure, and special requirements for ignitable, reactive and incompatible wastes.

(g) A copy of 49 CFR Part 172, Subparts D and E; 49 CFR Parts 173, 178 and 179; 40 CFR Part 265, Subparts C, D, and J except for 40 CFR 265.193, or any portion thereof, may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

~~(2)~~ (3) Same as proposed rule.

16.44.416 - 16.44.418 Same as proposed rules.

16.44.425 INTERNATIONAL SHIPMENTS Any person who exports a hazardous waste from Montana to a foreign country or imports hazardous waste from a foreign country into Montana must comply with the provisions of 40 CFR ~~262.50~~ 262.50(a), (b)(2) and (3), (c) and (d) ~~and any subsequent amendments thereto~~. The department hereby adopts and incorporates herein by reference 40 CFR 262.50(a), (b)(2) and (3), (c) and (d). 40 CFR 262.50(a), (b)(2) and (3), (c) and (d) are federal agency rules setting forth manifest and reporting requirements for importation of hazardous waste from a foreign country and exportation of a hazardous waste to a foreign country. A copy of 40 CFR 262.50(a), (b)(2) and (3), (c) and (d) may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

16.44.430 FARMERS A farmer disposing of waste pesticides from his own use which are hazardous wastes is not required to comply with the standards in this sub-chapter ~~or the standards contained in 40 CFR, Parts 122, 264 or 265 and any subsequent amendments thereto~~ for those wastes provided he triple rinses each emptied pesticide container in accordance with ARM 16.44.333(3) and disposes of the pesticide residues on his own farm in a manner consistent with the disposal instructions on the pesticide label.

16.44.501 - 16.44.508 Same as proposed rules.

16.44.511 HAZARDOUS WASTE DISCHARGES -- IMMEDIATE ACTION (1) and (2) Same as proposed rule.

(3) A transporter who has discharged hazardous waste must:

(a) Give notice, if required by 49 CFR 171.15 ~~and any subsequent amendments thereto~~, to the National Response Center (800-424-8802 or 202-426-2675);

(b) Report in writing as required by 49 CFR 171.16 ~~and any subsequent amendments thereto~~ to the Director, Office of Hazardous Materials Regulations, Materials Transportation Bureau, Department of Transportation, Washington, D.C. 20590; and

(c) Give notice to the department by immediately contacting the Montana hazardous materials emergency response system (449-3034).

(4) A water (bulk shipment) transporter who has discharged hazardous waste must give the same notice as required by 33 CFR 153.203 ~~and any subsequent amendments thereto~~ for oil and hazardous substances.

(5) The department hereby adopts and incorporates herein by reference 49 CFR 171.15 and 171.16 and 33 CFR 153.203.

(a) 49 CFR 171.15 and 171.16 are federal agency rules setting forth telephonic and written reporting requirements for certain hazardous materials incidents including incidents involving injury or death of a person, property damage, radioactive material, or etiologic agents.

(b) 33 CFR 153.203 is a federal agency rule setting forth reporting requirements for the discharge of oil or hazardous substance from a vessel or an onshore or offshore facility.

(c) A copy of 49 CFR 171.15 and 171.16 and 33 CFR 153.203 may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

16.44.512 Same as proposed rule.

Sub-chapter 6 Hazardous Waste Treatment, Storage and Disposal Facilities

~~16.44.601 INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE AND DISPOSAL FACILITIES (1) An owner or operator of an existing facility which treats, stores or disposes of hazardous waste must comply with the requirements for interim status under Section 3005(e) of RCRA and 40 CFR 122.22(a)(1), and, until final disposition of his permit application is made, is subject to the standards in subparts B through and including Q of Part 265, Title 40, CFR, and any subsequent amendments thereto.~~

~~(2) No person may commence construction, as defined in ARM 16.44.202(19), of a new facility which treats, stores or disposes of hazardous waste without obtaining a license from the department. Application for such license may be made after the department has promulgated licensure rules for hazardous waste management facilities.~~

~~16.44.602 EXCLUSIONS The requirements of ARM 16.44.601 do not apply to:~~

~~(1) the owner or operator of a POTW which treats, stores or disposes of hazardous waste;~~

~~(2) the owner or operator of a facility licensed by the department to manage solid waste pursuant to sub-chapter 5, Chapter 14, Title 16, ARM, if the only hazardous waste the facility treats, stores, or disposes of is excluded from regulation under this sub-chapter by ARM 16.44.305;~~

~~(3) the owner or operator of a facility which treats or stores hazardous waste, which treatment or storage meets the criteria in ARM 16.44.306(1), except to the extent that ARM 16.44.306(2) provides otherwise;~~

~~(4) a generator accumulating waste on site in compliance with ARM 16.44.415, except to the extent the requirements are included in ARM 16.44.415;~~

~~(5) a farmer disposing of waste pesticides from his own use in compliance with ARM 16.44.430; or~~

~~(6) the owner or operator of a totally enclosed treatment facility, as defined in ARM 16.44.202(63).~~

NOTE: All of the following is new material, replacing proposed rules 16.44.601 and 16.44.602. Due to its length and for convenience of the reader, this new material of sub-chapter (6) is not underlined.

16.44.601 PURPOSE The purpose of the rules of this sub-chapter is to provide temporary licensure and standards for the operation of treatment, storage and disposal facilities until final licensure rules and standards for these facilities are adopted.

16.44.602 PROHIBITIONS (1) No person may operate an existing facility which treats, stores or disposes of hazardous waste without obtaining a license under ARM 16.44.605.

(2) No person may commence construction of a new facility which treats, stores or disposes of hazardous waste without obtaining a license from the department. Application for such license may be made after the department has promulgated final licensure rules for hazardous waste management facilities, and must be submitted 180 days before continuous, physical on-site construction begins.

(a) For the purposes of this rule, "commence construction" means either:

(i) a continuous physical, on-site construction program has begun, or

(ii) contractual obligations, which cannot be cancelled or modified without substantial loss, have been entered into for construction of the facility to be completed within a reasonable time.

16.44.603 and 16.44.604 [reserved]

16.44.605 TEMPORARY LICENSURE A person who owns or operates an existing facility which treats, stores or disposes of a hazardous waste shall be licensed temporarily for the treatment, storage, or disposal of that waste if:

(1) he files completed form 8700-12 with the department or has filed this form with EPA by November 19, 1980; and

(2) he submits all the information required by 40 CFR 122.24 to the department or has submitted such information to EPA by November 19, 1980.

(a) The department hereby adopts and incorporates herein by reference 40 CFR 122.24. 40 CFR 122.24 is a federal agency rule setting forth Part A application requirements under RCRA. A copy of 40 CFR 122.24 may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

(3) Form 8700-12 and forms for submitting the information required in subsection (2) of this rule may be obtained from the department.

16.44.606 TEMPORARY LICENSE -- EXPIRATION -- TERMINATION (1) A license obtained under ARM 16.44.605 shall expire upon final administrative disposition of a license application.

(2) A license obtained under ARM 16.44.605 may be terminated if the licensee fails to submit, as required by the final licensure rules of the department, a license application on time or all the information required by the license application.

16.44.607 TEMPORARY LICENSE -- TERMS A facility licensed under ARM 16.44.605 may not:

(1) treat, store, or dispose of a hazardous waste not specified in the information submitted pursuant to ARM 16.44.605(2);

(2) employ processes not specified in the information submitted pursuant to ARM 16.44.605(2); or

(3) exceed the design capacities specified in the information submitted pursuant to ARM 16.44.602(2).

16.44.608 [Reserved]

16.44.609 STANDARDS FOR EXISTING FACILITIES WITH TEMPORARY LICENSE (1) A person who receives a license under 16.44.605 must comply with the standards and requirements in 40 CFR Part 265, Subparts B through and including Q.

(2) The department hereby adopts and incorporates herein by reference 40 CFR Part 265, Subparts B through and including Q. Subparts B through Q of 40 CFR Part 265 are federal agency rules setting forth general facility standards (B); requirements for preparedness and prevention (C); requirements for contingency plan and emergency procedures (D); manifest system, recordkeeping and reporting requirements (E); groundwater monitoring requirements (F); closure and post-closure requirements (G); financial requirements (H); requirements for use and management of containers (I) and requirements for tanks (J), surface impoundments (K), waste piles (L), land treatment (M), landfills (N), incinerators (L), thermal treatment (P), and chemical, physical and biological treatment (Q). A copy of 40 CFR Part 265, Subparts B through and including Q, or any portion thereof, may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

16.44.610 CHANGES DURING TEMPORARY LICENSURE (1) A new hazardous waste not previously identified in the information required by ARM 16.44.605(2) may be treated, stored, or disposed of at a licensed existing facility if the owner or operator submits to the department a revision of the information required by ARM 16.44.605(2) on the new waste prior to treatment, storage or disposal of the new waste.

(2) Increases in the design capacity of processes used at a licensed existing facility may be made if the owner or operator submits to the department a revision of the information required by ARM 16.44.605(2) with a written justification explaining the need for the capacity increase and the department approves the capacity increase because of a lack of available treatment, storage or disposal capacity at other hazardous waste management facilities.

(3) Changes in the processes for the treatment, storage or disposal of hazardous waste may be made at a licensed existing facility or additional processes may be added if the owner or operator submits a revision of the information required by ARM 16.44.605(2) prior to such change with a written justification explaining the need for the change and the department approves the change because:

(i) it is necessary to prevent a threat to human health or the environment because of an emergency situation, or

(ii) it is necessary to comply with federal regulations or state or local laws.

(4) Changes in the ownership or operational control of a licensed existing facility may be made if the new owner or operator submits a revision of the information required by ARM 16.44.605(2) no later than 90 days prior to the scheduled change. When a transfer of ownership or operational control of a facility occurs, the old owner or operator shall comply with the requirements of 40 CFR Part 265, Subpart H (financial requirements), incorporated by reference in ARM 16.44.609(2), until the new owner or operator has demonstrated to the department that it is complying with that Subpart. All other duties imposed by ARM 16.44.609 are transferred effective immediately upon the date of the change of ownership or operational control of the facility. Upon demonstration to the department by the new owner or operator of compliance with Subpart H, the department shall notify the old owner or operator in writing that it no longer needs to comply with ARM 16.44.609 as of the date of demonstration.

(5) Changes may not be made to a licensed existing facility during temporary licensure which amount to reconstruction of the facility. Reconstruction occurs when the capital investment in the changes to the facility exceeds fifty percent of the capital cost of a comparable entirely new facility.

16.44.611 [Reserved]

16.44.612 EXCLUSIONS The provisions of this sub-chapter do not apply to:

(1) the owner or operator of a POTW which treats, stores or disposes of hazardous waste;

(2) the owner or operator of a facility licensed by the department to manage solid waste pursuant to sub-chapter 5, Chapter 14, Title 16, ARM, if the only hazardous waste the facility treats, stores, or disposes of is excluded from regulation under this sub-chapter by ARM 16.44.305;

(3) the owner or operator of a facility which treats or stores hazardous waste, which treatment or storage meets the criteria in ARM 16.44.306(1), except to the extent that ARM 16.44.306(2) provides otherwise;

(4) a generator accumulating waste on-site in compliance with ARM 16.44.415, except to the extent the requirements are included in ARM 16.44.415;

(5) a farmer disposing of waste pesticides from his own use in compliance with ARM 16.44.430; or

(6) the owner or operator of a totally enclosed treatment facility, as defined in ARM 16.44.202(72).

3. The following written comments were received concerning the proposed rules:

A. Sub-Chapter 2 -- Definitions

(1) EPA and CONOCO commented that definitions from the Montana Solid Waste Management Act (MSWMA) should be repeated in the rules. The department has not acceded to this request because section 2-4-305(2), MCA, requires that state agency "rules may not unnecessarily repeat statutory language." The department plans to prepare booklets containing the Act and these rules and will make them available upon request.

(2) EPA and Anaconda Aluminum Company raised the issue of interim status as related to the definitions of "existing facility" and "new facility." EPA stressed that pending federal legislation would change the date in these federal definitions. Anaconda Aluminum pointed out that by setting a specific date for existing facilities, interim status would be denied to activities which might fall under regulation as facilities by future additions to the hazardous waste lists. Such actions could conceivably force an industry to cease operation of a facility until the state was able to process and issue a license. It was suggested that the department allow a six-month period after any additions to the waste lists or characteristics for any affected activities to achieve interim status by appropriate notification and the filing of a license application.

Congress recently passed amendments to RCRA which set the cutoff date for existing facilities as November 19, 1980; the department changed its definition accordingly. The department did not add a provision to allow the six-month period because such a provision could be viewed by EPA as not substantially equivalent to the EPA regulations and therefore possible grounds for denying interim program authorization to Montana. EPA is presently developing a policy on the possible granting of interim status to facilities affected by future changes to 40 CFR Part 261. The department will attempt to conform its rules and procedures to any changes by EPA in this area.

(3) A number of comments were received objecting to the absence of procedures for approving equivalent testing methods and delisting of specific wastes in these rules. The rules were written without procedures for delisting for the following reasons:

(a) The department has not yet been fully informed by EPA on the data and decision-making procedures EPA used to develop the waste lists in 40 CFR Part 261. The department would need to involve EPA in any evaluation of a delisting petition to insure that it had all the relevant facts for rendering a decision.

(b) During Phase I interim authorization, the department will be developing its resources and developing the proper laboratory capability to be able to handle such rulemaking petitions effectively. EPA is presently better staffed and has greater expertise to handle such petitions.

(c) EPA has not yet developed a formal policy as to how it will view delisting procedures in the program of a state seeking interim authorization of its hazardous waste program. EPA could view state delisting procedures as an avenue by which the state program could become less stringent than the federal program.

Because of these considerations, the department has elected to leave the acceptance of rulemaking petitions to EPA during the Phase I program. The department plans to take the lead role in such actions at a later date in its program development.

A successful petition to EPA for either a waste delisting or use of an alternate testing procedure would result in amendment to the appropriate federal regulations. Since ARM 16.44.330 through 16.44.333 and ARM 16.44.352 adopt the EPA hazardous waste lists and testing procedures by reference, any addition to or deletion from the waste lists or procedures will be incorporated into the department's rules.

B. Sub-Chapter 3 -- Identification and Listing of Hazardous Waste

(1) 16.44.302 Definition of Waste.

The Montana Petroleum Association suggested a simpler definition of waste related only to the economic value of a material. The department rejected the suggestion. EPA discussed at considerable length in the preamble to its regulations (45 Federal Register 33090 et seq.) the reasons for its definitions of "waste" and its policy towards wastes which may be reused or recycled. The department doubts that EPA would judge the "waste" definition suggested to be substantially equivalent to the federal definition.

Regarding the comments concerning lack of a definition of the term "disposed of", the department changed ARM 16.44.302 (3)(a)(i) to provide definition.

(2) 16.44.303 Definition of Hazardous Waste

Several commentators were concerned that ARM 16.44.303 (4)(b) would allow a waste generator to delist his own waste based on his determination that the waste which he generated from the treatment, storage or disposal of a listed waste did not meet the criteria of 16.44.311. The department revised this subsection in light of these comments.

(3) 16.44.304 Exclusions.

Several comments were received concerning the wastes exempted from regulation as hazardous wastes. St. Regis Paper Co. noted the exemption for wastes derived from the combustion of fossil fuels and suggested that the exemption be extended to wastes from the combustion of wood. The department rejected the suggestion. These wastes are not listed as hazardous wastes and unless they met one of the four characteristics of a hazardous waste, they would be excluded from regulation.

The other comments related to the exclusion for mining overburden and the pending amendments to RCRA concerning other wastes from mining and beneficiation processes. The Anaconda Co. and the Montana Mining Association requested that Montana not be more stringent than EPA in this regard. The pending RCRA amendments defer the regulation of mining wastes as hazardous wastes until the completion of an intensive study of such wastes and a recommendation for or against regulation is made by EPA. The department will review EPA's recommendation and will take appropriate action at that time.

(4) 16.44.310 Criteria for Identifying Characteristics of Hazardous Waste

Exxon and Phillips both noted the differences in wording between ARM 16.44.310(1)(a) and 40 CFR 261.10(a)(1) and suggested that the department alter its wording to conform with the federal regulation. ARM 16.44.310(1)(a) uses the wording from the definition of hazardous waste in MSWMA to

establish a criterion for defining characteristics of hazardous wastes. Because the hazardous waste definitions in MSWMA and RCRA are different, the department cannot use the federal language in its rule.

(5) 16.44.320 and 16.44.351 Representative Sampling Methods.

Exxon requested that the use of alternative methods to EPA approved methods, which could be shown to be equivalent, be allowed. The department agreed and changed the rule accordingly.

(6) 16.44.330 Lists of Hazardous Wastes -- General

Exxon noted that ARM 16.44.330 did not refer to the mention of recordkeeping and reporting requirements or the exclusion limits stated in 40 CFR 261.30 (c) and (d), and suggested these omissions may jeopardize the substantial equivalency of the department's rules.

The department has determined that it is not necessary to make changes in ARM 16.44.330(3) to comport with 40 CFR 261.30(c) since "with the requirements of this chapter" incorporates the pertinent recordkeeping and reporting requirements. The department did not add a section equivalent to 40 CFR 261.30(d). EPA has indicated to the department that this section will be deleted from the federal regulations. There are no exclusion limits set forth in 40 CFR 261.31 and 261.32; all wastes listed in these sections have the general 1000 Kg exclusion set forth in 40 CFR 261.5(a) and (b).

(7) 16.44.333 Discarded Commercial Chemical Products, etc.

St. Regis noted that ARM 16.44.333(3)(b) appeared to pertain to the cleaning of containers for liquid materials, but not to the paper or fiberboard packaging often used for powder or granular form chemicals. This section as proposed would allow demonstrations by the generator or facility operator to show chemical residue removal equivalent to the rinsing of other container types; therefore, no changes have been made in the final rule.

C. Sub-Chapter 4 -- Standards Applicable to Generators of Hazardous Waste

(1) 16.44.406 Required Information on Manifest

Chem-Security Systems, Inc. and Transformer Service, Inc. asked if Montana would mandate a specific manifest form for use in the state. The department currently does not intend to require a specific form.

(2) 16.44.415 Accumulation Time

EPA suggested that the words "and tank" be added at the end of the sentence in ARM 16.44.415(c). The omission of these words in 40 CFR 262.34(a)(3) was an oversight by EPA which it intends to rectify in its next rulemaking. The department concurs with the recommendation and has made this change in the final rule.

D. Sub-Chapter 6 -- Standards for Owners and Operators of Facilities.

(1) EPA commented that the intent in ARM 16.44.601 was not clearly stated. This sub-chapter has been rewritten in the final rules to more specifically state the requirements for existing and new facilities.

(2) EPA suggested that the concept of commence physical construction be employed in place of "commence construction" as defined in ARM 16.44.202(19),. The department agreed with the recommendation and changed the rule accordingly.

E. General comments not applicable to a specific rule.

(1) Incorporation of federal rules by reference.

Several comments were received requesting clarification of those federal agency rules which the department intended to incorporate by reference. Between the time of filing the notice of proposed action and the filing of the notice of final action, the office of the secretary of state has requested by memorandum all state agencies to conform to a model provision for incorporation by reference material. The department has complied with the request of the secretary of state, and changed its rules accordingly. Most of the changes to the proposed rules shown in the notice of adoption are (a) the result of clarifying what the department is and is not incorporating by reference and (b) complying with the format of the secretary of state when material is incorporated by reference.

In addition, Exxon asked why the department had used full text of rules in some places and incorporated by reference in others. Until the state receives final authorization of the hazardous waste management program from EPA, the department decided that it was more cost-efficient to incorporate by reference those lengthy portions of the EPA regulations which reduces the volume of the department's rules and consequent costs of publication in the code.

(2) Delayed effective dates of federal rules.

After the effective date of these rules, all future amendments to federal rules incorporated by reference in ARM 16.44.330 to 16.44.331 and 16.44.352 will become effective in Montana on the legally effective date of the federal regulations.

(3) Control of PCBs.

Chem-Security Systems, Inc. and Transformer Service, Inc. asked if the department was controlling PCB (polychlorinated biphenyl) under these rules. PCB does not meet any of the four characteristics of a hazardous waste and it is not a

listed waste under these rules; therefore, it is not subject to regulation under these rules.

A. C. KNIGHT, Director

Certified to the Secretary of State November 5, 1980

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

In the matter of the amendment of ARM 16-2.12(3)-S12303 [16.40.303], Exemptions -- Radioactive Material other than Source Material	NOTICE OF AMENDMENT OF ARM 16-2.12(3)-S12303 [16.40.303] (Exemptions -- Radioactive Material other than Source Material)

TO: All Interested Persons

1. On September 11, 1980, the Department of Health and Environmental Sciences published notice of a proposed amendment to rule 16-2.12(3)-S12303 [16.40.303] concerning exemptions for radioactive material other than source material at pages 2531-2532 of the 1980 Montana Administrative Register, issue number 17.

2. The Department has amended the rule as proposed.

3. No comments or testimony were received.

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

By JOHN W. BARTLETT, Deputy Director

Certified to the Secretary of State November 5, 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 AMENDMENT OF RULE 42.15.321, relating to joint tax returns.

TO: All Interested Persons:

1. On September 25, 1980, the Department of Revenue published notice of the proposed amendment of Rule 42.15.321, relating to joint tax returns, at pages 2628 and 2629 of the 1980 Montana Administrative Register, Issue no. 11.

2. The Department has amended the rule as proposed.

3. One written comment in support of the rule was received.

MARY L. CRAIG, Director
Department of Revenue

Certified to the Secretary of State 11-3-80.

VOLUME NO. 38 OPINION NO. 110

SCHOOL BOARDS - Individual tuition for high school pupil; SCHOOL DISTRICTS - Individual tuition for high school pupil; MONTANA CODE ANNOTATED - Sections 20-5-303 and 20-5-313.

HELD: Individual tuition for a high school pupil attending a high school outside of his district of residence may not be waived on the ground that the parent pays $200 or more in district and county property taxes during the preceding school fiscal year for the benefit and support of the district in which the pupil will attend school.

22 October 1980

Robert J. Brooks, Esq.
Powder River County Attorney
P.O. Box 345
Broadus, Montana 59317

Dear Mr. Brooks:

You have requested my opinion on the following question:

> Whether individual tuition for a high school pupil must be waived when the parent pays $200 or more in district and county property taxes during the preceding school fiscal year for the benefit and support of the district in which the pupil will attend school.

Montana law allows high school pupils to attend high schools outside of their districts of residence. You have described a situation involving circumstances which are governed by section 20-5-313, MCA. That statute provides in pertinent part:

> (2) No provision of this title shall be construed to deny a parent the right to send his child, at his own expense, to any high school outside of his district of residence when the parent agrees to pay the tuition acceptable to the trustees of the high school district operating such high school. When the attendance is approved, the parent shall pay tuition at the rate fixed by the trustees.

Section 20-5-313, MCA, contains no provision for the kind of tuition waiver in question. Section 20-5-303, MCA, which covers individual tuition for elementary school pupils, does expressly provide for the waiver of elementary tuition, "when the parent of the child paid $200 or more in district and county property taxes during the immediately preceding school fiscal year for the benefit and support of the district in which the child will attend school."

In my opinion, the tuition waiver which is available to parents of elementary pupils pursuant to section 20-5-303, MCA, is not available to parents of high school pupils who attend high schools outside of their districts of residence. By its terms, section 20-5-303, MCA, applies to elementary school pupils only. Nothing in that section reflects legislative intent to encompass high school pupils as well. As noted above, section 20-5-313, MCA, which corresponds to section 20-5-303, MCA, but deals expressly with high school pupils, is silent as to tuition waivers. In construing a statute, what has been omitted may not be inserted. Montana Department of Revenue v. American Smelting and Refining Co., 173 Mont. 316, 324, 567 P.2d 901 (1977). However, nothing in these sections prohibits the trustees from setting a rate for tuition that takes into account the taxes previously paid to that district.

It should be noted that this opinion concerns high school tuition situations governed by section 20-5-313, MCA, and has no effect on tuition agreements approved by the trustees of the district where the child wishes to attend school and the trustees of the child's district of residence pursuant to section 20-5-311, MCA.

THEREFORE, IT IS MY OPINION:

> Individual tuition for a high school pupil attending a high school outside of his district of residence may not be waived on the ground that the parent pays $200 or more in district and county property taxes during the preceding school fiscal year for the benefit and support of the district in which the pupil will attend school.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 38 OPINION NO. 111

BOARD OF PUBLIC EDUCATION - School for Deaf and Blind: transfer of gifts to nonprofit organization;
CHARITABLE ORGANIZATIONS - Transfer of School for Deaf and Blind funds to nonprofit organization;
GIFTS - Transfer of gifts for School for Deaf and Blind to nonprofit organization;
PUBLIC FUNDS - School for Deaf and Blind: transfer of gifts to nonprofit organization;
MONTANA CODE ANNOTATED - Sections 5-13-101, 5-13-102(1), 5-13-304(1), 5-13-304(7), 7-7-2103, 17-3-1001, 20-8-110, 20-8-111, 20-8-112;
MONTANA CONSTITUTION OF 1972 - Article V, section 11(5); Article VIII, section 12; Article X, section 10;
OPINIONS OF THE ATTORNEY GENERAL - 36 OP. ATT'Y GEN. NO. 106, at 553 (1976); 37 OP. ATT'Y GEN. NO. 105 (1978).

HELD: Under section 20-8-111, MCA, the Board of public Education, in its discretion, may give money that has been donated for the use and benefit of the Montana School for the Deaf and Blind to a private non-profit corporation created and controlled by the Board and operated for the benefit of that school. However, the Board remains accountable for the money until it is used directly for the general support, maintenance, or improvement of the Montana School for the Deaf and Blind.

27 October 1980

Mr. Morris L. Brusett
Legislative Auditor
State Capitol
Helena, Montana 59601

Dear Mr. Brusett:

You have requested my opinion on the following question:

> May the Board of Public Education transfer from the state treasury to a private non-profit organization, gifts and donations made to the state and intended for the use of the Montana School for the Deaf and Blind and its students?

You and the Board of Public Education have provided me with the following facts. Over a number of years, gifts, largely unrestricted cash donations, have been received by the Montana School for the Deaf and Blind. These funds, together with their accumulated interest, amounting to a sum exceeding $120,000, are now deposited with the State Treasurer in accordance with a previous attorney general's opinion, 36 OP. ATT'Y GEN. NO. 106, at 553 (1976). The Board of Public Education, which is responsible for the funds, has retained a law firm to create a non-profit corporation or foundation to be operated for the benefit of the Montana School for the Deaf and Blind. The directors of the proposed corporation or foundation are to be appointed by and serve at the pleasure of the Board of Public Education. Some of the members of that Board may be directors. Once the proposed corporation or foundation is established, the Board intends to give the funds referred to above to the newly-created entity. Your question does not refer to the creation of the organization, but only to the transfer of funds from the state treasury to that organization.

Three statutes specifically govern the use of gifts to the Montana School for the Deaf and Blind. Section 20-8-110, MCA, states in part:

> [A]ll donations, gifts, devises, or grants which have been heretofore or may hereafter be made by any person or corporation to [the Montana state school for the deaf and blind] shall vest in the state of Montana for the use and benefit thereof.

Section 20-8-111, MCA, states:

> The board of public education shall have the power and it shall be its duty to receive, hold, manage, use, and dispose of any and all real and personal property made over to such board or to the state of Montana by purchase, gift, devise, bequest, or otherwise acquired and the proceeds, interest, and income thereof for the use and benefit of said school.

Section 20-8-112, MCA, states:

> No moneys belonging to the deaf and blind school fund shall be expended for any purpose other than for the Montana state school for the deaf and

> blind, and any moneys belonging to any fund or funds which may be hereafter created for such school shall be expended for the express purpose designated in the act or acts creating such fund or funds and for no other purpose.

In addition, section 17-3-1001, MCA, states:

> (1) |T]he Montana school for the deaf and blind, ... may accept gifts, donations, grants, devises, or bequests of real or personal property from any source. Gifts, donations, grants, bequests, or devises may be made directly to the state, in the name of any of the institutions, to any officer or board of the institutions, or to any person in trust for the institutions.
>
> (2) In the event it is made directly to any institution or to any officer or board of any institution, the gift, donation, grant, devise, or bequest is a gift, donation, grant, devise, or bequest to the state and shall be administered and used by the state for the particular purpose for which it was given, donated, granted, bequeathed, or devised. In the event no particular purpose is mentioned in the gift, grant, devise, or bequest, then it shall be used for the general support, maintenance, or improvement of such institution by the state.

These statutes give the Board of Public Education broad discretion concerning the use of the money you described if the money is spent for the general support, maintenance, or improvement of the Montana School for the Deaf and Blind. The question presented, therefore, is whether the transfer of that money to a private foundation, as outlined above, constitutes an abuse of discretion, under the guidelines given. My opinion is that under the facts presented, it does not.

The Wisconsin Supreme Court addressed a similar question in Glendale Development, Inc. v. Board of Regents, 12 Wis.2d 120, 106 N.W.2d 430 (1960), cert. denied, 366 U.S. 931 (1961). In that case, the Board of Regents of the University of Wisconsin had given money that had been donated to the university to a non-profit corporation organized by friends of the university. The corporation's purpose as stated in its articles was:

> To aid the university of Wisconsin by solicitation for the benefit of said university of gifts of real property or personal property or both; to collect, accept and receive gifts, bequests, devises or things of value and to hold, administer, use or distribute the same for the benefit of the university of Wisconsin.

106 N.W.2d at 435. The court held that the transfer of the donated money to the non-profit corporation by the Board of Regents was not unlawful. The court stated:

> There is no doubt but that the anonymous donors of the money to the Board of Regents desired that it should be used by the Board of Regents in any legitimate manner and in its discretion, so long as it was for the benefit of the university.
>
> * * *
>
> While the funds were public funds in a general sense, they were funds earmarked for such purposes as the Board of Regents, in its discretion, deemed proper, so long as they were for the benefit of the university.
>
> * * *
>
> [T]he money given to [the non-profit corporation] was properly used for the benefit of the university within the discretion and best judgment of the Board of Regents.

106 N.W.2d at 439. Just as the court in that case found no abuse of discretion and deferred to the best judgment of the Board of Regents, so I can find no abuse of discretion and must defer to the best judgment of the Board of Public Education.

I emphasize that my opinion is strictly limited to the specific funds, the specific agency, and the specific private non-profit corporation described herein. It is based not on any inherent power of state agencies, but on the specific grant of power by the legislature to the Board of Public Education contained in section 20-8-111, MCA. I reject the notion that this opinion would allow any other state agency or institution to transfer monies from the state treasury to a nonprofit foundation.

In the memorandum accompanying your opinion request, you suggest that Article X, section 10 of the Montana Constitution may prohibit the proposed transfer of funds. That provision states:

> The funds of the Montana university system and of all other state institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be provided by law, and shall be guaranteed by the state against loss or diversion. The interest from such invested funds, together with the rent from leased lands or properties, shall be devoted to the maintenance and perpetuation of the respective institutions.

Volume 36 OP. ATT'Y GEN. NO. 106, at 553 (1976) applied Article X, section 10 to the Montana School for the Deaf and Blind. While I concur with the result reached in that opinion, my agreement is based on statutory provisions. My opinion is that Article X, section 10 does not apply to the funds of the Montana School for the Deaf and Blind. In State ex rel. Evans v. Stewart, 53 Mont. 18, 23, 161 P. 309, 312 (1916), the Montana Supreme Court stated:

> [The predecessor to article X, section 10] deals with the permanent funds belonging to the higher educational institutions, the university, agricultural college, school of mines, and normal. There is [another] group made up of the permanent funds belonging to the reform school, deaf and dumb asylum, and capitol building. The constitution makes no reference whatever to the investment of the funds belonging to this last group, and therefore the Legislature was free to prescribe such regulations as might seem fit and proper. With reference to the higher educational institution funds constituting the [former] group, the mandate of the Constitution is that they shall be invested under such regulations as "may be prescribed by law."

(Emphasis added.) The provision referred to in that case, Article XI, section 12 of the 1889 Montana Constitution, was re-adopted with no substantive change as part of the present Montana Constitution. See 1972 Montana Constitutional

Convention Transcript of Proceedings at 6556-58. The "deaf and dumb asylum" referred to was the forerunner to the present Montana School for the Deaf and Blind. See § 20-8-110, MCA. Article X, section 10 does not apply to the Montana School for the Deaf and Blind.

As a matter of law, therefore, the proposed transfer is permissible. However, I agree with you that as a matter of public policy the proposed transfer is inadvisable. I would advise the Board of Public Education to reconsider its decision to transfer the funds, for two reasons. First, the purposes for the transfer stated in the memorandum from the Board of Public Education do not necessitate the transfer. The first two stated purposes are the establishment of an entity "whose exclusive concern is the needs and interests of the school and its students" and "which can actually solicit charitable contributions from the general public." The establishment of the entity is not being challenged. If the entity is to engage in the solicitation of funds, there is no need for public funds to be transferred to it. The third stated purpose is "to remove these funds from the State Treasury to eliminate the temptation for future legislatures to base their appropriations for the school upon the existence of such a fund." This goal cannot be accomplished by transferring the money to a private organization. The funds will remain public funds until they are actually expended, "for the general support, maintenance, or improvement" of the Montana School for the Deaf and Blind, whether the expenditure is administered directly by the Board of Public Education, or indirectly by the private organization. Any temptation for the legislature to base its appropriations on the existence of a fund will be present regardless of whether the fund is kept in the state treasury or by a private organization under the control of the Board of Public Education.

Second, the citizens of this state have long demanded strict accountability of all money received and spent by the state. Cf. Mont.Const. of 1889, Art. XII, §§ 13 and 14; Mont. Const. of 1972, Art. VIII, § 12 (mandate to legislature). And they have scrutinized carefully payments to private associations for charitable purposes. Cf. Mont. Const. of 1889, Art V, § 35; Mont. Const. of 1972, Art. V, § 11(5) (legislative appropriations); § 7-7-2103 MCA; 37 OP. ATT'Y. GEN. NO. 105, at 5-8 (1978)(county expenditures). While the provisions cited are not directly applicable to the situation presented by your request, the public policy is clear.

The Board of Public Education should maintain the strictest control possible over the funds that are the subject of this request. If, upon reconsideration, the Board of Public Education adheres to its decision to transfer the funds, I would recommend that it require the organization to contract to provide specific materials or services in return for the funds.

In addition, I recognize that this opinion may provide some practical problems for you and your staff, as you are charged with the duty of auditing fiscal accounts and records so that it may be assured that the directives of the legislature have been faithfully carried out. § 5-13-101 MCA. Your concern extends, therefore, not only to the gift of money to an appropriate organization, but also to that organization's ultimate use of the money "for the general support, maintenance, or improvement" of the Montana School for the Deaf and Blind. It is arguable that the organization to be created and controlled by the Board of Education may be a "state agency" within the meaning of your mandate to "audit the financial affairs and transactions of every state agency." See §§ 5-13-102(1) and 5-13-304(1) MCA. Or the gift from the Board of Public Education may be considered a grant from a state agency to an organization within the meaning of section 5-13-304(7) MCA. That provision states:

> The legislative auditor shall...have the authority to audit records of organizations and individuals receiving grants from or on behalf of the state to determine that the grants are administered in accordance with the grant terms and conditions. Whenever a state agency enters into an agreement to grant resources under its control to others, the agency must obtain the written consent of the grantee to the audit provided for in this subsection.

Under either interpretation of your mandate, it appears that your office may audit the fiscal accounts and records of the organization that the Board of Public Education proposes to create, to ensure that the money is devoted to the purposes for which it was given to the state -- "for the general support, maintenance, or improvement" of the Montana School for the Deaf and Blind.

THEREFORE, IT IS MY OPINION:

Under section 20-8-111, MCA, the Board of Public Education, in its discretion, may give money that has been donated for the use and benefit of the Montana School for the Deaf and Blind to a private non-profit corporation created and controlled by the Board and operated for the benefit of that school. However, the Board remains accountable for the money until it is used directly for the general support, maintenance, or improvement of the Montana School for the Deaf and Blind.

Very truly yours,

MIKE GREELY
Attorney General

cc: Executive Secretary
Board of Education

VOLUME NO. 38 OPINION NO. 112

ATTORNEY GENERAL - Effect of unreported district court judgment on Attorney General Opinions;
JUDGMENTS - Binding effect of declaratory judgment on persons not parties to lawsuit;
MUNICIPAL GOVERNMENT - Functions which must be financed through all-purpose levy;
MUNICIPAL GOVERNMENT - Options where no funding mechanism provided for new municipal function;
MONTANA CODE ANNOTATED - Sections 1-2-112, 2-15-501, 7-1-114, 7-6-4431, 7-6-4452, 7-6-4453, 7-6-4455, 7-32-4117, 7-33-4111, 7-33-4130, 19-3-204, 19-9-704, 19-10-301, 19-11-503, 27-8-301;
LAWS OF MONTANA (1975) - ch. 324, sec. 2; ch. 359, sec. 2; ch. 438, sec. 3.

HELD: 1. Municipalities which adopt the all-purpose mill levy authorized in section 7-6-4452, MCA, forfeit the power to impose levies for any particular purpose not clearly excepted by statute from exclusivity of the all-purpose levy.

2. The taxing authority granted in sections 19-10-301, MCA (local police retirement plans), 19-11-503, MCA (firemen's disability), and 7-33-4111, MCA (volunteer fire departments), is supplanted by the adoption of an all-purpose levy under section 7-6-4452, MCA.

3. The taxing authority granted in sections 7-32-4117, MCA (police group insurance), 7-33-4130, MCA (fireman's group insurance, first and second class cities), 19-9-704, MCA (statewide police retirement plan), 19-3-204 (PERS for city employees), Laws of Montana (1975) ch. 359, sec. 2 (not codified) (group insurance for city employees), Laws of Montana (1975), ch. 324, sec. 2 (not codified) (firemen's minimum wage, first and second class cities) and Laws of Montana (1975), ch. 438, sec. 3 (not codified) (police mimimum wage, first and second class cities) is not supplanted by adoption of an all-purpose levy under section 7-6-4452, MCA.

4. The Attorney General, in issuing advisory opinions, is not bound by a conclusion of law expressed in a district court declaratory judgment in an action to which the Attorney General is not a party.

29 October 1980

Harold A. Fryslie, Director
Department of Community Affairs
Capitol Station
Helena, Montana 59601

Dear Mr. Fryslie:

You have requested my opinion on whether particular expenditures required of municipal governments by statute may be financed by property taxes levied in addition to the sixty-five mill all-purpose levy provided in section 7-6-4452, MCA. Section 7-6-4452, MCA, allows a municipal government to "make an all-purpose annual levy upon the taxable value of all property in the cities and towns subject to taxation for municipal purposes in lieu of the multiple levies now authorized by statute." I note that municipalities with self-government powers are exempt from this limit. Section 7-1-114(g), MCA. Section 7-6-4453, MCA, permits special levies in addition to the all-purpose levy to fund bonded indebtedness, to pay judgments, and to fund SID revolving funds. You inquire whether certain other activities which municipalities are required by law to undertake may also be funded by additional levies.

The Montana Supreme Court has not had occasion to construe the all-purpose levy statute to determine whether municipalities which adopt the all-purpose levy alternative may make additional special levies for other purposes. However, opinions of three Attorneys General have consistently held that a municipality adopting the all-purpose levy may not levy additional special taxes without clear statutory approval. 31 OP. ATT'Y GEN. No. 18 (1966) held that a municipality adopting the all-purpose levy could not levy an additional tax to retire general obligation bonds. 36 OP. ATT'Y GEN. NO. 61 (1976) adopted a similar construction, stating:

> It is apparent that this all-purpose levy is an optional system of financing a city's operations. It provides an alternative to financing through separate levies for each city function. Municipalities which choose this method of financing must include within the all-purpose levy those levies which would otherwise be imposed individually and which are not specifically exempt from the all-purpose levy.

This analysis was reiterated in 36 OP. ATT'Y GEN. NO. 94 (1976).

As recently as last year I reviewed these opinions and reaffirmed their reasoning. 38 OP. ATT'Y GEN. NO. 44 (1979). I continue to adhere to that viewpoint. The all-purpose levy is an alternative to the adoption of piecemeal special levies. The intent of the Legislature could not be clearer: The all-purpose levy is made "in lieu of the multiple levies now authorized by statute." When a municipality opts for this form of taxation, it forfeits the power to levy special additional taxes unless authorized by the Legislature.

It could be argued that the legislative history of the all-purpose levy does not support this conclusion. As originally enacted, section 7-6-4452, MCA, authorized "an all purpose exclusive annual mill levy in lieu of the multiple levies now authorized...." Laws of Montana (1965), ch. 82 (emphasis added). A 1969 amendment struck the word "exclusive" from the statute, Laws of Montana (1969), ch. 226, leading some to argue that the Legislature no longer intended the all purpose levy to supplant the piecemeal taxing authority which had been the rule prior to 1965. The argument is flawed in two respects. Initially, the 1969 amendment left intact the language providing that the all-purpose levy was an option to be exercised "in lieu of the multiple levies now authorized...." In my opinion this clause refers not to the specific multiple levies in existence in 1965, but rather to the system of multiple levies then in existence, to which the all-purpose levy was to provide an alternative. The retention of this phrase suggests a continuing legislative intent to exclude authority to levy taxes piecemeal in addition to the all-purpose levy. Further, the 1969 amendment authorized levies in addition to the all-purpose levy for two specific purposes - "to service and pay bonded indebtedness of municipalities or to pay judgments against municipalities...." It is entirely plausible that in striking the word "exclusive" the Legislature was merely recognizing that exceptions to the all-purpose levy could be created by statute. The 1969 amendment does not alter my conclusion that the adoption of an all-purpose levy supplants the authority to levy taxes not specifically permitted in addition to the all-purpose levy.

It is my opinion that the expenditures you present must be financed through the all-purpose levy unless exempted by statute. It is therefore necessary to review the statutory language to determine whether the Legislature has expressed an intention that cities may levy special taxes in addition to the all-purpose levy.

The levy for firemen's disability insurance is authorized by section 19-11-503, MCA. The taxing authority is granted in subsection (2):

> Whenever the fund contains less than 2% of the taxable valuation of all taxable property within the limits of the city or town, the governing body of the city or town shall, at the time of the levy of the annual tax, levy a special tax as provided in 19-11-504. The special tax shall be collected as other taxes are collected and, when so collected, shall be paid into the disability and pension fund.

This statute evidences no legislative intent to permit a special tax levy in addition to the all-purpose levy. It is significant that the taxing authority in section 19-11-503, MCA, has been in existence in some form since 1907, Laws of Montana (1907), ch. 71, sec. 3, and that the Legislature substantially rewrote these provisions as recently as 1977. Laws of Montana (1977), ch. 157. Attorneys General have construed the all-purpose levy as exclusive virtually since its inception. See 31 OP. ATT'Y GEN. NO. 18 (1966). The failure of the Legislature to include language excepting this levy from the all-purpose levy during the amendatory process suggests that the Legislature intended this levy to be supplanted by the all-purpose levy. See Bottomly v. Ford, 117 Mont. 160, 167-68, 157 P.2d 108 (1945). Section 7-33-4111, MCA, provides taxing authority to support volunteer fire departments:

> For the purpose of supporting volunteer fire departments in any city or town which does not have a paid fire department and for the purpose of purchasing the necessary equipment for them, the council in any city or town may levy, in addition to other levies permitted by law, a special tax not exceeding 2 mills on each dollar of the taxable value of the property of the city or town subject to taxation.

Section 19-10-301, MCA, contains a similar grant of authority to impose "an additional levy of three mills" to support police retirement funds "if the demand against a city for deposits in its fund is such that it cannot be met within the general taxing authority of the city." While both of these statutes appear to provide "additional" taxing authority, a review of the legislative history discloses no legislative intent to exempt them from the exclusive all-purpose

levy. The "additional" language in section 7-33-4111, MCA, was part of the statute as originally enacted, Laws of Montana (1927), ch. 26, sec. 1. It is impossible to impute to that language an intent to except this levy from the all-purpose levy, which was not statutorily authorized until 1965. Laws of Montana (1965), ch. 82. Likewise, the "additional levy" language in section 19-10-301, MCA, was added by amendment in chapter 78, section 1, Laws of Montana (1949). The 1949 amendment provided additional taxing authority if the then existing one mill levy proved insufficient. Both statutes have been amended since the adoption of the all-purpose levy, and in neither case did the Legislature add language specifically creating an exception to the exclusivity of the all-purpose levy. See Laws of Montana (1974), ch. 335, sec. 6; Laws of Montana (1977), ch. 224, sec. 1; Laws of Montana (1977), ch. 456, sec. 35; Laws of Montana (1977), ch. 489, sec. 3; Laws of Montana (1977), ch. 566, sec. 26; Laws of Montana (1979), ch. 114, sec. 20. I therefore conclude that the taxing authority granted in these two statutes is supplanted by the all-purpose levy.

Section 19-3-204, MCA, authorizes a tax levy by local governments to finance participation in the Public Employee's Retirement System. It provides:

> If the required contributions to the retirement system exceed the funds available to a contracting employer (i.e. a city or town) from general revenue sources, the contracting employer may budget, levy, and collect annually a special tax upon the assessable property of the contracting employer in a number of cents per $100 of assessable property as is sufficient to raise the amount estimated by the legislative body to be required to provide sufficient revenue to meet the obligation of the contracting employer to the retirement system. The rate of taxation may be in addition to the annual rate of taxation allowed by law to be levied by the contracting employer.

I conclude that this tax may be levied in addition to the all-purpose levy. This statute was enacted after the creation of the all-purpose levy as a financing alternative for city governments. It specifically provides for a situation where the general revenue raised by the city is inadequate to meet the obligations assumed, and allows the city to levy a tax "in addition to the annual rate of taxation allowed by law...." This language clearly states a legislative intent to grant taxing authority in addition to that found in the all-purpose levy.

I reach the same conclusion with respect to the taxing authority granted by Laws of Montana (1975), ch. 359, sec. 2, which, although not codified, gives cities the power to tax to fund group insurance plans for city employees. It provides:

> In compliance with section 43-517 (now codified at 1-2-112, MCA) the administration of this act is declared a public purpose of a county, city or town which may be in addition to any other levy and may be paid out of the general fund of the governing body and financed by a levy on the taxable value of property within the county, city, or town. (Emphasis added.)

The Legislature's insertion of the underlined language evidences an intent to confer taxing authority beyond any statutory limitation such as is found in the all-purpose levy statute. I therefore conclude that this tax may be levied in addition to the 65-mill all-purpose levy.

You also inquire concerning section 19-9-704, MCA, which confers taxing authority to support municipal participation in the statewide police retirement plan. It provides in pertinent part:

> (1) [W]hen the demand for deposits of such contributions cannot be met within the general taxation authority and other revenues available to the city, the appropriate authority of the city may levy any additional tax authorized by law until the general taxing authority and other revenue available is sufficient to meet the demand.
>
> (2) "General taxing authority," as used in this section, means that levy which the city may make under the all-purpose levy or under multiple-purpose levies, if the city is using multiple purpose levies.
>
> (3) No provision of any statute relating to the all-purpose levy may be so construed as to limit the additional taxing authority created by this section. (Emphasis added.)

This statute creates a conditional authorization to exceed the 65-mill limit in those municipalities which have adopted the all-purpose levy. When the 65-mill levy is inadequate to fund the program, this statute allows the city to levy any additional tax "authorized by law," despite the 65-mill limitation.

The remaining statutes about which you inquire refer, more or less explicitly, to the provisions of section 1-2-112, MCA, although none creates an explicit exception to the all-purpose levy. C.f., Laws of Montana (1975), ch. 359, sec. 2 (refers to 1-2-112, MCA, but creates explicit exception). Prior to July 1, 1979, section 1-2-112, MCA, provided:

> (1) Any law enacted by the legislature after July 1, 1974, which requires a local government unit to perform an activity or provide a service or facility which will require the direct expenditure of additional funds must provide a means to finance the activity, service, or facility. The means of financing such activity may be through a general all-purpose, or special levy or through remission of funds by the state of Montana to said local government unit. However, any requirement in such law that financing be made from the local government unit's levy authority must also provide authority therein to increase said levy by an amount necessary to finance said program....
>
> (2) The local government unit may refuse to administer or enforce any law which does not comply with the requirements of this section if that law requires an expenditure that would require a local government to exceed its statutory levy authority.
>
> ***

The 1979 Legislature substantially rewrote section 1-2-112, MCA. However, the 1979 amendments apply only to measures enacted after July 1, 1979.

The provisions relating to minimum wages for policemen and firemen, Laws of Montana (1975), ch. 324, sec. 2, and ch. 438, sec. 3, respectively, provide:

> In compliance with section 43-517, R.C.M. 1947, (now codified as amended at 1-2-112, MCA), the administration of this act is declared to be a public purpose of a city or town which may be paid out of the general fund of the governing body and financed by a levy on the taxable value of property within the city or town.

Section 7-32-4117(3), MCA, pertaining to group insurance for policemen, states:

> In compliance with 1-2-112, the administration of this section is declared a public purpose of a city, which may be paid out of the general fund of the governing body and financed by a levy not to exceed 2 mills on the taxable value of property within the city or town.

Section 7-33-4130(2), MCA, pertaining to group insurance for firefighters, does not refer to section 1-2-112, MCA, by number. However, it clearly embraces the intent of that section by providing:

> Those incorporated cities and towns which require additional funds to finance the provisions of this section may levy on property, by the amount required to meet these provisions, a tax not to exceed 2 mills on the dollar....

While none of these statutes creates an explicit exception to the all-purpose levy, the reference to section 1-2-112, MCA, evidences a clear legislative intent to comply with the mandate of that section by providing a means to finance the new local government responsibility through a fund raising mechanism in addition to those presently available. While the Legislature could have made their intention more clear, as they did in Laws of Montana (1975), ch. 359, sec. 2, and in section 19-9-704, MCA, relating to group insurance for city employees and police retirement, the intent to comply with section 1-2-112, MCA, is unmistakable. Where the intent to provide additional taxing authority in compliance with section 1-2-112, MCA, is expressed, I conclude that the taxes authorized may be levied in addition to the all-purpose levy.

36 OP. ATT'Y GEN. NO. 94 (1976) held that the taxing authority granted in sections 7-32-4117, MCA (police group insurance), 7-33-4130, MCA (firemen's group insurance), Laws of Montana (1975), ch. 438, sec. 3 (not codified) (police minimum wage) and Laws of Montana (1975), ch. 324, sec. 2 (not codified) (firemen's minimum wage), was supplanted by adoption of the all-purpose levy. I reach a contrary conclusion as to these statutes on the basis of my analysis of section 1-2-112, MCA, a factor not considered in the prior opinion. To the extent that it reaches a conclusion inconsistent with this opinion, 36 OP. ATT'Y GEN. NO. 94 (1976) is overruled.

My conclusions as to the exclusivity of the all-purpose levy are based largely on the reasoning of the prior Attorney General opinions cited above, which I find persuasive. Your letter suggests that these prior opinions are overruled by implication by the decision of the District Court for the Fourth Judicial District in Golden v. City of Missoula, Cause No. 44614, August 19, 1976, in which the court held that section 1-2-112, MCA, authorized levies in addition to the 65 mill all-purpose levy, apparently for any new expenditure required by a statute enacted after the effective date of section 1-2-112, MCA. I disagree with the court's analysis. The statutory scheme expressed in section 1-2-112, MCA, may be summarized as follows: Every measure enacted after July 1, 1974, which imposed a new financial responsibility on a city must provide a mechanism to fund the newly created liability. If the mechanism involved a commitment of general fund money, the enabling measure must provide for an increase in levy authority sufficient to offset the required increase in expenditures. In the event that no funding mechanism or levy authority increase is provided, subsection (2) empowered the city not to levy additional taxes, but rather to decline to enforce or administer any provision if enforcement or administration would force the city to exceed its statutory levy authority. The statute confers no additional taxing authority on the cities. It is rather a self-imposed limitation on the power of the Legislature to impose new financial obligations on local government units. The statute provides a remedy to local governmental units when legislative actions violate that limitation and force the local governments to exceed their spending authority. The statute is not a blanket abrogation of the exclusivity of the all-purpose levy. If anything, it strengthens that exclusivity by allowing cities to ignore legislative enactments which would require them to exceed their taxing authority. Further, if the mere enactment of section 1-2-112, MCA, allowed the levying of additional taxation, the provisions of sections 7-32-4117 and 7-33-4130, MCA, and chapters 324, 359 and 438, Laws of Montana (1975), which specifically refer to section 1-2-112, MCA, in granting additional taxing authority, would be unnecessary. I therefore conclude that a funding provision enacted to comply with the pre-1979 provisions of section 1-2-112, MCA, which does not clearly evidence a legislative intent to authorize a special additional levy, either by reference to section 1-2-112, MCA, or otherwise, must be funded through the all-purpose levy in those municipalities which elect to so finance their operations. If the amount generated by the all-purpose levy is inadequate, the municipality has the option of refusing to implement or enforce the program. It may not, however, levy additional taxes absent clear statutory authority.

By the terms of the Uniform Declaratory Judgments Act, section 27-8-301, MCA, the Attorney General is not bound by a declaratory judgment entered in a cause to which he was not a party. The court's judgment in the Golden case therefore does not foreclose the result I reach on the merits of your inquiry. Several considerations compel this conclusion. Initially, the district court did not explicitly overrule the prior opinions, despite the fact that the analysis is inconsistent with their content. Further, a district court judgment in an action to which the Attorney General is not a party is in no sense binding on the Attorney General in the performance of his statutory duty to render advisory opinions. I am aware of no authority in Montana defining the precedential value of district court judgments. However, practicality dictates that a district court's judgment cannot be taken as declaratory of the law except as applied to the parties before the court. One of the foundations of the system of stare decisis is the collection of opinions on the law in reporters, so that interested persons may determine through research the approaches taken by prior courts facing the question presented. Trial court opinions and judgments are not reported in Montana, and it is therefore impossible to research the views of the district courts on any question of law.

The present question provides an excellent example of the problems inherent in the use of district court judgments as precedent. My latest opinion construing the all-purpose levy, 38 OP. ATT'Y GEN. NO. 44 (1979), was issued on October 10, 1979, more than three years after the entry of judgment in Golden. I was unaware of the court's unreported order in that case, and no practical method exists to research such an order. To have value as precedent, a judicial decision must be readily available to persons doing research on the question decided. The absence of a reporter system for district court orders prevents them from serving as precedent in the way that reported Supreme Court decisions do.

Further, it is well to bear in mind the nature of Attorney General opinions. Although Attorney General opinions are declaratory of law, the Attorney General is an executive, and not a judicial officer. His opinions may occasionally serve to solve an ongoing dispute which might provide a court with a justiciable controversy. However, more frequently they serve as an executive construction of state law given for the benefit of executive branch agencies seeking guidance in situations where a justiciable controversy is absent. See 35 OP. ATT'Y GEN. NO. 68 (1974). Your request is a good example. The power to make such quasi-judicial pronouncements flows not from the judicial branch, but rather from the Attorney General's status as the chief legal officer and legal advisor of the executive branch. In the exercise of this executive power, the Attorney General need not be bound by district court judgments in actions to which he is not a party which do not explicitly overrule his

opinions. Thus, although the district court's opinion is entitled to weight, it does not foreclose the Attorney General from reaching a contrary result.

My view of the impact of the district court's order is not inconsistent with the provisions of section 2-15-501(7), MCA, which states:

> If an opinion issued by the attorney general conflicts with an opinion issued by a city attorney, county attorney, or an attorney employed or retained by any state officer, board, commission, or department, the attorney general's opinion shall be controlling unless overruled by a state district court or the supreme court.

This provision means that parties requesting an Attorney General's opinion are bound to follow it until the opinion is expressly overruled. It does not serve to limit the Attorney General in his consideration and analysis of legal questions, nor does it foreclose his consideration of questions already decided at some point by a district court. It is therefore within my statutory opinion power to reach the conclusion on the merits expressed above.

I am well aware of the difficulties faced by local governments in trying to finance necessary services within the constraints of inflexible mill levy limitations set by the Legislature. However, my conclusions are supported by sound reasoning. Cities should bear in mind that the all-purpose levy is an option which they need not employ. If the sixty-five mill levy limitation poses an insoluable problem for a city in preparing its budget, section 7-5-4455, MCA, permits the city to abandon the all-purpose levy and return to piecemeal taxation. The additional effort of enacting piecemeal taxation resolutions may pay dividends if the aggregate amount raised is better able to finance necessary services. In addition, section 7-6-4431, MCA, provides a mechanism whereby a city may exceed the mill levy limitation with the approval of the voters. Finally, as I noted above, the adoption of a form of government exercising self-government powers exempts a municipality from mill levy limitations. Section 7-1-114(g), MCA.

THEREFORE, IT IS MY OPINION:

1. Municipalities which adopt the all-purpose mill levy authorized in section 7-6-4452, MCA, forfeit the power to impose levies for any particular purpose not clearly excepted by statute from exclusivity of the all-purpose levy.

2. The taxing authority granted in sections 19-10-301, MCA (local police retirement plans), 19-11-503, MCA (firemen's disability), and 7-33-4111, MCA (volunteer fire departments), is supplanted by the adoption of an all-purpose levy under section 7-6-4452, MCA.

3. The taxing authority granted in sections 7-32-4117, MCA (police group insurance), 7-33-4130, MCA (fireman's group insurance, first and second class cities), 19-9-704, MCA (statewide police retirement plan), 19-3-204 (PERS for city employees), Laws of Montana (1975) ch. 359, sec. 2 (not codified) (group insurance for city employees), Laws of Montana (1975), ch. 324, sec. 2 (not codified) (firemen's minimum wage, first and second class cities) and Laws of Montana (1975), ch. 438, sec. 3 (not codified) (police mimimum wage, first and second class cities) is not supplanted by adoption of an all-purpose levy under section 7-6-4452, MCA.

4. The Attorney General, in issuing advisory opinions, is not bound by a conclusion of law expressed in a district court declaratory judgment in an action to which the Attorney General is not a party.

Very truly yours,

MIKE GREELY
Attorney General