MONTANA ADMINISTRATIVE REGISTER

1983 ISSUE NO. 21
NOVEMBER 10, 1983
PAGES 1564-1681

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ISSUE NO. 21

The Montana Administrative Register (MAR), a twice monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are inserted at the back of each register.

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SPECIAL NOTICE AND TABLE SECTION

BEFORE THE DEPARTMENT OF ADMINISTRATION

OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rules Implementing the "Montana Procurement Act," Title 18, Chapter 4, MCA, and the Repeal of Rules 2.5.101 Through 2.5.117 A.R.M., Regulating the State's Purchasing Activity	NOTICE OF PUBLIC HEARING ON ADOPTION OF PURCHASING RULES AND THE REPEAL OF EXISTING PURCHASING RULES

TO: All Interested Persons:

1. On December 6, 1983, at 9:00 a.m., a public hearing will be held in room 160 of the Mitchell Building, Helena, Montana to consider the adoption of rules implementing the Montana Procurement Act, Title 18, Chapter 4, MCA, and the repeal of rules 2.5.101 through 2.5.117, A.R.M., the existing state purchasing rules.

2. The proposed rules replace rules 2.5.101 through 2.5.117 A.R.M. which can be found on pages 2-137 through 2-148 of the Administrative Rules of Montana. The authority of the agency to repeal the rules is based on section 18-4-221, MCA.

3. The proposed rules provide as follows:

RULE I DEFINITIONS In these rules, words and terms defined in Title 18, Chapter 4, MCA, shall have the same meaning as in the statutes and, unless the context clearly requires otherwise or a different meaning is prescribed for a particular section, the following definitions apply:

(1) "Bid Sample" means a sample to be furnished by a bidder to show the characteristics and/or quality of the item offered in the bid.

(2) "Bidders list" means a list maintained by the department giving the names and addresses of suppliers of various goods and services from whom bids, proposals, and quotations can be solicited.

(3) "Brand name specification" means a specification that cites a brand name, model number, or some other designation that identifies a specific product as an example of the desired characteristics and/or quality of merchandise.

(4) "Central Stores" means the enterprise program operated by the Department which develops standard specifications, procures, warehouses and delivers certain common use supplies for state agencies.

(5) "Competitive bidding" means the offering of prices by individuals or firms competing for a contract to supply specified services or merchandise.

(6) "Controlled items" means those supplies and services identified by the Department as commonly used items which, when consolidated for purchasing purposes, result in volume adequate to obtain discounted prices.

(7) "Days" mean calendar days. In computing any period of time prescribed or allowed by these rules, the day of the event after which the designated period of time begins to run is not to be included, but the last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next business day.

(8) "Descriptive Literature" means information available in the ordinary course of business which shows the characteristics, construction, or operations of an item and enables the State to consider whether the item meets its needs.

(9) "Offer" means proposal. "Offeror" means a person submitting a proposal when a procurement is made by a source selection method other than competitive sealed bidding.

(10) "Practicable" and "Practical" means that which can be accomplished or put into practical application.

(11) "Purchase order" means a document used to formalize a purchase transaction with a vendor.

(12) "Requisition" means the document used to request that a contract be entered into for a specific need, and may include, but is not limited to, the description of the requested item, delivery schedule, transportation data, criteria for evaluation, suggested sources of supply, and information supplied for the making of any written determination required by Title 18, chapter 4, MCA or these rules.

(13) "Requisition time schedule" means a schedule issued by the purchasing division each year which designates the dates by which certain categories of controlled items must be requested from the department.

(14) "Resident" means any person, firm, partnership, or corporation whose domicile or offered materials, supplies, or equipment meets the requirements of 18-1-103, MCA.

(15) "Restrictive specification" means specifications that unnecessarily limit competition by eliminating supplies and services that would be capable of satisfactorily meeting actual needs.

(16) "Solicitation" means an Invitation for Bids, a Request for Proposals, a Request for Quotations, or any other document issued by the State for the purpose of soliciting bids or proposals to perform a State contract.

(17) "Specifications" means a detailed description of what the purchaser requires and what a bidder must offer to be considered for an award.

(18) "Term contract" means a contract in which supplies or services are purchased at a predetermined unit price for a specific period of time.

(19) "Unit price" means the price of a selected unit of a supply or service; e.g., price per ton, foot, box.

(20) "Vendor" means a seller of supplies or services. (AUTH: 18-4-221, MCA; IMP; 18-4-221, MCA.)

RULE II DEPARTMENT OF ADMINISTRATION RESPONSIBILITIES (1) The Department is responsible for all procurements of all State supplies and services. All activities, including procedures, manuals, and forms, which govern such procurements will be prepared by or under the supervision of the Department.

(2) Bidders list. The Department will establish a central State bidders list, determine eligibility for residence preference of vendors for purchases made under Title 18, Chapter 4, MCA, investigate complaints

against vendors, and remove vendors from the State list as described in Rules VI, VII, and VIII.

(3) Purchasing for Agencies. The Department shall process requisitions for agencies, for items not delegated, in accordance with Rule IV.

(4) Controlled items. The Department will identify and purchase for the State controlled items. Controlled items will be purchased by:

(a) Term Contract;

(b) Requisition Time Schedule; and

(c) Central Stores.

(5) Printing. The Department is responsible for all printing.

(6) Approvals. The Department is responsible for coordinating certain functions within state government. Part of the coordination process is the review and approval of certain equipment. Approval prior to purchase is required for the following supplies or services regardless of delegated authority:

(a) Duplicating, Printing, Bindery, Graphic Arts and Photocopy Equipment--approval by Publications and Graphics Division is required.

(b) Data Processing, Word Processing and Filing Equipment--approval by Computer Services Division is required.

(c) Communications Equipment--approval by Communications Division is required.

(7) Delegation of Authority

(a) The Department may delegate authority and may revoke authority it has delegated. Factors to be considered in making the decision to delegate include:

(i) the expertise of the potential delegate in terms of procurement knowledge and any specialized knowledge pertinent to the authority to be delegated;

(ii) the past experience of the potential delegate in exercising similar authority;

(iii) the degree of economy and efficiency to be achieved in meeting the State's requirements if authority is delegated; and

(iv) the consistency of delegation under similar circumstances.

(b) The Department may delegate authority to any department of the executive branch, to legislative entities, and judicial entities of this State. Such delegation shall be written into a delegation agreement and shall specify:

(i) the activity or function authorized;

(ii) any limits or restrictions on the exercise of the delegated authority;

(iii) whether the authority may be further delegated; and

(iv) the duration of the delegation.

(c) The Department will provide training to agencies on purchasing in accordance with delegated responsibilities.

(d) The Department will perform reviews of agency purchasing procedures to insure compliance with the delegation agreement, these rules and Title 18, Chapter 4, MCA. (AUTH: 18-4-221, MCA; IMP: 18-4-221 and 18-4-222, MCA.)

RULE III DELEGATION OF PURCHASING AUTHORITY (1) A designee of the Department shall exercise delegated authority in accordance with the written delegation agreement described in Rule II, with the Montana Procurement Act, and with these rules.

(2) To initiate development of a delegation agreement with the Department, an agency should submit a written request to the Department.

(3) Unless specifically addressed in a delegation agreement, agencies must buy controlled items from the Requisition Time Schedule, Term Contracts and Central Stores. Agencies can procure non-controlled items and controlled items not available from the above sources by the procedures established in these rules. (AUTH: 18-4-221, MCA; IMP: 18-4-221 and 18-4-222, MCA.)

RULE IV REQUISITIONS FROM THE AGENCIES TO THE DEPARTMENT (1) All agencies of State government must complete the Department's requisitions when a State purchase order is required from the Department. The requisition must be signed by an authorized agency official. Only quantities of items of a like nature (items ordinarily procureable from the same vendor) shall be combined on one requisition. The requisition must be accompanied by specifications as described in Rule X.

(2) Agencies must obtain written approval as required for equipment described in Rule II (6).

(3) Upon receipt of a requisition, the Department will decide when the procurement will be initiated and the time for response to the solicitation. The Department will send a copy of the solicitation to the requesting agency for review prior to bid opening.

(4) The Department may return a requisition to the requesting agency without processing, if deemed appropriate by the Department, for reasons such as, but not limited to, the requisition:

(a) does not contain sufficient specifications;

(b) can not be processed in a timely manner;

(c) is within the agency's delegated authority;

(d) has no evidence of approvals required in (2) above; or

(e) does not comply with all requirements of these rules. (AUTH: 18-2-221; IMP: 18-4-221, MCA.)

RULE V ENFORCING THE CONTRACT (1) Except for items purchased and warehoused by the Central Stores program, agencies are responsible for receiving supplies and services procured on their behalf by the Department. Receiving means inspecting the supply or service and checking it against the contract to insure that it is acceptable, complete and in compliance with the terms of the contract.

(2) Agencies should seek to resolve problems with vendors directly. If such efforts are not successful, agencies must submit written formal complaints about vendor performance to the Department. (AUTH: 18-4-221, MCA; IMP: 18-4-221, MCA.)

RULE VI BIDDERS LIST (1) The State Purchasing Division maintains a central State bidders list for all supply and service commodities. Names and addresses on bidders lists shall be available for public inspection but these lists shall not be used for private promotional, commercial or market purposes.

(2) To get on the central State bidders list, a vendor must submit affidavit forms completed as appropriate, including information sufficient to identify the proper commodity(ies) on which the vendor wishes to bid. Affidavits are available from: Purchasing Division, 165 Mitchell Bldg., Helena, Montana 59620. (AUTH: 18-4-221, MCA; IMP: 18-4-221, MCA.)

RULE VII SUSPENSION OR REMOVAL FROM BIDDERS LIST (1) The Department has the authority to suspend or remove a vendor from the bidders list if the Department determines the vendor is:

(a) non-responsible as defined in 18-4-301, MCA; or

(b) non-responsive as defined in 18-4-301, MCA.

(2) Suspension from State Bidders List:

(a) The Department may suspend a vendor from the State Bidders List upon written determination by the Department that probable cause exists for removal under 18-4-241, MCA. A notice of suspension, including a copy of the determination, shall be sent to the affected vendor. The notice must state that:

(i) the suspension is for the period it takes to complete an investigation into possible removal but not for a period in excess of three month;

(ii) bids or proposals will not be solicited from the suspended vendor, and, if they are received, they will not be considered during the period of suspension; and

(iii) the suspended vendor may request a redetermination of the determination.

(b) Suspension is effective upon the notice of suspension and, unless the suspension is terminated by the Department or a court, it will remain in effect until its expiration date or until a removal decision takes effect.

(3) Removal from State Bidders List:

(a) For Cause:

(i) The Department may remove a vendor from the State bidders list upon written determination by the Department that cause exists under 18-4-241, MCA.

(ii) The Department shall prepare a written decision regarding a removal and send a copy to the affected vendor. The final decision shall recite the facts relied upon. The written decision shall indicate the length of the removal, not to exceed three years, the reasons for the action, and to what extent affiliates are affected.

(iii) A removal decision is effective upon issuance and receipt by the affected vendor and remains effective until its expiration date unless terminated by the Department or a court.

(b) For failure to respond:

(i) The Department may remove from the bidders list for particular items, vendors who fail to respond to Invitations for Bids on three (3) consecutive procurements of those items. Prospective bidders may be reinstated on such lists as described in Rule VI.

(4) Maintenance of List of Removed for Cause or Suspended Vendors. The Department shall maintain an updated list of vendors removed or suspended from the bidders list as described in (3) (a) above. The list shall be available to the public upon request. (AUTH: 18-4-221, MCA; IMP: 18-4-241 and 18-4-308, MCA.)

RULE VIII BIDDING PREFERENCES (1) The Department determines eligibility of vendors for bidding preferences authorized by 18-1-101 through 18-1-113, MCA.

(2) To determine eligibility, the Department requires vendors to apply for preference by completing the applicable sections of the Bidder Affidavit form described in Rule VI. Vendors who knowingly submit inaccurate information on this form may be deemed non-responsible and

subject to the provisions of Rule VII.

(3) To apply the preference, the amount of the preference is added to the nonpreferred bid, not subtracted form the preferred bid. For example:

Resident Bid	Non-Resident Bid
$100.00	$99.00
	x 1.03
	$101.97

(AUTH: 18-4-221, MCA; IMP: 18-4-221, MCA.)

RULE IX BID PREPARATION (1) Bids shall be prepared in ink or by typewriter. All bids must be signed in ink by an authorized person.

(2) Any exceptions to the bid or specifications on the part of the bidder must be clearly indicated. Exceptions may be rejected.

(3) Each item on which a bidder submits a quotation must be new and unused and of the latest model or manufacture unless otherwise specified by the State. It shall be equal in quality and performance characteristics to that indicated in the Invitation for Bid.

(4) The price for each item must be stated in the bid and shall be clearly shown in the space provided on the bid form. Only one unit price shall be shown for each item unless specific provision is made in the bid form for an optional figure. The price of each item shall be extended to show the total price for the quantity requested. In case of error in extension, the unit price shall prevail.

(5) Item-by-item unit price bids must be submitted and will receive primary consideration for award. All-or-none bids may be submitted as alternatives and will be considered if clearly in the best interest of the State.

(6) Payment will be due 30 days from the issuance of a signed Montana purchase order and:

(a) receipt of a properly executed claim; or

(b) completion of delivery of the items in a satisfactory condition, whichever is later.

(7) Vendors may quote a cash discount based on early payment; however such discounts will not be considered in determination of low bid and payment terms will remain as in (6) above.

(8) Vendors will offer a firm price for 30 days after a bid opening, pending award, unless otherwise provided for in the invitation for bids.

(9) Unless otherwise specified in the invitation for bids or request for proposals, all bids shall show the delivered price F.O.B. destination to the using agency, including all transportation and handling charges. (AUTH: 18-4-221, MCA; IMP: 18-4-221, MCA.)

RULE X SPECIFICATIONS (1) Specifications shall clearly describe the State's requirements and allow for the obtaining of a supply or service which is adequate and suitable for the State's needs in a cost effective manner. Specifications may take into account, to the extent practicable, the costs of ownership and operation as well as initial acquisition costs and shall permit maximum practicable competition consistent with this purpose.

(2) Specifications shall, to the extent practicable, emphasize functional or performance criteria and limit design or other detailed

physical descriptions to those necessary to meet the needs of the State. To facilitate the use of the criteria a Using Agency shall endeavor to include as a part of its purchase requisitions the principal functional or performance needs to be met and any compatibility requirement.

(3) In developing specifications, accepted commercial standards shall be used and unique requirements shall be avoided, to the extent practicable.

(4) Brand name items or descriptions may be used to indicate standards of quality, performance and/or use desired. More than one acceptable brand name must be indicated, to the extent practicable.

(5) Restrictive specifications shall not be used unless no other manner of description will suffice. In that event, a written determination shall be made that it is not practicable to use a less restrictive specification. (AUTH: 18-4-232, MCA; IMP: 18-4-231 through 18-4-234, MCA.)

RULE XI BID AND PERFORMANCE SECURITY (1) Bid Security. Factors to consider in determining whether to require bid security for supply contracts or service contracts include:

(a) Type of commodity;

(b) Past State experience; and

(c) Potential damages if bidder reneges.

(2) Performance security. Factors to consider in determining whether to require performance security for supply contracts or service contracts include:

(a) Type of commodity;

(b) Past State experience;

(c) Labor required to perform the contract;

(d) Materials required to perform the contract;

(e) Amount and number of subcontracts;

(f) Damages chargeable to the State if the contractor defaults.

(3) Bid and performance security requirements must be stated in the Invitation for Bids or the Request for Proposals.

(4) Types of security:

(a) The preferred types of security are bonds as described in 18-4-312(2) (a) and cash as described in 18-4-312(2) (c) and (d), MCA.

(b) If certificates of deposit or money market certificates are determined to be acceptable in order to increase competition, they shall be issued in the name of the vendor and the State of Montana from a properly insured financial institution.

(c) If irrevocable letters of credit are determined to be acceptable in order to increase competition, they shall be issued from a properly insured financial institution on a form reviewed and approved by the Department. (AUTH: 18-4-221, MCA; IMP: 18-1-201, MCA.)

RULE XII PUBLIC NOTICE (1) Invitations for Bids and Requests for Proposals shall be mailed or otherwise furnished to a sufficient number of bidders required to secure competition.

(2) In the interests of economy, Notices of Availability of Invitations for Bids and Requests for Proposals may be mailed as provided in subsection (1) and/or advertised as provided in subsection (4) instead of the complete Invitation or Request.

(3) Where appropriate the State may require payment of a fee or a deposit for supplying the Invitation for Bids or Request for Proposals.

(4) The State may determine that bids and proposals should be

solicited through advertising to secure adequate competition. If so, the advertisement shall be made in at least three newspapers (one of which must be a daily) of general circulation printed within the state, once each week for 2 consecutive weeks, and shall identify the supply or service solicited; the time, date and location where bids and proposal will be received and where to obtain copies.

(5) A copy of all Invitations for Bids and Requests for Proposals shall be made available for public inspection. (AUTH: 18-4-221, MCA; IMP: 18-4-303 and 18-4-304, MCA.)

RULE XIII COST PRINCIPLES (1) Definitions:

(a) "Actual Costs" means all direct and indirect costs incurred for services rendered or supplies delivered, as distinguished from allowable costs only.

(b) "Cost Objective" means any unit of work such as a function, an organizational subdivision, or a contract for which provision is made to accumulate and measure separately the cost of processes, products, jobs, capitalized projects, and similar items.

(c) "Final cost objective" means a cost objective that has allocated to it both direct and indirect costs and, in the contractor's accumulation system, is one of the final accumulation points.

(2) The cost principles and procedures contained in this rule are to be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs.

(a) The costs principles and procedures set forth in this rule may be used as guidance in:

(i) the establishment of contract cost estimates and prices under contracts awarded on the basis of competitive sealed proposals where the award may not be based on adequate price competition; sole source procurement; and competitive selection procedures;

(ii) the establishment of price adjustments for contract changes including contracts that have been let on the basis of competitive sealed bidding or otherwise based on adequate price competition;

(iii) the pricing of termination for convenience settlements; and

(iv) any other situation in which cost analysis is used.

(b) These cost principle rules are not applicable to:

(i) the establishment of prices under contracts awarded on the basis of competitive sealed bidding or otherwise based on adequate price competition rather than the analysis of individual, specific cost elements, except that this rule does apply to the establishment of adjustment of price for changes made to such contracts;

(ii) prices which are fixed by law or regulation; and

(iii) prices which are based on established catalogue prices as defined in 18-4-301, MCA, or established market prices.

(3) The contract shall provide that the total allowable cost of a contract is the sum of the allowable direct costs actually incurred in the performance of the contract in accordance with its terms, plus the properly allocable portion of the allowable indirect costs, less any applicable credits such as discounts, rebates, refunds, and property disposal income.

(a) Costs shall be accounted for in accordance with generally accepted accounting principles and in a manner that is consistent with the contractor's usual accounting practices in charging costs to its other activities. In pricing a proposal, a contractor shall estimate costs in a

manner consistent with its cost accounting practices used in accumulating and reporting costs.

(b) The contract shall provide that costs are allowable to the extent they are:

(i) reasonable, as defined in (4) below;

(ii) allocable, as defined in (5) below;

(iii) lawful under any applicable law; and

(iv) in the case of costs invoiced for reimbursement, actually incurred or accrued and accounted for in accordance with generally accepted accounting principles.

(4) A cost is reasonable if in its nature or amount it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of competitive business in that industry. In determining the reasonableness of a given cost, consideration shall be given to:

(a) requirements imposed by the contract terms and conditions;

(b) whether the cost is of a type generally recognized as ordinary and necessary for the conduct of the contractor's business or the performance of the contract;

(c) the restraints inherent in, and the requirements imposed by, such factors as generally accepted sound business practices and federal and state laws and regulations;

(d) the action that a prudent business manager would take under the circumstances, including general public policy and considering responsibilities to the owners of the business, employees, customers, and the State;

(e) significant deviations from the contractor's established practices which may unjustifiably increase the contract costs; and

(f) other relevant circumstances.

(5) Allocable costs shall be determined as follows:

(a) A cost is allocable if it is assignable or chargeable to one or more cost objectives in accordance with relative benefits received and if it:

(i) is incurred specifically for the contract;

(ii) benefits both the contract and other work, and can be distributed to both in reasonable proportion to the benefits received; or

(iii) is necessary to the overall operations of the business, although a direct relationship to any particular cost objective may not be evident.

(b) Costs are allocable as direct or indirect costs. Similar costs (those incurred for the same purpose, in like circumstances) shall be treated consistently either as direct costs or indirect costs except as provided by these rules. If a cost is treated as a direct cost in respect to one cost objective, it and all similar costs shall be treated as a direct cost for all cost objectives. Further, all costs similar to those included in any indirect cost pool shall be treated as indirect. All distributions to cost objective from a cost pool shall be on the same basis.

(c) A direct cost is a cost which can be identified specifically with a particular final cost objective. A direct cost shall be allocated only to its specific cost objective. To be allowable, a direct cost must be incurred in accordance with the terms of the contract.

(d) An indirect cost is one identified with no specific final cost objective or with more than one final cost objective. Indirect costs are those remaining to be allocated to the several final cost objectives after direct costs have been determined and charged directly to the contract or

other work as appropriate. A direct cost of minor dollar amount may be treated as indirect costs, provided that such treatment produces substantially the same results as treating the cost as a direct cost.

(e) Indirect costs shall be accumulated into logical cost groups (or pools), with consideration of the reasons for incurring the costs. Each group should be distributed to cost objectives benefiting from the costs in the group. Each indirect cost group shall be distributed to the costs substantially in proportion to the benefits received by the cost objectives. The number and composition of the groups and the method of distribution should not unduly complicate indirect cost allocation where substantially the same results could be achieved through less precise methods.

(f) The contractor's methods of distribution may require examination if:

(i) any substantial difference exists between the cost patterns of the work performed under the contract and the contractor's other work;

(ii) any significant change occurs in the nature of the business, the extent of subcontracting, fixed asset improvement programs inventories, the volume of sales and production, manufacturing processes, the contractor's products, or other relevant circumstances; or

(iii) indirect cost groups developed for a contractor's primary location are applied to off-site locations. Separate cost groups for costs allocable to off-site locations may be necessary to distribute the contractor's costs on the basis of the benefits accruing to the appropriate cost objectives.

(g) The base period for indirect cost allocation is the one in which such costs are incurred and accumulated for distribution to work performed in that period. Normally, the base period is the contractor's fiscal year. A different base period may be appropriate under unusual circumstances. In such cases, an appropriate period must be agreed to in advance. (AUTH: 18-4-225, MCA; IMP: 18-4-225, MCA.)

RULE XIV MISTAKES IN BIDS (1) The Procurement Officer may allow a bidder to correct minor mistakes in a bid if the mistake is clearly not attributed to an error in judgment and the mistake and the intended correct bid are clearly evident on the form of the bid document. Examples of correctable mistakes include, but are not limited to:

(a) typographical errors;

(b) errors in extending unit prices;

(c) transposition errors; and

(d) arithmetical errors.

(2) The Procurement Officer may permit a bidder to withdraw a low bid if:

(a) a mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or

(b) the bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made. (AUTH: 18-4-221, MCA; IMP: 18-4-303 and 18-4-304, MCA.)

RULE XV ANTICOMPETITIVE PRACTICES (1) Every solicitation must provide that by submitting a bid or offer, the bidder or offeror certifies that the price submitted was independently arrived at without collusion.

(2) A Procurement Officer who suspects that an anticompetitive practice has occurred or may be occurring shall notify the Department which shall

notify the Attorney General of the State and shall consider action which may be appropriate under Title 18, Chapter 4, MCA and these rules. (AUTH: 18-4-221, MCA; IMP: 18-4-314, MCA.)

RULE XVI COMPETITIVE SEALED BIDS (1) "Sealed bid" is the preferred method of competitive procurement for state supply contracts and service contracts. Sealed bids shall be solicited with an Invitation for Bids.

(2) The Invitation for Bids shall include the following:

(a) Instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt for bids, the address of the office to which bids are to be delivered, the maximum time for bid acceptance by the State, and any other special information;

(b) The purchase description, delivery or performance schedule, and any inspection and acceptance requirements not included in the purchase description; and

(c) the contract terms and conditions, including warranty and bonding or other security requirements, as applicable.

(3) The Invitation for Bids may incorporate documents by reference if the Invitation for Bids specifies where such documents can be obtained.

(4) Amendments shall be sent to all vendors who received an Invitation for Bids.

(5) The Invitation for Bids shall be on a form prescribed or approved by the Department.

(6) Upon receipt of a bid, the State will time-stamp it and store it in a secure place, unopened, until the time and date set for bid opening.

(7) Bids shall be opened publicly at the time, date and place designated in the Invitation for Bids. The name of each bidder, the bid price, and such other information as is deemed appropriate by the Procurement Officer, shall be read aloud or otherwise made available. Such information also shall be recorded at the time of bid opening; that is, the bids shall be tabulated or a bid abstract made. The record shall be available for public inspection.

(8) Following determination of product acceptability, if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the State in accordance with the evaluation criteria set forth in the Invitation for Bids and the preference provisions described in Rule VIII. Only objectively measureable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder. Examples of such criteria include, but are not limited to, transportation cost, and ownership or life cycle cost formulas. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible such evaluation factors shall:

(a) be reasonable estimates based upon information the State has available concerning future use; and

(b) treat all bids equitably.

(9) Nothing in this rule shall be deemed to permit contract award to a bidder submitting a higher quality item than that designated in the Invitation for Bids if such bidder is not also the lowest bidder as determined under sub-section (8). Further, this rule does not permit negotiations with any bidder.

(10) If low tie bids are received which are not resolved by the provisions of Section 18-1-111, MCA, award shall not be made by drawing lots, except as set forth below, or by dividing business among identical

bidders. In the discretion of the Department or the head of a Purchasing Agency, award shall be made in any permissible manner that will discourage tie bids. If no permissible methods will be effective in discouraging tie bids and a written determination is made so stating, award may be made by drawing lots. Records shall be made of all Invitations for Bids on which tie bids are received showing the following information:

(a) the identification number of the Invitation for Bids;

(b) the supply or service; and

(c) a listing of all the bidders and the prices submitted.

A copy of such records shall be sent to the Attorney General's office if collusion is suspected. (AUTH: 18-4-221, MCA; IMP: 18-4-303, MCA.)

RULE XVII COMPETITIVE SEALED PROPOSALS (1) "Practicable" means what may be accomplished or put into practical application.

(a) Competitive sealed bidding is practicable if the nature of the procurement permits award to a low bidder who agrees by its bid to perform without condition or reservation in accordance with the purchase description, delivery, or performance schedule, and all other terms and conditions of the Invitation for Bids.

(b) Competitive sealed bidding is not practicable when:

(i) the contract needs to be other than a fixed-price type;

(ii) oral or written discussions may need to be conducted with offerors concerning technical and price aspects of their proposals;

(iii) offerors may need to be afforded the opportunity to revise their proposals, including prices;

(iv) award may need to be based upon a comparative evaluation as stated in the Request for Proposals of differing price, quality, and contractual factors in order to determine the most advantageous offering to the State. Quality factors include technical and performance capability and the content of the technical proposal; and

(v) the primary consideration in determining award may not be price.

(2) "Advantageous" means a judgmental assessment of what is in the State's best interest.

(3) The officer who made the determination that sealed bidding is not practicable or advantageous may modify or revoke it at any time, and the determination should be reviewed for current applicability from time to time.

(4) The Request for Proposals must be prepared in accordance with sub-sections (1) through (6) of Rule XVI and must also include:

(a) a statement that discussions may be conducted with offerors who submit proposals but that proposals may be accepted without such discussions; and

(b) all evaluation factors, including price, to be used and their relative importance.

(5) Proposals shall not be opened publicly but shall be opened in the presence of two or more procurement officials. Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. After the date established for receipt of proposals, a Register of Proposals shall be prepared which shall include for all proposals the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the supply or service offered. The Register of Proposals shall be open to public inspection only after award of the contract. Proposals and modifications shall be shown only to State personnel having a legitimate interest in them.

(6) The evaluation shall be based on the evaluation factors set forth in the Request for Proposals. Numerical rating systems may be used but are not required. Factors not specified in the Request for Proposals shall not be considered.

(7) For the purpose of conducting discussions, proposals shall be initially classified as:

(a) acceptable;

(b) potentially acceptable; or

(c) unacceptable.

(8) For the purpose of competitive sealed proposals, the term "offerors" includes only those businesses submitting proposals that are acceptable or potentially acceptable and the term shall not include businesses who submitted unacceptable proposals. Discussions with offerors are held to:

(a) promote understanding of the State's requirements and the offerors' proposals; and

(b) facilitate arriving at a contract that will be most advantageous to the State taking into consideration price and other factors set forth in the Request for Proposals.

(9) The Procurement Office shall establish a common date and time for the submission of best and final offers. The Procurement Officer shall then make a written award determination showing the basis on which the award was found to be most advantageous to the State based on the factors set forth in the Request for Proposals. (AUTH: 18-4-221, MCA; IMP: 18-4-304, MCA.)

RULE XVIII SMALL PURCHASES OF SUPPLIES AND SERVICES (1) The Department or Purchasing Agency may procure supplies or services costing less than $2,000 under this rule.

(2) This rule does not apply to controlled items as defined in Rule I and items described in Rule II Subsections (4), (5) and (6); however, if an agency's annual aggregate total procurements of an item on the Departments Requisition Time Schedule is reasonably anticipated to be less than $200, the agency may purchase the item according to the provisions of this rule.

(3) If a supply or service is available from only one business, the sole source procurement methods set forth in Rule XIX shall be used even if the procurement is a small purchase as specified in sub-section (1).

(4) Procurement requirements shall not be artificially divided to avoid using the other source selection methods set forth in Title 18, Chapter 4, MCA.

(5) For small purchases of supplies or services over $500 and under $2,000, the Procurement Officer shall solicit no less than three (3) businesses to submit written quotations, and shall record the quotations and place them in the procurement file. The Procurement Officer shall award to the business offering the lowest acceptable quotation. The names of the businesses submitting quotations and the date and amount of each quotation shall be recorded and maintained as a public record.

(6) The Department shall adopt operational procedures for making small purchases of less then $500. The operational procedures shall provide for obtaining adequate and reasonable competition and for making records to properly account for funds and to facilitate auditing of the Purchasing Agency. (AUTH: 18-4-221, MCA; IMP: 18-4-305, MCA.)

RULE XIX SOLE SOURCE PROCUREMENT (1) The provisions of this rule

apply to all sole source procurements unless exigency procurements described in Rule XX are necessary.

(2) Sole source procurement is not permissible unless a required item is available from only a single supplier. A requirement for a particular proprietary item does not justify a sole source procurement if there is more than one potential bidder or offeror for that item. The following are examples of circumstances which could necessitate sole source procurement:

(a) The compatibility of equipment, accessories, or replacement parts is the paramount consideration; or

(b) there is no existent equivalent product.

(3) The determination as to whether a procurement shall be made as a sole source shall be made by the Department or as delegated by a written delegation agreement. The determination and the basis therefore must be in writing. In cases of reasonable doubt, competition should be solicited. Request by a Using Agency that a procurement be restricted to one potential contractor must be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need.

(4) The Procurement Officer may conduct negotiations, as appropriate, as to price, delivery, and terms.

(5) For the purpose of complying with 18-4-306, MCA, a record of sole source procurements shall be maintained that lists:

(a) each contractor's name;

(b) the amount and type of each contract;

(c) a listing of the supplies or services procured under each contract; and

(d) the identification number of each contract file. (AUTH: 18-4-221, MCA; IMP: 18-4-306, MCA.)

RULE XX EXIGENCY PROCUREMENTS (1) Exigency procurement shall be limited to those supplies or services necessary to meet the exigency.

(2) The determination as to whether a procurement shall be made as an exigency procurement shall be made by the Department or as delegated by a written delegation agreement. The determination must be in writing and must state the basis for an exigency procurement and for the selection of the particular contractor.

(3) The procedure used shall be selected to assure that the required supplies or services are procured in time to meet the exigency. However, such competition as is practicable shall be obtained.

(4) A record of each exigency procurement shall be made as soon as practicable and shall set forth:

(a) the contractor's name;

(b) the amount and type of the contract;

(c) a listing of the supplies or services procured under the contract; and

(d) the written documentation required in sub-section (2). (AUTH: 18-4-221, MCA; IMP: 18-4-133, MCA.)

RULE XXI AUTHORITY TO DISPOSE OF SUPPLIES (1) No Agency may transfer, sell, trade-in, or otherwise dispose of supplies owned by the State without written authorization of the Department.

(2) Agencies shall notify the Department of all surplus supplies on such forms and at such times as the Department may prescribe. In so doing, an Agency may suggest a dollar value per item or per lot that it desires to receive from any transfer or disposition of the surplus supplies, but the

suggestion does not constitute the minimum sale or transfer amount. The figures are not public information prior to transfer or sale. (AUTH: 18-4-226, MCA; IMP: 18-4-226, MCA.)

RULE XXII DISPOSITION OF SURPLUS SUPPLIES (1) Insofar as feasible and practical, the Department shall transfer surplus supplies to other State agencies and other units of government.

(2) Surplus supplies must be offered to the public through competitive sealed bids, public auction, established markets, or posted prices. It is recognized, however, that some types and classes of items can be sold or disposed of more readily and advantageously by other means, including barter. In such cases and also where the nature of the supply or unusual circumstances call for its sale to be restricted or controlled, the Department may employ such other means, including appraisal, if the Department makes a written determination that such procedure is advantageous to the State. Only United States Postal Money Orders, certified checks, cashier's checks or business checks may be accepted for sales of surplus property; except cash or a personal check may be accepted for petty cash sales of less than $100.

(3) Competitive Sealed Bidding:

(a) If a sale is made by competitive sealed bidding, notice of the sale must be given at least ten (10) days before the date set for opening bids by:

(i) mailing a Request for Sale Bids to prospective bidders, including those bidders on lists maintained for this purpose; and

(ii) newspaper advertisement may also be used.

(b) The Request for Sale Bids must list the supplies offered for sale; designate their location and how they may be inspected; and state the terms and conditions for bid opening. Bids shall be opened publicly.

(c) Award must be made in accordance with the provisions of the Request for Sale Bids to the highest responsive and responsible bidder, if the price offered by such bidder is acceptable to the Department. If the price is not acceptable, the Department may:

(i) reject the bids in whole or in part and negotiate the sale, but the negotiated sale price must be higher than the highest responsive and responsible bidder's price; or

(ii) such officer may resolicit bids.

(4) Auctions: Supplies may be sold at acution. When appropriate, an experienced auctioneer should be used to cry the sale and assist in preparation of the sale. The solicitation to bidders should stipulate, at a minimum, all the terms and conditions of any sale, including, but not limited to:

(a) that a deposit may be required in order to participate in the bidding;

(b) that the purchaser must remove within a stated time all surplus supplies purchased;

(c) that the State retains the right to reject any and all bids; and

(d) if a minimum bid is set, that bids below a minimum bid set by the State in advance will be rejected.

(5) Established Markets: Established markets are places where supplies such as livestock and produce are regularly sold in wholesale lots, and prices are set by open competition. Surplus supplies may be sold in established markets for such supplies.

(6) Posted Prices; Surplus supplies may be sold at posted prices as

determined by the Department when such prices are based on fair market value and the sale is conducted pursuant to written procedures established by the Department.

(7) Trade-Ins: Surplus supplies may be traded-in only if the Department determines the trade-in value is expected to equal or exceed the value estimated to be obtained through the sale or other disposition of the supplies. (AUTH: 18-4-226, MCA; IMP: 18-4-226, MCA.)

4. The Department is proposing these rules to implement the procurement procedures of the "Montana Procurement Act", (Chapter 519, L 1983) Title 18, Chapter 4, MCA, which provides a statutory framework of sound procurement fundamentals to be implemented by rules.

5. The existing rules are proposed to be repealed because they implement statutes which were repealed by the "Montana Procurement Act", Chapter 519, L. 1983.

6. Interested persons may present their data, views, or arguments either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Ms. Laurie Ekanger, Administrator, Purchasing Division, Room 165, Mitchell Building, Helena, MT, no later than December 9, 1983.

7. Ms. M. Valencia Lane has been designated to preside over and conduct the hearing.

Morris L. Brusett, Director
Department of Administration

Certified to the Secretary of State October 31, 1983.

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STATE AUDITOR'S OFFICE
SECURITIES DEPARTMENT
HELENA, MONTANA

In the matter of the adoption of rules creating a registration exemption for Regulation D securities offerings and creating examination, reporting and record keeping requirements for investment advisors.	)))))))	NOTICE OF PUBLIC HEARING FOR ADOPTION OF RULES

TO: All Interested Persons:

1. On December 16, 1983 at 10:00 A.M. a public hearing will be held in Room 159 of the Mitchell Building, Fifth & Roberts Street, Helena, Montana to consider the adoption of rules relating to a registration exemption for Regulation D securities offerings and relating to examination, reporting, and record keeping requirements for investment advisors.

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

3. The proposed rules provide as follows:

RULE I. UNIFORM LIMITED OFFERING EXEMPTION. (1) By the authority delegated to the Securities Commissioner in Section 30-10-105(16), MCA (1983), the following transaction is exempt from the registration provisions of the Securities Act of Montana:

(a) Any offer or sale of securities offered or sold in compliance with Securities Act of 1933, Regulation D, Rules 230.501-230.503 and 230.505 and/or 230.506 as made effective in Release No. 33-6389 and which satisfies the following further conditions and limitations:

(i) All persons who offer or sell securities in this state to nonaccredited and/or accredited investors as defined in Securities Act of 1933, Regulation D. Rule 230.501(a)(5)-(7) shall be appropriately registered in accordance with this state's securities law. It is a defense to a violation of this subsection if the issuer sustains the burden of proof to establish that he or she did not know and in the exercise of reasonable care could not have known that the person who received a commission, fee or other remuneration was not appropriately registered in this state.

(ii) No exemption under this rule shall be available for the securities of any issuer if any of the parties described in Securities Act of 1933, Regulation A, Rule 230.252 sections (c),(d),(e) or (f):

(A) Has filed a registration statement which is subject of a currently effective registration stop order entered pursuant to any state's securities law within five years prior to the filing of the notice required under this exemption.

(B) Has been convicted within five years prior to the filing of the notice required under this exemption of any felony or misdemeanor in connection with the offer, purchase or sale of any security or any felony involving fraud or deceit, including but not limited to forgery, embezzlement, obtaining money under false pretenses, larceny or conspiracy to defraud.

(C) Is currently subject to any state administrative enforcement order or judgment entered by that state's securities administrator within five years prior to the filing of the notice required under this exemption or is subject to any state's administrative enforcement order or judgment in which fraud or deceit, including but not limited to making untrue statements of material facts and omitting to state material facts, was found and the order or judgment was entered within five years prior to the filing of the notice required under this exemption.

(D) Is subject to any state's administrative enforcement order or judgement which prohibits, denies or revokes the use of any exemption from registration in connection with the offer, purchase or sale of securities.

(E) Is currently subject to any order, judgment or decree of any court of competent jurisdiction temporarily or preliminarily restraining or enjoining, or is subject to any order, judgment or decree of any court of competent jurisdiction, permanently restraining or enjoining, such party from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security or involving the making of any false filing with the state entered within five years prior to the filing of the notice required under this exemption.

(F) The prohibitions of paragraphs A-C and E above shall not apply if the person subject to the disqualification is duly licensed or registered to conduct securities related business in the state in which the administrative order or judgement was entered against such person or if the broker/dealer employing such party is licensed or registered in this state and the Form BD filed with this state discloses the order, conviction, judgment or decree relating to such person. No person disqualified under this subsection may act in a capacity other than that for which the person is licensed or registered.

(G) Any disqualification caused by this section is automatically waived if the state securities administrator or agency of the state which created the basis for disqualification determines upon a showing of good cause that it is not necessary under the circumstances that that exemption be denied.

(iii) The issuer shall file with the Commissioner a notice on Form D (17CFR239.500):

(A) Prior to any offer being made to a person in this state and no later than 10 days prior to the receipt of consideration or the delivery of a subscription agreement by an investor in this state which results from an offer being made in reliance upon this exemption and at such other times and in the form required under Regulation D, Rule 230.503 to be filed with the Securities and Exchange Commission.

(B) The notice shall contain an undertaking by the issuer to furnish to the securities commissioner, upon written request, the information furnished by the issuer to offerees, except where the Commissioner pursuant to regulation requires that the information be filled at the same time with the filing of the notice.

(C) Unless otherwise available, included with or in the initial notice shall be a consent to service of process.

(D) Every person filing the initial notice provided for in 1 above shall pay a filing fee of $200.00 for the first $100,000.00 of initial issue or portion thereof in this state, based on offering price, plus 1/10 of 1% for any excess over $100,000.00, with a maximum of $1,000.00.

(iv) In all sales to nonaccredited investors in this state the issuer and any person acting on its behalf shall have reasonable ground to believe and after making reasonable inquiry shall believe that one of the following conditions are satisfied:

A. The investment is suitable for the purchaser upon the basis of the facts, if any, disclosed by the purchaser as to his other security holdings and as to his financial situation and needs. For the purpose of this condition only, it may be presumed that if the investment does not exceed 10% of the investor's net worth, it is suitable.

B. The purchaser either alone or with his/her purchaser representative(s) has such knowledge and experience in financial and business matters that he/she is or they are capable of evaluating the merits and risks of the prospective investment.

2. Transactions which are exempt under this rule may not be combined with offers and sales exempt under any other rule or section of this act, however, nothing in this limitation shall act as an election. Should for any reason, the offer and sale fail to comply with all of the conditions for this exemption, the issuer may claim the availability of any other applicable exemption.

3. The Commissioner may, by rule or order, increase the number of purchasers or waive any other conditions of this exemption.

4. The Commissioner may, upon request, waive the examination requirements for an agent of the issuer offering and/or selling securities exempted by this Rule upon a showing of good cause.

5. In the case of offerings of direct participation programs as defined in Section 34 or Article III of the

National Association of Securities Dealers, Inc., Rules of Fair Practice, delivery of a disclosure document containing the information required by Rule 502(b) of Regulation D to individuals covered by subsections (5), (6), and (7) of Rule 501(a) of Regulation D is required.

6. The exemption authorized by this rule shall be known and may be cited as the "Uniform Limited Offering Exemption".

Auth: 30-10-105(16) and 30-10-107, MCA; Imp: 30-10-105(16), MCA.

RULE II. REGISTRATION AND EXAMINATION. (1) In order to become licensed in this state as an investment advisor, the individual applicant, an officer, if the applicant is a corporation, or a general partner, if the applicant is a partnership, shall pass the NASD Uniform Securities Agent State Law Exam with a score of 70% or better. The applicant must also complete a Uniform Application Form ADV and a Uniform Form U-2 for the Appointment of Attorney to Accept Service of Process for the State of Montana.

(2) If the individual officer who takes the examination on behalf of a corporate applicant or the individual general partner who takes the examination on behalf of a partnership ceases to be an officer or general partner, then a substitute officer or general partner must pass the examinations required in (1) above within two months in order to maintain the investment advisor license.

(3) Investment advisors that are registered with the Securities Department prior to January 1, 1984 shall have until December 31, 1984 to pass the examination required in subsection 1. After December 31, 1984 the Commissioner shall deny any application to renew registration as an investment advisor if the applicant has not passed the examination required in subsection 1.

Auth: 30-10-107(1) and 30-10-201(4-6), MCA; Imp: 30-10-107(1) and 30-10-201(4-6), MCA.

RULE III. REPORTING REQUIREMENTS. (1) Each investment advisor shall file with the commissioner a copy of any complaint related to its business, transactions, or operations in this state, naming the investment advisor or any of its partners, officers, or investment advisors representatives as defendants in any civil or criminal proceedings, or in any administrative or disciplinary proceeding by any public or private regulatory agency, within 10 days of the date the complaint is served on the investment advisor, a copy of any answer or reply to the complaint filed by the investment advisor within 10 days of the date the answer or reply is filed; and a copy of any

decision, order or sanction made with respect to any such proceedings within 30 days of the date the decision, order or sanction is rendered.

(2) Each investment advisor shall file with the commissioner a notice of transfer of control or change of name not less than 30 days prior to the date on which the tranfer of control or change of name is to become effective, or such shorter period as the commissioner may permit.

(3) Except as provided in subs. (1) and (2) all material changes in the information included in an investment advisor's most recent application for registration shall be set forth in an amendment to Form ADV and filed with the commissioner within 30 days after the change occurs.

Auth: 30-10-107(1) and 30-10-201(9), MCA; Imp: 30-10-201(9), MCA.

RULE IV. BOOKS AND RECORDS. (1) Every licensed investment advisor shall make and keep true, accurate and current books and records relating to his investment advisory business including at least the following:

(a) A list or other record of all accounts in which the investment advisor is vested with any power of attorney with respect to any client.

(b) All powers of attorney and other evidences of the granting of any discretionary authority by a client to the investment advisor, or copies thereof.

(c) All written agreements (or copies thereof) entered into by the investment advisor with any client or otherwise relating to the business of such investment advisor as such.

Auth: 30-10-107(1) and 30-10-201(9), MCA; Imp: 30-10-201(9), MCA.

4. Rule I is necessary for the following reasons:

(a). to insure that the scheme of securities regulation in Montana is uniform with the laws of other states and is compatible with Federal Regulation under the Securities Act of 1933. Uniformity is necessary to fulfill the purpose of the Securities Act and to reduce the cost and complexity of securities regulation in general; and

(b). to provide limited relief from the registration provisions of the Securities Act for small and existing businesses that are attempting to raise a limited amount of funds and to provide an exemption from registration for transactions in securities when the securities involved are adequately regulated by other bodies.

5. Rules II, III and IV are necessary for the following reasons:

(a). to insure that investment advisors registered in Montana are regulated in a manner that is uniform with the laws of other states and in a manner that is compatible with existing Federal Regulations. Uniformity is necessary to fulfill the purpose of the Securities Act and to reduce the cost and complexity of securities regulation in general;

(b). to fulfil the purpose of the Securities Act under Section 30-10-102, MCA (1983) to "protect the investors, persons engaged in securities transactions, and the public interest";

(c). to adequately notify persons interested in becoming registered investment advisors of the examination and application procedures and forms; and

(d). to adequately notify investment advisors which records and accounts the Securities Commissioner requires them to keep and preserve.

6. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Gordon Bruce, Room 209, Mithcell Building, Box 4009, Helena, Montana 59604, no later than December 10, 1983.

7. Gordon Bruce, State Auditor's Office, Mitchell Building, Helena, Montana has been designated to preside over and conduct the hearing.

E. V. "SONNY" OMHOLT
State Auditor & Ex Officio
Commissioner of Insurance and
Securities Commissioner

R. G. "RICK" TUCKER
Chief Deputy Securities Commissioner

CERTIFIED TO THE SECRETARY OF STATE 10-25-83

STATE OF MONTANA
BEFORE THE DEPARTMENT OF COMMERCE

In the matter of the proposed amendment of 8.56.407 concerning renewals for the board of radiologic technologists.) NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF 8.56.407 RENEWALS

TO: All Interested Persons:

1. On December 5, 1983, at 10:00 a.m., a public hearing will be held in the Downstairs Conference Room of the Department of Commerce, 1430 9th Avenue, Helena, Montana, to consider the amendment of 8.56.407 concerning renewals for the board of radiologic technologists.

2. The rule as proposed to be amended provides as follows (new matter underlined, deleted matter interlined)

"8.56.407 RENEWALS (1) Licenses for radiologic technologists shall expire on February 1st of the first even-numbered year following the year of their issuance and every even-numbered year thereafter.

(2) Permits issued under section 37-14-306 (1) and (3), MCA, shall expire on December 31st of each year.

(3) The board will notify every person licensed under this act, of the date of expiration of license or permit and the amount of fee required for renewal. Such notice shall be mailed at least one month in advance of the date of expiration of said license or permit."

3. The department is proposing the amendment to set the renewal dates as mandated by section 37-1-101 (1), MCA which becomes effective on January 1, 1984 and allows the department to set renewal dates for certain of the licensing boards. The department after meeting with the board has determined these dates are those which should be set to avoid peak periods of license renewals within the department.

4. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Shirley Miller, Bureau Chief, Bureau of Professional and Occupational Licensing, Department of Commerce, 1424 9th Avenue, Helena, Montana 59620-0407, no later than December 12, 1983.

5. Robert Wood, Department Attorney, Helena, Montana has been designated to preside over and conduct the hearing.

6. The authority of the department of make the proposed change is based on section 37-1-101 (7), MCA and implements sections 37-14-306 and 310, MCA. The effective date of the amendment will be January 1, 1984.

DEPARTMENT OF COMMERCE

BY: GARY BUCHANAN, DIRECTOR

Certified to the Secretary of State, October 31, 1983.

STATE OF MONTANA
BEFORE THE DEPARTMENT OF COMMERCE

In the matter of the proposed adoption of rules regarding polygraph examiners licensure.) NOTICE OF PROPOSED ADOPTION OF) RULES REGARDING LICENSURE) OF POLYGRAPH EXAMINERS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 10, 1983, the Department of Commerce proposes to adopt rules regarding licensure of polygraph examiners.

2. The proposed rules will read as follows:

"I. LICENSURE QUALIFICATIONS (1) In addition to the requirements of section 37-62-202, MCA, all applicants must meet the following requirements:

(a) must be fingerprinted and have fingerprint records on file with the department;

(b) have successfully completed at least 25 specific case polygraph examinations within the immediate year preceding application; and

(c) must have one year of investigative experience required through full time investigation of actual or suspected violations of law, insurance matters, or as related to military inquiries." (Authority: Sec. 37-62-102, MCA; Implement: Sec. 37-62-202, MCA)

"II. APPLICATION (1) Written application shall be made on forms prescribed and provided by the department and submitted to the Professional and Occupational Licensing Bureau, 1424 9th Avenue, Helena, Montana 59620-0407.

(2) Applications must be accompanied by copies of licensure from other states or agencies, fingerprint cards, proof of course completion, school records, diplomas, three statements of good moral character, a picture of the applicant. Additional information or documents may be required for any application which appears to be lacking in substantiating evidence.

(3) Applications shall be accompanied by a check or money order payable to Polygraph Examiners, Department of Commerce." (Authority: Sec. 37-62-102, MCA; Implement: Sec. 37-62-202, 203, MCA)

"III. EXAMINATION (1) Applicants must submit a minimum of 25 specific case polygraph exams to be reviewed and approved by a licensed polygraph examiner approved by the board, prior to application for written examination.

(2) Applicants must successfully pass a written examination with a minimum passing score of 75% or more on the entire examination.

(3) No applicant may bring books, papers, or other documents to the examination, unless requested by the department.

(4) No applicant is allowed to take any papers from the examination or the room in which the examination is administered.

(5) An applicant who has failed the examination may re-take the examination upon payment of a reexamination fee to the department.

(6) Examinations will be given in the offices of the department on any scheduled workday, Monday through Friday, by prior appointment with the administrative assistant.

(7) The department shall retain the applicant's examination papers for a period of one year. Individual scores on the examination shall be made a part of the permanent record of the applicant." (Authority: Sec. 37-62-102, MCA; Implement: Sec. 37-62-202, MCA)

"IV. FEES (1) Application fee of $125.00 shall include the investigation fee and the original license.

(2) Renewal fee shall be $100.00 annually.

(3) Original examination fee shall be $10.00.

(4) Re-examination fee shall be $10.00.

(5) Copies of the law and rules shall be $2.00.

(6) Duplicate license certificate or pocket card shall be $5.00."

(Authority: Sec. 37-62-102, MCA; Implement: Sec. 37-62-202, 203, 204, 208, MCA)

"V. LICENSE RENEWAL - DATE - CONTINUING EDUCATION

(1) The first 100 licenses issued will expire on March 1st following date of issue and to remain current must be renewed on or before March 1st of each year thereafter.

(2) Each licensee will be notified by mail at his last known address of the current renewal fee and furnished with a renewal application at least 30 days prior to March 1st of each year. The renewal application must be signed and returned with the fee to the department.

(3) Each licensee shall present evidence, of attending 20 hours of education in an approved polygraph course within 2 years of renewal. Failure for a licensee to comply with this rule will constitute reason for denial of license renewal.

(4) The 20 hours of continuing education requirement must be met with the following exception:

(a) Sickness, family emergency, or such other circumstance that the department may determine consistent with this act.

(5) It shall be the duty of each licensee to keep the department informed of any change in mailing address." (Authority: Sec. 37-62-102, MCA; Implement: Sec. 37-62-204, 207, MCA)

"VI. FORM OF LICENSE AND DISPLAY (1) License

certificates shall be printed on an 8½" x 11" form and shall include in addition to the provisions of 37-62-205, MCA, the name of the department.

(2) Pocket cards shall be printed on a 3½" x 2¼" card and shall include the following:

(a) the name of the department,

(b) the name of the examiner,

(c) the number of the license certificate,

(d) the renewal number shall be pre-printed,

(e) the date on which the renewal license expires, and

(f) shall be signed by the licensee upon receipt of the pocket card." (Authority: Sec. 37-62-102, MCA; Implement: Sec. 37-62-205, 206, MCA)

3. The department is proposing the rules to implement the provisions of House Bill 452 regarding licensure of polygraph examiners. The rules as proposed set forth the manner in which an applicant must prove his fitness for licensure, specify the fees, establish a date of expiration for licenses, provide for continuing education with regard to renewal, specify the form of license certificate and pocket cards. The rules also offer basic guidelines for examinations. These rules have been determined necessary to commence licensing of polygraph examiners.

4. Interested persons may submit their data, views or arguments concerning the proposed adoptions in writing to Mary Lou Garrett, Bureau of Professional and Occupational Licensing, Department of Commerce, 1424 9th Avenue, Helena, Montana 59620-0407, no later than December 8, 1983.

5. If a person who is directly affected by the proposed adoptions 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 comments he has to Mary Lou Garrett, Bureau of Professional and Occupational Licensing, Department of Commerce, 1424 9th Avenue, Helena, Montana 59620-0407, no later than December 8, 1983.

6. If the department receives requests for a public hearing on the proposed adoptions from either 10% or 25, whichever is less, of those persons who are directly affected by the adoptions, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, 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 has been determined to be 3, based on the approximately 30 potential licensees.

7. The authority and implementing sections are listed after each proposed adoption.

DEPARTMENT OF COMMERCE

BY: _____
GARY BUCHANAN, DIRECTOR

Certified to the Secretary of State, October 31, 1983.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF RADIOLOGIC TECHNOLOGISTS

In the matter of the proposed amendment of 8.56.409 concerning the fee schedule.) NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF 8.56.409 FEE SCHEDULE

TO: All Interested Persons:

The notice of proposed board action published in the 1983 Montana Administrative Register, issue number 18, on September 29, 1983 at pages 1284 and 1285, is amended as follows because the board has determined that the fees proposed in that notice were not sufficient to cover the program area costs. That notice also contained an amendment of 8.56.402 which will be delayed for adoption until after the hearing, even though it is not included in this hearing notice. No requests for hearing or comments were offered on either proposed change.

1. On December 5, 1983, at 10:00 a.m. or as soon thereafter as possible a public hearing will be held in the Downstairs Conference Room of the Department of Commerce, 1430 9th Avenue, Helena, Montana to consider the amendment of the fee schedule rule, 8.56.409.

2. The amendment provides as follows: (new matter underlined, deleted matter interlined) (full text of rule is located at page 8-1564, Administrative Rules of Montana)

"8.56.409 FEES SCHEDULE (1) ...

(a)	Examination fee.....	~~$10.00~~	65.00
(b)	~~Certificate fee~~ Application Fee - radiologic technologist..	~~15.00~~	50.00
(c)	Permits		
(i)	~~Initial~~ Application.....	~~10.00~~	60.00
(ii)	Certificate.....	~~10.00~~	25.00
(iii)	Renewal.....	~~10.00~~	30.00
(d)	Temporary permit.....	~~10.00~~	65.00
(e)	Renewal license fee - radiologic technologist.....	~~20.00~~	60.00
(f)	Duplicate or lost licenses or certificates.....		25.00
(g)	Late renewal fee (in addition to renewal fee.....		30.00
	~~License lists per copy.....~~		~~5.00~~"

3. The board is proposing the amendment to set fees commensurate with program area costs. The previous notice contained fees which were not sufficient to cover projected costs. An error had been made in that when the fees were originally computated, biannual renewal of the licenses of radiologic technologists was not taken into consideration.

4. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views and arguments may also be submitted to the Board of Radiologic Technologists, 1424 9th Avenue, Helena,

Montana, 59620-0407, no later than December 12, 1983.

5. Robert Wood, Department Attorney, Helena, Montana, has been designated to preside over and conduct the hearing.

6. The authority of the board to make the proposed amendment is based on sections 37-1-134, MCA and 37-14-202, MCA and implements sections 37-1-134, 37-14-303, 305, 306, 309, and 310, MCA.

BOARD OF RADIOLOGIC TECHNOLOGISTS
ALICE O'DONNELL, ACTING CHAIRMAN

BY: _____
GARY BUCHANAN, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, October 31, 1983.

BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 12.5.401 relating to oil and gas leasing policy for department-controlled lands	NOTICE OF PROPOSED AMENDMENT of Rule 12.5.401 - oil and gas leasing policy for department-controlled lands NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 12, 1983, the Fish and Game Commission proposes to amend Rule 12.5.401 regarding the oil and gas leasing policy for department-controlled lands.

2. The proposed rule will amend the current rule found in 12.5.401 of the Administrative Rules of Montana.

3. The proposed amendment provides as follows:

12-5-401 OIL AND GAS LEASING PROCEDURES FOR DEPARTMENT-CONTROLLED LANDS (1) ~~The primary responsibility of the fish and game commission is the protection and preservation of fish and wildlife habitat along with providing both recreational lands and recreational opportunities.~~ The purpose of resource management on lands controlled by the Montana Department of Fish, Wildlife and Parks is to maintain and enhance conditions for fish, wildlife and recreational activities. Oil and gas leasing, if accommodated, will be consistent with that purpose. Minimizing damage or losses is not the objective. Improving wildlife's potential and recreational opportunities is the objective. Oil and gas leasing must be consistent with state and federal laws and regulations governing the use of lands acquired with federal funds. Derived income, if any, should be clearly and directly routed into programs benefiting the fish, wildlife and recreational resource.

(2) Applications for seismic permits or for oil and gas leasing on lands controlled by the department will be considered on an individual basis according to the following procedures:

(a) Applications for seismic exploration permit for activities that cause no surface disturbance other than that necessary for seismic tests must be accompanied by a preliminary environmental review prepared by the department in accordance with the rules and regulations promulgated under the Montana Environmental Policy Act and adopted by the department. A permit, if granted by the department and approved by the commission, will be only for the purpose described in the preliminary environmental review and shall imply no right to engage in any activity not described in that review and will be for a specified period of time.

(b) ~~Applications for leases for the purposes of exploratory well drilling or development shall be accompanied by a complete environmental impact statement prepared by the department, consistent with the rules and regulations promulgated under the Montana Environmental Policy Act.~~ "Surface occupancy" leases for oil and gas development activity will not be issued, unless they are required to protect against asset depletion by drainage. In these instances, the lessee shall bear all costs incurred by the department in the monitoring of exploration and development.

(c) ~~The impact statement shall include all necessary stipulations to ensure that oil and gas drilling and extraction shall not adversely affect the purposes for which department properties were acquired, and shall be agreed to by the applicant. Cost of preparation of this environmental impact statement shall be borne by the applicant.~~ On parcels of 640 acres or less, it shall be the general policy of the commission to issue "no surface occupancy" leases after the preparation of a Preliminary Environmental Review.

(d) ~~Upon review of the application, environmental impact statement, and special stipulations, the department may or may not grant the lease, subject to commission approval.~~ In most instances, tracts larger than 640 acres have been purchased with federal funds. On these areas the issuance of a lease may be in conflict with the purpose for which the area was purchased. If a preliminary environmental review indicates that the area could potentially be leased, then an environmental impact statement, the cost of which shall be borne by the applicant, shall be prepared. Upon review of the environmental impact statement, the commission may or may not grant the lease.

(e) ~~In the event that a lease application for drilling an exploratory well or conducting oil and gas development activities is filed with the commission or department, the holder of an unexpired seismic exploration permit shall have the first right to apply for such a lease, provided he meets all the special conditions and stipulations specified by the department or commission.~~ The method of issuance of a lease shall be at the discretion of the commission, and may involve competitive bidding, direct negotiation, or any other method deemed appropriate.

(f) ~~On matters relating to oil and gas leasing other than those affecting the fish, wildlife, and recreational resources, the commission adopts the rules and regulations promulgated by the Montana department of state lands as found in ARM, Title 26, Chapter 6, Sub-Chapter 1.~~

AUTH: 87-1-301, 23-1-06, MCA IMP: 87-1-303, 23-1-102, MCA

4. The purpose of the proposed amendment is to comply with federal regulations and to bring department policy more in line with the reasons the department possesses such land.

5. Interested persons may present their data, views or arguments concerning the proposed rule in writing to Kevin C. Meek, Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620, no later than December 8, 1983.

6. 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 Kevin C. Meek, Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620, no later than December 8, 1983.

7. 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 25, based on the approximate number of people who expressed an interest in the department's current oil and gas leasing policy.

Spencer S. Hegstad

SPENCER S. HEGSTAD, Chairman
Montana Fish and Game Commission

By: James W. Flynn

JAMES W. FLYNN, Secretary
Montana Fish and Game Commission

Certified to Secretary of State October 27, 1983

BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the proposed AMENDMENT OF ARM 12.6.801 relating to boating closures and ARM 12.6.901 relating to water safety regulations.	NOTICE OF PROPOSED AMENDMENT OF ARM 12.6.801 relating to boating regulations and ARM 12.6.901 relating to water safety regulations. NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 12, 1983, the Montana Fish and Game Commission proposes to amend Rule 12.6.801 relating to boating closures and Rule 12.6.901 relating to water safety regulations. Rule 12.6.801, relating to boating closures, would be amended to provide as follows (new matter underlined):

12.6.801 BOATING CLOSURES (1) The following waters/areas will be either closed as posted or marked by barrel booms to the use of all boats or other water craft except in case of rescue craft or plant maintenance work:

(a) area immediately above and below Holter Dam in Lewis & Clark County;

(b) area immediately above and below Hauser Dam in Lewis & Clark County

(c) area immediately above and below Canyon Ferry Dam in Lewis & Clark County;

(d) area immediately above and below Milltown Dam in Missoula County;

(e) area immediately above Flint Creek Dam in Deer Lodge County;

(f) area immediately above Kerr Dam in Lake County;

(g) a portion of Brown's Lake near Ovando, Powell County, during the time period beginning April 1 and ending July 15.

AUTH: 87-1-301, 87-1-303, MCA; IMP: 87-1-303, MCA.

2. The above proposed amendment is designed to protect waterfowl nesting areas located on Brown's Lake.

3. Rule 12.6.901 is proposed to be amended as follows (new matter underlined):

12.6.901 WATER SAFETY REGULATIONS (1) In the interest of public health, safety, or protection of property, the following regulations concerning the public use of certain waters of the state of Montana are hereby adopted and promulgated by the Montana Fish and Game Commission.

(a) The following waters are closed to the use of any motor-propelled water craft except in case of use for official

patrol, search and rescue, maintenance of hydroelectric projects and related facilities with prior notification by the utility, or for scientific purposes:

Beaverhead County:	Big Hole River
Big Horn County:	Arapooish access area
Cascade County:	Smith River; That portion of the Missouri River from the Burlington Northern Railway Bridge No. 119.4 at Broadwater Bay in Great Falls to Black Eagle; and That portion of the Missouri River from the Warden Bridge on 10th Avenue South in Great Falls to the floater take-out facility constructed near Odd-fellows Park at Broadwater Bay as posted.
Custer County:	Branum Pond
Deer Lodge County:	Big Hole River
Gallatin County:	Bozeman Ponds
Granite County:	Bear Mouth rest area pond
Hill County:	Bearpaw Lake
Jefferson County:	Park Lake
Lewis & Clark County:	Wood Lake Spring Meadow Lake
Madison County:	Big Hole River
Meagher County:	Forest Lake - Smith River
Missoula County:	Frenchtown Pond - Harpers Lake
Ravalli County:	Twin Lakes
Richland County:	Gartside Reservoir
Silver Bow County:	Big Hole River
Toole County:	Henry Reservoir - Fitzpatrick Lake

(b) The following waters are closed to the use of all boats propelled by machinery of over 10 horsepower, except in cases of use for search and rescue, official patrol, or for scientific purposes:

(i) all rivers and streams in the following counties east of the continental divide:

Silver Bow	Gallatin - exception: Missouri downriver from Headwaters State Park
Beaverhead	
Jefferson	
Madison	Park - exception: Yellowstone downriver from I-90 bridge at Livingston Broadwater - exception: Missouri downriver from the Broadwater - Gallatin county line

(ii) other waters of the state as follows:

Hill County:	Beaver Creek Reservoir
Fallon County:	South Sandstone Reservoir

(c) The following waters are limited to a controlled no wake speed. No wake speed is defined as a speed whereby there is no "white" water in the track or path of the vessel or in created waves immediate to the vessel:

Broadwater County:	(A)	On Canyon Ferry Reservoir: White Earth and Goose Bay, within 300 feet of dock or as buoyed;
Carbon County:	(A)	On Cooney Reservoir: all of Willow Creek arm as buoyed;
Daniels County:	(A)	Whitetail Reservoir;
Fergus County:	(A)	Upper & lower Carter Ponds;
	(B)	Crystal Lake, 5:00 a.m. to 10:00 a.m. and 7:00 p.m. to 11:00 p.m. each day;
Flathead County:	(A)	On Flathead Lake: Bigfork Bay;
	(B)	Beaver Lake (near Whitefish), 5:00 a.m. to 10:00 a.m. and 7:00 p.m. to 11:00 p.m. each day;
Hill County:	(A)	Beaver Creek Reservoir;
Lewis & Clark County:	(A)	On Canyon Ferry Reservoir: Yacht Basin, Cave Bay, Little Hellgate, Magpie Bay & Carp Bay, within 300 feet of dock or as buoyed;
	(B)	On Hauser Reservoir: Lakeside Marina and Black Sandy Beach; within 300 feet of the docks or as buoyed;
	(C)	On upper Holter Lake: Gates of the Mountains Marina, within 300 feet of docks or as buoyed;
	(D)	On Holter Lake: Bureau of Land Management boat landing as buoyed; Juniper Bay, Log Gulch, Departure Point, Meriwether Camp, and Holter Lake Lodge docks;
Lincoln County:	(A)	Savage Lake during the hours of 5:00 a.m. to 10:00 a.m. and from 7:00 p.m. to 11:00 p.m. each day;
Missoula County:	(A)	Clearwater River from the outlet of Seeley Lake to the first bridge downstream from Camp Paxson swim dock;
	(B)	On Holland Lake: Holland Lake Lodge and the Bay Loop campground, within 300 feet or as buoyed.

(d) The following waters are closed to water skiing:

Lewis & Clark County:	(A)	On Saturday & Sunday of each week and on all legal holidays, from the mouth of the canyon on upper Holter Lake to Gates of the Mountains near Mann Gulch, as marked;
Valley County:	(A)	Fort Peck Dredge Cut Trout Pond.

(e) On the following waters all boats pulling, taking off with, and landing water skiers will travel in a general, consistent counterclockwise direction:

Missoula County: Alva Lake, Inez Lake, Seeley Lake.

(2) This rule has been reviewed and approved by the Department of Health and Environmental Sciences.

AUTH: 87-1-303, 23-1-106(1), MCA;
IMP: 87-1-303, 23-1-106(1), MCA.

4. The Bozeman Ponds and Spring Meadow Lake are being closed to the use of motorized vehicles because both bodies of water are small and the use of boat motors creates a hazardous condition.

5. The closure at Oddfellows Park on the Missouri River is to preclude the use of motor boats in an area that is designed to facilitate floaters who do not use motors. The department anticipates that the use of motors at an area designated for floaters would create a hazardous situation.

6. The reason for a no wake speed on Beaver Creek Reservoir is several reported incidents where the wake of larger boats has created a hazardous situation for small boaters.

7. The justification for disallowing water skiing on the Fort Peck Dredge Cut Trout Pond is that the pond is too small and contains hidden underwater obstacles making water skiing hazardous.

8. Interested parties may submit their data, views, or arguments concerning the proposed amendment in writing to Kevin C. Meek, Department of Fish, Wildlife and Parks, 1420 East 6th Avenue, Helena, Montana 59620, no later than December 9, 1983.

9. If a person who is directly affected by the proposed action 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. Meek no later than December 9, 1983.

10. If the commission receives requests for a public hearing on the proposed amendments 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.

SPENCER S. HEGSTAD, Chairman
Montana Fish and Game Commission

By: JAMES W. FLYNN, Secretary
Montana Fish and Game Commission

Certified to the Secretary of State October 27, 1983

BEFORE THE FISH AND GAME COMMISSION OF THE
STATE OF MONTANA

IN THE MATTER OF THE REPEAL of Rule 12.9.202 relating to Brinkman Game Preserve	))))	NOTICE OF PUBLIC HEARING ON PROPOSED REPEAL OF RULE 12.9.202 - Brinkman Game Preserve

TO: All Interested Persons

1. On December 1, 1983, at 7:00 p.m., a public hearing will be held in the auditorium of the Chester High School, in Chester, Montana, to consider the repeal of Rule 12.9.202.

2. The rule proposed to be repealed can be found on page 12-612 of the Administrative Rules of Montana.

3. The rule is proposed to be repealed because the deer population on the preserve has grown to the extent that they are causing extensive damage to haystacks and fields within the preserve. This condition has developed over a period of several years. In order to alleviate the damage from deer the commission proposes to open the area to hunting as is necessary.

4. Interested persons may present their data, views, or arguments orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Stan Bradshaw, Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620, no later than December 9, 1983.

5. Stan Bradshaw has been designated to preside over and conduct the hearing.

6. The authority of the agency to repeal the rule is based on Sec. 87-1-301 and 87-5-402, MCA, and the rule implements Sec. 87-1-305 and 87-5-401, MCA.

SPENCER S. HEGSTAD, Chairman
Montana Fish and Game Commission

By: JAMES W. FLYNN, Secretary
Montana Fish and Game Commission

Certified to the Secretary of State: October 31, 1983.

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

In the matter of the adoption of rules setting standards for administration of a program to pay treatment costs for victims of end-stage renal disease	)))))	NOTICE OF PUBLIC HEARING FOR ADOPTION OF RULES (End-Stage Renal Disease Program)

To: All Interested Persons

1. On December 9, 1983, at 1:30 p.m., a public hearing will be held in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the adoption of rules which set standards for payment of benefits to victims of end-stage renal disease in order to assist them with the costs associated with treatment of the disease.

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

3. The proposed rules provide as follows:

RULE I DEFINITIONS

(1) "Claimant" means a person applying for assistance from the ESRD.

(2) "End stage renal disease" means severe kidney disease or kidney failure which is irreversible and permanent, and which requires dialysis or kidney transplantation to control uremia and maintain life.

(3) "EOB" means an explanation of benefit form.

(4) "ESRD" means the end-stage renal disease program administered by the department pursuant to Chapter 692 of the 1983 Session Laws.

(5) "Family unit" means the individuals who are dependent upon a common primary source of financial support, including, but not limited to:

(a) the claimant,

(b) the claimant's spouse,

(c) the claimant's natural or adopted children under 18 years of age, and

(d) when the claimant is under 18 years of age, the claimant's natural or adoptive parents and the claimant's siblings living with them.

(6) "Third party" means a public or private agency which is or may be liable to pay all or part of the medical costs of a claimant, including, but not limited to, Medicare (Title XVIII of the Social Security Act), Medicaid (Title XIX of the Social Security Act), a county fund for the medically needy, private insurance (including group health, private health, or family health carried by an absent parent, if applicable), the Veteran's Administration, CHAMPUS (Civilian Health and Medical Program of the Uniform Services), the Indian Health Service of the U.S. Public Health Service, and the rehabilitative services of the Department of Social and Rehabilitation Services.

(7) "Severe economic imbalance" means deprivation of the family unit of the necessities of life, caused by payment of expenses for the treatment of renal disease.
AUTHORITY: Sec. 53-6-202, MCA
IMPLEMENTING: Sec. 53-6-202, MCA

RULE II APPLICATION PROCEDURES (1) An applicant must:

(a) Submit an application to the department in writing on the form and in the manner prescribed by the department; and

(b) Ensure that the application's witness and certification of economic need statements are signed prior to submission of the application.

(2) Application forms may be obtained from the department.

(3) Upon receipt, an application will be reviewed by the department to determine if it is complete. If it is not complete, the department will request the information lacking.

(4) The department will notify a claimant of the approval or denial of his application as soon as possible after the department receives either it or all the information needed to complete it.

(5) The claimant must make a new application for the continuation of program benefits at the end of the period during which he is entitled to benefits, as determined in Rule III.

(6) Upon being determined eligible, the claimant will receive an ESRD identification card and identification number which may be referred to by vendors in the billing process. In order to be valid, the card must be signed on the reverse side by the claimant and countersigned by a person authorized to sign for the ESRD.
AUTHORITY: Sec. 53-6-202, MCA
IMPLEMENTING: Sec. 53-6-202, MCA

RULE III TIME PERIOD FOR BENEFITS An approved application entitles the claimant to ESRD benefits, to the extent the ESRD appropriation allows, for the following periods:

(1) For one year from the date the claimant first contacts the department (by phone, mail, or otherwise) to commence application for ESRD benefits, if the claimant is applying for ESRD benefits for the first time or after a period during which he was ineligible for or otherwise not receiving ESRD benefits.

(2) For one year from the end of the prior one-year period, if the claimant has been receiving ESRD benefits and is applying for continuing benefits.
AUTHORITY: Sec. 53-6-202, MCA
IMPLEMENTING: Sec. 53-6-202, MCA

RULE IV RIGHT TO HEARING Any claimant who is dissatisfied with the action on an application may, upon request, have a fair hearing in accordance with the procedures prescribed for informal proceedings in Section 2-4-604, MCA.
AUTHORITY: Sec. 53-6-202, MCA
IMPLEMENTING: Sec. 53-6-202, MCA

RULE V NON-FINANCIAL ELIGIBILITY REQUIREMENTS In order to participate in ESRD, the claimant applying for benefits must:

(1) Have medical verification of end-stage renal disease from a licensed physician who is board eligible or certified in nephrology or a related specialty;

(2) Be on dialysis or have received a kidney transplant; and

(3) Be a resident of the state of Montana.
AUTHORITY: Sec. 53-6-202, MCA
IMPLEMENTING: Sec. 53-6-202, MCA

RULE VI FINANCIAL ELIGIBILITY REQUIREMENTS In order to participate in ESRD, the claimant must:

(1) Take all reasonable steps necessary to apply for and utilize any third-party benefits, other than ESRD, to which he is or may be entitled;

(2) Show that he, or the person financially responsible for his support, is unable, without creating a severe economic imbalance in the family unit to which he belongs, to pay the cost of needed care and treatment for end-stage renal disease which remains after the third-party benefits which are reasonably available to him have been exhausted.
AUTHORITY: Sec. 53-6-202, MCA
IMPLEMENTING: Sec. 53-6-202, MCA

RULE VII ELIGIBLE SERVICES AND SUPPLIES; GENERAL The department, to the extent of its appropriation for ESRD, will pay for the costs listed in Rules VIII and IX for approved ESRD-eligible individuals only if each service or supply is directly related to end-stage renal disease, medically necessary, ordered by a physician, and provided after the time the individual in question first contacts the department (in person, by mail, or by phone) to apply for ESRD benefits.
AUTHORITY: Sec. 53-6-202, MCA
IMPLEMENTING: Sec. 53-6-202, MCA

RULE VIII ELIGIBLE SERVICES AND SUPPLIES FOR PARTICIPANT NOT RECEIVING MEDICAID BENEFITS The cost of the following services and supplies may be paid by ESRD for individuals who are not receiving Medicaid benefits:

(1) For home dialysis:

(a) Insertion of and maintenance of access site;

(b) Training the patient to implement and maintain home dialysis (excluding room, board, and travel expenses);
(c) Rental and/or purchase of dialysis machine and supplies;
(d) Repairs to dialysis equipment;
(e) Modification of existing plumbing and wiring, at the cost represented by the lowest of three bids submitted to the department;
(f) Supplies for home dialysis;
(g) Physician and hospital service for maintenance of home dialysis.
(2) The following medications:
(a) Hepatitis vaccine;
(b) Gamma globulin;
(c) Whole blood;
(d) Hyperphosphatemia (phosphate binders) drugs;
(e) Hypocalcemia drugs;
(f) Vitamins with iron and/or folic acid;
(g) Vitamin D preparations;
(h) Steroids (transplant patients only);
(i) Immunosuppressants (transplant patients only);
(j) Antibiotics for peritonitis associated with peritoneal dialysis (CAPD).
(3) For renal transplant patients, only if ESRD is notified within 72 hours after the patient is admitted to a hospital for the transplant:
(a) Preliminary work-up and medical costs of the transplant;
(b) Transportation of the patient to and from the site where the transplant takes place, in the cheapest manner medically appropriate, taking into account necessary time constraints in each individual case (e.g., emergency transport may be necessary in place of commercial carrier if the transplant deadline is imminent).
(4) Center dialysis, if its use in place of home dialysis is medically justified in writing by a physician.
AUTHORITY: Sec. 53-6-202, MCA
IMPLEMENTING: Sec. 53-6-202, MCA

RULE IX ELIGIBLE SERVICES AND SUPPLIES FOR PARTICIPANT RECEIVING MEDICAID BENEFITS If an ESRD-eligible individual is also receiving Medicaid benefits, ESRD will pay only for the cost of the following medications:
(1) Hyperphosphatemia (phosphate binders) drugs;
(2) Vitamins with iron and/or folic acid;
(3) Vitamin D preparations.
AUTHORITY: Sec. 53-6-202, MCA
IMPLEMENTING: Sec. 53-6-202, MCA

RULE X NON-ELIGIBLE SERVICES The cost of the following services and supplies is not eligible for payment from ESRD:
(1) Attendant or "back-up" person;

(2) Drugs not specifically listed in Rule VIII as eligible medications;
(3) Transportation for anyone other than a transplant patient;
(4) Services provided which are not related to kidney condition, e.g., epistaxis, otitis media, diabetes, eye examinations, and heart evaluations;
(5) Medicare premiums;
(6) Hospital in-patient care of over 60 days unless specifically justified as ESRD-related (e.g., not due to chronic debilitating disease other than renal disease).
AUTHORITY: Sec. 53-6-202, MCA
IMPLEMENTING: Sec. 53-6-202, MCA

RULE XI DOCUMENTATION OF CLAIMS A claim for ESRD reimbursement, in order to be reimbursable, must contain, or be accompanied by, the following documentation:
(1) Each claim for any reimbursable service or supply must contain:
(a) The patient's name and address; and
(b) The provider's federal tax identification number.
(2) A physician service claim must be:
(a) Submitted and itemized on a completed universal health insurance claim form approved by the American Medical Association's Council on Medical Services, with the assignment box checked yes to indicate that the physician agrees not to bill the ESRD patient for any portion of the cost of the service which exceeds the Medicare allowance for that service.
(b) Accompanied by a completed Medicare EOB and an EOB from any private insurance which the patient might have which covers the service in question.
(3) A hospital service claim (in-patient or out-patient) must be:
(a) Submitted on the universal hospital insurance form approved by the Health Insurance Association of America and accepted for hospital use by the American Hospital Association.
(b) Accompanied by an itemized statement, Medicare EOB, and an EOB from any private insurance which the patient might have which covers the service in question.
(4) A claim for dialysis supplies must be accompanied by an itemized statement from the supplier, proper invoice numbers, Medicare EOBs and the EOBs from any private insurance which the patient might have which covers purchase of the supplies in question.
(5) A claim for drugs must be submitted with either itemized drug charge slips or a Medicaid drug claim form.
(6) A claim for any ESRD-eligible service or supply other than one of those listed in subsections (2) through (5) above must be submitted with an itemized statement or bill, plus a Medicare EOB.
AUTHORITY: Sec. 53-6-202, MCA
IMPLEMENTING: Sec. 53-6-202, MCA

RULE XII CONDITIONS OF CLAIM PAYMENT Payment of a claim will be made only:

(1) To the provider of the service or supply for which a claim is made.

(2) To a provider of a service or supply who refrains from billing the ESRD patient for any portion of the cost of the service or supply which exceeds the Medicare allowance for that service or supply.

(3) After all other reasonably available sources of payment for that service or supply, such as Medicare or private insurance, have either paid in part or denied payment for the service or supply in question.

(4) For the portion of the cost of an ESRD-eligible service or supply which does not exceed the amount allowed by Medicare for that service or supply.

AUTHORITY: Sec. 53-6-202, MCA
IMPLEMENTING: Sec. 53-6-202, MCA

RULE XIII PRIORITY OF PAYMENT To the extent of the ESRD appropriation for a given fiscal year, bills received by the department during that fiscal year will be paid according to the date ESRD receives them, the first bills received being the first paid.

AUTHORITY: Sec. 53-6-202, MCA
IMPLEMENTING: Sec. 53-6-202, MCA

RULE XIV NOTICE OF END OF ESRD BENEFITS Whenever it appears that the ESRD appropriation for the fiscal year in question will be used up before the end of that fiscal year, the department will provide a news release to each major wire service serving Montana announcing the imminent cessation of benefits.

AUTHORITY: Sec. 53-6-202, MCA
IMPLEMENTING: Sec. 53-6-202, MCA

4. The Department is proposing these rules because the 1983 legislature, in Senate Bill 418 transferring the program from the Department of Social and Rehabilitation Services to the Department of Health and Environmental Sciences, directed DHES to replace SRS' rules (codified in the bill for temporary use) with rules of its own.

The rules proposed are reasonably necessary for the following reasons:

(a) Application procedures and time frames are needed to clarify how claimants apply for benefits and how long the benefits last.

(b) A hearing procedure is needed to provide a remedy for claimants to protest an unfavorable application decision.

(c) Eligibility standards are needed to spread limited funds among those most needing them for costs of handling their disease.

(d) Specification and limitation of the services and supplies which will be paid for by the program are needed so that the limited available funding is spent on the services and supplies directly related to and necessary for treatment of end-stage renal disease, instead of peripheral or unrelated expenses.

(e) Bill documentation requirements and payment conditions are needed to verify the nature of and necessity for billed items, to ensure payments go directly to those due them, to limit the fee which may be charged to a reasonable level, to assure that ESRD beneficiaries are not forced to pay costs above that level, and to ensure that the ESRD program is used to supplement other available payment sources rather than as a primary funding source.

(f) Since available funding is likely not to last a full fiscal year, rules are needed to indicate which bills will be paid first and how beneficiaries and providers will be warned benefits are terminating.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Robert L. Solomon, Cogswell Building, Capitol Complex, Helena, Montana, no later than December 9, 1983.

6. Robert L. Solomon, Cogswell Building, Capitol Complex, Helena, Montana, has been designated to preside over and conduct the hearing.

7. The authority of the Department to make the proposed rules is based on section 53-6-202, MCA, and the rules implement section 53-6-202, MCA.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State October 31, 1983

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

In the matter of the amendment of rules 16.32.103 and 16.32.106, the repeal of rules 16.32.104 and 16.32.105, and the adoption of new rules I through VI relating to certificate of need application forms and health care facility annual reporting forms	))))))	NOTICE OF PROPOSED ADOPTION, AMENDMENT AND REPEAL OF RULES NO PUBLIC HEARING CONTEMPLATED

To: All Interested Persons

1. On December 19, 1983, the department proposes to amend rules 16.32.103 and 16.32.106, to repeal rules 16.32.104 and 16.32.105, and to adopt new rules I through VI relating to certificate of need application forms and annual reporting forms for health care facilities.

2. The rules proposed to be repealed can be found on pages 16-1395—16-1410 of the Administrative Rules of Montana.

3. The proposed new rules set forth the information which must be provided on certificate of need letters of intent and application forms and on annual report forms submitted by hospitals, long-term care facilities, home health agencies, and alcohol and drug treatment facilities. Copies of the complete text of the proposed rules may be obtained by contacting Gary Rose, Health Planning and Resource Development Bureau, Department of Health and Environmental Sciences, 1400 Broadway, Helena, Montana, 59620.

4. In order to conform certificate of need review procedures to the legislative changes enacted by the 1983 legislative session, the department has revised the forms for certificate of need letters of intent and applications. The new rules simply codify the information which is requested on the application forms. The new rules replace 16.32.104 and 16.32.105, which are being repealed, and they replace portions of 16.32.103 and 16.32.106, which portions are being deleted from those rules. The new rules also codify information which is presently requested by the department on annual reporting forms submitted by health care facilities.

5. Interested persons may submit their data, views, or arguments concerning the proposed adoption, amendment, and repeal in writing to Gary Rose, Health Planning and Resource Development Bureau, Department of Health and Environmental Sciences, 1400 Broadway, Helena, Montana, 59620, no later than December 12, 1983.

6. The authority of the department to repeal the rules is based on sections 50-5-103, 50-5-302, and 2-4-201, MCA, and implement sections 50-5-302 and 50-5-106, MCA. The authority and implementing sections for the proposed amendments and new rules are stated at the end of those rules.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State October 31, 1983

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

In the matter of the adoption of rules I through VIII relating to licensure of cesspool, septic tank and privy cleaners	NOTICE OF PUBLIC HEARING FOR ADOPTION OF RULES (Cesspool, Septic Tank and Privy Cleaners)

To: All Interested Persons

1. On December 9, 1983, at 1:30 p.m., a public hearing will be held in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the adoption of rules I through VIII concerning the licensure of cesspool, septic tank and privy cleaners.

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

3. The proposed rules provide as follows:

RULE I PURPOSE The purpose of this sub-chapter is to provide standards for the licensure of cesspool, septic tank and privy cleaning businesses; and to establish uniform requirements for disposal sites receiving septage.
AUTHORITY: Sec. 37-41-103, MCA
IMPLEMENTING: Title 37, Chapter 41, MCA

RULE II DEFINITIONS In addition to the definitions in section 37-41-104, MCA, the following definitions apply in this sub-chapter:

(1) "Crops for direct human consumption" means crops that are consumed by humans without processing to minimize pathogens prior to distribution to the consumer.

(2) "Incorporated into the soil" means the injection of solid waste beneath the surface of the soil or the mixing of septage with the surface soil.

(3) "Processes to further reduce pathogens" and "processes to significantly reduce pathogens" means processes described in RULE VI which are determined by the department to provide adequate treatment of septage prior to land surface application or incorporation into the soil.

(4) "Trenching or burial operation" means the placement of septage in a trench or other natural or man-made depression and the covering with soil or other suitable material at the end of each operating day such that the septage wastes do not migrate to the surface.
AUTHORITY: Sec. 37-41-103, MCA
IMPLEMENTING: Title 37, Chapter 41, MCA

RULE III LICENSURE; DURATION OF LICENSE; FEES (1) Except as provided in section 37-41-105, MCA, any person wishing to engage in the business of cleaning cesspools, septic tanks,

or privies and disposal of septage therefrom shall first submit an application for a license to the department on a form provided by the department. Such forms shall require at least the following information if applicable:

(a) full name and business address of the applicant;

(b) list of counties in which business is to be conducted;

(c) list of permanent disposal site(s) in service area(s);

(d) estimated volume of septage to be disposed of at each disposal site;

(e) pertinent water quality information at each disposal site;

(f) geological and soil information at each disposal site;

(g) present uses of lands adjacent to each disposal site;

(h) zoning information for each disposal site;

(i) proposed disposal operation and maintenance plan for each disposal site including provisions for access control, if necessary; and

(j) certification by a local health officer or his designated representative in each county in which the applicant's business is to be conducted that proposed disposal sites to be used by the applicant meet all applicable state and local requirements.

(2) The exclusion provided in section 37-41-105, MCA, is available only to private individuals wishing to dispose of their own septage on privately owned land.

(3) A cesspool, septic tank and privy cleaning license expires on December 31 of each calendar year or when revoked by the department in accordance with section 37-41-211, MCA.

(4) A license is not transferable, and the license must be surrendered to the department in the event that the licensee ceases to do business.

(5) During the term of the license, the licensee may add new disposal sites to the service area with the approval of the department and after fulfilling the requirements of subsection (1)(j) of this rule.

(6) A license fee of $25 is required for each new or renewal license, except as provided in section 37-41-202, MCA.

(7) The license fee is payable to the department at the time the license application is submitted to the department.

(8) Annually, the department shall return 80% of all license fees collected to the counties in which the licensees reside.

(a) The county portion of license fees shall be deposited with the county treasurer.

(b) The department shall deposit 20% of the license fees collected in the state general fund as they are received from applicants.

AUTHORITY: Sec. 37-41-103, MCA
IMPLEMENTING: Sec. 37-41-201, 37-41-202, MCA

RULE IV PROCESSING OF LICENSE APPLICATIONS (1) The department shall review each submitted application to insure that it is complete. If additional information is required, the department shall notify the applicant in writing and shall postpone processing the application until the additional information requested is received and the application is complete. If the requested additional information is not received within 90 days after the applicant has been notified, a new application must be submitted.

(2) The department shall review the completed application and relevant information and make a decision based on the applicant's apparent ability to comply with the act and this sub-chapter.

(3) The department's decision to grant a license may include such special conditions imposed pursuant to RULES VI, VII and VIII, as are considered necessary to protect public health and avoid public nuisances.

(4) An applicant who wishes to protest a condition imposed on his license may, within 30 days after receipt of notice of the department's action, request a hearing before the department, pursuant to the procedures provided in section 37-41-211, MCA.

AUTHORITY: Sec. 37-41-103, MCA
IMPLEMENTING: Sec. 37-41-201, 37-41-202, 37-41-211, MCA

RULE V INSPECTIONS AND ENFORCEMENT (1) the department and local health officers or local designated health representatives may conduct inspections of disposal facilities receiving septage.

(2) If, after an inspection, the department or local health officer determines that a violation of the act or this sub-chapter is occurring, it shall notify the licensee of the nature of the violation.

(3) Depending upon the severity of the violation, the department or local health offcer may seek a compliance schedule from the licensee or initiate proceedings to revoke the license.

AUTHORITY: Sec. 37-41-103, MCA
IMPLEMENTING: Sec. 37-41-212, MCA

RULE VI OPERATION AND MAINTENANCE REQUIREMENTS

(1) Septage that is applied to the land surface or incorporated into the soil is subject to the following requirements:

(a) If no crops for direct human consumption will be grown on the site within 18 months subsequent to application or incorporation:

(i) the septage must be treated by a process to significantly reduce pathogens; or

(ii)(A) public access to the disposal site must be adequately controlled during the period of disposal and for at least 12 months after the final application or incorporation of septage; and

(B) grazing by animals whose products are consumed by humans must be prevented on the disposal site during the period of disposal and for at least one month after the final application or incorporation.

(b) If crops for direct human consumption will be grown on the site within 18 months subsequent to application or incorporation:

(i) If there will be contact between the septage and the edible portion of the crop, the septage must be treated by a process to further reduce pathogens prior to application or incorporation.

(ii) If there will be no contact between the septage and the edible portion of the crop, the septage must be treated by a process to significantly reduce pathogens prior to application or incorporation, and access control as described in subsections (1)(a)(ii)(A) and (B) must be provided.

(2) Septage that is disposed in a trench or burial operation must be:

(a) placed in Class II disposal facilities licensed by the department pursuant to ARM 16.14.501 et seq. and authorized by the department to receive septage, liquid or semi-liquid waste;

(b) placed in a trench or man-made depression which is approved by the department and the local health officer or his representative and operated in conformance with subsection (3) below; or

(c) placed in an approved waste water treatment facility.

(3) Trench or burial operations receiving septage pursuant to subsection (2)(b), above, shall:

(a) cover in-place septage with suitable soil or other material at the end of each operating day.

(i) Depth of cover will be determined by the department on a case-by-case basis but in all cases must be of sufficient depth to insure that septage does not migrate to the ground surface.

(b) Confine the dumping of septage to areas within the disposal site. Confining of septage must be provided by:

(i) supervision;

(ii) fencing;

(iii) signs; or

(iv) similar means approved by the department.

(c) Effectively control flies and other insects.

(4) Where methods other than trench or burial operations are proposed to dispose of septage, the licensee or applicant must demonstrate to the department's satisfaction that such disposal methods pose no danger to the public's health or safety, or to the environment.

(5) For the purposes of this rule, "processes to significantly reduce pathogens" means any of the following:

(a) Aerobic digestion. The process is conducted by agitating septage with air or oxygen to maintain aerobic conditions at residence times ranging from 60 days at 15° C to 40 days at 20° C, with a volatile solids reduction of at least 38 percent.

(b) Air drying. Liquid septage is allowed to drain and/or dry on underdrained sand beds, or paved or unpaved basins in which the septage is at a depth of nine inches. A minimum of three months is needed, during two months of which temperatures average on a daily basis above 0° C.

(c) Anaerobic digestion. The process is conducted in the absence of air at residence times ranging from 60 days at 20° C to 15 days at 35° to 55° C, with a volatile solids reduction of at least 38 percent.

(d) Composting. Using the within-vessel, static aerated pile or windrow composting methods, the septage is maintained at minimum operating conditions of 40° C for 5 days. For four hours during this period the temperature must exceed 55° C.

(e) Lime stabilizaton. Sufficient lime is added to produce a pH of 12 after 2 hours of contact.

(f) Other methods or operating conditions may be acceptable if pathogens and vector attracton of the waste (volatile solids) are reduced to an extent equivalent to the reduction achieved by any of the methods described in subsection (5)(a) through (f).

(6) For the purposes of this rule, "processes to further reduce pathogens" means any of the following:

(a) Composting: Using the within-vessel composting method, the solid waste is maintained at operating conditions of 55° C or greater for three days. Using the static aerated pile composting method, the solid waste is maintained at operating conditions of 55° C or greater for three days. Using the windrow composting method, the solid waste attained a temperature of 55° C or greater for at least 15 days during the composting period. Also, during the high temperature period, there will be a minimum of five turnings of the windrow.

(b) Heat drying. Dewatered septage is dried by direct or indirect contact with hot gases, and moisture content is reduced to 10 percent or lower. Sludge particles reach temperatures well in excess of 80° C, or the wet bulb temperature of the gas stream in contact with the sludge at the point where it leaves the dryer is in excess of 80° C.

(c) Heat treatment. Liquid septage is heated to temperatures of 180° C for 30 minutes.

(d) Thermophilic aerobic digestion. Liquid septage is agitated with air or oxygen to maintain aerobic conditions at residence times of 10 days at 55-60° C, with a volatile solids reduction of at least 38 percent.

(e) Other methods or operating conditions may be acceptable if pathogens and vector attraction of the waste (volatile solids) are reduced to an extent equivalent to the reduction achived by any of the methods described in subsectons (6)(a) through (d).

(7) Any of the processes listed below, if added to the processes described in subsection (5), further reduce pathogens. Because the processes listed below, on their own, do not reduce the attraction of disease vectors, they are only add-on in nature.

(a) Beta ray irradiation: Septage is irradiated with beta rays from an accelerator at dosages of at least 1.0 megarad at room temperature (ca. 20° C.)

(b) Gamma ray irradiation: Septage is irradiated with gamma rays from certain isotopes, such as ^{60}Cobalt and ^{136}Cesium, at dosages of at least 1.0 megarad at room temperature (ca. 20° C).

(c) Pasteurizaton: Septage is maintained for at least 30 minutes at a minimum temperature of 70° C.

(d) Other methods or operating conditions may be acceptable if pathogens are reduced to an extent equivalent to the reduction achieved by any of the above add-on methods.

AUTHORITY: Sec. 37-41-103, 75-10-204, MCA
IMPLEMENTING: Sec. 37-41-103, 75-10-204, MCA

RULE VII SPECIFIC SITE CRITERIA (1) There must be no occupied building or drinking water supply well within 500 feet of the land application area.

(2) There must be no state, federal, county or city maintained highways or roads or surface water bodies, within 500 feet of the land application area.

(3) Topographical slopes on cultivated fields must be no more than 4 percent. Slopes on sodded fields must be no more than 8 percent. Forest slopes must be no more than 8 percent for year-round operations but for seasonal operation, forest slopes up to 14 percent may be acceptable.

(4) If trench or burial disposal is used, there must be at least twenty feet of separation between the septage and the groundwater with no soil percolation rate within this zone exceeding 1½ inches per hour.

(5) If septage is applied to the land surface or incorporated into the soil, there must be at least ten feet separation between the septage and the ground water.

AUTHORITY: Sec. 37-41-103, MCA
IMPLEMENTING: Sec. 37-41-103, MCA.

RULE VIII SPECIAL CONDITIONS The department may, in individual cases, place more or less restrictive criteria on septage treatment processes and individual land incorporation and disposal sites, taking into account proximity to

population centers, volume of septage and soil types, and considering the objectives of protecting public health and avoiding public nuisances.
AUTHORITY: Sec. 37-41-103, 75-10-204, MCA
IMPLEMENTING: Sec. 37-41-103, 75-10-204, MCA

4. These rules are adopted in compliance with Ch. 556, Laws of 1983, which amended Title 37, Chapter 41, MCA. That legislation substantially changed the procedures and the department's responsibilities regarding licensure of cesspool, septic tank and privy cleaners, and directed the department to adopt rules to implement the law. The rules are necessary in order to establish procedures and criteria for licensure, conditions of licensure, requirements for treatment of septage, and disposal site selection criteria, all of which are designed to protect public health and to prevent the creation of public nuisances.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Robert L. Solomon, Cogswell Building, Capitol Complex, Helena, Montana, 59620, no later than December 14, 1983.

6. Robert L. Solomon, Cogswell Building, Capitol Complex, Helena, MT, has been designated to preside over and conduct the hearing.

7. The authority of the Department to make the proposed rules is based on section 37-41-103, MCA and the rules implement Title 37, Chapter 41, MCA.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State October 31, 1983

BEFORE THE DEPARTMENT OF HIGHWAYS
OF THE STATE OF MONTANA

In the matter of the repeal of Rule 18.5.106, relating to design requirements for access driveways	)))))	NOTICE OF PROPOSED REPEAL OF RULE 18.5.106, RELATING TO DESIGN REQUIREMENTS FOR ACCESS DRIVEWAYS NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 12, 1983, the Department of Highways proposes to repeal rule 18.5.106, which provides design requirements for access driveways.

2. The rule proposed to be repealed is on page 18-69 of the Administrative Rules of Montana.

3. The agency proposes to repeal this rule because Rule 18.5.106 is outdated by and repetitious of newly adopted Rule 18.5.112. Repeal of the section was inadvertently omitted from the revisions made in July, 1983.

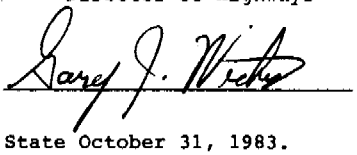
4. Interested parties may submit their data, views, or arguments concerning the proposed repeal in writing to Stephen C. Kologi, P.E., Chief, Preconstruction Bureau, Montana Department of Highways, 2701 Prospect Avenue, Helena, MT 59620, no later than December 10, 1983.

5. If a person who is directly affected by the proposed repeal 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 Stephen C. Kologi, P.E., Chief, Preconstruction Bureau, Montana Department of Highways, 2701 Prospect Avenue, Helena, MT 59620, no later than December 10, 1983.

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 who are directly affected by the proposed repeal; 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 the persons directly affected has been determined to be in excess of 25 persons based on the percentage of the state population requiring direct access onto state maintained highways.

7. The authority of the department to make the proposed rule is based on section 60-2-201, MCA, and the rule implements sections 60-2-201, MCA.

Gary J. Wicks
Director of Highways

By: 

Certified to the Secretary of State October 31, 1983.

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

* * * * * * * * * *

IN THE MATTER OF THE ADOPTION OF PROCEDURAL RULES FOR CONTESTED CASE HEARINGS HELD BY THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION PURSUANT TO TITLE 85, CHAPTER 2, MCA)	NOTICE OF PUBLIC HEARINGS ON PROPOSED ADOPTION OF PROCEDURAL RULES

TO: All Interested Persons

1. On December 1, 6, 8, and 15, 1983, public hearings will be held to consider the adoption of new rules and the amendment of ARM 36.2.101 pertaining to procedural rules. The proposed new rules and amendment set forth procedural rules for contested case hearings held by the Department of Natural Resources and Conservation pursuant to Title 85, chapter 2, MCA. The proposed rules will not govern any proceedings conducted by the Board of Natural Resources and Conservation pursuant to Title 85, chapter 2, MCA. The public hearings will be held as follows:

1. December 1, 1983, at 7 p.m., in the Auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana.
2. December 6, 1983, at 7 p.m., in the Kalispell Field Office, 3220 Highway 93 South, Kalispell, Montana.
3. December 8, 1983, at 7 p.m., in the Legion Room of the City Hall, 39 South 2 E, Malta, Montana.
4. December 15, 1983, at 7 p.m., in Room 201, at the County Courthouse, the corner of 3rd Avenue N and 27th Street, Billings, Montana.

2. The proposed rules will supersede ARM 36.2.101 for contested case hearings held by the Department of Natural Resources and Conservation pursuant to Title 85, chapter 2, MCA. The Department of Natural Resources and Conservation has adopted the Attorney General's model rules in ARM 36.2.101 and is now proposing to amend ARM 36.2.101 to limit its application in light of the proposed new procedural rules.

3. The proposed new rules and the proposed amendment to ARM 36.2.101 provide as follows:

RULE I SCOPE AND PURPOSE The procedures contained herein shall govern the contested case proceedings conducted by the department of natural resources and conservation pursuant to MONTANA CODE ANNOTATED (MCA) Title 85, chapter 2. The Attorney General's Model Rules for conducting contested case proceedings, adopted by the department at Administrative Rules of Montana (ARM) §36.2.101, shall not apply to proceedings conducted by the department pursuant to MCA Title 85, chapter 2 and are superseded for that purpose only. These rules do not govern any proceedings conducted by the board of natural resources and conservation pursuant to MCA Title 85, chapter 2.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-201(2) and 85-2-113(2), MCA

RULE II DEFINITIONS As used in these rules, the following definitions apply:

(1) "Applicant" means a person who filed an application.

(2) "Application" means any application which has been filed pursuant to MCA Title 85, chapter 2 for appropriating water or changing appropriation rights.

(3) "Board" means the board of natural resources and conservation.

(4) "Department" means the department of natural resources and conservation. (MCA § 85-2-102(6)

(5) "Director" means the director of the department or his designee.

(6) "Final decision-making" means all events after the issuance of a proposal for decision necessary to the completion of a final order.

(7) "Hearing Examiner" means the person or persons assigned by the director to hear the contested case and to participate in the final decision-making process.

(8) "Notice of Application" means the notice prepared and published by the department pursuant to MCA §85-2-307.

(9) "Objection" means an objection to an application filed in accordance with MCA Title 85, chapter 2.

(10) "Objector" means a person who filed an objection.

(11) "Party" means those persons who are applicants, timely objectors, petitioners or permittees under MCA Title 85, chapter 2, parts 3, 4, 5 and 8 and are entitled as of lawful right to a contested case hearing. The term "party" shall include the department when it is acting by and through staff participating in a proceeding. Staff participating in a proceeding shall have the full rights and responsibilities of a party under these rules and shall be bound by RULE XXX.

(12) "Permit" means a permit to appropriate water issued by the department under MCA Title 85, chapter 2, part 3.

(13) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity. (MCA § 85-2-102(10)

(14) "Petition" means the document filed with the department pursuant to MCA §85-2-505(2).

(15) "Proceeding" means all events, including prehearing conferences, hearings, orders, and proposals for decision, necessary to the completion of the hearing process.

(16) "Service; serve" means personal service or service by first class United States mail, postage prepaid and addressed to the party at his last known address. An affidavit of service shall be made by the person making such service. Service by mail is complete upon the placing of the item to be served in the mail. Agencies of the state of Montana may also serve by depositing the item to be served with the mail and distribution section, general services division, department of administration.

(17) "Staff" means a person employed or retained by the department.

(18) "Timely objector" means a person who filed an objection to an application with the department by the date specified in the notice of application. Objections that are postmarked on or before or personally delivered by the date specified in the notice of application shall be deemed as timely filed.

(19) "Untimely objector" means a person who did not file an objection to an application by the date specified in the notice of application, but who objects to an application sometime thereafter.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-201(2) and 85-2-113(2), MCA

RULE III HEARING EXAMINERS (1) Assignment. When the department orders a contested case hearing, the director shall assign a hearing examiner to hear the case. The file that is submitted to the hearing examiner, subsequent to the assignment of the case, shall contain only the parties' applications, notices of applications, petitions, objections to applications, or permits under consideration to be modified or revoked. After reviewing the file, the hearing examiner shall contact the parties and advise them as to the location and time during which a hearing should be held. Except as required under the circumstances of RULE XXXII, no hearing shall be scheduled on a Saturday, Sunday or legal holiday.

(2) Duties. Consistent with law, the hearing examiner shall perform the following duties:

(a) regulate the course of the hearing, including the scheduling, recessing, reconvening and adjournment thereof;

(b) grant or deny motions for discovery including the taking of depositions;
(c) receive and act upon requests for subpoenas where appropriate;
(d) hear and rule on motions;
(e) preside at the contested case hearing;
(f) administer oaths and affirmations;
(g) grant or deny requests for continuances;
(h) examine witnesses where he deems it necessary to make a complete record;
(i) rule upon offers of proof and receive evidence;
(j) make preliminary, interlocutory or other orders as he deems appropriate;
(k) recommend a summary disposition of any part of the case where there is no genuine issue as to any material fact or recommend dismissal where the case or any part thereof has become moot or for other reasons;
(l) require testimony, upon the motion of a party or upon his own motion, to be prefiled in whole or in part when prefiling will expedite the hearing and the interests of the parties will not be prejudiced substantially;
(m) hold conferences for settlement, simplification of the issues, or any other proper purpose;
(n) appoint a staff expert;
(o) prepare a proposal for decision containing findings of fact, conclusions of law and a proposed order;
(p) after issuing the proposal for decision, participate in the final decision-making process;
(q) do all things necessary and proper to the performance of the foregoing; and
(r) as authorized by law and rule, perform such other duties as well as any that may be delegated to him by the director.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-611, 2-4-612, and 2-4-621, MCA

RULE IV COMMENCEMENT OF A CONTESTED CASE A contested case is commenced, subsequent to the assignment of a hearing examiner, by the service of a notice of and order for hearing by the director.

(1) The notice and order. A notice of and order for hearing, which shall be a single document, shall be served upon all parties and shall contain, but not be limited to, the following:
(a) the time, date, place, and nature of the hearing;
(b) name, address and telephone number of the hearing examiner;
(c) a statement of the legal authority and jurisdiction under which the hearing is to be held;
(d) a reference to the particular sections of the statutes and rules involved;

(e) a short and plain statement of the matters asserted; For an application or petition, the matters asserted shall be whether the application or petition meets the statutory requisites. For revocation or modification of a permit, the matters asserted are the grounds for revocation or modification;

(f) notification of the right of the parties to be represented by legal counsel or appear on their own behalf;

(g) a citation to these procedural rules and to the contested case provisions of MCA Title 2, chapter 4, part 6;

(h) a statement that a formal proceeding may be waived pursuant to MCA §2-4-603;

(i) a statement advising parties that if any party fails to appear at the hearing, the party will be in default; and a statement which explains the possible results of a default;

(2) Service. The notice of and order for hearing shall be served not less than 30 days prior to the hearing. Provided, however, that a shorter time period may be allowed when the hearing examiner determines, on the basis of the parties' applications and objections to applications, that the parties will not be substantially prejudiced by a shorter time. (Note: §§ (1)(a)(c)(d)(1st sentence (e)(h) of this rule are codified at MCA § 2-4-601(2)(a-e).

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-601, MCA

RULE V THE NOTICE OF APPLICATION (1) Duty of applicant. Before the notice of application is published, the department shall send a copy of the notice of application to the applicant for his review. The applicant shall have the duty and responsibility at all times to make certain that the information published in the notice of application is correct and conforms with the filed application.

(2) When republication of the notice of application is necessary. When either during the time the notice of application is being published or at any subsequent time, the department discovers that the notice of application omits or erroneously describes the period of appropriation or the total amount appropriated (rate of flow or volume); the place of diversion, place of use, purpose of use or place of storage; which are claimed by the applicant in his filed application and which the department determines to be material errors or material omissions, the notice of application shall be republished to correct such material omissions or material errors. The determination of whether an omission or error is material shall be made by the hearing examiner. If the hearing examiner makes the determination that the omissions or errors are not material, the applicant has the discretion to republish the notice of application.

(3) The defective notice of application and its effect on scheduled hearings. When the notice of application is republished, scheduled hearings shall be continued until the time period for filing objections (as set forth in the republished notice of application) has expired, unless all the parties agree (a) to participate in the scheduled hearings and (b) to waive their right to file objections to the republished notice of application. Regardless of the parties' agreement, when additional timely objections are filed in response to the republished notice of application, the hearing examiner shall hold such hearings as are necessary to allow the additional timely objectors an opportunity to exercise their rights under these rules. Further, upon written request by any additional timely objector, the hearing examiner shall order that transcripts of any hearings (including prehearing conferences) held prior to or during the time the notice of application is being republished, be prepared and be made available to the additional timely objector. Except as provided above, no other action shall be taken in the case by the hearing examiner or any final decision-makers until the time period for filing objections (as set forth in the republished notice of application) has expired.

(4) Cost. The cost of republishing the notice of application shall be paid by the applicant. The cost of preparing and duplicating transcripts for additional timely objector(s) shall be paid by the applicant. However, if the department fails to send a notice of application to the applicant for review as required in subsection 1 of this rule, the department shall pay for said costs. No hearings shall be held until the applicant has paid all his costs incurred under this rule.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 85-2-113 and 85-2-107, MCA

RULE VI RIGHT TO COUNSEL Any party may be represented by legal counsel throughout the proceedings in a contested case or may appear on their own behalf. This rule shall not be construed to sanction the unauthorized practice of law. Admission of foreign attorneys, pro hac vice, shall be in accordance with the current Montana statutory law, now codified at MCA § 37-61-208.

AUTH: 2-4-201(2) and 85-2-113(2) MCA IMP: 2-4-105, MCA

RULE VII INFORMAL DISPOSITION Informal disposition may be made of any contested case or any issue therein at any point in the proceedings by agreed settlement, stipulation or default. Agreed settlements and stipulations shall be served on the hearing examiner. For agreed settlements, the hearing examiner shall prepare a proposal for decision and serve it in the manner provided for in RULE XXVIII(2). An opportunity to

file exceptions shall be afforded to each party within the time limit specified in RULE XXIX(1). In the event that the proposal for decision modifies, conditions, limits or denies the agreed settlement without factual basis therefor, the hearing examiner shall, if requested within the 20 day exception period, reconvene the hearing to allow the parties an opportunity to respond and to present evidence and argument on all issues involved. A final order shall be made and issued in the manner provided for in RULE XXIX(2).

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-603, MCA

RULE VIII DEFAULT A default occurs when a party fails to appear at a hearing or fails to comply with any interlocutory orders of the hearing examiner. Upon default, the defaulting party's claim or interest in the proceeding may be dismissed (with or without prejudice), denied, disregarded or disposed of adverse to him. An applicant shall not be relieved of the duty to present evidence to satisfy his substantive burden of proof when all objectors to a proceeding default.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-603 and 85-2-311, MCA

RULE IX TIME (1) Computation of time. The time within which an act is to be done as provided in these rules shall be computed by excluding the first day and including the last, except that if the last day be Saturday, Sunday, or a legal holiday, the act may be done on the next succeeding regular business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(2) Computing time when serving by mail. Whenever a party has the right or is required to do some act or take some action within a prescribed period after the service of a notice or other paper upon him, or whenever such service is required to be made within a prescribed period before a specified event, and the notice or paper is served by mail, postmarking of the notice or paper on or before the prescribed period shall satisfy this rule.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-611, MCA

RULE X CONSOLIDATION (1) Authority. Whenever, before hearing on any contested case, the hearing examiner, either on his own motion or upon motion by any party, determines that separate contested cases present substantially the same issues of fact or law; that a holding in one case would affect the rights of parties in another case; and the consolidation would not substantially prejudice any party, the hearing examiner may order such cases consolidated for a single hearing on the merits. Parties may also stipulate and agree to such

consolidation. Regardless of the discretion otherwise permitted in this rule, in every case, all objections to a single application shall be consolidated without requirement of order.

(2) Notice of order. Following an order for consolidation, the hearing examiner shall serve on all parties a copy of the order for consolidation. The order shall contain, among other things:

(a) a description of the cases for consolidation.

(b) the reasons for consolidation.

(c) notification of a consolidated prehearing conference if one has been requested.

(3) Objection to consolidaton.

(a) Motion for severence. Any party may object to consolidation by filing, at least 10 days prior to the hearing in the case, a motion for severence from consolidation, setting forth the party's name and address, the title of his case prior to consolidation, and the reasons for his motion.

(b) Determination. If the hearing examiner finds that consolidation would prejudice the party, he may, without hearing, order such severence or other relief as he deems necessary.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 85-2-309, MCA

RULE XI DISQUALIFICATION OF HEARING EXAMINER Upon the filing in good faith by a party of an affidavit of disqualification of hearing examiner, the director shall determine the matter as a part of the record provided the affidavit is filed no later than 10 days prior to the original date set for hearing, and states the facts and reasons for the belief that the hearing examiner should be disqualified.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-611, MCA

RULE XII PREHEARING CONFERENCE

(1) Purpose. The purpose of the prehearing conference is to simplify the issues to be determined, to fix hearing dates, to obtain stipulations in regard to foundation for testimony or exhibits, to hear and rule upon evidentiary objections to prefiled testimony, to identify the proposed witnesses for each party, to schedule discovery, to discuss the procedure at the hearing, to consider such other matters that may be necessary or advisable, and, if possible, to reach a final settlement without the necessity for further hearing.

(2) Procedure. Upon written request of any party or upon his own motion, the hearing examiner may, in his discretion, hold a prehearing conference prior to each contested case hearing. The hearing examiner may require the parties to file a prehearing statement prior to the prehearing conference which shall contain such items as the hearing examiner deems

necessary to promote a useful prehearing conference. A prehearing conference shall be an informal proceeding conducted expeditiously by the hearing examiner. Agreements on the simplification of issues, amendments, stipulations, or other matters may be entered on the record or may be the subject of an order by the hearing examiner. A party who fails (without having made prior arrangements with the hearing examiner) to appear at a prehearing conference shall have waived his right to object to any matters agreed upon by other parties in attendance at the prehearing conference. Following a prehearing conference, the hearing examiner may issue a procedural order which fixes any dates which are appurtenant to the disposition of the case, and which sets out the procedures to be followed by the parties. The procedural order may include a description of the matters discussed at and the actions taken pursuant to the prehearing conference.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-611, MCA

RULE XIII MOTIONS TO HEARING EXAMINER Any application to the hearing examiner for an order shall be by motion which, unless made during a hearing, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought. Written motions or responses to motions shall first be served on all parties, and then filed with the hearing examiner. A written motion shall give notice to other parties that should they wish to contest the motion they must file a written response with the hearing examiner (after first serving all parties), and that the written response, with an affidavit of service attached, must be filed within 7 days after service of the motion. Only motions served and filed in the manner described above shall be considered and ruled upon by the hearing examiner. Improperly filed and served motions shall be promptly dismissed without prejudice. Requests for disqualification of a hearing examiner, prehearing conferences, subpoenas and continuances are not governed by the requirements of this rule. The hearing examiner may, at his discretion, require a hearing or telephone conference call before issuing an order on the motion. All orders on such motions, other than those made during the course of the hearing, shall be in writing, and shall be served upon all parties of record. In ruling on motions where these rules are silent, the hearing examiner shall apply the Montana Rules of Civil Procedure to the extent that he determines that it is appropriate to do so in order to promote a fair and expeditious proceeding.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-611, MCA

RULE XIV MOTIONS TO DIRECTOR (1) Certification of motions to director. No motions shall be made directly to or be decided by the director subsequent to the assignment of a hearing examiner and prior to the completion and filing of the hearing examiner's proposal for decision except as provided by RULE XI or except when the motion is certified to the director by the hearing examiner. Any party may request that a pending motion, or a motion decided adversely to that party by the hearing examiner before or during the course of the hearing be certified by the hearing examiner to the director. In deciding what motions should be certified, the hearing examiner shall consider the following:

(a) whether the motion involves a controlling question of law, which if finally determined, would materially advance the ultimate termination of the hearing; or

(b) whether certifying the motion is necessary to promote the development of the full record and avoid a remand.

(2) Briefs. The hearing examiner or the director may require the parties to file briefs before ruling upon a certified motion. Certified motions shall be decided in the manner provided for in RULE XXIX(2). Uncertified motions shall be made to the hearing examiner and considered during the final decision-making process.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-611, MCA

RULE XV DISCOVERY (1) Demand. Each party shall, within 10 days of a demand by another party, disclose the following:

(a) The names and addresses of all witnesses that a party intends to call at the hearing together with a brief summary of each witness's testimony. All witnesses unknown at the time of said disclosure shall be disclosed, together with a brief summary of their testimony, as soon as they become known.

(b) Any relevant written or recorded statements made by the party or by witnesses on behalf of the party shall be permitted to be inspected and reproduced by the demanding party.

(2) Failure to disclose statements. Any party unreasonably failing upon demand to make the disclosure by this rule, may, in the discretion of the hearing examiner, be foreclosed from presenting any evidence at the hearing through witnesses not disclosed or through witnesses whose statements are not disclosed.

(3) Requests for admissions. A party may serve upon any other party a written request for the admission of relevant facts or opinions, or of the application of law to relevant facts or opinions, including the genuineness of any document.

The request must be served at least 15 days prior to the hearing, and it shall be answered in writing by the party to whom the request is directed within 10 days of the receipt of the request. The written answer shall either admit or deny the truth of the matters contained in the request, or shall make a specific objection thereto. Failure to make a written answer may result in the subject matter of the request being deemed admitted.

(4) Motion to hearing examiner for discovery. Upon the motion of a party, the hearing examiner may order discovery of any other relevant material or information. The hearing examiner shall recognize all privileged information or communications which are undiscoverable at law. Upon proper motion made to the hearing examiner, any means of discovery available pursuant to the Montana Rules of Civil Procedure (excepting Rule 37(b)(1) and 37(b)(2)(D)) may be allowed provided that such requests can be shown to be needed for the proper presentation of a party's case, are not for the purposes of delay, and the issues or amounts in controversy are significant enough to warrant extensive discovery. Upon the failure of a party to reasonably comply with an order of the hearing examiner made pursuant to this rule, the hearing examiner may make further orders as follows:

(a) An order that the subject matter of the order for discovery or any other relevant facts shall be taken as established for the purposes of the case in accordance with the claim of the party requesting the order.

(b) An order refusing to allow the party failing to comply to support or oppose designated claims or defenses, or an order prohibiting him from introducing designated matters into evidence.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-602, MCA

RULE XVI DEPOSITIONS TO PRESERVE TESTIMONY Upon the motion of any party, the hearing examiner may order that the testimony of any witness be taken by deposition to preserve his testimony in the manner prescribed by law for depositions in civil actions. The motion shall indicate the relevancy and shall make a showing that the witness will be unable or cannot be compelled to attend the hearing or show other good cause. No part of a deposition shall constitute a part of the record unless received in evidence by the hearing examiner.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-602 and 2-4-611, MCA

RULE XVII SUBPOENAS Requests for subpoenas for the attendance of witnesses or the production of documents shall be made in writing to the hearing examiner and shall contain a brief statement demonstrating the potential relevance of the

testimony or evidence sought and shall identify any documents sought with specificity, and shall name all persons to be subpoenaed.

(1) Service of subpoenas.

(a) A subpoena shall be served in the manner provided by the Montana Rules of Civil Procedure.

(b) The cost of service, fees, and expenses of any witnesses subpoenaed shall be paid at the rates prescribed by Montana law by the party at whose request the witness appears.

(c) The person serving the subpoena shall make proof of service by filing the subpoena together with his affidavit of service with the hearing examiner.

(2) Motion to quash. Upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance therewith, the hearing examiner may quash or modify the subpoena if he finds that it is unreasonable or oppressive.

(3) Enforcement. The party seeking the subpoena may seek enforcement of the same by applying to a judge of any district court of the state of Montana for an order to show cause why the subpoena should not be enforced against any witness who fails to obey the subpoena.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-104 and 2-4-611, MCA

RULE XVIII RIGHTS OF PARTIES All parties shall have the right to present evidence, rebuttal testimony and argument with respect to the issues and to cross-examine witnesses. (MCA § 2-4-612(1)).

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-612, MCA

RULE XIX PARTICIPATION BY UNTIMELY OBJECTORS The hearing examiner may hear testimony and receive exhibits from an untimely objector at the hearing, or allow an untimely objector to note his appearance, or allow an untimely objector to question witnesses, but no untimely objector shall become, or be deemed to have become, a party by reason of such participation. Untimely objectors offering testimony or exhibits may be questioned by parties to the proceeding.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-611 and 2-4-612, MCA

RULE XX WITNESSES Any party may be a witness and may present witnesses on his behalf at the hearing. All oral testimony at the hearing shall be under oath or affirmation.

(1) Prefiled testimony. The Hearing Examiner, upon the motion of a party, or upon his own motion, may order that the testimony to be given upon direct examination by experts or other witnesses shall be prepared in advance in either

question and answer or narrative format. Such prefiled testimony shall be served upon the hearing examiner and all parties at least 7 days prior to the first hearing date. The prefiled testimony will be part of the record in each proceeding as if read, but all of the witnesses whose substantive testimony is prefiled shall be available for cross-examination at the hearing. Evidentiary objections (such as motions to strike) to such direct testimony may be made by any party at any time during the hearings conducted pursuant to these rules. At the hearing, the party presenting the testimony may, if they deem it appropriate, briefly summarize the prefiled testimony prior to the start of cross-examination. Nothing contained herein shall be deemed to foreclose any party from presenting rebuttal testimony or from presenting testimony in response to reasonably unforeseen areas without the necessity of prefiling.

(2) Appointment of staff expert witnesses. Before or during the hearing, the hearing examiner may, on his own motion, enter an order to show cause why staff expert witnesses should not be appointed. The parties may recommend the special expertise or qualifications that the staff expert witnesses should possess. The parties' recommendations shall in no way prohibit the hearing examiner from appointing staff expert witnesses of his own selection. The staff expert witnesses so appointed shall be informed of their duties by the hearing examiner in writing, a copy of which shall be either served on the parties or submitted to the parties at a prehearing conference. A staff expert witness so appointed shall advise the parties of his findings, if any, based on any prepared written testimony filed by the parties pursuant to RULE XX(1), site observations taken pursuant to RULE XXV, materials noticed pursuant to RULE XXI(4) and RULE XXVIII(1)(b), or testimony or other documents introduced during the proceeding. His deposition may be taken by any party and he may be called to testify by the hearing examiner. He shall be subject to cross-examination by each party. Nothing in this rule shall prevent any of the parties from producing other expert evidence on the same fact or matter to which the testimony of the staff expert witness appointed by the hearing examiner relates.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-611 and 2-4-612, MCA

RULE XXI RULES OF EVIDENCE (1) General rules. The common law and statutory rules of evidence shall apply only upon stipulation of all parties to the hearing. Otherwise, the hearing examiner may admit all evidence that possesses probative value, including hearsay if it is the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. The hearing examiner shall give

effect to the rules of privilege recognized by law. Evidence which is irrelevant, immaterial, or unduly repetitious may be excluded.

(2) Evidence must be offered to be considered. All evidence to be considered in the case, including all records and documents in the possession of a party (or a true and accurate photocopy thereof), shall be offered and made a part of the record in the case. No other factual information or evidence shall be considered in the determination of the case.

(3) Documentary evidence. Documentary evidence in the form of copies or excerpts may be received or incorporated by reference in the discretion of the hearing examiner or upon agreement of the parties. Upon request, parties shall be given an opportunity to compare copies with the originals.

(4) Notice of facts. The hearing examiner may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the department's specialized knowledge. Parties shall be notified, either before or during the hearing or by reference in the proposal for decision, of the material noticed, including any staff memoranda or data. Each party shall be afforded an opportunity to contest the materials so noticed.

(5) Examination of adverse party. A party may call an adverse party or his managing agent or employees, or an officer, director, managing agent, or employee of the state or any political subdivision thereof, or of a public or private corporation or of a partnership or association or body politic which is an adverse party, and interrogate him by leading questions and contradict and impeach him on material matters in all respects as if he had been called by the adverse party. The adverse party may be examined by his counsel upon the subject matter of his examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted, and impeached by any other party adversely affected by his testimony.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-612 and 85-2-121, MCA

RULE XXII CONTINUANCES (1) Filing and service of request. A request for a continuance of the hearing shall be filed in writing with the hearing examiner, shall state with particularity the reasons for the continuance and shall be served on all parties of record. Only requests filed and served in the manner described above shall be considered and ruled upon by the hearing examiner. Improperly filed and served requests shall be promptly dismissed without prejudice.

(2) Granting continuances. A request for a continuance filed not less than 5 days prior to the hearing may, in the discretion of the hearing examiner, be granted upon a showing of good cause. Due regard shall be given to the ability of the party requesting a continuance to proceed effectively without a continuance.

(3) Denying continuances. A request for a continuance filed less than 5 days prior to the hearing shall be denied unless good cause exists and the reason for the request could not have been ascertained earlier.

(4) What constitutes good cause. "Good cause" for purposes of this rule includes:

(a) death or incapacitating illness of a party or attorney of a party or witness to an essential fact;

(b) a court order requiring a continuance;

(c) lack of proper notice of the hearing;

(d) a substitution of the attorney of a party if the substitution is shown to be required;

(e) a change in the parties or pleadings requiring postponement;

(f) unavailability of a party or a witness to an essential fact for serious and compelling reasons where the conflict could not be anticipated and cannot be avoided; or

(g) agreement for a continuance by all parties upon a showing that:

(i) more time is clearly necessary to complete discovery authorized pursuant to RULE XV(3) or other mandatory preparation for the case, and the parties have agreed to a new hearing date; or

(ii) the parties have agreed to a settlement of the case; or,

(iii) all the parties have agreed to a new hearing date and the agreed upon date is convenient for the hearing examiner.

(5) What does not constitute good cause. "Good cause" for purposes of this rule shall not include:

(a) intentional delay;

(b) unavailability of counsel due to engagement in court or another administrative proceeding unless all other members of the attorney's firm are similarly engaged;

(c) unavailability of an expert witness if the witness' deposition could have been taken prior to the hearing;

(d) failure of a party or their counsel to properly utilize the notice period to prepare for the hearing;

(e) failure of a party to act with due diligence in acquiring counsel within the notice period.

(6) Continuances during hearing. During a hearing, if it appears in the interest of justice that further testimony should be received, the hearing examiner, in his discretion, may continue the hearing to a future date and oral notice of such continuance on the record shall be sufficient.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-611, MCA

RULE XXIII HEARING PROCEDURE Unless the hearing examiner determines otherwise the hearing shall be conducted substantially in the following manner:

(1) Statement of hearing examiner. After opening the hearing, the hearing examiner shall, unless all parties are represented by counsel, state the procedural rules for the hearing including the following:

(a) All parties may present evidence and argument with respect to the issues and cross-examine witnesses. At the request of the party or the attorney for the party whose witness is being cross-examined, the hearing examiner may make such rulings as are necessary to prevent repetitive or irrelevant questioning and to expedite the cross-examination to the extent consistent with disclosure of all relevant testimony and information.

(b) All parties have a right to be represented at the hearing; and,

(c) The rules of evidence are set forth in RULE XXI(1).

(2) Stipulations or agreements. Any stipulation agreements entered into by any of the parties prior to or during the hearing shall be entered into the record.

(3) Opening statements. The party with the burden of proof may make an opening statement. All of the parties may make such statements in a sequence determined by the hearing examiner.

(4) Presentation of evidence. After any opening statements, unless otherwise determined by the hearing examiner, the party with the burden of proof shall begin the presentation of evidence. He shall be followed by the other parties in a sequence determined by the hearing examiner.

(5) Cross-examination. Cross-examination of witnesses shall be conducted in a sequence determined by the hearing examiner.

(6) Final argument. When all parties and witnesses have been heard, opportunity shall be offered to present final argument in a sequence determined by the hearing examiner. Such final argument may, in the discretion of the hearing examiner, be in the form of written memoranda or oral argument, or both. The final argument need not be recorded if, in the discretion of the hearing examiner, it becomes unduly repetitious, irrelevant or immaterial.

(7) End or continuance of hearing. After final argument, the hearing shall be closed or continued at the discretion of the hearing examiner. If continued, it shall be either continued to a certain time and day, announced at the time of the hearing and made a part of the record, or continued to a date to be determined later, which must be upon not less than 5 days written notice to the parties.

(8) Proposed findings and briefs. The hearing examiner may require all parties of record to file proposed findings of fact or briefs, or both, at the close of testimony in the hearing. The proposed findings and briefs may, at the discretion of the hearing examiner, be submitted simultaneously or sequentially and within such time periods as

the hearing examiner may prescribe. Any party may volunteer to file proposed findings and briefs, and the hearing examiner, in his discretion, may receive them even if the other parties choose not to so file.

(9) Closure of record. The record of the contested case proceeding shall be closed upon receipt of the final written memorandum, transcript, if any, or late filed exhibits that the parties and the hearing examiner have agreed should be received into the record, whichever occurs latest.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-611 and 2-4-612, MCA

RULE XXIV DISRUPTION OF HEARING It is the duty of the hearing examiner to conduct a fair and impartial hearing and to maintain order. All parties to the hearing, their counsel, and any other persons present shall conduct themselves in a respectful manner. Any disregard by parties or their attorneys of the rulings of the hearing examiner on matters of order and procedure may be noted on the record and, where deemed necessary, referred to in the proposal for decision. In the event that parties or their attorneys conduct themselves in a disrespectful, disorderly or contumacious manner which interferes with the proper and orderly holding of the hearing, the hearing examiner may, in his discretion, recess or continue the hearing. Before recessing or continuing any hearing under this rule, the hearing examiner shall first read this rule to those parties or attorneys causing such interference or disruption.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-611, MCA

RULE XXV SITE VISIT Upon his own motion or upon the motion of any party, the hearing examiner may, at any time in the proceeding, make a site visit of the lands involved in the proceeding. The hearing examiner may enter upon lands to view proposed works, sources of water, location of proposed uses, construction of works and such other views that are deemed relevant by the hearing examiner to gain a proper understanding of the issues involved in the proceeding. Before making any site visit, the hearing examiner shall give the parties at least 5 days written notice to participate, unless the motion is made during a hearing and then oral notice on the record shall be sufficient. During the final decision-making process, the final decision-makers may, upon their own motion or upon the motion of any party, make a site visit of the lands involved in the proceeding provided that the parties are given written notice as stated above.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 85-2-115, MCA

RULE XXVI THE RECORD (1) Location of record. The hearing examiner shall maintain the official record in each contested case until the issuance of the final order.

(2) What the record shall contain. The record in a contested case shall contain:

(a) all pleadings, motions and intermediate rulings;

(b) all evidence received or considered, including a verbatim record of oral proceedings when demanded by a party;

(c) a statement of matters officially noticed;

(d) questions and offers of proof, objections and rulings thereon;

(e) proposed findings and exceptions;

(f) any decision, opinion or report by the hearing examiner; and

(g) all staff memoranda or data submitted to the hearing examiner as evidence in connection with the case. (Note substantially the same as MCA § 2-4-614).

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-614, MCA

RULE XXVII THE TRANSCRIPT The verbatim record shall be transcribed if requested by the director, a party, or the hearing examiner. If a transcription is made, the requesting party or parties who request copies of the transcript shall pay the charge set by the board. All monies received for transcripts shall be payable to the department and shall be deposited in the department's water right appropriation account in the state treasury.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-614, MCA

RULE XXVIII THE HEARING EXAMINER'S PROPOSAL FOR DECISION (1) Basis for the proposal for decision.

(a) The record. No factual information or evidence which is not a part of the record shall be considered by the hearing examiner in the preparation of the proposal for decision.

(b) Official notice. The hearing examiner may take official notice of judicially cognizable facts and generally recognized technical or scientific facts within the department's specialized knowledge, in conformance with the requirements of MCA §2-4-612(6).

(2) The hearing examiner's proposal for decision. Following the close of the record, the hearing examiner shall make his decision pursuant to MCA §2-4-621, and upon completion a copy of the decision shall be served upon all parties by personal service, by first class mail or by depositing it with the mail and distribution section, general services division, department of administration.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-612, 2-4-621, and 2-4-623, MCA

RULE XXIX EXCEPTIONS TO THE HEARING EXAMINER'S PROPOSAL FOR DECISION AND THE FINAL DECISION-MAKING PROCESS

(1) Exceptions. Any party adversely affected by the hearing examiner's proposal for decision may file exceptions. Such exceptions shall be filed with the hearing examiner and/or within 20 days after the proposal is served upon the party. A written request for additional time to file exceptions may, in the discretion of the hearing examiner, be granted upon a showing of good cause. Exceptions must specifically set forth the precise portions of the proposed decision to which the exception is taken, the reason for the exception, authorities upon which the party relies, and specific citations to the transcript or if one was prepared. Parties are cautioned that vague assertions as to what the record shows or does not show without citation to the precise portion of the record (e.g., to exhibits or to a transcript, if one was prepared) may be accorded little attention.

(2) The final decision-making process.

(a) Role of hearing examiner and director. The hearing examiner and the director shall render the final decision in any contested case hearing, in accordance with MCA §§ 2-4-621 to 2-4-623. Only factual information or evidence which is a part of the contested case hearing record shall be considered in the final decision-making process.

(b) The final order. After the 20-day exception period has expired, the director and hearing examiner shall:

(i) adopt the proposal for decision as the final order; or,

(ii) reject or modify the findings of fact, interpretation of administrative rules, or conclusions of law in the proposal for decision.

(c) Mailing of the final order. A copy of the final order shall be served upon all parties by personal service, by first class mail, or by depositing it with the mail and distribution section, general services division, department of administration.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-621, 2-4-622, and 2-4-623, MCA

RULE XXX EX PARTE COMMUNICATIONS (1) Prohibition. Except as provided in subsection 2, no party or his representative shall communicate, in connection with any issue of law or fact in a pending contested case, with any person serving as a hearing examiner or as a final decision-maker without notice and opportunity for all parties to participate in the communication. The prohibitions of this subsection shall apply beginning at the time at which a contested case is noticed for hearing and shall continue until a final order has been issued unless the person responsible for the

communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) Procedural questions. A hearing examiner or a final decision-maker may respond to questions of any party or his representative if it relates solely to procedures to be followed during the pendency of the contested case. A communication made for this purpose is not an ex parte communication.

(3) Record of prohibted ex parte communications. A hearing examiner or final decision-maker who receives a communication prohibited by subsection 1 shall decline to listen to such communication and shall explain that the matter is pending for determination. If unsuccessful in preventing such communication, the recipient shall advise the communicator that he will not consider the communication. The recipient shall then place on the record of the pending matter all written communications received and all written responses to the communications; a memorandum stating the substance of all oral communications received and all responses made; the identity of each person from whom the recipient received an ex parte communication; and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the ex parte communication shall be allowed to do so upon requesting the opportunity for rebuttal within 10 days after the date of the notice of communication. Rebuttal to ex parte communications shall be in writing, served on all parties, and received by the recipient within 20 days after the date of the notice of the communication.

(4) Sanctions. Upon receipt of a communication knowingly made in violation of subsection 1, a hearing examiner or final decision-maker may require, to the extent consistent with the interests of justice and the policy of underlying statutes, the communicator to show cause why his claim or interest in the contested case should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-613, MCA

RULE XXXI REHEARING A rehearing proceeding is expressly prohibited under these rules, except as otherwise required under MCA §§2-4-703, 2-4-621 and 2-4-622

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-703, 2-4-621, and 2-4-622, MCA

RULE XXXII EMERGENCY PROCEDURES Nothing contained in these rules is intended to preempt, repeal or be in conflict

with any rule or statute which provides for acts by the department in an emergency or procedure for conduct by the department in such a situation.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-201(2) and 85-2-113(2), MCA

RULE XXXIII SEVERABILITY If any provision of these rules is held invalid, such invalidity shall not effect any other provisions of the rules which can be given effect without the invalid provision, and to this end the provisions of these rules are declared to be severable.

AUTH: 2-4-201(2) and 85-2-113(2), MCA IMP: 2-4-201(2) and 85-2-113(2), MCA

4. The need for each of the proposed rules is as follows:

RULE I SCOPE AND PURPOSE

This proposed rule is needed to clarify that these rules apply only to the contested case hearings that the Department holds under MCA Title 85, chapter 2 (commonly referred to as the Water Use Act). The rule as proposed notes that the Attorney General's Model Rules have been adopted by the Department but that the Model Rules will no longer apply to contested case hearings held by the Department under the Water Use Act. Upon adoption, these rules will govern all Water Use Act hearings held by the Department. However, the Model Rules will still be applicable to other non-Water Use Act hearings held by the Department.

RULE II DEFINITIONS

This proposed rule is needed to define terms that are used throughout the rules. Some of the terms are defined in the Water Use Act but are included to make the rules more complete and understandable.

RULE III HEARING EXAMINERS

This proposed rule is a statement of the method of appointment and duties of the Hearing Examiner. One particular portion of this rule warrants comment. Subsection (k) allows the Hearing Examiner to recommend the equivalent of a "summary judgment" in a case where there is no genuine issue as to any material fact. Experience has shown that there are a variety of situations where all parties are amenable to such a procedure. Often times parties want the Hearing Examiner to rule on the basis of stipulated facts and then they need submit only legal argument. This subsection would also allow the Hearing Examiner to recommend a dismissal of the case where it is appropriate to do so rather than proceed to a hearing.

RULE IV COMMENCEMENT OF A CONTESTED CASE

This proposed rule is needed to outline the procedure to be followed in setting a case for hearing. The 30-day notice requirement is a reasonable time period to allow parties to prepare for the hearing. This rule allows for a shorter notice period when the Hearing Examiner determines that the parties will not be substantially prejudiced by a shorter time.

RULE V THE NOTICE OF APPLICATION

This proposed rule is needed to address a reoccuring issue in water rights hearings, i.e., the defective Notice of Application and the application that does not conform to the published Notice of Application. This rule sets forth the procedure that the Department has employed in the past to resolve this issue.

RULE VI RIGHT TO COUNSEL

This proposed rule is required to inform parties of their right to counsel and the applicable law for admission pro hac vice.

RULE VII INFORMAL DISPOSITION

This rule is needed to authorize informal settlement at any point in the proceedings. The procedure outline for agreed settlements is an effective procedure established by previous Hearing Examiners with the Department.

RULE VIII DEFAULT

This proposed rule is necessary to authorize action in the event a party does not appear at a hearing or fails to comply with orders of the Hearing Examiner. This rule provides that a default judgment may be entered against any party who fails to appear at a hearing or fails to comply with interlocutory orders of the Hearing Examiner.

RULE IX TIME

This proposed rule is needed to settle any time questions arising in contested case hearings.

RULE X CONSOLIDATION

This proposed rule is needed to consolidate hearings when they should logically be heard at the same time in the interest of justice or economy.

RULE XI DISQUALIFICATION OF HEARING EXAMINER

This proposed rule is needed to provide a mechanism for disqualification of a Hearing Examiner when appropriate.

RULE XII PREHEARING CONFERENCE

This proposed rule is needed to provide a procedure for simplifying and settling issues prior to the contested case hearing.

RULE XIII MOTIONS TO HEARING EXAMINER

This proposed rule is needed for at least two reasons. First, this rule specifies a procedure for filing motions with the Hearing Examiner. Written motions must be served on all parties, stating that if other parties wish to contest the motion they must file a written response with the Hearing Examiner within 7 days after service. Failure to file and serve a motion as required under this rule will result in the motion being dismissed without prejudice. This procedure will save time for the Hearing Examiner. He will no longer have to contact the parties to fix a date for responding to the motion. The rule does that. Second, this rule allows the Hearing Examiner to look to the Montana Rules of Civil Procedure when these procedural rules are silent. This is a reasonable means of providing guidance on procedural questions which are not covered in these procedural rules. It is also reasonable, however, that the Rules of Civil Procedure not be binding in administrative cases since, in many instances, they would not be consistent with traditional administrative procedures.

RULE XIV MOTIONS TO DIRECTOR

This proposed rule is needed to clarify that the Director has only a limited role in the hearings process. The only motions that the Director can consider in the hearing process are for disqualification of the Hearing Examiner and those motions certified by the Hearing Examiner.

RULE XV DISCOVERY

This proposed rule details discovery procedures. It is needed to allow for proper preparation of cases by the parties and prevents the use of surprise as a tactic at the hearing, one thing which is essential to fundamental due process. Sanctions for failure to comply with discovery orders are also available.

RULE XVI DEPOSITIONS TO PRESERVE TESTIMONY

This proposed rule is needed to provide deposition procedures for preservation of testimony. The taking of a deposition is a formal procedure and may have to be resorted to where the nature of the case and the issues therein require it. Depositions may be necessary to complete a case where a party or a witness within the state is seriously ill or is located a long distance from the place where the hearing will be held.

RULE XVII SUBPOENAS

This proposed rule provides a necessary detailing of subpoena procedures to be employed in an administrative hearing. The procedure for the issuance of a subpoena is simple and available to all parties. This rule provides no more control by the Hearing Examiner than is necessary for the protection of the interest of the person subpoenaed or others who may be affected.

RULE XVIII RIGHTS OF PARTIES

This proposed rule defines in one sentence the rights of parties to hearings conducted under these rules.

RULE XIX PARTICIPATION BY UNTIMELY OBJECTORS

Under this proposed rule, the Hearing Examiner, in his discretion, may admit evidence and testimony of untimely objectors. An untimely objector is defined in these rules as a person who does not file an objection to an application within the time period specified in the Notice of Application. See RULE II(20). Without this proposed rule, the evidence of untimely objectors could in every instance be excluded since untimely objectors are not "parties." See RULE II(12); MCA §85-2-308(1). In some instances, such evidence may be relevant. This rule as proposed essentially codifies past Departmental practice regarding the receipt of evidence from untimely objectors. The rule states that an untimely objector's participation in a hearing does not make him a "party."

RULE XX WITNESSES

This proposed rule is needed for at least two reasons. First, this rule allows the Hearing Examiner to appoint a staff expert witness of his own selection. The practice of shopping for experts, the venality of some experts and the inability of fact finders to decide which of two scientific theories presented by competing experts is correct, have been matters of deep concern to trial judges and Hearing Examiners. One approach taken by trial judges to address these concerns is to use a court-appointed expert. Though the contention has been made that court-appointed experts acquire an aura of infalibility to which they are not entitled, Levy, Impartial Medical Testimony-Revisited, 34 Temple L. Q. 416 (1961), the trend is increasingly to provide for their use.

In the absence of legislation to the contrary, the power of a trial judge to appoint an expert of his own choosing is inherent and virtually unquestioned. Ex parte Peterson, 306 S. Ct. 543 (1919); Scott v. Spanjer Bros., Inc., 298 F. 2d 928 (2d Cir. 1962); Danville Tobacco Ass'n v. Bryant-Buckner Associates, Inc., 333 F. 2d 202 (4th Cir. 1964); Sink, The

Unused Power of a Federal Judge to Call His Own Expert Witnesses, 29 S. CAL. L. REV. 195 (1956); Korn, Law, Fact, and Science in the Courts, 66 COLUM. L. REV. 1081, 1083 (1966). Hence, the only problem becomes the extent and manner whereby such power is to be exercised and the degree to which the expert chosen should participate at the trial. The judicial power has traditionally been exercised by appointing the expert to interpret the evidence produced by the parties or to obtain new evidence. Sink, supra, at 210-211.

Hearing Examiners or Administrative Law Judges (ALJ) often times, like trial judges, also need the assistance of an expert in analyzing a complex and bulky record. Hearing Examiners or ALJs have the same inherent power as trial judges to appoint an expert, even "in-house" agency experts. The Hearing Examiner's power to appoint an expert witness is implied or derived from the Hearing Examiner's lawful right to utilize "[t]he agency's experience, technical competence and specialized knowledge ... in the evaluation of evidence." MCA §2-4-612(7).

The Hearing Examiner's right to rely on agency expertise is subject to a litigating party's right "to conduct cross-examination" of any witness the Examiner intends to rely upon in the preparation of the Proposal for Decision. MCA §2-4-612(5). To satisfy this cross-examination requirement, this proposed rule requires that the appointed staff expert be at the hearing and be available for cross-examination. At the hearing, the staff expert may present his findings (if any) or testify. A staff appointed expert is also subject to the ex parte requirements of RULE XXX(1). See RULE II(12). Therefore, this proposed rule resolves a tension between the Hearing Examiner's right to avail himself of Department expertise and a party's right to cross-examine witnesses.

The second reason that this rule is needed is that it states when the prefiling of testimony will be required and how it will be used in the hearing.

RULE XXI RULES OF EVIDENCE

This proposed rule is needed to clarify that hearings will generally be governed by liberal evidentiary rules which create a strong presumption in favor of admitting questionable or challenged evidence. Unless all the parties to the hearing stipulate to the use of common law and statutory rules of evidence, this rule states that the liberal evidence rules shall apply.

RULE XXII CONTINUANCES

This proposed rule is needed to address what has been a problem for the Department. Frequently, after hearings have been scheduled, a party will request a continuance. The purpose of this rule is to define under what circumstances a

continuance will be granted. This rule will preclude the routine granting of continuances and will enable the Hearing Examiner to develop a stable docket from which he can hear and quickly dispose of cases.

RULE XXIII HEARING PROCEDURE

This proposed rule is necessary to set forth a general frame-work for the hearing. When parties are not represented by counsel, this rule will require that the Hearing Examiner briefly advise unrepresented parties of the rules of evidence, their right to counsel and their right to present evidence, argument and cross-examination.

RULE XXIV DISRUPTION OF HEARING

This rule is needed to give the Hearing Examiner some power to control disruptive and disobedient parties. The rule is particularly necessary since Hearing Examiners lack contempt powers.

RULE XXV SITE VISIT

This proposed rule is necessary to settle any questions regarding the right of the Hearing Examiner and the final decision-makers to take a site visit of the lands involved in a hearing.

RULE XXVI THE RECORD

This proposed rule is needed to list what items may be received into the record. The items listed in this proposed rule are taken directly from MCA §2-4-614.

RULE XXVII THE TRANSCRIPT

This proposed rule is needed to clarify that transcripts are not a matter of right for parties. The requesting party pays for all transcripts.

RULE XXVIII THE HEARING EXAMINER'S PROPOSAL FOR DECISION

This proposed rule is needed in that it details what the Hearing Examiner can consider in the preparation for a Proposal for Decision. Like a trial court, an administrative hearing is supposed to be decided solely on the basis of evidence in the record. This principle is embodied in this proposed rule.

RULE XXIX EXCEPTIONS TO THE HEARING EXAMINER'S PROPOSAL FOR DECISION AND THE FINAL DECISION-MAKING PROCESS

This proposed rule is needed to outline the decision-making process after the Proposal for Decision has been issued. This rule allows parties adversely affected to submit exceptions. Only evidence which is part of the contested case record can be considered in the final decision.

RULE XXX EX PARTE COMMUNICATIONS

This rule is needed to prevent parties and staff participating in the hearing from attempting to submit facts outside the record without notice or opportunity for others to respond. If the right to a hearing is to be meaningful, a participant must be able to know what evidence may be used against him, and to contest it through cross-examination and rebuttal evidence. These rights can be nullified if the Hearing Examiner or the final decision-makers are free to consider facts that are submitted outside the hearing and off the record. This rule prohibits substantive ex parte communications and provides a procedure for placing on the record all such communications received by a Hearing Examiner or final decision-maker.

RULE XXXI REHEARING

This proposed rule is needed to express the Department's long-standing policy that rehearings are prohibited, unless otherwise ordered by law pursuant to MCA §2-4-703.

RULE XXXII EMERGENCY PROCEDURES

This proposed rule is needed to make it clear that emergency procedures are unaffected by these rules.

RULE XXXIII SEVERABILITY

This proposed rule is necessary to declare the severability of these rules.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Larry Holman, Chief, Water Rights Bureau, Department of Natural Resources and Conservation, 32 South Ewing, Helena, Montana, 59620, no later than 10 days after the date of the last public hearing.

6. Larry Holman has been designated to preside over the December 1, and 8, 1983, public hearings. Charles Brasen has been designated to preside over the December 6, 1983, public hearing. Sarah Bond has been designated to preside over the December 15, 1983, public hearing.

7. The authority and implementing sections are listed at the end of each rule.

DONE this 31st day of October, 1983.

for Robert J. Robinson

Leo Berry, Jr., Director
Department of Natural Resources
and Conservation
32 South Ewing, Helena, MT 59620

Certified to the Secretary of State October 31, 1983.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE REPEAL of Rule 42.13.302 relating to) brewer storage depots.)	NOTICE OF THE PROPOSED REPEAL of Rule 42.13.302 relating to brewer storage depots.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 12, 1983, the Department of Revenue proposes to repeal rule 42.13.302 relating to brewer storage depots.

2. The rule proposed to be repealed can be found on page 42-1331 of the Administrative Rules of Montana.

3. Prior to amendment by the 1983 Legislature, §16-4-102, MCA, allowed only instate brewers to own, lease, maintain, and operate storage depots. Chapter 178, 1983 Laws of Montana, removed this requirement and allowed all brewers to have such facilities. For this reason, rule 42.13.302, which allows brewers to establish storage depots pursuant to the old terms of 16-4-102, MCA, is inaccurate, repetitious and should be repealed.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendments in writing to:

Ann Kenny
Department of Revenue
Legal Division
Mitchell Building
Helena, Montana 59620

no later than December 9, 1983.

5. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Ann Kenny at the above address no later then December 9, 1983.

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 who are directly affected by the proposed repeal; from the Administrative Code Committee of the Legislature; from a governmental subdivision or agency; or from an association having no 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 3 based on 30 out-of-state brewers.

7. The authority of the agency to repeal the rule is based on §16-1-303, MCA, and the rule implements §§16-3-230 and 16-4-102, MCA.

Ellen Feaver

ELLEN FEAVER, Director
Department of Revenue

Certified to Secretary of State 10/31/83
MAR Notice No. 42-2-248

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE REPEAL of Rule 42.11.111 relating to state liquor identification stamps.	NOTICE OF THE PROPOSED REPEAL of Rule 42.11.111 relating to state liquor identification stamps.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 12, 1983, the Department of Revenue proposes to repeal rule 42.11.111 relating to state liquor identification stamps.

2. The rule proposed to be repealed can be found on page 42-1111 of the Administrative Rules of Montana.

3. The Department is proposing to repeal rule 42.11.111 because Chapter 47, 1983 Laws of Montana, eliminated the requirement for state liquor identification stamps effective October 1, 1983. Rule 42.11.111 is therefore unnecessary after that date.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendments in writing to:

Ann Kenny
Department of Revenue
Legal Division
Mitchell Building
Helena, Montana 59620

no later than December 9, 1983.

5. If a person who is directly affected by the proposed repeal 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 Ann Kenny at the above address no later then December 9, 1983.

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 who are directly affected by the proposed repeal; from the Administrative Code Committee of the Legislature; from a governmental subdivision or agency; or from an association having no 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 18 based on 180 liquor store employees.

7. The authority of the agency to repeal the rule is based on §16-1-303, MCA, and the rule implements §§16-3-102 and 16-3-102, MCA.

Ellen Feaver

ELLEN FEAVER, Director
Department of Revenue

Certified to Secretary of State 10/31/83

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE Amendment of Rule 42.12.203 relating to inter-quota area transfers of all-beverages licenses.	NOTICE OF PROPOSED AMENDMENT of Rule 42.12.203 relating to inter-quota area transfers of all-beverages licenses.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 12, 1983, the Department of Revenue proposes to amend rule 42.12.203 relating to inter-quota area transfers of all-beverages licenses.

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

42.12.203 INTER-QUOTA AREA TRANSFERS (1) All-beverages licenses may be transferred between quota areas if the requirements of 16-4-204, MCA, are met. A license may be transferred out of a quota area when the total number of all-beverages licenses in that area exceeds 125% of the number of licenses to which that quota area is entitled based on the results of the most recent census or population estimate. Licenses may be transferred from a quota area until the total number of licenses in the area falls below 125% of the number of licenses to which the quota area is entitled. If, upon transfer of a license, the number of licenses in a quota area falls below 125% of the number of licenses to which the area is entitled, no additional transfers may be made from the area until the number of licenses once again exceeds 125% of the number to which the area is entitled.

(2) (a) All-beverages licenses may be transferred to any county quota area or an incorporated city quota area of less than 10,000 inhabitants in which the total number of licenses issued is less than ~~125%~~ 133% of the total number of licenses to which that area is entitled based on the results of the most recent census or population estimate. If, the total number of licenses in a these quota ~~area~~ areas exceeds ~~125%~~ 133% , no additional transfers may be made to ~~the area~~ these areas until the number of licenses falls below ~~125%~~ 133% of the number of licenses to which ~~the area is~~ these areas are entitled.

(b) All-beverages licenses may be transferred to any incorporated city quota area of more than 10,000 inhabitants in which the total number of licenses issued is less than 143% of the total number of licenses to which that area is entitled based on the most recent census or population estimate. If the total number of licenses in these quota areas exceeds 143%, no additional transfers may be made until such time as the number of licenses falls below 143% of the number of licenses to which these areas are entitled.

(3) ~~The phrase "natural persons" shall not include limited partnerships or other business entities of any kind in which each natural person is not a full participant in the ownership and operation of the business authorized by the license.~~ If ~~the~~ a licensee has been issued an all-beverages license under the provisions of 16-4-204(6), MCA, and the licensee desires to ~~terminate~~ cease operating his ~~operation~~ licensed business prior to a transfer authorized by statute, the license shall lapse and shall be of no force and effect. ~~The lapse of a license under this regulation will reduce the percentage for inter-quota transfers.~~

(4) The following are examples of computations under subsections (1) and (2):

(a) if the quota for an area under (2)(a) above is two licenses and two have been issued, the quota area is at 100% of quota. Therefore, one additional license may be transferred to the quota area resulting in more than ~~125%~~ 133% of quota and prohibiting the transfer of any additional licenses to that area.

(b) if the quota for an area is 18 licenses and 32 licenses have been issued the quota area is 177.8% of the quota. Therefore 10 licenses may be transferred out of the quota area resulting in less than 125% of quota for that area and prohibiting the transfer of any additional licenses from that area.

(c) if the quota for an area under (2)(b) above is 47 all-beverages licenses and 57 licenses have been issued the quota area is 121% of the quota; therefore 11 licenses may be transferred into the quota area. The total number issued would then equal 144% of the quota and no additional licenses could be transferred into the quota area. (Note: If only 10 licenses were allowed to transfer, the area would be at 142% of quota and would qualify for one more license since at 67 issued, the area would not exceed the 143% allowed.)

AUTH: 16-1-303, MCA IMP: 16-4-201, 16-4-204, and 16-4-502, MCA

3. The Department is proposing to amend rule 42.12.203 because Chapter 636, 1983 Laws of Montana, established new criteria for "floater" licenses in certain corporate quota areas. Under the present criteria for most areas, in order for transfers to occur between quota areas, the total number of all-beverages licenses in the original area from which the license would be transferred must exceed the quota by at least 25% pursuant to census data or a population estimate under 16-4-502, MCA. For the quota area into which a license could be transferred, the total number of all-beverages licenses could not exceed the quota by 33%. However, Chapter 636 specifies that in a corporate quota area containing a population of 10,000 or more into which floater licenses might transfer, the rumber of licenses cannot exceed the quota by 43%. As a practical matter,

the effect of the law was to create one new "floater" license for Bozeman and five new "floater" licenses in Billings since these were the only two largely populated corporate city quota areas not over quota to the extent to be eligible for new licenses under the modified criteria. Subsection (3) of the rule is being amended because Chapter 59, 1983 Laws of Montana, removed the restriction allowing only natural persons to hold a "floater" liquor license transferred between the quota areas.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendments in writing to:

Ann Kenny
Department of Revenue
Legal Division
Mitchell Building
Helena, Montana 59620

no later than December 9, 1983.

5. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Ann Kenny at the above address no later then December 9, 1983.

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 no 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 at least 25 based on 51 city and/or county quota areas where licenses may be transferred.

7. The authority of the agency to amend the rule is based on §16-1-303, MCA, and the rule implements §§16-4-201, 16-4-204, and 16-4-502, MCA.

Ellen Feaver

ELLEN FEAVER, Director
Department of Revenue

Certified to Secretary of State 10/31/83

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE Amendment of Rule 42.12.129 relating to the determination of proximity to a place of worship or school.	NOTICE OF PROPOSED AMENDMENT of Rule 42.12.129 relating to the determination of proximity to a place of worship or school.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 12, 1983, the Department of Revenue proposes to amend rule 42.12.129 relating to the determination of proximity to a place of worship or school.

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

42.12.129 DETERMINATION OF PROXIMITY TO PLACE OF WORSHIP OR SCHOOL (1) ~~In order to determine if the provisions of 16-3-306, MCA, are applicable, the department utilizes a two step test~~ In order to apply the provisions of 16-3-306, MCA, the department must find:

(a) ~~determination of street of location~~ the entrance doors of the premise proposed for licensing and the entrance doors of the place of worship or school are situated on the same street; and

(b) ~~determination of distance between entrance doors.~~ the business mailing address of the premise proposed for licensing is designated as the same street as the business mailing address of the place of worship or school; and

(c) the distance, measured in a straight line, from the entrance doors of the business proposed for licensing and the entrance doors of the place of worship or school is 600 feet or less.

(2) ~~(a)--A building is considered to be on each street that abuts the building and appurtenant land. An alley is generally not considered to be a street unless it is used by the general public as a public thoroughfare for vehicular travel~~ If the above three part test is not met in its entirety, the provisions of 16-3-306, MCA, do not apply.

~~(b)--If the proposed premises for liquor sales are not located on the same street as a place of worship or school, the provisions of 16-3-306, MCA, are not applicable. If the proposed premises are on the same street, then the second step of the test, provided for in subsection (3), is utilized.~~

(3) ~~(c)--If the proposed premises are on the same street,~~ The distance between entrance doors is measured by a geometric straight line, regardless of intervening property and buildings. An entrance is considered to be a means of ingress to the premises generally used by the public.

~~(b)--If the distance is more than 600 feet, the provisions of 16-3-306, MCA, are not applicable. If the distance is less~~

~~than or equal to 600 feet, Section 16-3-306, MCA applies.~~

(4) (a) In the event that a county or city government should enact an ordinance or resolution supplanting the provisions of 16-3-306(1), MCA, the restriction shall not apply.

(b) A conformed copy of such supplanting ordinance or resolution must be submitted to the department by the applicant.

AUTH: 16-1-303, MCA; IMP: 16-3-306, MCA.

3. This proposed rule as amended complies with the Supreme Court's Opinion in **Bovey v. Department of Revenue,** decided on February 24, 1983, which held 42.12.129, in part, contradicted the plain and clear meaning of §16-3-306, MCA. The terms of the proposed rule comply with the Supreme Court's Opinion.

It should also be noted that Chapter 662, 1983 Laws of Montana, authorized local governments, (cities and counties) to supplement and/or override §16-3-306, MCA, by local ordinances if they should choose to do so. However, where they do not, the provisions of 42.12.129 will continue to apply.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendments in writing to:

Ann Kenny
Department of Revenue
Legal Division
Mitchell Building
Helena, Montana 59620

no later than December 9, 1983.

5. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Ann Kenny at the above address no later than December 9, 1983.

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 no 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 at least 25 based on approximately 126 city governments, 56 counties and those proposed premises within 600 feet of any church or school.

7. The authority of the agency to amend the rule is based on §16-1-303, MCA, and the rule implements §16-3-306, MCA.

Ellen Feaver

ELLEN FEAVER, Director
Department of Revenue

Certified to Secretary of State 10/31/83

MAR Notice No. 42-2-251

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE Adoption of Rule I relating to the determination of license quota areas.	)))	NOTICE OF PROPOSED ADOPTION of Rule I relating to the determination of license quota areas.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 12, 1983, the Department of Revenue proposes to adopt rule I relating to the determination of distance for purposes of license quota areas.

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

RULE I DETERMINATION OF LICENSE QUOTA AREAS (1) Any applicant applying to the department for a new license or transfer of an existing license under the quota limitations provided for under 16-4-105 and 16-4-201, MCA, must submit to the department:

(a) a sworn statement or affidavit from the local county or city surveyor attesting to the distance as measured by the surveyor from official city or county plats; accompanied by a copy of the plat indicating the points between which the measurement was made, and the distance; or

(b) a certified survey from a licensed land surveyor attesting to the exact distance, accompanied by the plats indicating the points which were measured, and the distance.

(2) If the location of the premises falls within the incorporated city boundaries or within a distance of 5 straight-line miles from the nearest corporate city boundary, the premise will be subject to that quota established for the "city" quota area.

(3) If the distance attested to is more than 5 straight-line miles from the nearest corporate city boundaries, the premise is considered under the quota established for the "county" quota area.

AUTH: 16-1-303, MCA; IMP: 16-4-105, 16-4-201, 16-4-409 and 16-4-501, MCA.

3. The Department is proposing this new rule because Chapter 595, 1983 Laws of Montana, revised the method of measuring the 5-mile distance for corporate city and county quota areas from the shortest public road or highway to a straight line measurement. This rule, as proposed, implements the new measurement criteria.

4. Interested parties may submit their data, views, or arguments concerning the proposed adoption in writing to:

Ann Kenny
Department of Revenue
Legal Division
Mitchell Building
Helena, Montana 59620

no later than December 9, 1983.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Ann Kenny at the above address no later then December 9, 1983.

6. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the Legislature; from a governmental subdivision or agency; or from an association having no 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 at least 25 based on 14 counties with licenses available.

7. The authority of the agency to amend the rule is based on §16-1-303, MCA, and the rule implements §§16-4-105, 16-4-201, 16-4-409 and 16-4-501, MCA.

ELLEN FEAVER, Director
Department of Revenue

Certified to Secretary of State 10/31/83

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE Repeal of Rules 42.12.321 and 42.12.322 relating to special permits.	))))	NOTICE OF PROPOSED REPEAL of Rules 42.12.321 and 42.12.322 relating to special permits.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 12, 1983, the Department of Revenue proposes to repeal rules 42.12.321 and 42.12.322 relating to special permits.

2. The rules as proposed to be repealed can be found on page 42-1281 of the Administrative Rules of Montana.

3. Rules 42.12.321 and 42.12.322 are proposed to be repealed because after a thorough review of the statutory language on which these rules are based, it was determined that §16-4-301, MCA, clearly sets forth the procedure by which special permits may be applied for and issued. It is believed, therefore, that the rules unnecessarily repeat the statutory provisions and should be repealed.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendments in writing to:

Ann Kenny
Department of Revenue
Legal Division
Mitchell Building
Helena, Montana 59620

no later than December 9, 1983.

5. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Ann Kenny at the above address no later than December 9, 1983.

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 amendments; from the Administrative Code Committee of the Legislature; from a governmental subdivision or agency; or from an association having no 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 approximately 100 based on a yearly average of 1,000 special permit applications.

7. The authority of the agency to repeal the rules is based on §16-1-303, MCA, and the rules implement §16-4-301, MCA.

ELLEN FEAVER, Director
Department of Revenue

Certified to Secretary of State 10/31/83
21-11/10/83

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE Amendment of Rules 42.22.101 and 42.22.105 and the ADOPTION of Rule I relating to the assessment and taxation of centrally assessed property.	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT of Rules 42.22.101 and 42.22.105 and the ADOPTION of Rule I relating to the assessment of centrally assessed property.

TO: All Interested Persons:

1. On December 5, 1983, at 1:30 p.m., a public hearing will be held in Room 160 of the Mitchell Building, Fifth and Roberts Streets, Helena, Montana, to consider the proposed amendment of rules 42.22.101 and 42.22.105 and the adoption of rule I relating to the assessment and taxation of centrally assessed property.

2. The rules as proposed to be amended and adopted provide as follows:

42.22.101 DEFINITIONS (1), (2) and (3) remain the same.

(4) "Beneficial use" as it relates to electric energy producers is defined as the use of tax exempt power transmission lines having a capacity of at least 500 k.v. for bulk power transfers.

(5) "Bulk power transfers" means transfers made by taxable electrical energy producers.

(4) through (16) remain the same but will be renumbered.

AUTH: 15-23-108, MCA; IMP: Title 15, Chapter 23, part 1, MCA.

42.22.105 REPORTING REQUIREMENTS (1) Each year all centrally assessed companies shall submit to the department of revenue a report of operations for the preceding year. Railroads and pipelines shall submit the report by April 15 and all others by March 31, on forms supplied by the department.

(2)(a) through (m) remain the same.

(n) in the case of centrally assessed electric utilities, all information required under Rule I, if applicable;

(n) and (o) remain the same but will be relettered.

(3) remains the same.

AUTH: 15-23-108, MCA; IMP: 15-23-101, 15-23-201, 15-23-301, 15-23-402, 15-23-502, 15-23-602 and 15-23-701, MCA.

RULE I ADDITIONAL REPORTING REQUIREMENTS FOR BENEFICIAL USE OF GOVERNMENT OWNED TRANSMISSION LINES (1) Qualifying companies shall provide to the department of revenue information on any possession or beneficial use of government owned transmission lines, as defined in 15-23-101 and 15-24-1207, MCA, during the preceding calendar year. The information shall be submitted beginning March 31, 1984, and each year thereafter and shall include the following:

(a) the name and address of the person, association, or corporation;
(b) the location of the (tax exempt property) transmission lines;
(c) original cost and accrued depreciation and market value in dollars and cents of the tax exempt property;
(d) copies of all charges from the Bonneville Power Administration for bulk power transfers;
(e) copies of contracts with the Bonneville Power Administration for use of said line;
(g) any other information requested by the department which will assist in valuing the government owned electric transmission lines.
AUTH: 15-1-201 and 15-24-1207, MCA; IMP: 15-24-1207, MCA.

3. The 48th Legislature enacted House Bill 747 (Ch. 683) which provides for a system of taxing the beneficial use of an otherwise exempt government-owned transmission line. This administrative rule is promulgated to put potentially affected taxpayers on notice as to the manner in which the Department will administer the new law. Subsection (1) of rule 42.22.105 is being amended to implement the provisions of Chapter 606, Laws of 1983, which changed the filing date for pipelines from March 31 to April 15.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendments in writing to:

Larry Schuster
Department of Revenue
Property Assessment Division
Mitchell Building
Helena, Montana 59620

no later than December 9, 1983.

5. Allen Chronister, Agency Legal Services, Department of Justice, has been designated to preside over and conduct the hearing.

6. The authority of the Department to make the proposed amendments and to adopt the proposed rule is based on §§15-1-201, 15-23-108 and 15-24-1207, MCA, and the rules implement Title 15, Chapter 23, Parts I and II, and §15-24-1207, MCA.

ELLEN FEAVER, Director
Department of Revenue

Certified to Secretary of State 10/31/83

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of adoption of rules pertaining to prescribed graphics and information required to be printed on ballot envelopes for electors in United States service	))))))	NOTICE OF PROPOSED ADOPTION OF RULES FOR ABSENTEE BALLOT ENVELOPES NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On December 10, 1983, the Secretary of State proposes to adopt Rules I through VI pertaining to absentee ballot envelopes.

2. The new rules are proposed as follows:

RULE I PURPOSE (1) The purpose of these rules is to provide Montana election administrators and printers with federal post office regulations in regard to required markings for absentee balloting materials without placing the requirements in statute.

(2) Balloting materials, consisting of post card applications, ballot voting instructions, and envelopes, are sent through the mail without prepayment of postage to enable every person in any of the following categories to apply for registration and to vote by absentee ballot when absent from the place of voting residence and when otherwise eligible to vote absentee:

(a) Members of the Armed Forces while in the active service and their spouses and dependents.

(b) Members of the Merchant Marine of the United States and their spouses and dependents.

(c) Citizens of the United States residing for a definite or indefinite time outside the territorial limits of the United States and the District of Columbia and their spouses and dependents when residing with or accompanying them. To be mailable free of postage, the balloting materials must be deposited at a United States Post Office, an overseas United States Military Post Office, or presented to an American Embassy.

AUTH & IMP: 13-13-214-(4), MCA.

RULE II ELECTIONS AFFECTED (1) The materials may be sent for any general election of electors for President and Vice President or of Senators and Representatives in Congress and for other general, primary, and special elections.

AUTH & IMP: 13-13-214-(4), MCA.

RULE III REQUIRED MARKINGS (1) Envelopes used to send balloting material and envelopes supplied for return of the ballot must have printed across the face two parallel

horizontal red bars each 1/4 inch wide, extending from one side of the envelope to the other side, with an intervening space of 1/4 inch, the top bar to be 1 1/4 inches from the top of the envelope, and the words "OFFICIAL ELECTION BALLOTING MATERIAL" between the bars. There must be printed in the upper right corner of each envelope in a rectangular box the words "U.S. POSTAGE PAID 42 USC 1973dd." All printing on the face must be in red with an appropriate inscription or blanks for return address of sender in the upper left corner. Sample available from Secretary of State.

(2) Facing Identification Marks (FIM) must be printed on the address side. The shade of red ink identified as Pantone 193U will generally meet print reflectance needs (30 percent) when used on white or light colored paper stock. A darker shade of red ink will be needed on darker paper stock. The distance from the vertical bar closest to the postage paid box to the right edge of the envelope should be 2 inches, plus or minus 1/8 inch. Film negatives available from a local post office.

AUTH & IMP: 13-13-214-(4), MCA.

RULE IV ENVELOPE SIZE (1) Ballot transmission and ballot return envelopes must meet the following maximum and minimum height and length requirements:

(a) Maximum;
  (i) Height 6 1/8 inches
  (ii) Length 11 1/2 inches
(b) Minimum;
  (i) Height 3 1/2 inches
  (ii) Length 5 inches

AUTH & IMP: 13-13-214-(4), MCA.

RULE V NON USE OF REQUIRED MARKINGS (1) Non use of required markings will require affixing of pay postage for international airmail.

AUTH & IMP: 13-13-214-(4), MCA.

RULE VI WHERE MARKINGS NOT ACCEPTED (1) If Ballot Return Envelopes are mailed from a non U.S. Postal System the elector must pay postage.

AUTH & IMP: 13-13-214-(4), MCA.

3. The reason for the proposed adoption of these rules is to implement amendments to section 13-13-214, MCA as required by House Bill 559, Chapter 110, Laws of 1983.

4. Interested parties may submit their data, views or arguments concerning the proposed rules in writing to the Secretary of State, Room 202, State Capitol, Helena, MT 59620, no later than December 8, 1983

5. If a person who is directly affected by the proposed adoption wishes to express his data, views, and arguments orally or in writing at a public hearing, he must make written request

for a hearing and submit this request along with any written comments he has to the Secretary of State, Room 202, State Capitol, Helena, MT 59620, no later than December 8, 1983.

6. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption, from the Administrative Code Committee of the legislature; from a governmental sub-division 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 10 persons, based on 56 county election administrators and 44 approximately contract printers in Montana.

Jim Waltermire, Secretary of State

Certified to the Secretary of State October 31, 1983

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF NURSING HOME ADMINISTRATORS

In the matter of the amendment of 8.34.414 concerning examinations.) NOTICE OF AMENDMENT OF 8.34.414 EXAMINATIONS

TO: All Interested Persons:

1. On September 29, 1983, the Board of Nursing Home Administrators published a notice of proposed amendment of 8.34.414 at pages 1282 and 1283, 1983 Montana Administrative Register, issue number 18.

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

3. No comments or testimony were submitted.

DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF VETERINARIANS

In the matter of the amendment of ARM 8.64.501 concerning application requirements.) NOTICE OF AMENDMENT OF ARM 8.64.501 APPLICATION REQUIREMENTS

TO: All Interested Persons:

1. On September 29, 1983, the Board of Veterinarians published a notice of proposed amendment of 8.64.501 concerning application requirements at pages 1286 and 1287, 1983 Montana Administative Register, issue number 18.

2. The board has amended the rule exactly as proposed

3. No comments or testimony were submitted.

DEPARTMENT OF COMMERCE

BY: _____
GARY BUCHANAN, DIRECTOR

Certified to the Secretary of State, October 31, 1983.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PHYSICAL THERAPY EXAMINERS

In the matter of the amendments) NOTICE OF AMENDMENT OF ARM
of ARM 8.42.401 concerning) 8.42.401 APPLICATIONS, 8.42.402
applications, 8.42.402 concern-) EXAMINATIONS, 8.42.403 FEES,
ing examinations, 8.42.403 con-) 8.42.405 TEMPORARY LICENSES,
cerning fees, 8.42.405 concern-) and ADOPTION OF A NEW RULE,
ing temporary licenses, and) 8.42.410 FOREIGN TRAINED
adoption of a new rule concern-) APPLICANTS
ing foreign trained applicants.)

TO: All Interested Persons:

1. On August 25, 1983, the Board of Physical Therapy Examiners published a notice of public hearing on the proposed amendments and adoption listed above at pages 1134 through 1139, 1983 Montana Administrative Register, issue number 16.

The hearing was duly held on October 4, 1983 in the Scott Hart Building Auditorium, 303 Roberts, Helena, Montana. Two persons offered testimony at the hearing, neither in opposition. A letter was submitted to the board dated September 7, 1983 from the Administrative Code Committee, expressing its concerns about some of the proposed rules, the rationale for one of the rules and statistical support for the proposed fee increases. Several additional letters were submitted, none in opposition.

The board has made grammatical amendments to improve the sentence structure of rule 8.42.401 and to complete the first sentence of rule 8.42.402 (5) with no change in substance intended, and adding the International Credentialing Association, Inc. to the list of evaluation services in section (1)(a) of the new rule 8.42.410 regarding foreign trained applicants.

Several other changes were made in response to the letter from the Administrative Code Committee. The rules as changed will read as follows: (new matter underlined, deleted matter interlined)

"8.42.401 APPLICATIONS (1) Application packets will be provided to all applicants. Packets shall include application forms and copies of the current statutes and rules to help prepare for the jurisprudence examination. ~~The application forms for licensure as a physical therapist, copy of current statutes and rules, along with the jurisprudence examination will be provided to applicants in accordance with the requirements of section 37-11-304, MCA. In addition, the board may, in its discretion, require statements of good moral character and references from the applicant's previous place(s) of employment.~~"

The board proposed the rule change to correspond with the rule change in 8.42.402 which provides for the jurisprudence examination. The board feels it is their duty to supply the material upon which the jurisprudence examination is based. The current wording and deletion of the previous material

is in response to the letter from the code committee objecting to the references from the applicant's previous place of employment. The authority of the board to make the amendment is based on section 37-11-201, MCA and implements section 37-11-304, MCA.

Rule 8.42.402 is being amended as proposed with the following changes in subsection (4): (new matter underlined, deleted matter interlined)

"8.42.402 EXAMINATIONS (1)...

(4) Applicants for examination shall file with the board office an application which shall include the following:

(a) ...

(c) three ~~reference letters~~ statements of good moral character;

(d) ...

(e) recent photograph of the application; ~~and~~.

~~(f) completed jurisprudence examination;~~

(5) The applicant's overall passing score for the Professional Examination Service's examination is to be equal to or higher than 1.5 standard deviation below the national mean. The passing score on the jurisprudence examination shall be 75%.

(6) The jurisprudence examination shall be an open book examination covering current Montana physical therapy statutes and rules, subject to Title 37, Chapters 1, 2, and 11, Montana Codes Annotated, state and federal narcotic statutes, and standards of care and definition of moral turpitude. The jurisprudence examination must be passed by all examination and endorsement applicants before original licensure will be granted. For examination candidates the jurisprudence exam will be given concurrently with the PES examination. For endorsement candidates separate provisions will be made for taking the jurisprudence examination prior to licensure. Applicants failing the jurisprudence examination must retake said examination until passed. The fee of each retake will be assessed in accordance with the established fee schedule."

The changes set requirements for making application. The change from reference letters to statements of good moral character is again in reference to the September letter from the Code Committee. Subsection (4)(f) has been deleted and subsection (6) amended to include the jurisprudence examination with the PES examination, rather than as a part of the application. Subsection (5) set passing grades on the examinations. Subsection (6) outlines procedures and policies for the jurisprudence examination. By implementing the jurisprudence exam the board will try to assure that professionals practicing in Montana are familiar with the laws that apply to Montana

so that they know the limits of their practice and sanctions that apply to prescription dispensation and use of narcotics. The authority of the board to make the amendment is based on section 37-11-201, MCA and implements sections 37-11-303, 304, MCA.

Rule 8.42.403 concerning fees is amended as proposed with the addition of one fee which reads as follows:

"8.42.403 FEES (1) The fees shall be as follows:

(a) ...

(h) Duplicate license 10.00"

The board proposed the fee changes to set the fees commensurate with program costs. The board had reviewed its fee schedule and administrative costs and determined that these fees were necessary to cover the costs. In justifying the fees, the board office realized the fee for duplicate licenses should have been included. The authority of the board to make the change is based on sections 37-1-134 and 37-11-201, MCA and implements sections 37-11-304, 307, 308, and 309, MCA.

The amendment of ARM 8.42.405 Temporary Licenses has been completed as proposed for the reasons stated in the original notice.

Rule 8.42.406 has been amended as proposed with the following change: (new matter underlined, deleted matter interlined)

"8.42.406 LICENSURE BY ENDORSEMENT (1) ...

(2) ...

(d) submit three ~~reference letters~~ statements of good moral character;

(e) ..."

The board is making the amendment for those reasons stated in the original notice. The above change is in response to the letter from the Administrative Code Committee to clarify that the statements required are for good moral character. The authority of the board to make the amendment is based on section 37-11-201, MCA and implements sections 37-11-307, MCA.

The new rule, 8.42.410 is being adopted as proposed with the following changes: (new matter underlined, deleted matter interlined)

"8.42.410 FOREIGN TRAINED APPLICANTS (1) ...

(a) compliance with educational standards equivalent to the University of Montana, Physical Therapy Curriculum shall be established by using an evaluation of educational background performed by any of the following evaluation services;

World Education Services, Inc.

...

International Consultants, Inc.

...

Newark, Delaware, 19711

International Credentialing Associates, Inc.
1101 New Hampshire Avenue NW
Washington, DC 20037

(b) pay any a fee ~~is~~ required by the services, ~~and shall be paid by the applicant~~;

(c) ~~be of good moral character and~~ at least 18 years of age;

(d) submit three statements of good moral character;

(e) have graduated from a board approved physical therapy school;

(f) if from a non-english speaking ~~country~~ culture the applicant shall display competency in the English language by passing the national examination Test of English as a Foreign Language (TOEFL) with a score of 55% of the total possible points on each subject. The applicant would contact TOEFL by writing:

TOEFL
Box 899
Princeton, New Jersey 08541, USA

A fee is required by TOEFL and must be paid by the applicant.

~~(e)~~ (g) pass to the satisfaction of the board a written examination prescribed by the board and, if considered necessary, an oral interview to determine the fitness of the applicant to practice as a physical therapist."

The changes is the rule are to add the ICA which has been approved by the American Physical Therapy Association as an approved credentials evaluation service. The change to subsection (b) indicates that the applicant must pay any fee required by the services. Subsections (c) and (d) are amended in response to the Administrative Code Committee's letter and again to indicate that the statements required are for good moral character. The change in subsection (f) is to make clear that the problem relates to the ability to communicate in the English language, rather than to a country.

2. No other comments or testimony were received.

BOARD OF PHYSICAL THERAPY EXAMINERS
HELEN JORGENSON, R.P.T., CHAIRMAN

BY: _____
GARY BUCHANAN, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, October 31, 1983.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of repeal of rules 10.16.102, 10.16.212, 10.16.213, 10.16.1210, 10.16.1802, 10.16.1803, 10.16.2301 pertaining to special education programs.	))))))	NOTICE OF THE REPEAL OF RULES 10.16.102, 10.16.212 10.16.213, 10.16.1210 10.16.1802, 10.16.1803 10.16.2301

To: All Interested Persons

1. On August 25, 1983, the superintendent published notice of a proposed repeal of rules 10.16.102, 10.16.212, 10.16.213, 10.16.1210, 10.16.1802, 10.16.1803 and 10.16.2301 concerning special education programs at page 1148 of the 1983 Montana Administrative Register, issue number 16.

2. The superintendent has repealed the above-numbered rules as proposed.

3. No comments or testimony were received.

Ed Argenbright
Superintendent of Public Instruction

Certified to the Secretary of State October 31, 1983.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of amendment of rules governing special education programs of the public schools of the state of Montana	NOTICE OF AMENDMENT OF CHAPTER 16, SPECIAL EDUCATION

To: All Interested Persons

1. On August 25, 1983, the superintendent published notice of proposed amendment of Chapter 16, Special Education at page 1150 of the 1983 Montana Administrative Register, issue number 16.

2. The superintendent has amended the rules as proposed with the following exception.

10.16.1102--The proposed changes were discussed with the Special Education Advisory Panel. Members of the panel believed that procedures for request of the evaluation process should be included in the rule. Therefore, section (3)(a) of the rule--which was proposed to be repealed--will be included in the rule. Rule 10.16.1102 will now read as follows:

10.16.1102 INDEPENDENT EDUCATION EVALUATION.

(1) Parents shall have the right to an independent educational evaluation of their child at public expense when those parents have reason to question the appropriateness of the public agency's educational evaluation. The public agency may initiate a hearing under 10.16.101 to show that its evaluation is appropriate. If the decision of the hearing officer is that the evaluation is appropriate, the parent(s) still has the right to an independent evaluation, but not at public expense.

(2) The parent(s) must direct a request for an independent educational evaluation in writing to the district superintendent or the county superintendent when there is no district superintendent. The parent(s) must state the reasons(s) for such an evaluation:

(a) the parent(s) must allow the local school district to complete a current evaluation (assessment during the school year) before requesting an independent evaluation;

(b) the parent(s) must sign a consent or evaluation to be conducted by the independent evaluator(s); and

(c) the parent(s) must sign a release of information between the school district and the independent evaluator(s). The school district and the independent evaluator(s) must exchange all records concerning the child. All records and information from the independent evaluation become part of the child's school record.

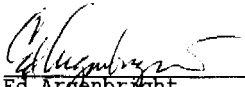
(3) If the parent(s) obtains an independent evaluation at private expense, the results of the evaluation:

(a) must be considered by the public agency in any decisions made with respect to the provision of a free appropriate public education of the child, and

(b) may be presented as evidence at a hearing regarding the child.

(4) If a hearing officer requests an independent evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(5) Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner(s), must be the same as the criteria which the public agency uses when it initiates an evaluation. (Auth. Sec. 20-7-403, MCA; IMP, Sec. 20-7-403, MCA.)



Ed Argenbright
Superintendent of Public Instruction

Certified to the Secretary of State October 31, 1983.

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

In the matter of the adoption of rules relating to decision criteria for certificates of need for health care facilities	))))	NOTICE OF ADOPTION OF RULES 16.32.125, 16.32.126 and 16.32.127 (Certificate of Need)

To: All Interested Persons

1. On September 29, 1983, the department published notice of the adoption of proposed rules concerning decision criteria for certificates of need for health care facilities, at page 1295 of the 1983 Montana Administrative Register, issue number 18. A public hearing on the proposed rules was held on October 24, 1983.

2. The department has adopted the rules with the following changes:

16.32.125 [RULE I] ACUTE CARE BED NEED (1) Except as provided in subsections (2) and (3), acute care bed need projections will be based on the following formulas:

$$\text{Expected bed-need in target year} = \frac{\text{Average daily census in target year}}{\text{occupancy factor}}$$

Where (~~i~~a) Average daily census in target year =

$$\frac{\text{(use rate) (projected population of service area in target year)}}{365}$$

(~~ii~~b) $\text{Use rate} = \frac{\text{current 3-year average of patient-days in service area}}{\text{current population of service area}}$

(~~iii~~c) Occupancy factors are as follows:

Facility size	Occupancy Factor
under 30 beds	40 percent
30 - 89 beds	60 percent
90 beds and over	80 percent

Where a community has more than one acute care facility, the total number of acute care beds in the community will be used to determine the occupancy factor.

(2) and (3) Same as proposed.

16.32.126 [RULE II] LONG-TERM CARE BED NEED (1) Except as provided in subsection (4), regional long-term care bed-need projections for 1990 will be based on the following formulas:

$$\text{Bed Need in 1990} = \frac{\text{(Adjusted average daily census)(1990 regional population, 65 year and older)}}{\text{(1980 regional population, 65 years and older) (.925)}}$$

Where Adjusted Average Daily Census =

$$\frac{\text{(1979-~~1980~~ 1981 Average yearly patient-days for region)(.85)}}{365}$$

(2) - (4) Same as proposed.

16.32.127 [RULE III] CT-SCANNERS; NEED CRITERIA

(1) The service region for a CT-scanner is that geographic area in which the CT-scanner is closer than any other CT-scanner. All CT-scanners in the same community have the same service region.

(2)(a) and (b) Same as proposed.

(c) Existing CT-scanners in the same ~~service region~~ community as the applicant are performing and will continue to perform at least 1500 scans per year.

(d) ~~Appropriately skilled physicians~~ Appropriate physician specialties and appropriate facilities for providing medical care in areas of surgery, neurology, urology, oncology, gynecology, ~~and~~ or other specialties which can make beneficial use of CT-scanners are present in the community.

3. The following comments and testimony were received:

Comment: The Montana Health Systems Agency (MHSA) commented that the State Health Coordinating Council had recommended that the total number of beds in a community be utilized in determining the occupancy factor for acute care facilities.

Response: The department concurs and has amended 16.32.125 (Rule I) to reflect that policy.

Comment: The MHSA commented that neurology is the most common application for CT scanners and should be specifically mentioned in subsection (2)(d) of 16.32.127 (Rule III).

Response: The department concurs and has added "neurology" to the list of specialties in subsection (2)(d) of 16.32.127.

Comment: The formula for Adjusted Average Daily Census in 16.32.126 (Rule II) incorrectly used "1979-1980 Average yearly patient-days." This should have been "1979-1981." This correction has been made in the rule.

Comment: "And" is replaced with "or" in subsection (2)(d) of 16.32.127 (Rule III) in order to clarify that not all the listed specialties need be present simultaneously to satisfy the criterion.

Comment: One commenter expressed uncertainty over the definition of "service region" when there are more than one CT-scanners in the same community.

Response: Language has been added to 16.32.127 (Rule III), subsections (1) and (2)(c), to clarify this.

Comment: A commenter expressed concern that subsection (2)(d) of 16.32.127 (Rule III) implied department involvement in determining physician competency and "mix".

Response: The department will not be involved in determining physician competency. However, the presence of appropriate

specialties in a community is a legitimate inquiry in determining utilization potential for a CT-scanner. The language in 16.32.127(2)(d) (Rule III) has been amended to reflect this distinction more clearly.

Comment: St. Vincent Hospital of Billings suggested that the Department of Health and Human Services document, Technical Guidance for Planning and Review of CT Scanning Services, be used in determining need for new CT-scanners.
Response: The Department feels that the proposed rules are more appropriate than the HHS guidlines because they are less restrictive, and more accurately reflect Montana's situation of smaller, widely separated population centers. The proposed rules emphasize geographic considerations rather than number of scans, except where a scanner already exists in the community where a new scanner is proposed.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State October 31, 1983

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
OF THE STATE OF MONTANA

In the matter of the proposed adoption of rules implementing 39-51-404(4) providing for an assessment on employers making payments in lieu of contributions and the apportionment of monies received by experience rated employers.	)))))))	NOTICE OF THE ADOPTION OF RULES - 24.11.1001 THROUGH 24.11.1006

TO: All Interested Persons.

1. On September 15, 1983, the Department of Labor and Industry published notice of a proposed adoption on rules concerning providing for an assessment on employers making payments in lieu of contributions and the apportionment of monies received by experience rated employers, at page 1240-1241 of the 1983 Montana Administrative Register, issue number 17.

2. The agency has adopted the rules as proposed.

3. No comments or testimony were received.

4. The authority for the rule is 39-51-301, MCA and the rule implements 38-51-404(4), MCA.

David L. Hunter

DAVID L. HUNTER, Commissioner
Department of Labor and Industry

Certified to the Secretary of State 10/31/83.

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 bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt or amend 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, Montana State Capitol, Helena, Montana 59620.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statute and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter	1. Consult ARM topical index, volume 16. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.
Statute Number and Department	2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 1983. This table includes those rules adopted during the period October 1, 1983 through December 31, 1983, and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 1983, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1983 Montana Administrative Registers.

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