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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 20

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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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BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of rules relating to the administration of the state's equal employment opportunity and affirmative action program	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF RULES RELATING TO THE STATE'S EQUAL EMPLOYMENT OPPORTUNITY AND AFFIRMATIVE ACTION PROGRAM

To: All Interested Persons.

1. On November 20, 1984, at 12:15 p.m. in Room C-209, Cogswell Building, Helena, Montana, a public hearing will be held to consider the adoption of rules relating to the state's equal employment opportunity and affirmative action program.

2. The proposed rules provide as follows:

RULE I SHORT TITLE (1) This sub-chapter may be cited as the equal employment opportunity/affirmative action program policy.

(Auth. 2-18-102, MCA; Imp. 2-18-102 and 49-3-201, MCA)

RULE II POLICY AND OBJECTIVES (1) It is the policy of the state of Montana that:

(a) equal opportunity is a goal of state government;

(b) discriminating barriers to employment in state government must be eliminated, and

(c) an effective state equal employment opportunity program must be implemented and maintained.

(2) It is the objective of this policy to establish minimum standards for the implementation of an equal employment opportunity/affirmative action program for all executive branch agencies, in compliance with relevant state and federal law or regulation and executive order.

(Auth. 2-18-102, MCA; Imp. 2-18-102 and 49-3-201, MCA)

RULE III DEPARTMENT OF ADMINISTRATION RESPONSIBILITIES (1) The department of administration has the responsibility to administer and implement the state's equal employment opportunity/affirmative action program.

(2) At a minimum, the department shall perform the following functions:

(a) develop EEO standards and guidelines, and administrative systems to support the state EEO program, including standards for approval of agency plans;

(b) provide EEO analyses and the technical assistance needed by executive branch agencies to establish affirmative action programs;

(c) review and approve all agency affirmative action plans for compliance with federal and state law and with the requirements of the state's equal employment opportunity guidelines.

(d) prepare an annual report to the governor evaluating the progress of affirmative action in state government and recommending, where appropriate, corrective measures to be taken; and

(e) provide training for agency EEO officers.

(Auth. 2-18-102, MCA; Imp. 2-18-102 and 49-3-201, MCA)

RULE IV AGENCY PROGRAM (1) The head of each executive branch agency is responsible for the implementation of that agency's equal employment opportunity/affirmative action program.

(2) The agency head shall appoint an equal employment opportunity officer for the agency who has the authority and resources to develop the agency's program and work with managers to implement the program.

(3) The program at a minimum shall include a policy statement, described in (4) and a plan of corrective measures described in (5).

(4) Each agency shall develop a written equal employment opportunity policy statement for internal and external dissemination. The equal employment opportunity policy shall include, at a minimum, the following elements.

(a) A statement that it is the policy of the agency to provide equal employment opportunity (EEO) to all persons regardless of race, color, religion, creed, sex, national origin, age, handicap, marital status or political belief with the exception of special programs established by law.

(b) A statement that the agency will:

(i) take affirmative action to equalize employment opportunities at all levels of agency operations where there is evidence that there have been barriers to employment for those classes of people who have traditionally been denied equal employment opportunity;

(ii) make a commitment to make any reasonable accommodation to any known disability that may interfere with a disabled applicant's ability to compete in the selection process or a disabled employee's ability to perform the duties of his job.

(c) A statement guaranteeing employee protection against retaliation for lawfully opposing any discriminatory practice, including the filing of an internal grievance, the filing of a union grievance, the initiation of an external administrative or legal proceeding or testifying in or participating in any of the above.

(d) A statement assigning responsibility for coordinating the agency affirmative action program and for attempting to resolve employee EEO complaints to a designated EEO officer and assigning responsibility for implementing the affirmative action program to all agency managers and supervisors.

(e) Agency head's signature and date.

(5) An agency shall establish an affirmative action plan as prescribed by the state's equal employment opportunity guidelines (available from the state personnel division, department of administration) or in another format approved by the department of administration based on an analysis of current data which identifies problem areas and establishes goals, timetables and action items to correct problem areas.

(6) The agency shall update the plan on a schedule established by the department of administration. The agency should periodically review progress under the plan.

(7) The department of administration may require an agency to provide employment data needed to conduct more central EEO analyses to complete required EEO reports and/or to conduct special analyses where problem areas have been identified.

(8) An agency with 10 or fewer employees must develop a policy statement as required in (4), but may be exempted by the department of administration from adopting a specific plan of corrective measures as required in (5).

(Auth. 2-18-102, MCA; Imp. 2-18-102 and 49-3-201, MCA)

3. These rules have been proposed at the request of the Personnel Policy Network, a group made up of executive branch personnel officers and by agency equal employment opportunity officers, who are responsible for the equal employment opportunity and affirmative action efforts in the individual agencies. Currently, the state's equal employment opportunity and affirmative action program operates on the basis of executive order, reporting requirements of the Governmental Code of Fair Practices and state and federal guidelines.

4. The rules are proposed to be adopted to describe specific areas of responsibility of the department of administration in support of agency activities and to describe the minimum requirements with which an agency must comply to develop, implement and monitor its equal employment opportunity and affirmative action programs

These rules are proposed to be adopted under the authority of 2-18-102, which requires in part that the department of administration shall "foster and develop programs for recruitment and selection of capable persons." The department is also directed to "develop and issue personnel policies for the state," in 2-18-102(3), MCA. The department has proposed the adoption of rules specifically relating to recruitment and selection, which may be found at notice number 2-2-137, published in issue number 17 of the Montana Administrative Register, page 1199, dated September 13, 1984. Equal employment opportunity and affirmative action are an integral part of recruitment and selection. These rules are proposed to further implement the legislature's directive to "foster and develop" such programs. These proposed rules were prepared in conjunction with the proposed recruitment and selection rules and could have been incorporated into that policy. However, the department believes

that the educational value of a separate policy in this area justifies a separate set of rules.

The rules are intended to fulfill the responsibilities authorized in 2-18-102, MCA, in a way that is consistent with requirements of Executive Order 24-81 and the Code of Fair Practices, 49-3-101, et. seq. MCA.

The Governmental Code of Fair Practices provides in 49-3-201, MCA, that "(1) State and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications, without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap or national origin.

(2) All state and local governmental agencies shall:

(a) promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government;

(b) regularly review their personnel practices to assure compliance; and

(c) conduct continuing orientation and training programs with emphasis on human relations and fair employment practices.

(3) The department of administration shall insure that the entire examination process, including appraisal of qualifications, is free from bias.

(4) Appointing authorities shall exercise care to insure utilization of minority group persons.

These rules are intended to conform to these requirements. These rules are not intended to interfere with the authority of the Human Rights Commission to adopt rules pursuant to this act and would be amended to be consistent with any rules the commission may adopt.

5. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing to:

Dennis M. Taylor, Administrator
State Personnel Division
Department of Administration
Room 130, Mitchell Building
Helena, Montana 59620

no later than November 26, 1984.

6. Mark Cress, Chief, Employee Relations Bureau, State Personnel Division, Department of Administration, Mitchell Building, Helena, Montana 59620, has been designated to preside over and conduct the hearing.

7. The authority of the agency to make the proposed adoption is based on 2-18-102, MCA, and the rules implement 2-18-102 and 49-3-201, MCA.

Morris L. Brusett, Director
Department of Administration

Certified to the Secretary of State October 15, 1984.

STATE OF MONTANA
BEFORE THE DEPARTMENT OF COMMERCE

In the matter of the proposed adoption of rules concerning airport certification and licensing	))))	NOTICE OF PUBLIC HEARING ON ADOPTION OF AIRPORT CERTIFICATION AND LICENSING RULES

TO: All Interested Persons.

1. On December 14, 1984 at 9:00 a.m., a public hearing will be held in the board room in the Aeronautics Division Office Building, 2630 Airport Road, Helena, Montana, to consider the adoption of airport certification and licensing rules.

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

3. The proposed rules will provide as follows:

"I. DEFINITIONS Unless the context requires otherwise, in these rules the definitions set forth in 67-1-101, MCA, will apply in addition to the following:

(1) 'Class AA airport' means an airport possessing a current and valid operating certificate issued by the federal government.

(2) 'Class A airport' means an airport receiving scheduled air carrier service and having obstruction free imaginary surfaces as appropriate.

(3) 'Class B airport' means an airport meeting the dimensional standards set forth in FAA Utility Airport Advisory Circular for General Utility airports and having obstruction free imaginary surfaces as appropriate.

(4) 'Class C airport' means an airport meeting the dimensional standards set forth in the FAA Utility Airports Advisory Circular for Basic Utility Stage II airports and having obstruction free imaginary surfaces as appropriate.

(5) 'Class D airport' means an airport meeting the dimensional standards set forth in FAA Utility Airports Advisory Circular for Basic Utility Stage I airports and having obstruction free imaginary surfaces as appropriate.

(6) 'Class E airport' means an airport not meeting any particular dimensional or obstruction criteria but which is open to use by any pilot who possesses the skill to operate an aircraft which, according to the aircraft manufacturer's specifications can safely operate within the dimensions of that airport. A person using a Class E airport does so at his own risk.

(7) 'FAA Utility Airport Advisory Circular' means Advisory Circular 150/5300-4B published by the Federal Aviation Administration of the United States.

(8) 'Heliport' means an area of land, water, or structure designated for the landing or takeoff of helicopters

or other rotorcraft which meets the design criteria set forth in FAA Advisory Circular 150/5390-1B Heliport Design Guide.

(9) 'Imaginary surfaces' means those civil airport imaginary surfaces as defined in Part 77.25 of the Federal Aviation Regulations.

(10) 'Division' means the Montana aeronautics division of the Montana department of commerce.

(11) 'Administrator' means the administrator of the Montana aeronautics division of the department of commerce."

Auth: 67-2-102, MCA Imp: 67-3-101, MCA

"II. AIRPORT SITE CERTIFICATION (1) A municipality or person acquiring or designating presently owned property for the purpose of constructing or establishing an airport or restricted landing area after the effective date of these rules shall first make written application to the department on forms provided by the department for a certificate of approval of the site selected, and the general purpose for which the proposed airport or restricted landing area is to be used. This provision of these rules applies equally to establishment of new airports, or substantial modification of an existing facility. Substantial modification means any significant change of physical dimensions, as determined by the division, or any change of physical conditions which cause the airport to become unsafe or unuseable for the aeronautical purposes for which the original license was issued. Such application for site certification shall set forth the proposed use of the airport, a map, plan or sketch depicting location, layout, dimensions, topographical features, obstructions, and relationship to all other aeronautical facilities within five miles. In addition, any applicant under these rules, shall show in writing, that he or it has legal access to, and control of, the proposed site or airport as owner, co-owner, leasee, special use permit, or by any other commonly recognized legal right of control and user.

(2) Within a reasonable time after receipt of an application for site approval or modification, an inspection will be scheduled. After the division's inspection as provided herein, a determination will be made whether to grant or deny approval. Such determination will take into consideration public safety; the facility's proposed location, size, and layout; the public need and conveniences; its relationship and compatibility with the Montana state airport system plan and the national plan of integrated airports systems; whether there exist adequate expansion possibilities; whether the imaginary surfaces criteria contained in FAR Part 77 can be satisfied; whether the site and usage complies with all other applicable and pertinent governmental regulations and standards."

Auth: 67-2-102, MCA Imp: 67-3-104, 301, 303, MCA

"III. AIRPORT LICENSING (1) Applications for licensing of airports and restricted landing areas, required to be licensed under 67-3-301, MCA, shall be made upon forms provided by the department, and shall be accompanied by the license fee of $1.00 as provided by 67-3-101, MCA.

(2) Upon receiving the licensing application and fee, the department shall conduct an inspection which shall take into consideration whether the facility is serving the public convenience and necessity in a safe and efficient manner; whether or not discrimination is practiced; whether the appropriate FAR Part 77 standards relative to imaginary surfaces are obstruction free; whether or not all things affecting the safety and efficiency of the airport are being operated and/or maintained in accordance with reasonable, effective, and applicable standards. A determination will be made by the division of the appropriate class to which an airport will be assigned. A license issued under the provisions herein shall expire one year from the date of issuance. Licenses issued under these rules will be prominently displayed at the airport."

Auth: 67-2-102, MCA Imp: 67-3-101 (3), 104, 301, 303, MCA

"IV. SEAPLANES AND FLOAT PLANES (1) Seaplanes utilizing public waters on which to land, take off, and taxi shall comply with appropriate United States Federal Aviation Administration and United States Coast Guard regulations, as well as those regulations which may be set forth by other appropriate authorities or enforcement agencies for boats or vessels, which are deemed appropriate for seaplane/boat safety while operating on such public waters."

Auth: 67-2-102, MCA Imp: 67-3-304, MCA

"V. INSPECTION (1) Aeronautics division personnel shall be permitted at any time to make such inspections as deemed necessary to determine compliance with Montana Codes Annotated and these rules."

Auth: 67-2-102, MCA Imp: 67-3-105, 304, MCA

"VI. REVOCATION (1) The department may temporarily or permanently revoke a certificate of approval or license issued by it when it determines that an airport or restricted landing area fails to meet safety standards; is practicing discrimination; or is not being maintained or used in accordance with the provisions of the Montana aeronautics code and these rules."

Auth: 67-2-102, MCA Imp: 67-3-104, 304, MCA

"VII. PUBLIC HEARINGS (1) The department may, in its discretion, hold a public hearing before making an order granting or denying a certificate of approval or original

license to use or operate an airport, restricted landing area, or other air navigational facility.

(2) When the department makes an order granting or denying a certificate of approval or an airport or restricted landing area operating license, public hearings may be demanded and held as provided by 67-3-302, MCA."

Auth: 67-2-102, MCA Imp: 67-3-302, MCA

"VIII. EXEMPTIONS In addition to exemptions provided in 67-3-305 and 67-3-306, the following are provided for:

(1) Airports and restricted landing areas in existence as of August 2, 1984, which were then depicted upon DOT-FAA aeronautical charts available for public distribution, shall automatically be exempt from the requirements of site certification approval.

(2) In lieu of an inspection by aeronautics division personnel, the division may issue a license upon receipt of an official certification from an airport sponsor certifying that their airport has been inspected and certified or licensed by the U.S. government. The expiration of such license shall be one year after the issuance of the US government's certification or license."

Auth: 67-2-102, MCA Imp: 67-3-301, MCA

"IX. LIABILITY Nothing in these rules shall be construed as a representation or guarantee by the state of Montana as to the safety and adequacy of conditions at an airport at any given moment. Nothing herein relieves the pilot in command of an aircraft of his primary responsibility for safe operation of his aircraft, nor the airport owner/operator of its primary responsibility for the safety and useability of its facility."

Auth: 67-2-102, MCA Imp: 67-3-301, MCA

4. The foregoing rules are necessary to establish a procedure to license airports under Montana's statutes. The establishment of a procedure to license airports, and the actual licensing of airports meeting the appropiate criteria, was mandated by Judge Henry Loble in Lewis and Clark County District Court proceeding number 49580, on August 2, 1984.

Copies of the pertinent sections of the Federal Aviation Regulations and the FAA Advisory circulars cited above are available at the Montana Aeronautics Division office at the address specified herein.

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 Michael J. Ferguson, Division Administrator, Aeronautics Division, 2630 Airport Road, Helena, Montana 59620, no later than December 7, 1984.

6. James A. McLean, Attorney, Bozeman, will preside over and conduct the hearing.

DEPARTMENT OF COMMERCE

BY: GARY BUCHANAN, DIRECTOR

Certified to the Secretary of State October 15, 1984.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of Rules 42.22.101, 42.22.103, 42.22.105, 42.22.106, 42.22.111, 42.22.112, 42.22.114, 42.22.115, 42.22.121, and 42.22.122, all of which relate to the assessment and taxation of centrally assessed companies.	NOTICE OF PUBLIC HEARING on Rules 42.22.101, 42.22.103, 42.22.105, 42.22.106, 42.22.111, 42.22.112, 42.22.114, 42.12.115, 42.22.121, and 42.22.122, all of which relate to the assessment and taxation of centrally assessed companies.

TO: All Interested Persons:

1. On November 19, 1984, at 10:00 a.m., a public hearing will be held in the First Floor Conference Room of the Social & Rehabilitation Building, at Helena, Montana, to consider the amendment of rules 42.22.101, 42.22.103, 42.22.105, 42.22.106, 42.22.111, 42.22.112, 42.22.114, 42.22.115, 42.22.121, and 42.22.122, all of which relate to the assessment and taxation of centrally assessed companies.

2. The rules as proposed to be amended provide as follows:

42.22.101 DEFINITIONS (1) through (6) remain the same.

(7) "Correlate" as used in the unit method of valuation, is the blending of the indicator(s) of value into one unit value with no specific weight applied to any indicator.

(7) through (16) remain the same but will be renumbered.

(18) "Taxable period" refers to the entire period of the immediate preceding calendar year. All operations of a centrally assessed company during a taxable period are assessed during the immediate following calendar year.

(17) and (18) remain the same but will be renumbered.

AUTH: 15-23-108 MCA; IMP: Title 15, chapter 23, part 1 MCA.

42.22.103 DETERMINATION OF OPERATING AND NONOPERATING PROPERTY (1) and (2) remain the same.

(3) Gathering lines owned and operated by centrally assessed pipeline companies will be considered operating property. All other gathering lines will be considered nonoperating property to be reported to the local county appraiser.

AUTH: 15-23-108 MCA; IMP: Title 15, chapter 23, part 1 MCA.

42.22.105 REPORTING REQUIREMENTS (1) and (2) remain the same.

(3) In addition to the report each centrally assessed company must revise and update ~~a statement~~ statements of situs and mileage ~~printout~~ printouts provided by the department and return ~~it~~ them along with the report. ~~Telephone, telegraph, and microwave companies shall also include a list of Montana commu-~~

~~nications equipment and towers including book cost and the school and special districts in which they are situated.~~ The information on the printouts shall be reported by county and taxing units in which they are situated. The situs printouts shall contain the following additional information for operating situs property:

(a) complete description of the property; and

(b) installed cost and date of installation if required under 42.22.122(3). If additions have been made to operating property then there should be a breakdown of installed costs and dates under the property listing.

AUTH: 15-23-108 MCA; IMP: 15-23-103, 15-23-201, 15-23-301, 15-23-402, 15-23-502, 15-23-602, and 15-23-701 MCA.

42.22.106 ADDITIONAL REPORTING REQUIREMENTS FOR CENTRALLY ASSESSED RAILROADS (1) Each year all centrally assessed railroads shall submit by April 15 a report of operations for the preceding year containing in addition to that information required by 42.22.105 the following information and items:

(a) copies of all Montana valuation maps;

(b) copies of all Montana track charts;

(c) a statement setting forth by individual counties the total acreage of Montana real property and right-of-way;

(d) a statement setting forth by individual state the total acreage of all system real property and right-of-way;

(e) a statement of all track in Montana listing the pattern weight, number of miles, and location by railroad segment and milepost; and

(f) a statement of all agreements authorizing the longitudinal use of Montana right-of-way, including for each agreement the names of the parties to the agreement, a summary of its terms, the amounts paid thereunder, the longitudinal use contemplated, and the location and length of right-of-way covered ~~;~~ .

~~(g)--a statement of all monthly bad order ratios for cars and locomotives in Montana;~~

~~(h)--a statement by network segment of Montana gross and net tons hauled during the year and a copy of any chart setting forth this information;~~

~~(i)--a statement by network segment of system gross and net tons hauled during the year; and a copy of any chart setting forth this information;~~

~~(j)--a copy of the company's freight car diagram book;~~

~~(k)--a statement setting forth all locomotive tonnage ratings;~~

~~(l)--a copy of Montana employee timetable for the year;~~

~~(m)--a copy of Montana operating rules;~~

~~(n)--a copy of freight train schedules for the year;~~

~~(o)--a list of all Montana equipment and repair shops and yards;~~

(2) and (3) remain the same.

AUTH: 15-23-108 MCA; IMP: 15-23-201 MCA.

42.22.111 VALUATION METHOD (1) The unit method of valuation will be used to appraise centrally assessed companies whenever appropriate. When applying this method, the department will use commonly accepted methods and techniques of appraisal to determine market value. The application of the unit method may include a cost indicator, capitalized income indicator, and a market indicator (stock and debt) of value when sufficient information is available. If the department determines that an individual indicator, the unit method of valuation or other method of valuation does not reflect a company's market value or that information is unavailable, it may adopt a different method or methods of valuation, including but not limited to net scrap, net salvage, corridor value in the case of railroads, comparative market sales in the case of airlines, or any combination of methods of valuation which reflect the company's market value.

(2) When the unit method of valuation is used with multiple indices of value, they will be combined into one (system) value. Combining of the indices shall require the department to review all available information including: reliability of the cost data, sufficiency of the depreciation allowed, frequency of full audit by a regulatory agency, quality of the income to be capitalized, level of income to be capitalized, accuracy of information used to set a capitalization rate, accounting principles used to report data from which the valuation is made, fluctuations in the stock market, methods used by other taxing authorities, and all other pertinent information. After ~~thoroughly acquainting itself with the indices, the department shall determine the degree to which each indicator will influence the unit valuation.~~ examination of the above information the department shall correlate the indices into one system value.

(3) This rule shall be effective for all reporting years ending December 31, 1981 and thereafter.

AUTH: 15-23-108 MCA; IMP: Title 15, chapter 23, part 1 MCA.

42.22.112 COST INDICATOR (1) and (2) remain the same.

(3) The choice of cost shall depend upon which type best reflects market value of the property at the time of valuation. For taxable periods ending on or beginning after December 31, 1985, the cost indicator shall be consistent with the cost approach used in valuation of other commercial and industrial property.

AUTH: 15-23-108 MCA; IMP: Title 15, chapter 23, part 1 MCA.

42.22.114 INCOME INDICATOR (1) The income indicator will be determined by the capitalization of the company's operating income, cash flow analysis, or capital asset pricing models. The capitalization rate used by the department may be determined by the band of investment theory or any other generally accepted method. In determining a capitalization rate the department shall consider the level of income to be capitalized. The income which the department capitalizes ~~will normally~~ may be a

~~2-year~~ historic average or a projected level of income ~~, however, it may be a longer or shorter period,~~ depending upon the department's analysis of future earning capacity.
AUTH: 15-23-108 MCA; IMP: Title 15, chapter 23, part 1 MCA.

42.22.115 NOTIFICATION AND HEARING (1) Remains the same.
~~(2)--Within 10 days after receipt of the department's intended action, a centrally assessed company (except airlines) may request a hearing before the director of the department of revenue to show cause why the valuation should either be lowered or raised. Airlines are allowed 30 days to request a hearing. The request shall contain the specific points to which the company takes exception.~~
~~(3)~~ (2) If the company does not find the results of the department hearing satisfactory, an appeal may be made to the state tax appeal board for review.
~~(4)~~ (3) If additional time is needed for filing reports or preparing for hearings, the department must receive the request prior to the due date if the extension request is to be considered.
AUTH: 15-23-108 MCA; IMP: 15-23-102 and 15-23-403 MCA.

42.22.121 ALLOCATION PROCEDURE (1) and (2) remain the same.
(3) For the purpose of allocating the unit value, quantity, use, and productivity ratios may be applied. Following are examples of possible ratios the department may apply to allocate unit value to Montana. The following examples shall not be construed to prohibit the use of other factors in the allocation process:
(a) for airlines:
(i) Western States Association of Tax Administrators formula which separates mobile and terminal property for the purpose of allocation;
(ii) originating and terminating tons;
(iii) equated ground hours;
(iv) equated flight hours;
(v) revenue ton miles;
(vi) arrivals and departures;
(b) for electric:
(i) cost;
(ii) revenue;
(iii) wire miles;
(iv) pole line miles;
(c) for gas:
(i) cost;
(ii) revenue;
(iii) pipe miles;
(iv) mcf miles;
(d) for pipelines:
(i) cost, trended cost, depreciated cost;

(ii) mcf miles;
(iii) pipe miles;
(iv) barrel miles;
(e) for railroads;
(i) track mileage;
(ii) train miles;
(iii) revenue traffic units;
(iv) revenue;
(v) car and locomotive miles;
(vi) cost;
(vii) originating and termination tonnage;
(f) for telephone:
(i) cost;
(ii) revenue;
(iii) telephone;
(g) for telegraph:
(i) cost;
(ii) revenue;
(h) for microwave;
(i) cost;
(ii) revenue.

(3) Remains the same.

AUTH: 15-23-108 MCA; IMP: Title 15, chapter 23 MCA.

42.22.122 APPORTIONMENT PROCEDURE (1)(a) To determine the amount of value available for distribution to the taxing units, the department shall deduct the Montana situs property value from the Montana unit value. The difference is apportioned to the taxing units as provided in subsection (2).

(b) The Montana situs property value is apportioned to the taxing units as provided in subsection (3).

(c) The Montana situs property value (MSPV) ~~is~~ may be determined from the following ~~equation~~ equations:

(i) $$\text{MSPV} = \text{Installed cost of Montana Situs property} \times \frac{\text{(Total unit value)}}{\text{Total installed cost of all operating property for the unit.}}$$

(ii) $$\text{MSPV} = \frac{\text{Installed cost of Montana Situs property}}{} \times \frac{\text{MT unit value}}{\text{Total installed cost of MT operating property for the unit.}}$$

(2) Remains the same.

(3) The Montana situs property value is apportioned to the taxing units in which the property is situated. To accomplish this, the department may utilize one of the two following methods:

(a) ~~the~~ total installed cost of situs property in each taxing unit ~~is~~ multiplied by the percentage computed by dividing the MSPV developed in subsection (1)(c) by the total installed cost of Montana situs property~~.~~; or

(b) total installed cost of situs property in each taxing unit multiplied by a trending index to arrive at a current dollar value for all property. The trending index may be determined by the following indices:

(i) Implicit Price Deflator

(ii) Handy-Whitman; or

(iii) other indices that attempt to measure price change for like properties. The current dollar price of situs property is then multiplied by the MSPV developed in subsection (1)(c).

(4) Recognizing the difficulty in generating installed cost data, and dates of installation, the department will, upon written request, consider ~~grant~~ granting an extension until December 31, ~~1981~~ 1986, for information requested as of December 31, 1985, to any centrally assessed company in order to enable the company to provide the necessary cost information. If an extension is granted, the company is required to assist the department in developing an acceptable method of apportioning the ~~1980~~ 1986 valuation.

AUTH: 15-23-108 MCA; IMP: Title 15, chapter 23 MCA.

3. The Department is proposing these amendments to existing rules for the following reasons:

42.22.101(7) and 42.22.111(2) - Rules 42.22.101(7) and 42.22.111(2) are proposed to be amended to eliminate the current policy of assigning fixed weights to the various indicators of value (cost, income, and market) and determine a correlated value based on a blending of the indicator(s). The blending will be based on the reliability of the indicators and an analysis of the industry. Fixed weights for industry groups do not necessarily reflect the individual companies operations. These amendments will serve to notify the taxpayers that the Department may utilize appraisal methodologies other than the ones which have historically been employed.

42.22.101 - A new subsection (18) is proposed to be added to rule 42.22.101 to clarify the taxable period and tax year for centrally assessed companies to ensure companies periodically operating in Montana do not escape assessment. This amendment will clarify the period(s) for which a taxpayer, subject to central assessment, may expect to be assessed.

42.22.103 - Rule 42.22.103 is proposed to be amended by adding a new subsection (3) to more clearly define which gathering lines shall be subject to central assessment and which gathering lines shall be subject to local appraisal.

42.22.105 and 42.22.122 - Subsection (3) of rule 42.22.105 and subsections (1)(c), (3), and (4) of rule 42.22.122 are proposed for amendment to clarify reporting requirements of centrally assessed companies and request additional information in order to adjust tax inequities among the counties.

42.22.106 - Subsection (1)(g) through (o) of rule 42.22.106 is proposed to be deleted to ensure that the rules governing the appraisal of railroad operating properties comport with the Railroad ReVitalization and Regulatory Reform Act of 1976.

42.22.111, 42.22.112, and 42.22.114 - Subsection (1) of rule 42.22.111, subsection (3) of rule 42.22.112, and subsection (1) of rule 42.22.114 are proposed to be amended to clarify valuation procedures for centrally assessed companies in order to promote valuation equalization with other similar properties in conjunction with the completion of the 1986 reappraisal.

42.22.115 - Subsection (1) of rule 42.22.115 is proposed to be deleted in order to eliminate valuation hearings before the Director of the Department of Revenue in order to meet statutory deadlines imposed under 15-23-106, MCA. These hearings are largely superfluous in that the taxpayer has adequate legal recourse to the State Tax Appeal Board and the courts.

42.22.121 - Subsection (3)(d)(i) of rule 42.22.121 is proposed to be amended to add additional allocation methods for pipelines to ensure equitable allocation of values among the states.

4. Interested parties 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:

Ann Kenny
Department of Revenue
Legal Division
Mitchell Building
Helena, Montana 59620

no later than November 22, 1984.

5. Barbara Bozman-Moss, 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 is based on § 15-23-108, MCA. The rules implement §§ 15-23-102, 15-23-103, 15-23-201, 15-23-301, 15-23-402, 15-23-403, 15-23-502, 15-23-602, 15-23-701, MCA, and Title 15, chapter 23, part 1, MCA.

Ellen Feaver

ELLEN FEAVER, Director
Department of Revenue

Certified to Secretary of State 10-15-84

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE REPEAL of Rule 42.21.133 relating to oil field machinery and supplies; the AMENDMENT of Rules 42.21.101, 42.21.107, 42.21.123, and 42.21.151 relating to the market value of personal property; and the ADOPTION of NEW RULE I relating to leased and rented equipment; NEW RULE II relating to abstract record valuation; NEW RULE III relating to property reporting time frames; and NEW RULES IV through VII relating to oil field machinery and equipment.	NOTICE OF PUBLIC HEARING on the Proposed Repeal of Rule 42.21.133; the AMENDMENT of Rules 42.21.101, 42.21.107, 42.21.123, and 42.21.151; and the ADOPTION of New Rules I through VII.

TO: All Interested Persons:

1. On November 16, 1984, at 10:00 a.m., a public hearing will be held in Rooms 159-160 of the Mitchell Building, at Helena, Montana, to consider the repeal of rule 42.21.133; the amendment of rules 42.21.101, 42.21.107, 42.21.123, and 42.21.151 relating to the market value of personal property; and the adoption of New Rule I relating to leased and rented equipment; New Rule II relating to abstract record valuation; New Rule III relating to property reporting time frames; and New Rules IV through VII relating to oil field machinery and equipment.

2. The Department proposes to repeal rule 42.21.133 relating to oil field machinery and supplies. The rule as proposed to be repealed may be found on page 42-2128 of the Administrative Rules of Montana.

3. The rules as proposed to be amended and adopted provide as follows:

42.21.101 AIRCRAFT (1) Remains the same.

(2) The department shall add or delete equipment or high and low hours according to the instructions set forth in the "Aircraft Price Digest".

(3), (4), and (5) remain the same.

(6) This rule is effective for tax years beginning after December 31, ~~1983~~ 1984.

AUTH: 15-1-201 MCA; IMP: 15-6-138 MCA.

42.21.107 TRAILERS (1) and (2) remain the same.

(3) If the above named publications do not value these properties, the department of revenue shall develop trended depreciation tables in which the percentages will approximate:

(a) the estimated current value less repairs-high for all trailers 18,000 gvw and under as calculated from the guidebook listed in subsection (1) and;

(b) ~~the quick sale value for all trailers over 18,000 gvw as calculated from the guidebook listed in subsection (2);~~ the wholesale value for all trailers over 18,000 gvw as calculated from the schedule referred to in ARM 42.21.106(2).

(4), (5), and (6) remain the same.

(7) This rule is effective for tax years beginning after December 31, ~~1983~~ 1984.

AUTH: 15-1-201 MCA; IMP: 15-6-138 and 15-6-139 MCA.

42.21.123 FARM MACHINERY AND EQUIPMENT (1) The average wholesale value for farm machinery and equipment shall be the ~~estimated current value less repairs-high as shown in "Farm Tractor Trade-In Guide" and "Farm Equipment Trade-In Guide" of the current year of assessment, Technical Publications Division, Intertec Publishing Corporation, Box 12901, Overland Park, Kansas 66212. This publication may be reviewed in the department or purchased from the publisher.~~ "average as is" value as shown in the "Official Guide Tractors and Farm Equipment", Spring Edition, for the year of the assessment. This guide may be reviewed in the department or purchased from the publisher: National Farm and Power Services, Inc., 10877 Watson Road, P. O. Box 8517, St. Louis, Missouri 63126.

(2) If the above ~~named publications do~~ publication does not value these properties, the department of revenue shall develop trended depreciation ~~tables in which the percentages will approximate the estimated current value less repairs-high as calculated from the~~ schedules using the ~~guidebooks~~ guidebook listed in subsection (1) and the "Farm Tractor Trade-In Guide" and "Farm Equipment Trade-In Guide" of the current year of assessment, Technical Publications Division, Intertec Publishing Corporation, Box 12901, Overland Park, Kansas 66212, as the data base. These trended depreciation schedules will approximate wholesale value.

(3) Remains the same.

(4) If the methods mentioned in subsections (1) and (3) cannot be used to ascertain ~~an estimated current~~ a wholesale value ~~less repair-high~~ for farm machinery and equipment, the owner or applicant must certify to the department of revenue or its agents the year acquired and the acquired price before that value can be applied to the table in subsection (2).

(5) Remains the same.

(6) This rule is effective for tax years beginning after December 31, ~~1983~~ 1984.

AUTH: 15-1-201 MCA; IMP: 15-6-138 MCA.

42.21.151 TELEVISION CABLE SYSTEMS (1) The average market value of television cable systems is $2,000 per mile of ~~co-axial~~ coaxial cable (transmission line) and $25 per service drop.

(2) The average market value for the dishes and towers will be determined by using ~~the following valuation tables. These tables were~~ a 5-year trended depreciation schedule on dishes and a 10-year trended depreciation schedule on towers. Both the trend factors and the depreciation tables will be derived from the Marshall and Swift Publication Company, 1617 Beverly Boulevard, P. O. Box 26307, Los Angeles, California 90026.

~~TABLE 1: 5 YEARS "DISHES"~~

AGE	% GOOD	TREND FACTOR	% TRENDED DEPRECIATION
1 Year Old	85%	1.000	85%
2 Years Old	69%	1.106	76%
3 Years Old	52%	1.214	63%
4 Years Old	34%	1.348	46%
5 Years Old and Older	20%	1.443	29%

~~TABLE 2: 10 YEARS "TOWERS"~~

AGE	% GOOD	TREND FACTOR	% TRENDED DEPRECIATION
1 Year Old	92%	1.000	92%
2 Years Old	84%	1.106	92%
3 Years Old	76%	1.214	92%
4 Years Old	67%	1.348	90%
5 Years Old	58%	1.443	83%
6 Years Old	49%	1.535	75%
7 Years Old	39%	1.635	63%
8 Years Old	30%	1.744	52%
9 Years Old	24%	2.127	51%
10 Years Old and Older	20%	2.197	43%

(3) The trended depreciation schedules will be applied to the acquired cost and year acquired of the dish or tower.

~~(3)~~ (4) The dishes are circular shaped pieces of equipment used to receive the television signal. The towers are structures (usually metal) used to support any receiving equipment.

(5) All other television cable system equipment not valued from the above schedule will be valued according to guidelines in ARM 42.21.156(4).

~~(4)~~(6) This rule ~~will be~~ is effective for tax years beginning after December 31, ~~1981~~, ~~1978~~ 1984.

AUTH: 15-1-201 MCA; IMP: 15-6-140 MCA.

RULE I LEASED AND RENTED EQUIPMENT (1) Equipment leased or rented must meet all of the following criteria to qualify as class 6 property:

(a) the full and true value of the personal property is less than $5,000.00;

(b) the personal property is owned by a business whose primary business income is from rental or lease of personal property to individuals wherein no one customer of the business accounts for more than 10% of the total rentals or leases during a calendar year; and

(c) the lease of the personal property is generally on an hourly, daily, or weekly basis.

(2) Leased or rental equipment which meets the criteria of subsection (1) will be valued in the following manner:

(a) For equipment that has an acquired cost of $0 to $500, the department shall prepare a 3-year trended depreciation schedule.

(b) For equipment that has an acquired cost of $501 to $1500, the department shall prepare a 5-year trended depreciation schedule.

(c) For equipment that has an acquired cost of $1501 to $5000, the department shall prepare a 7-year trended depreciation schedule.

(3) The trend factors and depreciation factors will be derived from the "Marshall and Swift Publication Company". The taxpayer must report the acquired cost, year acquired and an itemized description of each piece of equipment. The acquired cost will be applied to the above schedule to arrive at market value.

(4) Lease or rental equipment which does not meet all of the criteria of subsection (1), shall be assessed and taxed in the appropriate class of property in which it is specifically included.

(5) Business inventories do not include goods held for lease and rent or goods leased or rented.

(6) This rule is effective for tax years beginning after December 31, 1984.

AUTH: 15-1-201 MCA; IMP: 15-6-136 MCA.

RULE II ABSTRACT RECORD VALUATION (1) The market value for all abstract records will be the value at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.

(2) If there is no market data available to the taxpayer, the value reported to the department must represent current replacement cost of the records. The current replacement cost shall be the total cost of replacing the records including the information contained on the record. The cost shall indicate that the record is in such a condition that it can be used in the normal day to day business.

(3) At no time will the market value be less than one dollar per parcel. The number of parcels per county shall be determined by the previous year end parcel count as determined by the Residential-Commercial Bureau.

(4) This rule is effective for tax years beginning after December 31, 1984.

AUTH: 15-1-201 MCA; IMP: 15-6-140 MCA.

RULE III PROPERTY REPORTING TIME FRAMES (1) Taxpayers having property in the state of Montana on January 1 of each year must complete the statement as provided for in 15-8-301, MCA. With the exception of livestock owners who elect a March 1 reporting date, the taxpayer has 30 days from the date of receipt of any request for information to respond to the department of revenue or its agent's request for information. The department or its agent may grant a 10 day extension if the taxpayer requests such an extension during the 30 day period.

(2) If the taxpayer shall fail to respond to the department or its agent's request for information during the time frames set forth in subsection (1), the department or its agent shall assess the property under the provisions of 15-1-303, MCA.

(3) If such requests for information involve migratory property as defined in 15-24-301, MCA, the taxpayer will have 5 days to respond to the department or its agent's request for information as provided by 15-16-111, MCA. The department or its agent may grant a 10 day extension if the taxpayer requests such an extension during the 5 day period and the department or its agent is satisfied the property will remain in the county for a time period sufficient to guarantee the payment of taxes.

(4) If the taxpayer shall fail to respond to the department or its agent's request for information during the time frames set forth in subsection (3), the department or its agent shall assess the property under the provisions of 15-1-303, MCA.

(5) A taxpayer who raises livestock and elects the March 1 reporting date has 5 days from March 1 to respond to the department or its agent's request for information. The department or its agent may grant a 10 day extension if the taxpayer requests such an extension during the 5 day period.

(6) This rule is effective for tax years beginning after December 31, 1984.

AUTH: 15-1-201 MCA; IMP: 15-8-303 MCA.

RULE IV SEISMOGRAPH UNITS AND ALLIED EQUIPMENT (1) Seismograph units and allied equipment shall be valued using the

cost approach to market value. The taxpayer must provide to the department or its agent the acquired cost, the year acquired, and an itemized description of each piece of equipment. The acquired cost will be trended to current replacement cost and then depreciated according to the schedules mentioned in subsection (2).

(2) The department of revenue shall prepare a 5-year trended depreciation schedule for seismograph units and a 5-year trended deprecation schedule for all other allied seismograph equipment. These trended depreciation schedules will be derived by using trend factors and depreciation factors published by "Marshall and Swift Publication Company". The trend factors shall be the most recent available from the "Chemical Industry Cost Indexes" listed in the above publication.

(3) For wheeled seismograph units an additional 80% wholesale factor shall be used in determining market value.

(4) This rule is effective for tax years beginning after December 31, 1984.

AUTH: 15-1-201 MCA; IMP: 15-6-138 MCA.

RULE V OIL AND GAS FIELD MACHINERY AND EQUIPMENT (1) Oil and gas field machinery and equipment shall be valued using the cost approach to market value. The taxpayer must provide to the department or its agent the acquired cost, the year acquired, and an itemized description of each piece of machinery and equipment. The acquired cost will be trended to current replacement cost and then depreciated according to the schedule mentioned in subsection (2).

(2) The department of revenue shall prepare a 15-year trended depreciation schedule for oil and gas field machinery and equipment. The trended depreciation schedule will be derived by using trend factors and depreciation factors published by "Marshall and Swift Publication Company." The trend factors shall be the most recent available from the "Chemical Industry Cost Indexes" listed in the above publication.

(3) This rule is effective for tax years beginning December 31, 1984.

AUTH: 15-1-201 MCA; IMP: 15-6-138 MCA.

RULE VI WORKOVER AND SERVICE RIGS (1) Each tax year bids for new rigs will be solicited from manufacturers of workover and service rigs to determine current replacement costs based on the depth rating listed below. For each depth rating listed below of workover and service rigs, there will be 2 replacement cost value categories. One value category will represent average good quality of a rig and the second value category will represent average fair quality of a rig. Each rig as it is assessed will be placed in one value category or another based on its depth and quality.

DEPTH CATEGORIES

Class	Depth Capacity
1	0 to 3,000 ft.
2	3,001 ft. to 5,000 ft.
3	5,001 ft. to 8,000 ft.
4	8,001 ft. to 10,000 ft.
5	10,001 ft. to 14,000 ft.
6	14,001 ft. and over

These replacement costs will then be depreciated to arrive at market value according to the schedule mentioned in subsection (2).

(2) The department of revenue shall prepare a 10-year depreciation schedule for workover and service rigs. The depreciation schedule shall be derived from depreciation factors published by "Marshall and Swift Publication Company".

(3) In any year that the information required in subsection (1) is not available for use by the department, workover and service rigs shall be valued by using the cost approach to market value. The taxpayer must provide to the department or its agent the acquired cost, the year acquired, and an itemized description of each piece of equipment. The acquired cost will be trended to current replacement cost and then depreciated according to the schedules mentioned in subsection (4).

(4) The department of revenue shall prepare a 10-year trended depreciation schedule for workover and service rigs. The trended depreciation schedule will be derived by using trend factors and depreciation factors published by "Marshall and Swift Publication Company". The trend factors shall be the most recent available from the "Chemical Industry Cost Indexes" listed in the above publication.

(5) The department of revenue shall annually prepare a trended depreciation schedule for workover and service rig components in addition to those components included in subsection (1) on the basic rig. The trended depreciation schedule shall be developed based on the methodologies mentioned in subsections (3) and (4).

(6) For self propelled wheeled workover and service rigs an additional 80% wholesale factor shall be used in determining market value in conjunction with the schedules mentioned in subsection (2) and subsection (4).

(7) This rule is effective for tax years beginning after December 31, 1984.

AUTH: 15-1-201 MCA; IMP: 15-6-138 MCA.

RULE VII OIL DRILLING RIGS (1) Each tax year bids for new rigs will be solicited from manufacturers of oil drilling rigs to determine current replacement costs based on the depth rating listed below. For each depth rating listed below for oil

drilling rigs, there will be 2 replacement cost value categories. One value category will represent average good quality of a rig and the second value category will represent average fair quality of a rig. Each rig as it is assessed will be placed in a value category based on its depth and quality.

DEPTH CATEGORIES

Class	Depth Capacity
1	0 to 3,000 ft.
2	3,001 ft. to 5,000 ft.
3	5,001 ft. to 7,500 ft.
4	7,501 ft. to 10,000 ft.
5	10,001 ft. to 12,500 ft.
6	12,501 ft. to 15,000 ft.
7	15,001 ft. to 20,000 ft.
8	20,001 ft. and over

The depth capacity for drilling rigs will be based on the "Manufacturers Depth Rating". These replacement costs will then be depreciated to arrive at market value according to the schedule mentioned in subsection (2).

(2) The department of revenue shall prepare a 15-year depreciation schedule for oil drilling rigs. The depreciation schedule shall be derived from depreciation factors published by "Marshall and Swift Publication Company".

(3) In any year that the information required in subsection (1) is not available for use by the department, oil drilling rigs shall be valued by using the cost approach to market value. The taxpayer must provide to the department or its agent the acquired cost, the year acquired, and an itemized description of each piece of equipment. The acquired cost will be trended to current replacement cost and then depreciated according to the schedules mentioned in subsection (4).

(4) The department of revenue shall prepare a 15-year trended depreciation schedule for oil drilling rigs. The trended depreciation schedule will be derived by using trend factors and depreciation factors published by "Marshall and Swift Publication Company. The trend factors shall be the most recent available from the "Chemical Industry Cost Indexes" listed in the above publication.

(5) The department of revenue shall annually prepare a trended depreciation schedule for oil drilling rig components in addition to those components included in subsection (1) on the basic rig. The trended depreciation schedule shall be developed based on the methodologies mentioned in subsections (3) and (4).

(6) This rule is effective for tax years beginning after December 31, 1984.

AUTH: 15-1-201 MCA; IMP: 15-6-138 MCA.

4. The Department proposes to repeal rule 42.21.133 and replace it with new rules IV through VII because the oil and gas field schedule formerly utilized pursuant to APM 42.21.133 did not yield market value for oil field machinery and supplies.

The Department proposes to amend the following rules for these reasons:

42.21.101 - In ascertaining the market value of aircraft, the condition of the aircraft including both low and high hours must be considered.

42.21.123 - The amended rule makes it clear that the Department will rely upon the "average as is" value, as reflected in a national valuation guide, in order to ascertain the value of most farm machinery.

42.21.151 - The amended rule makes it clear that the Department will be relying on the acquired cost of the television cable property in order to ascertain market value.

The Department proposes to adopt the following rules for these reasons:

NEW RULE I - This rule relating to the valuation of leased and rented equipment, makes it clear that the Department will utilize acquired cost, trended and depreciated, in order to ascertain market value.

NEW RULE II - This rule relating to valuation of abstract records, sets forth a three tiered approach by which the Department will ascertain the market value of the property.

NEW RULE III - This rule, which establishes time deadlines for reporting property to the Department, provides a uniform system for rendering such reports. It also puts taxpayers on notice as to the consequences of failing to report property or failing to supply requested information to the Department.

5. Interested parties 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:

Ann Kenny
Department of Revenue
Legal Division
Mitchell Building
Helena, Montana 59620

no later than November 22, 1984.

6. Sarah Power, Hearing Examiner for Agency Legal Services, Department of Justice, has been designated to preside over and conduct the hearing.

7. The authority of the Department to make the proposed repeal, amendments, and adoption is based on § 15-1-201, MCA.

The rules implement §§ 15-6-136, 15-6-138, 15-6-139, 15-6-140, and 15-8-303, MCA.

ELLEN FEAVER, Director
Department of Revenue

Certified to Secretary of State 10/15/84

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of rules relating to the recruitment and selection of employees by state agencies	))))	NOTICE OF ADOPTION OF RULES 2.21.3701-3703; 2.21.3708, 3709, 3712, 3715; 2.21.3718-3721; 2.21.3723, 3724; 2.21.3726-3728; 2.21.3735

To: All Interested Persons.

1. On September 13, 1984, the department of administration published notice of the proposed adoption of rules relating to the recruitment and selection of employees by state agencies at page 1199 of the 1984 Montana Administration Register, issue number 17.

2. The rules have been adopted with the following changes:

2.21.3702 POLICY AND OBJECTIVES (1) It is the policy of the state of Montana to:

(a) recruit, and select, ~~and promote~~ employees on the basis of merit and job-related qualifications and without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental handicap, or national origin as provided in 49-3-201, MCA, except where marital status, age, sex, or physical or mental handicap is a bona fide occupational qualification reasonably necessary to the agency's operations.

(b)-(2) Same as proposed rule.

(3) It is the objective of this policy to:

~~(a)~~ establish minimum standards for fair and consistent treatment of applicants and employees in recruitment, and selection ~~and promotion~~ in accordance with applicable law and regulation.

~~(b) ensure that recruitment, selection, and promotion activities are in compliance with:~~

~~(i) the Uniform Guidelines on Employee Selection Procedures, 29 CFR 1607;~~

~~(ii) the Standards for a Merit System of Personnel Administration, 5 CFR 900.601, as applicable; and~~

~~(iii) the veteran's and handicapped person's employment preference act, 39-30-101, et. seq., MCA, and the veteran's and handicapped person's preference policy 2.21.1401, et. seq., ARM. (Also found at policy 3-0171, Montana Operations Manual, Volume III.)~~

2.21.3703 DEFINITIONS (1) - (8) Same as proposed rule.

(9) "Qualifications" means knowledges, skills, and abilities required to perform a job and the education and experience ~~believed to~~ leading to them.

(10) - (14) Same as proposed rule.

2.21.3709 EXTERNAL VACANCY ANNOUNCEMENTS (1)(a)-(c) Same as proposed rule.

(d) A description of the essential duties obtained from a current job analysis~~, and not copied directly from a class specification~~;

(e) A description of the qualifications required to perform the essential duties of the job obtained from a current job analysis~~, and not copied directly from the class specification~~;

(f) Same as proposed rule.

~~(g) The selection procedures to be used to evaluate qualifications. Such procedures may include, but are not limited to, an evaluation of the application and application supplement, work samples, performance exams, written exams, structured interviews, reference checks, and the probationary period;~~

~~(h)~~(g) Entrance salary and grade level as provided in the pay plan rules, policy 3-0505 (copies available from the department of administration, state personnel division).

~~(i)~~(h) Closing date. The closing date shall be that date by which application materials must be received at any job service office participating in recruitment or at the agency for those agencies which accept materials directly from applicants, as well as from job service.

~~(j)~~(i) The place(s) designated for receipt of applications.

~~(k)~~(j) A list of all required application materials and forms.

2.21.3712 INTERNAL RECRUITMENT (1) An agency may use internal recruitment. During internal recruitment, external applications will not be accepted.

(2) Temporary employees may ~~not be considered for the applicant pool when internal recruitment is conducted.~~ be excluded from the internal applicant pool.

(3) Temporary employees may be included in the internal applicant pool, when:

(a) The agency has established a policy in compliance with ARM 2.21.1203 allowing temporary employees to apply for internal promotion;

(b) the recruitment process used to fill the temporary position was conducted in accordance with ARM 2.21.3708 and 2.21.3709 and;

(c) the temporary appointment was based on merit and job-related qualifications.

(4) When temporary employees are included in the applicant pool, employment preference must be applied in accordance with ARM 2.21.1422(5).

~~(4)~~ (5) Internal vacancy announcements shall be posted according to agency policy. It is recommended that internal vacancy announcements contain information similar to that required in 2.21.3709.

RULE 2.21.3715 NONDISCRIMINATION (1) In accordance with 49-3-201, MCA, each agency shall promulgate written directives to ~~ensure that the~~ provide equal opportunity in recruitment and selection~~.process is free from bias~~.

(2) Each agency shall maintain records or other information which will disclose the impact its recruitment, tests, or other selection procedures have upon employment opportunities of persons by race/ethnic group, sex, ~~ethnic group~~, and age. Records shall be maintained for a period of time consistent with the employee record keeping policy, ARM 2.21.6601~~5~~, et. seq., ~~ARM~~, (also found at policy 3-0110, montana operations manual, volume III.)

RULE 2.21.3723 INTENTIONAL MISREPRESENTATION (1) Where an applicant has made intentional misrepresentation during the application process, the applicant may be excluded from further employment consideration ~~with the State of Montana~~ for the position or may be removed from appointment.

(2) Applicants shall be notified that willful misstatements of qualification may exclude them from further consideration ~~with the State of Montana~~ for the position or removal from appointment.

RULE 2.21.3726 DOCUMENTATION (1) (a)-(g) Same as proposed rule.

(h) records or other information necessary for applicant flow. ~~regarding the impact of the procedures on the employment opportunities of protected classes.~~

(i)-(2) Same as proposed rule.

RULE 2.21.3727 ACCESS TO SELECTION MATERIAL (1) Same as proposed rule.

~~(2) Each applicant shall, upon request, be given an explanation of the specific job related reasons that the applicant was not hired for the position.~~

RULE 2.21.3728 CONFIDENTIALITY (1)-(2) Same as proposed rule.

~~(3) An agency may release general information about the successful applicant's qualifications upon request.~~

3. The department received the following comments during the comment period.

COMMENT: The rules should require use of the official state application form and should specify what action should be taken when an incomplete application is received by the

hiring authority.

RESPONSE: The department feels a few positions may be better served by other than the state application. The other problem is addressed directly by the state application form.

COMMENT: The first three rules are inconsistent in addressing "promotion." The term is not referenced in the remainder of the policy.

RESPONSE: Because the term "selection" encompasses promotion activities, as well as other internal agency personnel actions such as lateral transfers and voluntary demotions, the term "promotion" is deleted from Rule 2.21.3702(1)(a) and (3)(a) and (b).

COMMENT: Change Rule 2.21.3702(3) to read "It is the objective of this policy to establish minimum standards for fair and consistent treatment of applicants and employees in recruitment and selection in accordance with applicable laws."
RESPONSE: The department has amended the rule as suggested. This change eliminates the necessity for keeping a comprehensive and up-to-date list of applicable laws in rule form. Specific laws will be discussed in greater detail in guide material.

COMMENT: The use of the word "believed" in Rule 2.21.3703(9) is nebulous.

RESPONSE: The department has amended the rule as suggested.

COMMENT: The term "qualifications" as defined does not permit evaluation of certain behavioral characteristics, for example, elimination of an applicant for a past record of tardiness.

RESPONSE: The department believes any requirement for a position can be translated into some knowledge, skill, or ability. For example, if an ability is a present competence to perform a function, physical or mental, it would seem reasonable to require an employee to have the ability to arrive at work at a designated hour. This ability would typically be demonstrated through an evaluation of past work experience which is included in the definition of the term "qualification."

COMMENT: Expand the definition of "reference check" in Rule 2.21.3703(10) to include an applicant's past work record.

RESPONSE: The department believes that the definition of the term "qualifications" includes prior related work experience.

COMMENT: Why does Rule 2.21.3709(1)(c) require the position number on the vacancy announcement?

RESPONSE: The state applicant flow system will be established using position numbers. For tracking purposes, the position number needs to be on the announcement and the application to participate in the applicant flow system.

COMMENT: In Rule 2.21.3709(1)(d) and (e) delete the wording "and not copied directly from the class specification" because the statement seems to be reprimanding agencies for past behavior.

RESPONSE: The department agrees and deleted as suggested.

COMMENT: In Rule 2.21.3709(1)(g) delete the requirement to advertise the specific selection procedures to be used, since circumstances might require an additional step during the selection process.

RESPONSE: The department agrees and has deleted as suggested.

COMMENT: Two persons suggested changing Rule 2.21.3709(1)(i) to read that applications must be postmarked on or before the closing date rather than received at the job service or agency by the closing date.

RESPONSE: By setting the closing date as the date applications are received rather than postmarked, the hiring agency can better plan its selection process. Relying on postmarks would require waiting an indefinite period of time for applications to arrive.

COMMENT: Include a requirement in Rule 2.21.3709 that the vacancy announcement will state where the position description can be viewed.

RESPONSE: The department believes that such a statement would be a good practice, but does not wish to make it a minimum standard of the policy.

COMMENT: Change Rule 2.21.3712(1) to read "An agency may use internal recruitment to the exclusion of external applications."

RESPONSE: The department has amended this rule to clarify that external applications will not be accepted during internal recruitment.

COMMENT: Two agencies suggested allowing temporary employees under Rule 2.21.3712(2) to be included in the applicant pool at the discretion of the agency.

RESPONSE: The department feels that allowing temporary employees to be considered along with other employees for internal vacancies could be viewed as an attempt to circumvent the

Veterans and Handicapped Persons Employment Preference Act. We realize that in certain circumstances, requiring an agency to conduct external recruitment in order to consider its temporary employees may constitute an undue administrative burden. Therefore, a provision has been substituted which would allow consideration of temporary employees where an agency policy has been established and where temporary positions are advertised to the public and a competitive selection procedure is employed.

COMMENT: Why is ethnic group information being collected under Rule 2.21.3715(3)?

RESPONSE: Ethnic group information has been collected for several years because the terms "American Indian" and "Hispanic" refer to ethnicity, rather than race. The department will use the term "race/ethnic group" to coincide with the applicant flow system.

COMMENT: Change Rule 2.21.3715(1) because requiring an agency to ensure that the selection process is free from bias is an impossible standard.

RESPONSE: The rule has been reworded.

COMMENT: In Rule 2.21.3723, the department must make a showing that excluding an applicant from further employment consideration with the State of Montana or removal from appointment for intentional misrepresentation is reasonably necessary to ensure impartial recruitment and selection. Removal from appointment may be reasonably necessary, but barring further application for state employment does not appear to be reasonably necessary.

RESPONSE: In 2-18-102, MCA, the Department of Administration is directed in part to, "foster and develop programs for recruitment and selection of capable persons for permanent, seasonal, temporary, and other types of positions..." (emphasis added). Under this broad mandate, agencies have the authority to assess capabilities of applicants; it therefore seems reasonable and appropriate that where such capabilities are intentionally misrepresented, agencies have the authority to remove an employee from that position. In addition, this rule will assist agencies in the implementation of the Veterans and Handicapped Persons Employment Preference Act. Where a person without preference is judged to be more qualified for a position on the basis of information intentionally misrepresented to an agency, the agency can rely on this rule to remove the person from employment and to correctly implement the preference. The reference to barring application for further employment will be deleted.

COMMENT: Delete the requirement in Rule 2.21.3726(1)(a) to include a position description among the documentation, since the position description is already on file elsewhere in the agency.

RESPONSE: This rule requires only that a position description be on file; the hiring agency may file the position description wherever most convenient.

COMMENT: Rule 2.21.3726 should apply only to permanent positions and not to temporary positions.

RESPONSE: The rule does not apply to temporary positions but does apply to permanent and seasonal positions to comply with the Veterans and Handicapped Persons Employment Preference Act.

COMMENT: Delete Rule 2.21.3726(h) because it is unclear what information is required, and it may be requiring information which is duplicated elsewhere.

RESPONSE: The department agrees that the requirement is vague, however, the amount and type of information may vary with the situation. Language has been added to clarify the meaning. This policy does not envision a separate selection file where information collected elsewhere is duplicated. The documentation may be filed wherever convenient for the agency.

COMMENT: Allow the agency discretion in providing the explanation for not hiring an applicant as required in Rule 2.21.3727(2). There is no legal requirement for such an explanation.

RESPONSE: The department agrees and has deleted as suggested.

COMMENT: Delete Rule 2.21.3728(3) because it is unclear who the requestor must be and what the term "general information" means.

RESPONSE: The department agrees and has deleted as suggested.

Morris L. Brusett, Director
Department of Administration

Certified to the Secretary of State October 15, 1984.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PHARMACY

In the matter of the amendments of 8.40.404 concerning the fee schedule, and 8.40.1215 concerning additions, deletions & rescheduling of dangerous drugs	)))))	NOTICE OF AMENDMENT OF 8.40.404 FEE SCHEDULE AND 8.40.1215 ADDITIONS, DELETIONS, & RESCHEDULING OF DANGEROUS DRUGS

TO: All Interested Persons:

1. On September 13, 1984, the Board of Pharmacy published a notice of amendments of the above-stated rules at pages 1208 through 1209, 1984 Montana Administrative Register, issue number 17.

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

3. It should be noted that the section cited for authority on the change to rule 8.40.1215 was cited as 37-32-103 rather than 50-32-103, MCA. This was brought to the board's attention by phone call from Greg Petesch, attorney for the Administrative Code Committee. No other comments or testimony were received.

DEPARTMENT OF COMMERCE

BY: _____
GARY BUCHANAN, DIRECTOR

Certified to the Secretary of State, October 15, 1984.

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

In the matter of the amendment of rules 16.16.101, 16.16.303, 16.16.304, and 16.16.305, concerning sanitary approval of multiple family water and sewer systems	)	NOTICE OF AMENDMENT OF RULES (Sanitation in Subdivisions)

TO: All Interested Persons

1. On August 16, 1984, the department published notice of proposed amendment of rules 16.16.101, 16.16.303, 16.16.304 and 16.16.305 regarding the sanitary approval of subdivisions at pages 1104 through 1107 of the 1984 Montana Administrative Register, issue number 15.

2. The department has amended the rules as proposed.

3. No comments or testimony were received.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State October 15, 1984

VOLUME NO. 40 OPINION NO. 74

PROBATION - Possible dispositions at hearing to revoke probation under Youth Court Act;
RIGHT TO COUNSEL - Effect of waiver by youth alleged to be youth in need of supervision and youth's parent;
YOUTH COURT ACT - Term of commitment of youth in need of supervision who violates probation;
YOUTH COURT ACT - Waiver of counsel by youth alleged to be youth in need of supervision and youth's parent;
YOUTH IN NEED OF SUPERVISION - Commitment for probation violation;
MONTANA CODE ANNOTATED - Sections 41-5-103(12)(b), 41-5-103(13), 41-5-511, 41-5-523(1), 41-5-533.

HELD: 1. Section 41-5-511, MCA, does not preclude commitment of a youth to the Department of Institutions following revocation of probation for violating its terms where the youth and the youth's parent waived counsel at the adjudicatory hearing at which the youth was placed on probation as a youth in need of supervision but was represented by counsel during proceedings to revoke probation.

2. A youth adjudicated as a youth in need of supervision who violates probation cannot be committed to the Department of Institutions for more than six months, but such a youth may then be charged as a delinquent youth in an original proceeding with a possible result that the youth could be committed to the Department of Institutions for more than six months.

3 October 1984

Ronald W. Smith
Hill County Attorney
Hill County Courthouse
Havre MT 59501

Dear Mr. Smith:

You have requested my opinion on the following issues related to the Montana Youth Court Act:

1. When a youth, who has waived counsel at the adjudicatory hearing in which he was found to be a youth in need of supervision, violates the terms of his probation, does section 41-5-511, MCA, preclude commitment of the youth to the Department of Institutions?

2. Can a youth be committed to the Department of Institutions for a period of more than six months following revocation of the youth's probation where the youth was adjudicated a youth in need of supervision for commission of status offenses and committed only status offenses in violating the terms of probation?

These issues arise from the following facts. A petition was filed in youth court charging a youth with the commission of two status offenses and alleging that the youth was a youth in need of supervision. At the hearing the youth and the youth's parent were advised of their right to counsel and both the youth and the youth's parent waived counsel. The youth admitted the offenses and the judge found the youth to be a youth in need of supervision and placed the youth on probation.

The terms of the youth's probation included the requirement that the youth follow the rules and regulations of the foster parents of any foster home in which the youth was placed and to be law abiding. Subsequently, a petition to revoke the youth's probation was filed in which it was alleged that the youth failed to follow the rules and regulations of the foster parents and that the youth was a runaway, both status offenses.

The youth and the youth's parent appeared with court-appointed counsel to respond to the petition to revoke the youth's probation. The youth admitted the violations of probation, and the probation officer recommended that the youth be committed to the Department of Institutions because the youth was a delinquent youth for having violated the terms of the probation.

Counsel for the youth objected to this recommendation on the grounds that the provisions of section 41-5-511,

MCA, required the court to appoint counsel for the youth at the prior hearing on the petition alleging the youth to be a youth in need of supervision because commitment to a state correctional facility was a possible result of that proceeding, and that the court's failure to appoint counsel at that time prevented the court from committing the youth for more than six months because of the probation violations. The youth's counsel also objected on the grounds that section 41-5-533, MCA, precludes commitment of a youth in need of supervision to a state correctional facility for more than six months because such a disposition could not have been made in the original case.

Section 41-5-511, MCA, outlines the right to counsel of a youth in youth court proceedings:

> In all proceedings following the filing of a petition alleging a delinquent youth or youth in need of supervision, the youth and the parents or guardian of the youth shall be advised by the court or, in the absence of the court, by its representative that the youth may be represented by counsel at all stages of the proceedings. If counsel is not retained or if it appears that counsel will not be retained, counsel shall be appointed for the youth if the parents and the youth are unable to provide counsel unless the right to appointed counsel is waived by the youth and the parents or guardian. Neither the youth nor his parent or guardian may waive counsel after a petition has been filed if commitment to a state correctional facility or to the department of institutions for a period of more than 6 months may result from adjudication. [Emphasis added.]

The issue here is whether the facts are within the prohibition of the last sentence of section 41-5-511, MCA; that is, whether the waiver of counsel at the adjudicatory hearing declaring the youth to be in need of supervision prevented commitment of the youth for more than six months at a later hearing to revoke the youth's probation.

This section limits the requirement of counsel to those proceedings in which a youth is charged as a delinquent

youth because commitment for more than six months is possible only as a result of such an adjudication. Since a youth alleged to be in need of supervision cannot be committed for more than six months, the requirement of counsel under section 41-5-511, MCA, does not attach in this situation. It may be argued that a youth in need of supervision could be committed beyond a six-month period because of a probation violation, but this is not a foreseeable result at the time of adjudication as a youth in need of supervision and can only occur by a subsequent court order after notice and hearing.

Under the facts you describe, the requirement of counsel was not violated where counsel was waived at the adjudicatory hearing charging the youth as a youth in need of supervision as there was no possibility of commitment for more than six months at the hearing.

Concerning the second issue, section 41-5-103(13), MCA, defines a "youth in need of supervision" in pertinent part as "[a] youth who commits an offense prohibited by law which, if committed by an adult, would not constitute a criminal offense." Under section 41-5-523(1)(a), MCA, the youth court may place such a youth on probation. The definition of a delinquent youth includes a youth in need of supervision who violates a term of probation. § 41-5-103(12)(b), MCA. The Montana Supreme Court has found no constitutional infirmities in proceeding as a delinquent youth against a youth in need of supervision who violates probation. In the Matter of C.H., 41 St. Rptr. 997, ___ P.2d ___ (1984).

Under section 41-5-533(3), MCA, which outlines the procedure for revocation of a youth's probation, "[i]f a youth is found to have violated a term of his probation, the youth court may make any judgment of disposition that could have been made in the original case." Therefore, a youth adjudicated as a youth in need of supervision who violates probation cannot be committed for more than six months because such disposition was unavailable in the original adjudication. However, a youth originally charged as a delinquent youth who is placed on probation as a youth in need of supervision (as provided in section 41-5-103(13)(d), MCA) may be committed for more than six months if adjudged a delinquent youth after violating probation.

Case law in this area varies, and does not resolve the matter. In In re Dowell, 193 S.E.2d 302 (N.C. 1972), the court found commitment of a youth proper where both the original offense and the probation violation were truancy, because the statutory definition of delinquency included any child who violates a condition of probation. In State v. Doe, 619 P.2d 194 (N.M. 1980), however, the court held the commitment of a youth was not authorized under a probation revocation statute similar to that in Montana's Youth Court Act because commitment was not an available remedy in the original disposition.

This ambiguity may be resolved by reading together section 41-5-533, MCA, and the definition sections of the Youth Court Act. Section 41-5-533(1), MCA, provides that a delinquent youth or a youth in need of supervision who violates the terms of probation "may be proceeded against in a probation revocation proceeding." The use of the word "may" rather than "shall" indicates that this is not the exclusive method for dealing with such a youth. As an alternative to a revocation proceeding, under the definition of a delinquent youth, § 41-5-103(12)(b), MCA, a youth in need of supervision who violates probation could be charged by petition as a delinquent youth and could then be committed for a period of more than six months.

Here, the youth was proceeded against in a probation revocation proceeding. Therefore, the youth could not have been declared a delinquent youth and could not have been committed for a period of more than six months because neither the adjudication as a delinquent youth nor the disposition of commitment for more than six months were possible in the original case. Had the youth been proceeded against in an original proceeding as a delinquent youth, the youth could have been committed for more than six months.

THEREFORE, IT IS MY OPINION:

1. Section 41-5-511, MCA, does not preclude commitment of a youth to the Department of Institutions following revocation of probation for violating its terms where the youth and the youth's parent waived counsel at the adjudicatory hearing at which the youth was placed on probation as a youth in need of

supervision but was represented by counsel during proceedings to revoke probation.

2. A youth adjudicated a youth in need of supervision who violates probation cannot be committed to the Department of Institutions for more than six months, but such a youth may be charged as a delinquent youth in an original proceeding with a possible result that the youth could be committed to the Department of Institutions for more than six months.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 40 OPINION NO. 75

CITIES AND TOWNS - Escalating fines for ordinance violations;
CRIMES - Ordinances, escalating fines for violations;
FINES - Municipal ordinance violations, escalating fines;
PENALTIES - Civil or criminal, escalating fines for ordinance violations;
MONTANA CODE ANNOTATED - Sections 3-10-301, 3-11-103, 7-1-4124, 7-5-4207;
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 31 (1984).

HELD: The Lewistown city ordinance which allows an escalating monthly penalty for failure to obtain a city business license is valid.

5 October 1984

Thomas P. Meissner
City Attorney
305 Watson
Lewistown MT 59457

Dear Mr. Meissner:

You have requested my opinion on the following question:

> Whether the Lewistown city ordinance which allows an escalating monthly penalty for failure to obtain a local business license is valid in view of the decision in City of Missoula v. Shea.

The decision of the Montana Supreme Court in City of Missoula v. Shea, 40 St. Rptr. 91, 661 P.2d 410 (1983), determined that the escalating penalties for the parking violations in question were criminal penalties, and as such were unconstitutional. The Court specifically declined to rule on escalating civil penalties. As the Court said at 40 St. Rptr. 99:

> While such a scheme [escalating fines] may be acceptable in enforcing civil penalties, we hold that the escalating fine provisions of

> the Missoula ordinances violate Article II, section 28 of the Montana Constitution, which provides that laws for the punishment of crime shall be founded on principles of prevention and reformation.

On the other hand, in the case of State ex rel. Hardy v. Board of Equalization, 133 Mont. 43, 319 P.2d 1061 (1958), the Montana Supreme Court ruled that a statute establishing a civil penalty with an escalating clause was lawful. Furthermore, the clear implication of section 3-10-301(e), MCA, is that incorporated cities and towns are authorized to impose civil penalties. My previous opinion, 40 Op. Att'y Gen. No. 31 (1984), should not be taken beyond its holding:

> A city with general government powers may not establish a civil penalty and collection system for motor vehicle parking offenses.

The initial determination to be made here, then, is whether the penalties that the City of Lewistown imposes for failure to obtain a business license are civil or criminal. Although the statutes of Montana are clear in their grant of authority to cities to adopt and enforce ordinances (§§ 7-1-4124(1), 7-5-4207, MCA), they do not establish clearly which penalties for the violation of municipal ordinances are civil and which are criminal (§§ 7-5-4207, 3-11-103(1), MCA). Referring to the case law on this question, I find that the Montana Supreme Court has ruled in a case with similar facts. State ex rel. Marquette v. Police Court, 86 Mont. 297, 283 P. 430 (1929). That case held that under the laws in force at the time, an action for the violation of a city ordinance requiring a business license was a criminal proceeding. Nevertheless, I conclude that because of the substantial statutory changes since 1929, the rule in this case is no longer good law.

The method applied in the Marquette case is still a sound starting place, however:

> We think that the nature of the action must be determined by the relief sought in the proceeding.

86 Mont. at 306. The City of Lewistown's business license ordinances speak clearly to this question:

> PENALTY: Persons violating any provision of this Title shall be subject to the general penalty provided in Section 1-3-1. In addition, a civil judgment for the amount of the license fee due and unpaid, plus penalty may be entered against the defendant.

Ordinance 5-1-20.

Modern cases have also had to determine whether penalties were civil or criminal. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 nn.22-28, 372 U.S. 144 (1962). The best discussion I have found of the factors to consider in deciding a civil/criminal question is that by Linde, J., in the case of Brown v. Multnomah County District Court, 570 P.2d 52 (Or. 1977). I would commend the discussion at pages 57-60 to anyone seeking guidance on this question. Justice Linde set out five factors to consider when deciding if a penalty is civil or criminal:

1. Type of offense;
2. Penalty;
3. Collateral consequences;
4. Punitive significance; and
5. Arrest and detention.

Taking the first factor, history is of little help in classifying the offense of failure to obtain a city business license. This is because license requirements have been enforced in many different ways. 51 Am. Jur. 2d Licenses and Permits § 70. Our other guide on this question is the intent of the Lewistown City Council as expressed in Ordinance 5-1-20, quoted above. Although this statement of intent is not determinative, we have no reason to doubt it. Passing on to the second factor, we again have no reason to doubt the City's denomination of the fine as a civil penalty. This view is reinforced by the absence of any sanction of imprisonment and the lack of severity of the fine imposed (Ordinance 5-1-21).

As for criterion No. 3, the absence of any collateral consequences implies a merely civil penalty. Criterion No. 4 is another factor that is judged from evidence of legislative intent. Again, we have no reason to believe that the Lewistown City Council or the community at large attaches any criminal significance to the fine assessed for failure to secure a city business license.

Finally, the ordinances of the City of Lewistown do not authorize any arrest and detention for the offense, only the fine discussed above. In summary, I conclude that the City of Lewistown validly licenses businesses in order to promote the health, safety, and welfare of its residents. As part of its regulation of business the City has adopted a lawful escalating civil penalty for failure to obtain a business license.

THEREFORE, IT IS MY OPINION:

The Lewistown city ordinance which allows an escalating monthly penalty for failure to obtain a city business license is valid.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 40 OPINION NO. 76

BUILDING CODES - Authority of the Department of Administration;
CITIES AND TOWNS - Authority to enact building construction regulations;
DEPARTMENT OF ADMINISTRATION - Authority over state building code;
ADMINISTRATIVE RULES OF MONTANA - Section 2.32.202;
MONTANA CODE ANNOTATED - Sections 7-15-4122, 7-33-4203, 50-60-101(2), 50-60-101(3), 50-60-102(1), 50-60-201, 50-60-202, 50-60-203, 50-60-301(2);
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 81 (1977); 38 Op. Att'y Gen. No. 3 (1979);
REVISED CODES OF MONTANA, 1947 - Sections 69-2105(14), 69-2107, 69-2111;
SESSION LAWS OF 1969 - Chapter 366, sections 1, 4, 8, 9.

HELD: The authority of city and town councils to prescribe building construction regulations pursuant to section 7-15-4122, MCA, and to prescribe limits within which combustible buildings must not be erected, pursuant to section 7-33-4203, MCA, was repealed by the enactment in 1969 of the state building code, Title 50, ch. 60, pt. 2, MCA.

11 October 1984

Robert E. Kelly
State Fire Marshal
Room 371, Scott Hart Building
303 North Roberts
Helena MT 59620

Dear Mr. Kelly:

You have requested my opinion on the following question:

> Is the authority of city and town councils to prescribe building construction regulations pursuant to sections 7-15-4122 and 7-33-4203, MCA, superseded by the state building code, Title 50, ch. 60, pt. 2, MCA?

The state building code was enacted in 1969. Its purpose, as stated in section 50-60-201, MCA, is to provide standards for building construction, including building materials. The Department of Administration is vested with the power to adopt the state building code by rule. § 50-60-203, MCA. Title 7, MCA, contains statutes which appear to give cities and towns overlapping jurisdiction in the area of building construction. Specifically, section 7-15-4122, MCA, enacted in 1921, provides that a city or town council has the authority to "(1) prescribe the thickness, strength, and manner of constructing stone, brick, and other buildings; and (2) order the construction of fire escapes thereon." Under section 7-33-4203, MCA, also enacted in 1921, a city or town council may "prescribe limits within which wooden or combustible buildings must not be erected, placed, or repaired and...establish fire limits within the city or town." Your question concerns whether these two statutes, sections 7-15-4122 and 7-33-4203, MCA, are in conflict with the statutes that comprise the state building code.

As a preliminary matter, it is necessary to determine whether sections 7-15-4122 and 7-33-4203, MCA, deal with the subject of "building regulations" as that phrase is used in Title 50, chapter 60, MCA. "Building regulations," as defined in section 50-60-101(2), MCA, includes, inter alia, any laws or ordinances enacted by a municipality relating to the "design, construction, reconstruction, alteration, conversion, repair, inspection, or use" of buildings. "Construction" includes "requirements or standards relating to or affecting materials used, including provisions for safety...conditions." § 50-60-101(3), MCA. Section 7-15-4122, MCA, clearly involves "building regulations," since it deals with a local government's authority to prescribe "the manner of constructing...buildings." Section 7-33-4203, MCA, involves the construction of buildings, specifically the requirements relating to the use of wooden or combustible materials within a prescribed area. I conclude, then, that both section 7-15-4122, MCA, and section 7-33-4203, MCA, are concerned with matters included in the definition of "building regulations" as that phrase is used in the state building code. The remainder of this opinion will deal with whether sections 7-15-4122 and 7-33-4203, MCA, were revoked by the subsequently-enacted state building

code. Some background on the history of the state building code is in order.

In 1969 the Legislature adopted statewide building construction standards. 1969 Mont. Laws, ch. 366, codified in Title 50, ch. 60, MCA. Included among the 1969 provisions was a state building code, the rules of which were to be adopted by the Department of Administration (formerly the responsibility of a state building code council). 1969 Mont. Laws, ch. 366, § 8 (§ 50-60-203, MCA; formerly codified as § 69-2111, R.C.M. 1947).

From the time of its initial adoption in 1969 until amendments were adopted in 1981, the state building code's scope of application remained the same. 1969 Mont. Laws, chapter 366, section 8 (codified as § 69-2111, R.C.M. 1947), provided that the state building code should apply to the construction of "all buildings." 1969 Mont. Laws, chapter 366, section 4 (codified as § 69-2107, R.C.M. 1947), created an exception outside a municipal jurisdiction area for buildings that were not "public places," defined in 1969 Mont. Laws, chapter 366, section 1 (codified as § 69-2105(14), R.C.M. 1947), as places maintained by the government for the use of the public, or places where the public has a right to be. The state building code's application was not limited with respect to buildings located inside a municipal jurisdictional area. See 38 Op. Att'y Gen. No. 3 (1979). In 1981 the Legislature created a residential exemption to the application of the state building code. See § 50-60-102(1), MCA. This does not mean, however, that local governments may prescribe rules for exempted "residential" buildings within their jurisdictional areas that differ from the state building codes. Section 50-60-102(1), MCA, still requires that local governmental bodies that choose to regulate residential buildings must do so by adoption of the state building code. See also § 2.32.202, ARM.

As a result of the 1969 law's application to all buildings within a municipal jurisdictional area, the authority granted local governments under section 7-15-4122, MCA, to "prescribe the...manner of constructing...buildings" and under section 7-33-4203, MCA, to "prescribe limits within which...combustible buildings must not be erected" was repealed by implication. Repeal of an earlier statute by

implication will be found if it is unavoidably implied by irreconcilable provisions in two statutes. Kuchan v. Harvey, 179 Mont. 7, 10, 585 P.2d 1298, 1300 (1978); State v. Langen, 151 Mont. 558, 564, 445 P.2d 565, 568 (1968). The existence of an irreconcilable conflict between sections 7-15-4122 and 7-33-4203, MCA, both of which were enacted in 1921, and the state building code provisions, enacted in 1969, is manifested by the language of 1969 Mont. Laws, chapter 366, section 9. That section permitted a local government to adopt a building code incorporating standards equal to or more stringent than the state code, and later, in 1977, was amended to require that a local code include only codes adopted by the state. See § 50-60-301(2), MCA, and 37 Op. Att'y Gen. No. 81 (1977). The authority to adopt rules for the construction of all buildings was vested in the state under 1969 Mont. Laws, chapter 366, section 8. See §§ 50-60-202 to 203, MCA. These provisions leave no room for a local government to prescribe rules dealing with building construction; therefore, sections 7-15-4122 and 7-33-4203, MCA, must be considered repealed by the enactment and amendment of 1969 Mont. Laws, chapter 366.

THEREFORE, IT IS MY OPINION:

> The authority of city and town councils to prescribe building construction regulations pursuant to sections 7-15-4122, MCA, and to prescribe limits within which combustible buildings must not be erected, pursuant to section 7-33-4203, MCA, was repealed by the enactment in 1969 of the state building code, Title 50, ch. 60, pt. 2, MCA.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 40 OPINION NO. 77

COUNTIES - Applicability of section 2-18-501, MCA, to county officers and employees;
COUNTIES - Authority of board of county commissioners to adopt meal and lodging expense regulations;
COUNTY COMMISSIONERS - Authority to adopt meal and lodging expense regulations;
COUNTY EMPLOYEES - Applicability of section 2-18-501, MCA, to county officers and employees;
COUNTY EMPLOYEES - Authority of board of county commissioners to adopt meal and lodging expense regulations;
COUNTY OFFICERS - Applicability of section 2-18-501, MCA, to county officers and employees;
COUNTY OFFICERS - Authority of board of county commissioners to adopt meal and lodging expense regulations;
EXPENSES - Applicability of section 2-18-501, MCA, to county officers and employees;
EXPENSES - Authority of board of county commissioners to adopt meal and lodging expense regulations;
LODGING - Applicability of section 2-18-501, MCA, to county officers and employees;
LODGING - Authority of board of county commissioners to adopt meal and lodging expense regulations;
MEALS - Applicability of section 2-18-501, MCA, to county officers and employees;
MEALS - Authority of board of county commissioners to adopt meal and lodging expense regulations;
MONTANA CODE ANNOTATED - Sections 2-18-501, 2-18-503(1), 2-18-603, 7-1-2103, 7-5-2142(2), 7-5-2143(2), 7-5-2144(2), 7-5-2145, 7-6-2403, 41-5-704(3);
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 102 (1977), 38 Op. Att'y Gen. No. 16 (1979), 40 Op. Att'y Gen. No. 51 (1984).

HELD: Section 2-18-501, MCA, does not, by its own terms, govern meal and lodging expense payments to county officers or employees. Except as may otherwise be specified statutorily, a board of county commissioners with general governmental powers may adopt rules and regulations providing for payment or reimbursement of reasonable meal and lodging expenses incurred by county officers or employees in the performance of official duties.

12 October 1984

Russell R. Andrews
Teton County Attorney
Teton County Courthouse
Choteau MT 59422

Dear Mr. Andrews:

You have requested my opinion concerning a question which I have phrased as follows:

> Are county officers and employees governed by section 2-18-501, MCA, with respect to meal and lodging expense payments and, if not, does a board of county commissioners with general governmental powers have the authority to establish rules and regulations concerning such expenses?

Your question must be answered with reference to the express language of section 2-18-501, MCA, the general authority of boards of county commissioners under section 7-1-2103, MCA, and specific statutory provisions governing payment of meal and lodging expenses to county officers and employees.

Section 2-18-501, MCA, regulates payment of meal and lodging expenses to "[e]very elected official, appointed members of boards, commissions, councils, department directors, and all other state employees." Although the term "state employees" is not defined, it clearly has reference only to persons employed by the State of Montana and not to those employed by a political subdivision. Had the Legislature intended to cover county officers or employees under section 2-18-501, MCA, it would have so stated. Thus, section 2-18-503(1), MCA, which deals with reimbursement of mileage expenses to employees who use their own vehicles in connection with the performance of official duties, extends to, among others, "county agents [ ] and all other persons who may be entitled to mileage paid from public funds," and indisputably applies to county officers and employees. Williams v. Sorenson, 106 Mont. 122, 75 P.2d 784 (1938).

Nothing in 38 Op. Att'y Gen. No. 16 (1979) indicates a construction of section 2-18-501, MCA, contrary to that stated above. The relevant issue there was whether section 2-18-603, MCA, applied to employees of a county hospital district, and I concluded that, based upon the language of the statute prior to the 1978 recodification, my opinion in 37 Op. Att'y Gen. No. 102 (1977), and the decision in Teamsters Local 45 v. Cascade County School District No. 1, 162 Mont. 227, 511 P.2d 339 (1973), full-time salaried employees of the hospital district were covered under that section. None of the factors underlying the holding in 38 Op. Att'y Gen. No. 16 is present here. Rather, section 2-18-501, MCA, must be applied consistently with its express terms and does not extend to county officers or employees.

The fundamental grant of authority to a board of county commissioners with general governmental powers is set forth in section 7-1-2103, MCA. Section 7-1-2103(3), MCA, gives counties the power to "make such contracts...as may be necessary to the exercise of [their] powers." Implicit in that power is the authority to employ persons for performance of otherwise authorized county functions and to compensate them for such services. See State ex rel. Blair v. Kuhr, 86 Mont. 377, 382-83, 283 P. 758, 759-60 (1930); Simpson v. Silver Bow County, 87 Mont. 83, 91-92, 285 P. 195, 198 (1930); Ransom v. Pingel, 104 Mont. 119, 122, 65 P.2d 616, 617 (1937); Kelly v. Silver Bow County, 125 Mont. 272, 274-75, 233 P.2d 1035, 1036 (1951); see generally 40 Op. Att'y Gen. No. 51 (1984). To the extent the Legislature has not otherwise specified a particular method for calculating meal and lodging expense payments, the board may adopt any rules and regulations consonant with the purpose of paying or reimbursing county officers and employees for reasonable meal and lodging expenses. The board should consult with the county attorney prior to adoption of policies for payment of meal and lodging expenses to insure that such policies comply with any statutory limitation or requirement. See, e.g., § 41-5-704(3), MCA (requiring meal and lodging payments to county juvenile probation officers to be determined in accordance with section 2-18-501, MCA); § 7-5-2142(2), MCA (transportation expenses and per diem allowance payments to county clerk and recorders for attending general meeting of Montana association of clerk and recorders); § 7-5-2143(2), MCA (transportation expenses and per diem allowance payments

to county district court clerks for attending general meeting of Montana association of clerks of court); § 7-5-2144(2), MCA (transportation expense and per diem allowance payments to county treasurers for attending general meeting of Montana association of treasurers); § 7-5-2145, MCA (general provisions governing payment of county officers and employees for attendance at conventions or meetings); § 7-6-2403, MCA (governing payment of living and travel expenses to county auditor).

THEREFORE, IT IS MY OPINION:

Section 2-18-501, MCA, does not, by its own terms, govern meal and lodging expense payments to county officers or employees. Except as may otherwise be specified statutorily, a board of county commissioners with general governmental powers may adopt rules and regulations providing for payment or reimbursement of reasonable meal and lodging expenses incurred by county officers or employees in the performance of official duties.

Very truly yours,

MIKE GREELY
Attorney General

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 June 30, 1984. This table includes those rules adopted during the period July 1, 1984 through September 30, 1984, 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 June 30, 1984, 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 1984 Montana Administrative Registers.

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