

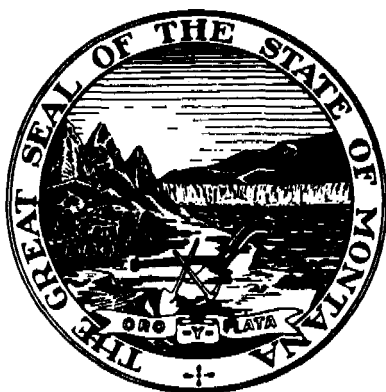
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OF MONTANA

MONTANA ADMINISTRATIVE REGISTER

**1984 ISSUE NO. 5
MARCH 15, 1984
PAGES 409-467**



MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 5

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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)	NOTICE OF PUBLIC
amendment of Rule 2.31.101	)	HEARING FOR AMENDMENT
adopting the American	)	OF RULE 2.31.101 ANSI
National Standard Safety	)	STANDARDS FOR AERIAL
Requirements for Aerial	)	PASSENGER TRAMWAYS
Passenger Tramways.)	

TO: All Interested Persons.

The notice of proposed agency action published in the Montana Administrative Register on February 29, 1984, is amended as follows because it has been determined that a public hearing is required by law:

1. On April 16, 1984, at 2:00 PM, a public hearing will be held in Room 160 of the Mitchell Building, Helena, Montana, to consider the amendment of rule ARM 2.31.101 which adopts the American National Standard Safety Requirements for Aerial Passenger Tramways.

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

"2.31.101 ADOPTION OF ANSI STANDARDS (1) As permitted by statute, the department of administration, in cooperation with the passenger tramway advisory council, has adopted hereby adopts and incorporates by reference the "American National Standard Safety Requirements for Aerial Passenger Tramways" (referred to herein as ANSI Standards) promulgated by the American national standards institute, incorporated, on January 25, 1973 July 16, 1982 (publication numbered ANSI B77.1-1973 B77.1-1982) to the extent that said standards do not conflict with Montana statutory laws or these regulations. By this reference, the above-cited publication is hereby annexed to these rules and made a part hereof. The ANSI Standards establish safety requirements for passenger transportation systems that use cables or ropes in the system for power transmission, including reversible aerial tramways, detachable and fixed grip aerial lifts, surface lifts, and trolleys. Copies of the ANSI Standards text may be obtained from the Department of Administration, Architecture and Engineering Division, 1500 East Sixth Avenue, Helena, Montana 59620, upon request at cost.

(2) The department of administration reserves the right to modify, add, or delete provisions included in the above referenced ANSI Standards."

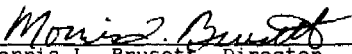
3. The department proposes these changes to its rule to keep the state's passenger tramway safety codes current with modern technology by adopting the latest available edition of the ANSI Standards. These changes are reasonably necessary

to effectuate the purpose of the tramway laws by ensuring that the state has the highest standards available to safeguard the life, health, property, and welfare of the citizens of Montana while using passenger tramways.

4. 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 Mr. Philip H. Hauck, Administrator, Architecture and Engineering Division, 1500 East Sixth Avenue, Helena, Montana 59620, no later than April 16, 1984.

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

6. The authority of the department to make the proposed amendment is based on section 23-2-721, MCA, and the rule implements section 23-2-721, MCA.


Morris L. Brusett, Director
Department of Administration

Certified to the Secretary of State March 2, 1984

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF MILK CONTROL

In the matter of the amendment)
of rule 8.86.301 (6) (a), (b), (e),)
(f), (g), (h) and (i) (vi), as)
they relate to the class I price) (i) (vi)
formulas)
NOTICE OF PUBLIC HEARING
ON PROPOSED AMENDMENT
OF RULES 8.86.301 (6) (a),
(b), (e), (f), (g), (h) AND
PRICING RULES

DOCKET #69-84

TO: All Interested Persons:

1. On April 27, 1984 at 9:00 a.m., MST, or as soon thereafter as interested parties can be heard, a public hearing will be held in the lower conference room of the Department of Commerce at 1430 Ninth Avenue in Helena, Montana.

2. The hearing will be held at the request of Stacey J. Auch d/b/a Misty Vale Dairy to amend rule 8.86.301 (6) (i) (vi) and on the Board's own motion to amend rule 8.86.301 (6) (a), (b), (e), (f), (g) and (h) as shown below. (full text of rule is located at pages 8-2539 through 8-2549, Administrative Rules of Montana) (new matter underlined, deleted matter interlined)

"8.86.301 PRICING RULES

(1) . . .

(6) . . .

(a) The minimum prices which shall be paid to producers by distributors in the state of Montana shall be calculated by either applying the flexible economic formula described below or the Minnesota-Wisconsin series plus three dollars (\$3.00) whichever price is lower. The flexible economic formula utilizes a November, 1969 base equalling 100, an interval of 4.5 and consists of seven (7) factors. The factors and their assigned weights are as follows:

FACTOR	WEIGHT	CONVERSION FACTOR
(i) Unemployment U.S. (6.67 (3.8 - C) + 100)	.05 5%	
(ii) Unemployment MT. (6.67 (6.1 - C) + 100)	.10 10%	
*(iii) Weekly wages - Total private (Revised and seasonally adjusted)	15%	.13297873
(iv) Prices Received by Farmers - MT. ('47 - '49 = 100)	15%	.22960139
(v) Mixed Dairy Feed	20%	.32258065
(vi) Alfalfa Hay (Plus \$12.00 / ton for Transportation)	12%	.48000000
(vii) Prices paid by Farmers - U.S. ('67 = 100)	23%	.41990335
	<u>100%</u>	

*NOTE: The reported revised weekly wage - total private is seasonally adjusted by dividing each months revised figures by the following factors: Jan. - $\frac{.9770}{.9867}$; Feb. - $\frac{.9760}{.9832}$; March - $\frac{.9795}{.9809}$; April - $\frac{.9830}{.9822}$; May - $\frac{.9934}{.9911}$; June - $\frac{1.0067}{1.0053}$; July - $\frac{1.0292}{1.0165}$; August - $\frac{1.0274}{1.0261}$; Sept. - $\frac{1.0221}{1.0136}$; Oct. - $\frac{1.0135}{1.0192}$; Nov. - $\frac{1.0027}{1.0047}$; Dec. - $\frac{.9887}{.9905}$.

The following table will be used in computing producer prices:

TABLE I

Producer price determination using above formula with November, 1969 - 100 and an interval - 4.5

FORMULA INDEX	PRICE PER CWT
201.5 - 205.1	\$12.86
206.0 - 209.6	13.09
210.5 - 214.1	13.32
215.0 - 218.6	13.55
219.5 - 223.1	13.78
224.0 - 227.6	14.01
228.5 - 232.1	14.24
233.0 - 236.6	14.47
237.5 - 241.1	14.70
242.0 - 245.6	14.93
246.5 - 250.1	15.16
251.0 - 254.6	15.39
255.5 - 259.1	15.62
260.0 - 263.6	15.85
264.5 - 268.1	16.08
269.0 - 272.6	16.31
273.5 - 277.1	16.54
278.0 - 281.6	16.77
282.5 - 286.1	17.00
287.0 - 290.6	17.23

(i) the Class I butterfat differential will be calculated by multiplying the average Chicago area butterfat price (Grade A 92 score) by or most recently reported by the United States Department of Agriculture by .118 and the resulting answer from this calculation shall be rounded to nearest half cent. When milk does not test 3.5 percent butterfat, the price per CWT will be adjusted by the above resulting calculation for each .1 percent the butterfat test moves up or down.

The butterfat differential will be recalculated each time the producer price is adjusted up or down by at least \$0.23 per hundredweight.

(b) The flexible economic formula which shall be used in calculating minimum on-the-farm wholesale and retail, jobber, wholesale, institutional and retail prices of Class I milk in the state of Montana utilizes a November,

1969 base equalling 100, an interval of 5.3 and consists of five (5) economic factors. It is used to calculate incremental deviations from the price which was calculated for the first quarter of 1974. The factors and their assigned weights are as follows:

	FACTOR	WEIGHT	CONVERSION FACTOR
(i)	Weekly wages - total private revised	50%	.4035187
(ii)	Wholesale price index (U.S)	28%	.2607076
(iii)	Pulp, paper and allied products (U.S)	12%	.1142857
(iv)	Industrial machinery (U.S)	6%	.0556586
(v)	Motor vehicle and equipment (U.S)	4%	.0376294
		100%	

NOTE: The reported revised weekly wages - total private is seasonally adjusted by dividing each months revised figures by the factors listed above in paragraph 6(a).

The following table will be used in computing distributor prices.

TABLE II

Handler incremental deviation from last official reading of present formula. (December, 1973 - 122.10; Formula Base = November, 1969; Interval = 5.3.)

FORMULA INDEX	HANDLER INCREMENTAL DEVIATION
101.30 - 105.54	-\$0.02
106.60 - 110.84	- 0.01
111.90 - 116.14	- 0.00
117.20 - 121.44	0.01
122.50 - 126.74	0.02 (NOTE: This
127.80 - 132.04	0.03 chart is amend-
133.10 - 137.34	0.04 ed to reflect
138.40 - 142.64	0.05 a two cent
143.70 - 147.94	0.06 (\$0.02) reduc-
149.00 - 153.24	0.07 tion in the
154.30 - 158.54	0.08 distributor's
159.60 - 163.84	0.09 margin based on
164.90 - 169.14	0.10 a half (1/2)
170.20 - 174.44	0.11 gallon of whole
175.50 - 179.74	0.12 milk, as order-
180.80 - 185.04	0.13 ed by the board
186.10 - 190.34	0.14 of milk control
191.40 - 195.64	0.15 on Sept. 15,
196.70 - 200.94	0.16 1979.)
202.00 - 206.24	0.17
207.30 - 211.54	0.18

212.60 - 216.84	0.19
217.90 - 222.14	0.20
223.20 - 227.44	0.21
228.50 - 232.74	0.22
233.80 - 238.04	0.23
239.10 - 243.34	0.24
244.40 - 248.64	0.25

(c) . . .

(d) . . .

(e) For each 4.5 points that the weighted index advances or retreats, prices paid to producers will increase or decrease twenty-three cents (\$0.23) per hundredweight. For each officially announced increase or decrease in producer prices, the wholesale price of one half (1/2) gallon of whole milk all fluid milk items will increase or decrease one cent ~~(\$0.01)~~ by the amount of the increase or decrease in raw product cost.

(f) For each 5.3 points that the distributor weighted index increases or decreases, the wholesale price of one half (1/2) gallon of whole milk will increase or decrease one cent (\$0.01). Prices for all other milk items are calculated by historic factors in relation to one half (1/2) gallon of whole milk. Three (3) quart containers of homo and low fat will be priced at one and one half (1 1/2) times the one half (1/2) gallon container. It is impractical to reproduce all such factors herein, but they may be obtained at the board office, 1424 Ninth Avenue, Helena, Montana 59620, phone (406) 449-3163 444-2875.

(g) The minimum wholesale price of half (1/2) gallon of whole milk will be marked up ten percent (10%) to arrive at the minimum retail prices, and all other products priced accordingly.

(h) Minimum Jobber prices will be computed as a percentage of the producer-to-wholesale margin at an average of approximately seventy-eight percent (78%) of the wholesale price calculated by multiplying the difference between the wholesale price and raw product cost times one of the factors listed below with the resulting answer being added to the current raw product cost. The jobber prices calculated will be a minimum jobber price.

Factors will be established by computing what percentage the distributor margin on jobber prices is in relation to the distributors margin on wholesale prices which existed on April 5, 1974. The percentages to be used appear as follows:

1/2 pts. (elementary & high school)	47.477%
1/2 pts.	68.940%
1/3 qts.	64.307%

pts.	62.097%
gts.	59.021%
1/2 gals.	56.172%
gals.	55.462%
cream items	65.886%

(i) . . .

(vi) it is the intent of the board to set minimum on-the-farm prices for only products and quantities set forth in paragraphs (i) through (v) above. Prices for products or quantities for on-the-farm sales other than those specified in paragraphs (i) through (v) above are neither covered nor contemplated hereby and are therefore specifically denied. calculated by subtracting differentials from the existing whole white milk on the farm price. The differentials will be the differences between the regular whole white milk retail price and the other appropriate established retail prices.

(j) . . .

3. The purpose for Stacey J. Auch d/b/a Misty Vale Dairy proposing to amend rule 8.86.301 (6) (i)(vi) is to establish an on-the-farm price for low fat milk.

The Board of Milk Control is proposing to amend rule 8.86.301 (6) (a), (b), (e), (f), (g) and (h) for house cleaning purposes so the rule reflects more accurately what is actually being done and to make minor changes to producer and distributor formulas to improve their accuracy.

4. The Board wishes to serve notice that any method of calculating jobber prices presented at the hearing will be an item of proper consideration for this hearing.

5. The Board proposes to consider the statutory factors set out in section 81-23-302, MCA, (5) (a)-(i) as relevant matters for discussion. They are as follows:

"81-23-302. Establishment of minimum prices. (1) . . .

(b) . . .

(a) current and prospective supplies of milk in relation to current and prospective demands for such milk for all purposes;

(b) the ability and willingness of consumers to purchase, which shall include among other things per capita disposable income statistics, consumer price indexes, and wholesale price indexes;

(c) the cost factors in producing milk, which shall include among other things the prices paid by farmers generally (as used in parity calculations of the United States department of agriculture), prices paid by farmers for dairy feed in particular, and farm wage rates in this state;

(d) the alternative opportunities, both farm and nonfarm, open to milk producers, which shall include among other things prices received by farmers for all products

other than milk, prices received by farmers for beef cattle, and the percentage of unemployment in the state and nation as determined by appropriate state and federal agencies;

(e) the prices of butter, nonfat dry milk, and cheese;

(f) the cost factors in distributing milk, which shall include among other things the prices paid by distributors for equipment of all types required to process and market milk and prevailing wage rates in this state;

(g) the cost factors in jobbing milk, which shall include among other things raw product and ingredient costs, carton or other packaging cost, processing cost, and that part of general administrative costs of the supplying distributor which may properly be allocated to the handling of milk to the point at which such milk is at the supplying distributor's dock, equipment of all types required to market milk, and prevailing wage rates in the state;

(h) the need, if any, for freight or transportation charges to be deducted by distributors from producer prices for bulk milk."

6. In its consideration of amending rule 8.86.301 on its own motion, the Board takes official notice as facts within their own knowledge of a ten year study of the seasonality factor for weekly wages - total private the results of which are as follows:

Jan. - .9867	May - .9911	Sept. - 1.0136
Feb. - .9832	June - 1.0053	Oct. - 1.0192
March- .9809	July - 1.0165	Nov. - 1.0047
April- .9822	August - 1.0261	Dec. - .9905

The Board also takes official notice of costs of hauling alfalfa hay from dealers to dairy farmers. Based on telephone contacts with 13 hay haulers, the following are examples of those costs:

AREA OF STATE	ONE WAY MILEAGE		
	0 to 50 miles	51 to 100 miles	over 100 miles
Bozeman	\$10.00	\$15.00	\$20.00 - \$22.50
Billings	\$10.00	\$15.00	\$20.00
Great Falls	\$10.00--\$11.00	--	\$17.50 - \$20.00
Missoula	--	--	\$20.00
Kalispell	\$ 7.50--\$10.00	--	--

7. More detailed information is available for inspection during regular business hours, at the offices of the Department of Commerce, Milk Control Bureau, 1430 Ninth Avenue, Helena, Montana 59620-0422. Copies will be provided upon request and payment of copying charges. Requests for copies should be made to the Department by visiting or writing the address given in this paragraph or by telephoning (406) 444-2875.

8. Interested persons may present data, views or arguments pursuant to section 2-4-302, MCA, either orally or in writing at the hearing or by mailing the same to the Milk Control Bureau, 1430 Ninth Avenue, Helena, Montana 59620-0422 no later than April 24, 1984.

9. Mr. Allen Chronister, Esq., 215 North Sanders, Helena, Montana has been designated to preside over and conduct the hearing.

10. The authority of the Board of Milk Control to take the actions and adopt the rules as proposed is in section 81-23-302, MCA. Such rules, if adopted will implement the same section.

BOARD OF MILK CONTROL
CURTIS C. COOK, CHAIRMAN

By: William E. Ross
WILLIAM E. ROSS, CHIEF
MILK CONTROL BUREAU

Certified to the Secretary of State March 5, 1984.

MAR Notice No. 8-120-2

(b) The annual planning service fee shall be payable on the first and each succeeding anniversary date of the sale and issuance of the bonds or notes and shall be .15% of the principal amount of the bonds or notes outstanding on each such anniversary date.

(2) In addition to the initial and annual planning service fee, unless otherwise agreed by the authority, each health institution shall pay all costs and expenses incurred by the health institution in connection with the issuance and sale of the bonds or notes and shall also pay all costs and expenses incurred by the authority for services provided by third persons in connection with the issuance and sale of bonds or notes, including accounting, legal, consulting, printing and publication fees, costs and expenses. The health institution shall pay such costs and expenses regardless of whether the bonds or notes are issued and sold."

3. The fee structure presented here is intended to provide for payment of the expenses of the authority as provided in section 90-7-211, MCA. It has been developed to be consistent with other state health facilities authorities and other financing agencies to provide for the authority's expenses and maintain a competitive rate structure. The current rule is being replaced by this rule to provide specificity in the fee structure.

4. 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 Health Facility Authority Liaison, Department of Commerce, 1424 9th Avenue, Helena, Montana 59620, no later than April 12, 1984.

5. The board or its designee will preside over and conduct the hearing.

6. The authority of the agency to make the proposed amendment is based on section 90-7-202, MCA, and the rule implements section 90-7-211, MCA.

HEALTH FACILITY AUTHORITY
LARRY FASBENDER, CHAIRMAN

BY: 

GARY BUCHANAN, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 5, 1984.

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

In the matter of the adoption
of rules requiring certification
of blasters on strip or under-
ground coal or uranium mines

) NOTICE OF PROPOSED ADOPTION
) OF RULES FOR CERTIFICATION
) OF COAL OR URANIUM MINE
) BLASTERS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. At the May, 1984, meeting of the Board of Land Commissioners, which is currently scheduled for May 21, 1984, the Board of Land Commissioners and Department of State Lands propose to adopt rules requiring certification of blasters on strip or underground coal or uranium mines.
2. The proposed rules do not replace or modify any section currently found in the Administrative Rules of Montana.
3. The proposed rules provide as follows:

RULE I REQUIREMENTS FOR THE CONDUCT OF BLASTING OPERATIONS (1) No later than twelve months after the effective date of the U.S. Department of the Interior, Office of Surface Mining's final approval of blaster certification program for Montana, each operator shall conduct each blasting operation under direction of an individual who has been certified by the department pursuant to this subchapter and who is familiar with the operation's blasting plan and site-specific blasting performance standards.

(2) A certified blaster may not delegate the direction of blasting operation to any individual who is not a certified blaster.

(3) A blaster and at least one other person must be present during the detonation of each blast.

(4) A blaster shall immediately exhibit on-site or at the mine office his certificate to any authorized representative of the department or the Office of Surface Mining upon request.

(5) Operators shall require that persons who are not certified blasters receive direction and on-the-job training from a certified blaster before those persons assist in the use of explosives. AUTH: 82-4-204(3), 205(7), and 231(3)(e), MCA; IMP: 82-4-231(3)(e), MCA.

RULE II CERTIFICATION OF BLASTERS (1)(a) Persons seeking certification as blasters shall submit to the department an application on a form provided by the department. The applicant must include a verifiable statement that he has successfully completed a training course, provided by the department, the operator, or other person, meeting the requirements of Rule III (2) and incorporating the training manual prepared by the department.

(b) The department shall make available to the public, upon request and payment of a reasonable fee, a copy of the training manual. The training manual shall be updated yearly and these updates shall also be available upon request and payment of a reasonable fee. However, before adoption of the initial manual, the department shall circulate a draft for public re-

view.

(2) The department shall issue a blaster certification to each applicant who:

(a) has two years field experience in blasting;

(b) has successfully completed a blaster training course meeting the requirements of Rule III; and

(c)(i) if the department determines that the surface coal mine foreman's certificate examination administered by the department of labor and industry examines adequately, at a minimum, in the topics set forth in Rule III, achieves a grade of 80% or higher on the blasting portion of that test, or

(ii) achieves a grade of 80% on an examination administered by the department. The examination shall, at a minimum, reflect the training manual prepared by the department and examine in the topics set forth in Rule III. The examination shall also incorporate an equally weighted section that covers practical field experience on blasting procedures and occurrences. An applicant who fails may retake the examination. If the applicant fails the examination a second time, he must successfully complete a blaster training course again and reapply for certification before re-taking the examination.

(3) Blaster certifications are non-transferable.

(4) Certification shall expire three years after issuance. The department shall recertify if the blaster:

(a) submits to the department, at least 60 days prior to the expiration of his certification, an application for recertification on a form provided by the department;

(b) has successfully completed 24 hours of refresher training by a qualified blasting instructor during the certification period;

(c) has conducted or directed blasting operations within the 12 months immediately preceding the date of application for recertification or receives a grade of 80% or better on a recertification examination. The only new developments that the department may include in the recertification examination that have been included in annual supplements to the training manual. The applicant for recertification may take the examination twice.

(5) In lieu of the provisions of (1) and (2), the department shall certify any person who has a current state or federal blaster certificate under any program approved by the Department of Interior under 30 C.F.R. Part 850. The period of the department's certification shall be coextensive with the period of certification under the other program but shall not exceed three years. AUTH: 82-4-204(3). 205(7) and 231(3)(e), MCA; IMP: 82-4-231(3)(e), MCA.

RULE III. BLASTER TRAINING COURSES (1) In order to qualify for certification or recertification, an applicant must successfully complete training or refresher courses meeting the requirements of (2) or (3) below.

(2) A blaster training course must provide training and discuss practical applications of:

(a) use of explosives, including:

(i) selection of the type of explosive to be used;

- (ii) determination of the properties of explosives which will produce desired results at an acceptable level of risk;
- (iii) handling, transportation and storage;
- (b) design of blasts, including:
 - (i) geologic and topographic considerations;
 - (ii) blast hole design;
 - (iii) pattern design, field layout, and timing of blast holes;
 - (iv) field applications;
 - (c) loading of blast holes, including priming and boosting;
 - (d) use of initiation systems and blasting machines;
 - (e) effects of blasting vibrations, airblast, and flyrock, including:
 - (i) monitoring techniques;
 - (ii) methods to control adverse effects;
 - (f) use of secondary blasting;
 - (g) discussion of current federal and state rules applicable to the use of explosives;
 - (h) maintenance of blast records;
 - (i) determination of blasting schedules;
 - (j) design and use of preblasting surveys;
 - (k) requirements of blast plans;
 - (l) signs, warning signals, and site control;
 - (m) identification of unpredictable hazards including:
 - (i) lightning;
 - (ii) stray currents;
 - (iii) radio waves; and
 - (iv) misfires.
 - (3) A blaster refresher course must familiarize the blaster with new developments contained in the yearly supplement to the department's training manual and shall refresh the blaster's knowledge in one or more of the topics listed in (2) above. AUTH: 82-4-204(3), 205(7) and 231(3)(e), MCA; IMP: 82-4-231(3)(e), MCA.

RULE IV SUSPENSION OR REVOCATION OF BLASTER CERTIFICATION (1) The following are grounds for suspension or revocation of blaster certification:

- (a) noncompliance with any order of the department;
 - (b) conviction of criminal possession or sale of dangerous drugs;
 - (c) unlawful use in the work place of, or current addiction to, alcohol, narcotics, or other dangerous drugs;
 - (d) violation of any state or federal explosives laws or regulations;
 - (e) providing of false information or a misrepresentation to obtain certification;
 - (f) failure to present blaster certification upon request of the department or Office of Surface Mining personnel;
 - (g) delegating responsibility to any individual who is not a certified blaster;
 - (h) storage, transportation, or use of explosives in a manner that could threaten life or limb or cause environmental harm.
- (2) If the department finds that a certified blaster has committed

one or more of the acts prohibited in (1) above, the department may, and upon a finding of willful conduct shall, suspend or revoke the certification of the blaster. The department shall determine whether to suspend or revoke and the length of suspension on the basis of determination of reasonable necessity to protect human life or limb and to prevent environmental degradation.

(3) If the department has probable cause to believe that a certified blaster has committed any of the acts prohibited in (1) above and that the blaster's certification should or must be suspended or revoked, the department shall notify the blaster and his employer in writing by certified mail at the address contained in the blaster's application for certification or at a subsequent address of which the blaster has notified the department in writing. The blaster does not defeat service by refusing to accept or failing to pick up the notice. The notice shall advise the blaster of the department's proposed action, the alleged facts upon which the proposed action based, and the blaster's right to request a hearing. If the department determines that suspension of the blaster's certification is reasonably necessary in order to protect human life or limb or the environment, it may suspend the certification until the hearing is held; provided, however, that no such suspension may be in effect for longer than 45 days. At the close of the hearing, the hearing officer may, based on a finding that the department will probably prevail and that continued suspension is reasonably necessary, continue the suspension until a final decision is made. AUTH: 82-4-204(3), 205(7), 231(3)(e), MCA; IMP: 82-4-231(3)(e), MCA.

4. The department is proposing the rules in order to comply with 30 C.F.R. Part 850 which requires state coal regulatory authorities to adopt blaster certification programs and to ensure that blasting operations are conducted in a safe and environmentally protective manner.

5. Interested parties may submit their data, views or arguments, concerning the proposed rule in writing to John F. North, Chief Legal Counsel, Department of State Lands, Capitol Station, Helena, Montana 59620, no later than April 13, 1984.

6. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to John F. North, Chief Legal Counsel, Department of State Lands, Capitol Station, Helena, Montana 59620, no later than April 13, 1984.

7. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption, from the Administrative Code Committee of the legislature, from a governmental sub-division or agency, or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be one person based on the 13 coal mine operators in Montana.

8. The authority of the department to make the proposed rule is based

on 82-4-231(3), 205(7), and 231(3)(a), MCA, and the rule implements section 82-4-231(2)(e), MCA.


Dennis Hemmer, Commissioner
Department of State Lands

Certified to the Secretary of State this 5th day of March, 1984.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the repeal	)	NOTICE OF THE REPEAL OF
of rules 2.21.1401 through	)	RULES 2.21.1401 THROUGH
2.21.1408 and 2.21.1411 and	)	2.21.1408 and 2.21.1411;
the adoption of new rules	)	ADOPTION OF 2.21.1412-
relating to the administra-	)	1432; RELATING TO THE
tion of veteran's and handi-	)	ADMINISTRATION OF VET-
capped person's employment	)	ERAN'S AND HANDICAPPED
preference	)	PERSON'S EMPLOYMENT
	)	PREFERENCE

TO: All Interested Persons.

1. On January 26, 1984, the department of administration published notice of the proposed repeal of rules 2.21.1401 through 2.21.1408 and 2.21.1411 and the adoption of new rules relating to the administration of veteran's and handicapped person's employment preference at page 93 of the 1984 Montana Administrative Register, issue number 2.

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

2.21.1414 GENERAL ELIGIBILITY (1)(a) - (1)(b) same as proposed rule.

(c) if applying for municipal or county employment, he has resided continuously for at least 30 days immediately before applying for employment in the city, town, or county in which employment is sought, and

(1) (d) - (2) Same as proposed rule.

2.21.1415 ELIGIBLE VETERAN (1) Same as proposed rule.

(2) A veteran who is eligible for employment preference must have:

(a) have as provided in 39-30-103, MCA, "served on active duty during time of war or declared national emergency or in a campaign or expedition for which a campaign badge was authorized by the United States congress or the United States department of defense", as provided in 2.21.1426; and,

(b) have as provided in 39-30-103, MCA, "been separated from service by honorable discharge" or separation. A discharge "under honorable conditions" or any status other than "honorable" is not acceptable to receive employment preference.

(3) To meet the requirement to serve on active duty requires that the applicant has served on, as provided in 39-30-103, MCA, "full-time active duty other than for training in the regular components of the United States army, air force, navy, marine corps, or coast guard with full pay and allowances.

~~(4) --Active-duty~~ The term does not include ~~national~~

~~guard-or-reserve-service-such-as~~ monthly drills, summer encampments, initial training, or other inactive or active duty for training in the national guard and reserves."

~~(5)~~ (4) Excluded are is, as provided in 39-30-103, MCA, "a retired members of the United States armed forces who are is eligible for or receiving a military retirement allowance based on length of service and does not include any other retired members of a public retirement system, except social security, that is supported in whole or in part by tax revenues."

2.21.1416 ELIGIBLE DISABLED VETERAN (1) Same as proposed rule.

(2) A disabled veteran who is eligible for employment preference must have, as provided in 39-30-103, MCA:

(a) have "served on active duty;

(b) have been separated from service by honorable discharge," or separation. A discharge "under honorable conditions" or any status other than "honorable" is not acceptable to receive employment preference; and,

(c) as provided in 39-30-103, MCA, "suffers a service-connected disability determined by the United States veterans administration to be 30% or more disabling." The disability does not have to be incurred during time of war or national emergency or in a campaign or expedition for which a campaign badge was authorized by the U.S. Congress or department of defense.

(3) Same as proposed rule.

2.21.1417 ELIGIBLE SPOUSE (1) Same as proposed rule.

~~(2) Spouses who may be eligible to receive employment preference are:~~ As provided in 39-30-103, MCA, an eligible spouse is:

(a) "the unremarried surviving spouse of a veteran who died while on active duty or whose death resulted from a service-connected disability; or

(b) the current spouse of:

(i) a disabled veteran determined by the United States veterans administration to have a 100% service-connected disability who is unable to use his employment preference because of his disability; or

~~(c) (ii) the current spouse of a person on active duty currently listed determined by the United States government as to be missing in action or a prisoner of war; or~~

~~(d) (iii) the current spouse of a handicapped person determined by the department of social and rehabilitation services to have a total 100% disability and who is unable to use his employment preference because of his disability."~~

(3) Same as proposed rule.

2.21.1421 EMPLOYERS COVERED (1) Public employers covered by the veteran's and handicapped person's employment preference act, 39-30-101 et. seq. MCA, are, as provided in 39-30-103, MCA:

(a) any department, office, board, bureau, commission,

agency, or other instrumentality of the executive, judicial, or legislative branch of the government of the state of Montana; and

(b) any county, city, or town.

(2) Excluded--are The term does not include a school district, a post-secondary vocational-technical center or program, a community college, the board of regents of higher education, the Montana university system, a special purpose district, an authority, or any political subdivision of the state other than a county, city, or town."

2.21.1422 POSITIONS COVERED (1) - (2) Same as proposed rule.

(3) As provided in 39-30-103, MCA, position means "a permanent or seasonal position as defined in 2-18-101 for a state position or a similar permanent or seasonal position with a public employer other than the state. However, the term does not include:

(a) a temporary position as defined in 2-18-101 for a state position or similar temporary position with a public employer other than the state;

(b) a state or local elected official;

(c) employment as an elected official's immediate secretary, legal advisor, court reporter, or administrative, legislative, or other immediate or first-line aide;

(d) appointment by an elected official to a body such as a board, commission, committee, or council;

(e) appointment by an elected official to a public office if the appointment is provided for by law;

(f) a department head appointment by the governor or an executive department head appointment by a mayor, city manager, county commissioner, or other chief administrative or executive officer of a local government; or

(g) engagement as an independent contractor or employment by an independent contractor."

(4) Also excluded is appointment by lawful authority to fill an unexpired term in an elected office.

(5) A person hired into a temporary position shall not be considered a current employee for purposes of 2.21.1423. If a person hired into a temporary position is considered in the applicant pool for a permanent or seasonal position, the selection is considered an initial hire and the employment preference must be applied.

(4)--The following positions are excluded from employment-preference:

(a)--a-state-or-local-elected-official;

(b)--employment--as--an--elected--official's--immediate secretary, legal adviser, court reporter, or administrative, legislative, or other immediate or first-line aide;

(d)--appointment-by-an-elected-official-to-a-public office-if-the-appointment-is-provided-for-by-law;

(e)--appointment-by-lawful-authority-to-fill-an-un-expired-term-in-an-elected-office;

(f)--a-department-head-appointment-by-the-governor-or an-executive-department-head-appointment-by-a-mayor,-city

~~manager, county commissioner, or other chief administrative or executive officer of a local government, or~~
~~(g) -- engagement as an independent contractor or employment by an independent contractor.~~

2.21.1423 APPLYING PREFERENCE (1) - (2) Same as proposed rule.

(3) As provided in 39-30-203, MCA, an initial hire ~~is~~ means "a personnel action for which applications are solicited from outside the ranks of the current employees of:

(a) a department, as defined in 2-15-102 MCA, for a position within the executive branch;

(3) (b) - (4) Same as proposed rule.

(5) As provided in 39-30-103, MCA, substantially equal qualifications means "the qualifications of two or more persons among whom the public employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons."

(6) - (8) Same as proposed rule.

2.21.1424 CLAIMING PREFERENCE - DOCUMENTATION AND VERIFICATION (1) As provided in 39-30-206, MCA, "a public employer shall, ~~at the place where applications are received~~, by posting or on the application form, give notice of the preferences that 39-30-101, et. seq. MCA, (the veteran's and handicapped person's employment preference act) ~~(39-30-101 et. seq., MCA)~~ provides in public employment." The notice shall appear at the place where applications are received.

(2) As provided in 39-30-206, MCA, "a job applicant who believes he has an employment preference shall claim the preference in writing before the time for filing applications for the position involved has passed." An employer may provide a standard form for claiming employment preference. However, failure to complete such a form does not negate an applicant's claim for preference, as long as a reasonable and timely claim is made as required by this rule. As provided in 39-30-206, MCA, "failure to make a timely employment preference claim for a position is a complete defense to an action in regard to that position under 39-30-207, MCA."

(3) - (7) (d) Same as proposed rule.

(e) from an eligible spouse of a disabled veteran, a document from the U. S. veterans administration certifying the veteran is 100% disabled and unable to use the preference because of the disability and is married to the disabled veteran in accordance with Montana law. The spousal relationship will be certified for not more than 1 year. Where the veterans administration does not certify that the disabled veteran is unable to use the preference because of the disability, the hiring authority shall obtain a signed statement from the disabled veteran that:

(i) he is incapable of using his employment preference because of the severity of his disability; and

(ii) he will not claim employment preference with any covered employer for 1 year from the date his spouse obtains certification for the preference.

(f) from an eligible spouse of a handicapped person, a document from the department of social and rehabilitation services certifying the handicapped person is totally disabled, is unable to use the preference because of the disability, and is married to the ~~handicapped--person~~ eligible spouse in accordance with Montana law. The spousal relationship will be certified for not more than 1 year.

(7)(g) - (10) Same as proposed rule.

(11) Applicants shall be notified that intentional misrepresentation of the claim for preference is cause for immediate discharge.

2.21.1425 DURATION OF PREFERENCE (1) Subject to provisions of 39-30-202, MCA, a handicapped person as described in 2.21.1418, ~~the spouse of a handicapped person as described in Rule VII-(2)(d), or a disabled veteran as described in 2.21.1416, or the spouse of a disabled veteran as described in Rule VI-(2)(b),~~ qualifies for employment preference as long as the disabling condition persists.

(2) The spouse of a 100% handicapped person as described in 2.21.1417, or the spouse of a 100% disabled veteran as described in 2.21.1417, qualifies for employment preference as long as:

(a) the 100% handicapped person or 100% disabled veteran is unable to use the preference due to the severity of the disabling condition; and

(b) the spousal relationship continues. Continuation of the spousal relationship must be recertified annually by the appropriate certifying agency.

~~42~~ (3) A veteran, as described in 2.21.1415, who is not a disabled veteran, as described in 2.21.1416, qualifies for employment preference for no longer than 15 years following separation from service or December 20, 1988, whichever is later.

~~43~~ (4) The surviving spouse of a veteran as described in 2.21.1417, qualifies for employment preference for as long as the spouse remains unremarried.

~~44~~ (5) The spouse of a person as described in 2.21.1417, qualifies for employment preference for as long as the person is missing in action or is a prisoner of war.

2.21.1426 MILITARY CONFLICTS (1) To be eligible for employment preference a veteran must have served:

(a) on active duty during war or national emergency, ~~as follows:~~ which are, as provided in 39-30-103, MCA:

(i) "World War I, beginning on April 6, 1917, and ending on November 11, 1918, both dates inclusive;

(ii) World War II, beginning on December 7, 1941, and ending on December 31, 1946, both dates inclusive;

(iii) the Korean conflict, military expedition, or police action, beginning on June 27, 1950, and ending on

January 31, 1955, both dates inclusive; and

(iv) the Vietnam conflict, beginning on August 5, 1964, and ending on May 7, 1975, both dates inclusive; "or

(b) "in a campaign or expedition for which a campaign badge has been authorized by the department of defense."

(2) Same as proposed rule.

2.21.1427 CERTIFICATION OF HANDICAPPED PERSONS (1) Same as proposed rule.

(2) ~~As provided in 39-30-103, MCA,~~ In order to be eligible for employment preference, a handicapped person must be certified by the department of social and rehabilitation services to have, as provided in 39-30-103, MCA "a physical or mental impairment that substantially limits one or more major life activities, such as writing, seeing, hearing, speaking, or mobility, and which limits the individual's ability to obtain, retain, or advance in employment." The certification process may also consider impairments which limit an individual's ability to know or reason; or an individual's ability to make a choice or decision.

(3) The handicapped person shall have a professional diagnosis establishing the disabling condition. The handicapped person's medical evidence shall be provided by a licensed physician or a licensed practitioner competent to treat and diagnose the particular disabling condition.

~~(4)~~ (4) Each disabling condition will be individually evaluated on a case-by-case basis to determine eligibility for employment preference with the exception of those persons specifically excluded in Section (6c) of this Rule.

~~(4)~~ (5) To determine if a physical impairment exists, the department of social and rehabilitation services shall consider at least the following:

(a) For the purpose of determining whether a person will be considered to be a person handicapped by blindness, the department shall consider the definition in 53-7-301, MCA: "'blind individual' means an individual whose central visual activity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity is greater than 20/200 but is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees or who has other eye conditions which render vision equally defective or who has an eye condition which will cause blindness."

(b) For the purpose of determining whether a person will be considered to be a person handicapped by deafness; the department shall consider the definition in 49-4-502, MCA: "'deaf person' means a person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit the person from understanding oral communications. The term further includes, but is not limited to, a person who, because of loss of hearing, cannot communicate spoken language."

(c) For the purpose of determining whether a person

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will be considered to be a handicapped person, the department shall consider at least the following disorders to constitute neuromuscular disorders:

- (i) cerebral palsy;
- (ii) cystic fibrosis;
- (iii) multiple sclerosis;
- (iv) muscular dystrophy;
- (v) epilepsy;
- (vi) paraplegia;
- (vii) quadriplegia; or
- (viii) other diagnosable diseases or dysfunctions

recognized in medical literature as affecting neuromuscular performance.

(d) For the purpose of determining whether a person will be considered to be a handicapped person, the department shall consider at least the following disorders to constitute organic disorders:

- (i) diabetes;
- (ii) heart disease;
- (iii) cardiovascular disease;
- (iv) stroke;
- (v) respiratory/pulmonary dysfunctions;
- (vi) hemic dysfunctions;
- (vii) lymphatic dysfunctions;
- (viii) endocrine dysfunctions; or
- (ix) genito-urinary dysfunctions and other diagnosable diseases or dysfunctions recognized in medical literature as affecting organic performance;

(e) For the purpose of determining whether a person will be considered to be a handicapped person the department shall consider at least the following disorders to constitute orthopedic disorders:

- (i) disfigurement;
- (ii) anatomical loss;
- (iii) skeletal/muscular dysfunction and impairment;
- (iv) other diagnosable dysfunctions recognized in medical literature, as affecting orthopedic performance.

~~(5) (6) To determine if a mental impairment exists, for the purpose of determining whether a person will be considered to have a mental impairment the department of social and rehabilitation services shall consider--the following--to constitute a mental impairment: apply the following definition, as provided in 39-30-103, MCA:~~

~~(a) an individual mental impairment means "suffering from a disability attributable to mental retardation, cerebral palsy, epilepsy, autism, or any other neurologically handicapping condition closely related to mental retardation and requiring treatment similar to that required by mentally retarded individuals; or~~

~~(b) an organic or mental impairment that has substantial adverse effects on an individual's ability to know or reason, or on an individual's ability to make a choice or decision; cognitive or volitional functions.~~

~~(6) (C) The term mental impairment does not include~~
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alcoholism or drug addiction and does not include any mental impairment, disease, or defect that has been asserted by the individual claiming the preference as a defense to any criminal charge."

~~(7) A physical or mental impairment does not constitute a handicap for the purpose of employment preference unless its severity is such that it results in a substantial limitation of one or more major life activities, and as a consequence of the handicap, the person's employment opportunities have been or may be substantially limited.~~

(7) Handicapped certification for employment preference shall not be denied merely because of a person's current or former employment.

(8) The department of social and rehabilitation services will establish a process and standards for certifying handicapped persons for employment preference. The process shall include, but is not limited to:

(a) a determination established by a professional medical diagnosis that the person has a physical or mental impairment as defined by these rules; and

(b) a determination that the physical or mental impairment substantially limits one or more major life activity and as a consequence of the handicap the person's employment opportunities have been or may be substantially limited; or

(c) a determination by the counselor and medical consultant designated by the department of social and rehabilitation services that the disability is so severe or apparent that it has lead to or could lead to employment discrimination ~~when the handicapped person is searching for employment, which would substantially limit the person's ability to obtain, retain, or advance in employment; or~~

(d) a determination that the disabled person is totally disabled and that he is unable to use his preference because of the disability and therefore his spouse is eligible for preference.

~~(9)~~ Each determination will rely on the professional judgment of the counselor and medical consultant designated by the department of social and rehabilitation services to make the determination.

~~(10)~~ Each determination will be provided in writing in a standard form as established by the department of social and rehabilitation services. The written notice shall include a statement regarding the duration of the certification. The written notice shall be provided to the handicapped person within 30 days of the receipt of all information necessary to make the certification decision.

~~(11)~~ The process shall allow for permanent certification of those impairments (in the judgment of the counselor and medical consultant designated by the department of social and rehabilitation services) considered to be permanent and shall allow for loss of certification for those impairments which may be considered temporary.

~~(12)~~ The person requesting certification by the

department of social and rehabilitation services is responsible for providing all information necessary to document his claim to be certified for employment preference. All costs of obtaining the necessary information, including medical evidence to substantiate his claim, are the responsibility of the person requesting the certification.

444 (13) Where a handicapped person has been determined to have a disability so severe that he is unable to use his preference and therefore his spouse is eligible to use his preference, the written notice of certification should clearly state the preference-eligible person is an eligible spouse and that the certification is valid for not more than 1 year.

445 (14) The department of social and rehabilitation services shall insure the confidentiality of information gathered when making employment preference determination in accordance with federal and state law and as provided in 2.21.1424.

446 (15) Any handicapped person, as provided in 39-30-103, MCA, who is dissatisfied with the department of social and rehabilitation services certification decision regarding eligibility for employment preference, shall be advised of his right to file a request for an administrative review of that action and right to a fair hearing if he is dissatisfied with the outcome of the administrative review. The administrative review shall be conducted by the administrator of vocational rehabilitative services division or designee. The fair hearing shall be conducted in accordance with the fair hearing rules of the department of social and rehabilitation services as provided for in 46.2.201 et. seq., ARM.

2.21.1428 HIRING DECISIONS (1) As provided in 39-30-206 and 39-30-207, MCA, "if an applicant for a position makes a timely written employment preference claim, the public employer shall give written notice of its hiring decision to each applicant claiming preference." The notice shall include whether the position was obtained as the result of application of preference by the public employer.

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

2.21.1429 INTERNAL PROCEDURES - ENFORCEMENT OF PREFERENCE

(1) As provided in ~~39-30-206 and~~ 39-30-207, MCA, "an applicant who believes he has not been accorded his rights under the veteran's and handicapped person's employment preference act, 39-30-101, et. seq., MCA, may, within 30 calendar days of receipt of the notice of the hiring decision, submit to the public employer a written request for an explanation of the public employer's hiring decision."

(2) Same as proposed rule.

(3) As provided in 39-30-207, MCA, "Within 15 calendar days of receipt of the request for an explanation, the public employer shall give the applicant a written

explanation." The written explanation shall contain specific job-related reasons why the person claiming preference was not hired. The explanation should be dated and identify the specific position in question. The public employer should send the written explanation by certified mail. Failure to provide written explanation as required may subject the employer to reopening the selection process. The employer should safeguard the confidentiality of information he has considered in accordance with state and federal law and as provided in 2.21.1424.

(4) All days are calendar days.

2.21.1430 EXTERNAL PROCEDURES - ENFORCEMENT OF PREFERENCE

(1) "An ~~appealant~~ applicant may, within 90 calendar days after receipt of notice of the hiring decision, file a petition in district court in the county in which his application was received by the public employer," as provided in ~~39-30-206~~ and 39-30-207, MCA.

(2) All days are calendar days.

2.21.1432 CONFLICT WITH FEDERAL LAW (1) As provided in 39-30-108, MCA, employment preference does "not apply to work or positions subject to federal laws or regulations, if application of the employment preference conflicts with those laws or regulations."

(2) Same as proposed rule.

(3) Public hearings on the proposed rules were conducted on February 16, 21, and 22, 1984 in Helena, Billings, Missoula, Great Falls, and Havre. The following comments and testimony were received during the comment period and at the public hearings.

COMMENT: The department received the following comments regarding statutory language that can not be administratively changed:

- 1) One comment stated that persons who suffer from alcoholism or chemical dependency should also be eligible for employment preference since these conditions were declared to be diseases by the American Medical Association.
- 2) Two comments suggested that the law provide preference for retired veterans. The law should not exclude any retired veterans from eligibility for employment preference.
- 3) Two comments suggested that school districts and the university system should also be covered by the law.
- (4) One comment suggested that the nature of the employment preference should be absolute.

COMMENT: One comment stated that the rules should provide for a quantifiable selection system, such as a scored procedure or testing, to administer employment preference.

RESPONSE: The department and the legislature recognizes that public employers use a variety of scored and unscored selection procedures. Since the rules must be used and applied by a broad spectrum of state and local public employers, the department does not believe it can specify in rule the type of selection procedures to be used by all public employers covered by the rules.

COMMENT: One comment suggested that the rules should require an annual review of the number of positions filled through preference.

RESPONSE: The legislature specifically considered such a requirement and chose not to include such a requirement in the law or statement of intent.

COMMENT: Three comments stated that 2.21.1427 (Rule XIV) providing a one-year certification of the spouse of a handicapped person appears to be in conflict with 2.21.1425 (Rule XII) indicating that the spouse of a handicapped person qualified for employment preference for as long as the disabling condition persists.

RESPONSE: The department has amended 2.21.1425 (Rule XII) to require an annual renewal of eligible spouse's certification for employment preference. The change requires that eligible spouses of disabled veterans and eligible spouses of handicapped persons be treated the same. The department believes that since there is potential for the spousal relationship to change within a year, that it is appropriate to require an annual renewal of the eligible spouse's certification for preference.

COMMENT: One comment suggested that 2.21.1424 (Rule XI) implies that SRS will certify that the eligible spouse is married to the handicapped person but 2.21.1424 (Rule XI) does not say the same regarding the spouse of a disabled veteran.

RESPONSE: The department has amended 2.21.1424 (Rule IX), to state that the U. S. Veterans Administration will certify the spousal relation between the eligible spouse and the 100% disabled veteran.

COMMENT: One commenter did not understand what is meant by in 2.21.1422 (Rule IX), "positions which are designated as temporary."

RESPONSE: A temporary position is defined in 2-18-101, MCA as "a position so designated on the appropriate agency list of authorized positions referred in 2-18-206, created for a definite period of time not to exceed 9 months."

COMMENT: One comment stated that the term "cognitive reasoning" or a similar phrase should be added to the list of major life activities in 2.21.1427 (Rule XIV).

RESPONSE: The department added a statement following the statutory language in 2.21.1427 (Rule XIV), which includes similar wording to provide consistency between mental and physical impairment.

COMMENT: The department received three comments in general support of adoption of the proposed rules.

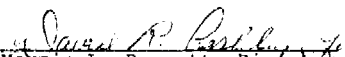
COMMENT: One comment concerned the proposed rules extensive use of statutory language and that statutory language was not clearly identified.

RESPONSE: It is necessary to repeat statutory language in these rules because of the broad spectrum of public employers, including municipal, county and all three branches of state government, covered by these rules. The department has amended all the rules to clearly show statutory language as such.

COMMENT: 2.21.1427 (Rule XIV) requires consideration of past or potential discrimination while the statute only requires certification of a physical or mental impairment substantially limiting in major life activity. One comment or suggests that this requirement could potentially conflict with 2.21.1427 (Rule XIV) which provides for no denial of certification based on current or former employment.

RESPONSE: 2.21.1427 (Rule XIV) is an alternate way a handicapped person can show that their past employment has been limited because of their physical or mental impairments. The statement of intent suggests that the rules give guidance as to in what instances a physical or mental impairment limits a person's ability to obtain, retain or advance in employment.

By:


MORRIS L. BRUSETT, Director
Department of Administration

Certified to the Secretary of State, March 5, 1984

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STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF ATHLETICS

In the matter of the adoption) NOTICE OF ADOPTION OF RULES
of rules governing professional) 8.8.101; 8.8.201, 8.8.202;
or semi-professional wrestling) 3.8.401-8.8.406; 8.8.501-504;
or boxing matches and) 3.8.601; 8.8.701-707; 8.8.801-
exhibitions) 803; 8.8.901-908; 8.8.1201;
8.8.1301-1306; 8.8.1401

TO: All Interested Persons:

1. On January 26, 1984, the Board of Athletics published a notice of adoption of the above-stated rules at pages 108 through 130, 1984 Montana Administrative Register, issue number 2.

2. The board received a letter from David Niss, Legal Counsel to the Administrative Code Committee, with several suggestions for changes or additions to the rules. Also received was a phone call from Dan Jancic, a licensed referee and former Anaconda Police Chief, with a suggested addition to rule XXVII. Referee. The board is adopting the rules as proposed with the following changes, based on the comments of the above comments: (new matter underlined, deleted matter interlined)

VII. now "8.8.404 LICENSING REQUIREMENTS (1) All persons, clubs, corporations, organizations, associations, referees, seconds, managers, boxers, wrestlers, promoters and/or matchmakers judges must be licensed by the board.

(2) All licenses shall expire on December 31st of each year.

{2} (3) Any club holding an annual license shall obtain a separate permit or sanction from the board before holding any specific boxing or wrestling contests at least 21 days prior to the event.

(a) The permit shall be posted and prominently displayed in the box office of the premises where the boxing, sparring or wrestling contest is held.

{3} (4) Every contestant must box or wrestle consistently under the same name. Ring names may be used by and must appear on the official license as issued by the board.

{4} (5) Prior to issuance of a promoters license, the promoter shall provide a surety bond in the amount of \$5,000, on forms provided by the board, to guarantee payment of all taxes and fees to the state of Montana.

(6) Promoters are responsible to insure that adequate public safety is maintained.

{6} (7) The promoter shall provide insurance to adequately protect the contestants, the officials and the attending public, and shall furnish proof of such insurance to the board.

~~(7)~~ (8) Applications and fees shall be made to the board prior to or on the date of the boxing, sparring or wrestling event.

(a) Application must be on forms provided by the board and include a photograph of the applicant or contestant.

~~(8)~~ (9) Contests staged on government or Indian reservations within the state of Montana, shall be governed by such rules and regulations as may be agreed upon between the governing bodies concerned and the board of athletics.

~~(9)~~ (10) The board must be notified of any proposed contests, together with the names and weights of all contestants, at least 10 days before such contest or exhibition.

(11) The board reserves the right to question any applicant, and if, in its judgement, the applicant does not have sufficient knowledge of the sport or is otherwise not deemed responsible to act, such license may be denied.

(12) No applicant, licensee or official shall appear at ringside who is under the influence of alcohol or drugs."

IX. now "8.8.501 FEES

- | | |
|-----------------------|-------|
| (1) .. | |
| (2) Boxers | 20 10 |
| (3) ... | |
| (5) Managers/Trainers | 10 |
| (6)..." | |

X. now "8.8.501 BOXING CONTESTANTS (1) ...

(6) Any boxing contestant who has participated in the following professional bouts, unless specifically authorized by the board, shall be placed under temporary suspension for the health and safety of the contestant:

- | | |
|------------------------------|----------------------|
| (a) more than 10 rounds | - 30 days suspension |
| (b) 6 to 10 rounds | - 21 days suspension |
| (c) 1 to 6 rounds | - 14 days suspension |
| (d) knockout | - 60 days suspension |
| (e) technical knockout (TKO) | - 30 days suspension |
| (7) ... | |

(8) All contestants must be in the building or wherever the contest is to be held at least one hour prior to the commencement of his bout.

(9) ..."

XXVII. now "8.8.903 REFEREE (1) Applicants for referee shall make application on forms prescribed by the board and shall furnish the following information:

(a) must present evidence of 5 years prior experience in judging boxing or wrestling events;

(b) must submit name and addresses of 3 references who can attest to his refereeing experience and integrity;

(c) each applicant for license shall become familiar with the law and rules of the board;

(d) must furnish proof of physical fitness, if applicant has not been actively refereeing for 3 years prior to application.

{1} (2) The referee shall be the chief official of contests, and shall have the general supervision over bouts, and shall take his position in the ring, and shall be properly attired.

{2} (3) ...

{16} (17) When a contestant is down, his opponent shall retire to the farthest neutral corner and remain there until the count is completed. Should he fail to do so, the referee may cease counting until he has so retired.

(18) If a contestant appears to be in distress or not giving his best effort, the referee may intervene and give a 'standing 8 count'.

{17} (19) ...

XXVIII. now "8.8.904 JUDGES (1) Each applicant shall make application on forms prescribed by the board and shall furnish the following information:

(a) must present evidence of 3 years prior experience in judging boxing events;

(b) must submit names and addresses of 3 references who can attest to judging experience and integrity;

(c) must be familiar with the law and rules of the board.

{1} (2) The judges shall be stationed at opposite sides of the ring.

{2} (3) ...

XXXI. now "8.8.907 SECONDS (1) Applicants for seconds license must be at least 18 years of age and furnish the following information:~

(a) must present evidence of assisting at boxing events;

(b) must submit names and addresses of 3 references who can attest to ring experience;

(c) name of boxer(s) in whose corner he usually assists at ringside.

(2) Licensed contestants and managers shall be permitted to act as seconds without purchasing an additional license. However in so doing, they must observe all rules pertaining to the conduct of seconds.

{2} (3) ..."

3. No other comments or testimony were received.

DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF SOCIAL WORK EXAMINERS

In the matter of the adoption) NOTICE OF ADOPTION OF
of rules regarding the board of) RULES 8.61.101; 8.61.201;
social work examiners) 8.61.401 - 8.61.404

TO: All Interested Persons:

1. On January 26, 1984, the Board of Social Work Examiners published a notice of public hearing on the proposed adoption of rules for the board at pages 131 through 133, 1984 Montana Administrative Register, issue number 2.

The hearing was held in the conference room of the Department of Commerce, 1424 9th Avenue, Helena, Montana. In addition to board members and staff, six persons were in attendance. Four gave testimony in favor of the rules. Six letters were received, all in favor. In addition to the favorable responses, there were suggested additions which will be taken up by the board at a later date. Some of the suggestions may require legislation.

2. The board has adopted the rules exactly as proposed.
3. No other comments or testimony were received.

DEPARTMENT OF COMMERCE

In the matter of the adoption) NOTICE OF ADOPTION OF RULE
of a rule pertaining to semi-) 8.80.104 SEMI-ANNUAL ASSESS-
annual assessments for state) MENT
banks, trust companies, and)
investment companies)

TO: All Interested Persons:

1. On January 26, 1984, the Department of Commerce published a notice of adoption of the above-stated rule at page 134, 1984 Montana Administrative Register, issue number 2.

2. The board has adopted the rule exactly as proposed.
3. No comments or testimony were received.

DEPARTMENT OF COMMERCE

BY: 

GARY BUCHANAN, DIRECTOR

Certified to the Secretary of State, March 5, 1984.

5-3/15/84

Montana Administrative Register

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

In the matter of the	)	NOTICE OF THE ADOPTION OF
ADOPTION OF RULES for	)	RULE 12.3.106, Defining
defining disability and	)	Disability; RULE 12.3.208,
relating to license	)	Relating to License Agent
agent security, and the	)	Security; and THE AMENDMENT
AMENDMENT OF RULE 12.3.202	)	OF RULE 12.3.202, Classes
regarding classes of	)	of License Agents
license agents)	

TO: All Interested Persons.

1. On January 26, 1984, the Department of Fish, Wildlife and Parks published notice of the proposed adoption of rules for defining disability and license agent security, and the proposed amendment of rule 12.3.202 which establishes classes of license agents, at pages 236-238 of the 1984 Montana Administrative Register, Issue No. 2.

2. The department has adopted the rule defining disability as follows:

12.3.106 RULE 1 DISABLED PERSONS Same as proposed rule.

3. No comments or testimony were received.

4. The authority for the rule is 87-2-803, MCA, and the rule implements 87-2-803, MCA.

5. The department has adopted the rule relating to license agent security as follows:

12.3.208 RULE 1 ACCEPTABLE LICENSE AGENT SECURITY

(1) - (1)(b) Same as proposed.

(c) Letter of Credit.

(2) - (3) Same as proposed.

6. The only comment received requested the addition of letters of credit to the forms of acceptable license agent security. The department has no reason not to allow this, and therefore has made this addition.


7. The authority for the rule is 87-2-902, MCA, and the rule implements 87-2-902, MCA.

8. The department has amended rule 12.3.202, Classes of License Agents, as proposed.

9. No comments or testimony were received.

10. The authorities for this rule are 87-2-901 and 87-2-903, MCA, and the rule implements 87-2-901 and 87-2-903, MCA.

By:


JAMES W. FLYNN, Director
Dept. of Fish, Wildlife & Parks

Certified to the Secretary of State: March 5, 1984

Montana Administrative Register

5-3/15/84

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

In the matter of the adoption	)	NOTICE OF ADOPTION OF RULES
of rules for assessment and waiver	)	FOR ASSESSMENT AND WAIVER OF
of civil penalties and amendment of	)	CIVIL PENALTIES AND AMENDMENT
Rules 26.4.1206, 1207, 1208 and 1209	)	OF RULES RELATING TO NOTICES
relating to notice and orders under	)	AND ORDERS
the Montana Strip and Underground)	
Mine Reclamation Act)	

TO: All Interested Persons.

1. On December 29, 1983, the Board and Department published notice of public hearing on the proposed adoption of rules for assessment and waiver of civil penalties and amendment of rules relating to notices and orders under the Montana Strip and Underground Mine Reclamation Act. The notice appeared in Issue No. 24, 1983 Montana Administrative Register, at pages 1905 - 1909.

2. The Board and Department have adopted and amended the rules as follows:

26.4.1210 (RULE 1) PROCEDURE FOR ASSESSMENT AND WAIVER OF CIVIL PENALTIES - same as proposed rule

26.4.1211 (RULE 1) POINT SYSTEM FOR CIVIL PENALTIES AND WAIVERS (1)
The department shall assign points for each violation based upon the following criteria:

(a) History of recent similar violations. One point shall be assigned for each similar violation contained in a notice of noncompliance and five points shall be assigned for each similar violation contained in a cessation order. Violations shall be counted for five one years after the notice of violation noncompliance was issued. No violation for which the notice of noncompliance or cessation order has been vacated or which is subject to a pending administrative or judicial appeal shall be counted. Violations subject to administrative or judicial appeal shall be counted for one year after resolution of the final appeal.

(b) Seriousness. Points shall be determined in accordance with one of the following subparagraphs:

(i) Harm to public health, public safety or environment. ~~If the violation is not a potential or actual harm to public health, public safety, or the environment, it shall receive no points under this category.~~ If the department determines that the violation created a situation in which the public health, public safety, or environment could have been harmed, and the violated law, rule, order, or permit term or condition was designed to prevent such harm, the violation shall be assigned up to 15 points, depending upon the probability of occurrence of the harm which the violated

standard was designed to prevent. ~~If the violation resulted in actual harm to the public health, public safety, or environment,~~ In addition, the violation shall be assigned ~~16 up to 20~~ 16 up to 20 15 points, depending on significance and amount of potential or actual harm.

(ii) Impairment of administration. ~~If the department determines that the violation does not involve administrative requirements or involves~~ of an administrative requirements but did not impair the department's administration of the act, rules, or permit, it shall assign no points under this category subparagraph. In the case of a violation of an administrative requirements which causes impairment of administration, the violation shall be assigned one to 30 points, depending upon the degree of impairment. An administration requirement, such as the keeping of records and filing of reports, is one that does not directly affect public health, safety, or the environment.

(c) Negligence. If a violation has occurred through no negligence on the part of the permittee, it shall be assigned no points under this category. A violation involving ordinary negligence, which is failure to exercise toward the violated legal requirement the care ordinarily exercised by a person of common prudence, shall be assigned one to 12 points depending upon the degree of negligence. If the violation occurred due to gross negligence which is gross or reckless disregard for the violated legal requirement, or intentional conduct, it shall be assigned 13 to 25 points depending upon the degree of fault.

(d) Good faith. If the person abates the violation in an adequate manner upon being notified of the violation or if the violation requires no abatement, no points shall be assigned. If the violator ~~points out the violation to the department, is extraordinarily cooperative, or~~ takes extraordinary measures to achieve compliance and before the time set in the abatement order or to minimize harm, up to 10 points may be deducted from the total points assigned. However, reduction of points due to good faith does not allow waiver of an otherwise unwaivable penalty.

(2) and (3) - same as proposed rule.

26.4.1206 NOTICES OF VIOLATION AND CESSATION ORDERS: SERVICE - same as proposed amendments.

26.4.1207 NOTICES OF VIOLATION NONCOMPLIANCE AND CESSATION ORDERS: INFORMAL HEARINGS (1) Except as provided in subsections (2) and (3) below, a notice of violation noncompliance or cessation order which requires cessation of mining or prospecting, expressly or by necessary implication, expires within 30 days after it is served unless an informal public hearing has been held within that time. The hearing shall be held at or reasonably close to the mine site so that the alleged violation may be viewed during the hearing or at any other location acceptable to the department and the person to whom the notice or order was issued. The departmental office nearest to the mine site shall be deemed to be ~~reasonable~~ reasonably close to the mine site unless a closer location is requested and agreed to by the department. For purposes of this rule "mining" means extracting coal from

the earth or waste piles and transporting it within or from the permit area.

(2) A notice of ~~violation noncompliance~~ or cessation order which requires cessation of prospecting or mining shall not expire as provided in subsection (1) ~~if the condition, practice or violation in question has been abated or~~ if the informal public hearing has been waived or, if, with the consent of the person to whom the notice or order was issued, the informal hearing is held later than 30 days after the notice or order.

(3) - (7) - same as proposed amendments.

26.4.1208 NOTICES OF ~~VIOLATION NONCOMPLIANCE~~ AND CESSATION ORDERS: EFFECT OF INABILITY TO COMPLY - same as proposed amendments.

26.4.1209 NOTICES OF ~~VIOLATION NONCOMPLIANCE~~ AND CESSATION ORDERS: CONTINUATION OF HEALTH AND SAFETY RELATED ACTIVITIES - same as proposed amendments.

3. Northern Plains Resource Council, Westmoreland Resources, Inc., and Western Energy Company submitted comments on the rules. The following are summaries of the comments received, the commenter, and the Department's response to those comments:

RULE 1 PROCEDURE FOR ASSESSMENT AND WAIVER OF CIVIL PENALTIES

(1) Comment: In paragraph (2), although the Department is required to issue a notice of violation and statement of proposed penalty within 30 days of issuance of the notice of noncompliance, failure to meet this deadline is not grounds for dismissal of the penalty collection proceedings unless the alleged violator can show prejudice from the delay. The department should be required to meet this deadline. (Westmoreland)

Response: The rule does require issuance within 30 days. If the department does not comply with this deadline, a violator whose rights have been prejudiced is entitled to dismissal. Other interested parties may bring a mandamus action against the department. Violators who can show no prejudice should not be entitled to dismissal. This provision is taken from the federal rule, 30 C.F.R. 845.17(b)(2). It is questionable whether the Office of Surface Mining would approve a penalty assessment procedure without this provision. The proposed amendment has been rejected.

(2) Comment: Paragraph (2) should contain a provision for an informal conference to discuss the penalty assessment prior to a formal hearing. (Westmoreland)

Response: The proposed rule provides that the alleged violator may confer with the department regarding the proposed penalty at any time after issuance of the notice of violation and before the formal hearing. This language is sufficient to guarantee an informal conference.

(3) Comment: Paragraph (2) and 26.4.1207(7) should indicate before whom the hearing will be held. (Westmoreland)

Response: Under 82-4-254 and 2-4-611, MCA, the department may conduct the hearing or appoint a hearing examiner. The procedure may vary. For

this reason, no general designation of a hearing officer has been made.

(4) Comment: The department should provide examples of "exceptional factors" upon which the department could waive use of the point system. (NPRC).

Response: One example could be the conduct of research project, relating to the violation, which enhanced scientific or practical knowledge of reclamation. Another could be a violation that resulted from a completely unforeseeable act of God. These exceptional factors would lower the penalty assessed.

Other exceptional factors could raise the penalty assessed. Examples are violations committed for economic reasons or a number of major violations within the same category, such as sedimentation or contamination of topsoil.

RULE II POINT SYSTEM FOR CIVIL PENALTIES AND WAIVERS

(1) Comment: In subparagraph (1)(a), the major-minor violation dichotomy should encourage the department to issue notice of noncompliance in even "marginal" cases and the proposed rule should be amended to provide that past violations are counted without regard to whether a penalty was assessed. (NPRC)

Response: By providing that all notices of violation and cessation orders are counted the proposed rule includes violations for which no penalty was assessed. However, in response to this comment, the proposed rule has been modified to provide that violations are counted from the date of notice of noncompliance.

(2) Comment: Proposed subparagraph (1)(a) requires that counting of previous similar violations for the five years previous to the violation for which a penalty is assessed. The federal rules include only violations that occurred during the previous year. This time limit, or the federal disclosure limit of three years should be adopted. (Westmoreland)

Response: The proposed rule contained a five year limit because only prior similar violations, not all prior violations, were counted. The federal rule counts all violations for the previous year. The final rule has been amended to adopt the federal approach.

(3) Comment: As proposed, subparagraph (1)(b) allows a possible combined assessment of seriousness of 60 points, 30 for environmental harm and 30 for administrative impairment. This would double the assessment authorized under this category in the federal rules. Subparagraph (1)(b) should be amended to reflect the federal assessment scheme. (Westmoreland)

Response: The department intended to allow no more than 30 points to be assessed for seriousness. The proposed rule could be interpreted to allow assessment of 60 points. The final rule has been amended to clearly set a 30 point limit.

(4) Comment: Proposed subparagraph (1)(b) would allow the assignment of a maximum of 15 points if actual damage did not occur, even if the potential damage was great. The federal system would allow up to 29 points. Subparagraph (1)(b) should be amended to reflect the federal system. (NPRC)

Response: If there is some likelihood of damage and the potential damage is great, more than 15 points should be assessed. The recommended change has been made.

(5) Comment: Proposed subparagraph (1)(b) should be amended by adding the point chart from the federal rule on probability of occurrence (NPRC)

Response: The proposed rule provides for assignment of 0 to 15 points based on probability of occurrence. The rule has been amended to clarify that assignment of points is based on degree of probability. With this clarification, adoption of the federal chart is unnecessary

(6) Comment: In subparagraph (1)(b)(ii), the definition of "administrative requirement" should be changed to state that such a requirement is one that does not directly "protect public health, safety, or the environment and that an example is failure to file reports "in a timely manner." (NPRC)

Response: Because the recommended changes would not result in a meaning substantially different from the existing language, they have not been incorporated into the final rule.

(7) Comment: Subparagraph (2)(c) appears to contain a typographical error that should be corrected. (NPRC, Westmoreland)

Response: The typographical error has been corrected.

(8) Comment: In subparagraph (2)(d), good faith points should be assigned only for rapid compliance, as defined on the federal rules, and not for pointing the violation out to the department or being extraordinarily cooperative without rapid compliance. (NPRC)

Response: As written, the rule would allow the violator to obtain good faith points by pointing out to the inspector a violation that would have been discovered. The federal rules allow good faith points only for rapid compliance. The federal rules should also allow good faith points for extraordinary measures to minimize harm. The final rule has been amended to allow good faith points only for rapid compliance and extraordinary measures to minimize harm over and above those required in the abatement order.

(9) Comment: Paragraph (3) should provide a maximum number of days for which a penalty may be assessed. (Westmoreland)

Response: The proposed amendment is contrary to 82-4-254, MCA, and has therefore not been adopted.

RULE 26.4.1207 NOTICES OF VIOLATION NONCOMPLIANCE AND CESSATION ORDERS: INFORMAL HEARING

(1) Comment: A.R.M. 26.4.1207(1) provides for expiration within 30 days of a notice of noncompliance or cessation order that requires cessation of mining unless an informal hearing is held within that time or unless the hearing is waived. A.R.M. 26.4.1207(2) provides that the notice of noncompliance does not expire if the violation has been abated. This conflict should be resolved. (Western Energy)

Response: The provision of 26.4.1207(2) that the notice of noncompliance does not expire if the violation has been abated was originally required by the federal government. That provision has been eliminated

from the federal rules and has been deleted from 26.4.1207(2). In addition, a provision for holding the formal hearing after 30 days upon consent of the violator has been added.

(2) Comment: A.R.M. 26.4.1207(2) should be amended to clarify that the notice of noncompliance or cessation referred to is one that requires cessation of mining or prospecting. (Westmoreland)

Response: The rule has been so amended.

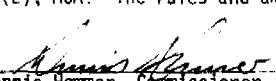
(3) Comment: The department should determine a conflict exists between the 30-day informal hearing provision in 26.4.1207(1) and the 30-day requirement under Rule I(2) (Western Energy)

Response: Rule I(2) requires service of the notice of violation within 30 days of issuance of the notice of noncompliance. A.R.M. 26.4.1207 requires an informal hearing on a notice of noncompliance within 30 days of issuance. The noncompliance (abatement) and notice of violation (penalty assessment) processes are separate. No conflict exists.

(4) Comment: Paragraph (2) and 26.4.1207(7) should indicate before whom the hearing will be held. (Westmoreland)

Response: Under 82-4-254 and 2-4-611, MCA, the department may conduct the hearing or appoint a hearing examiner. The procedure may vary. For this reason, no general designation of a hearing officer has been made.

4. The authority to adopt new rules and amend the present rules is found in 82-4-204(3), 205(7), and 254(2), MCA. The rules and amendments implement 82-4-254(2), MCA.


Dennis Hemmer, Commissioner
Department of State Lands

Certified to the Secretary of State this 5th day of March, 1984.

VOLUME NO. 40

OPINION NO. 35

CONVICTIONS - Availability for public inspection when part of "record or index;"
CRIMINAL INFORMATION DISSEMINATION - Convictions, deferred prosecutions or deferred sentences;
CRIMINAL INFORMATION DISSEMINATION - Original documents" available for public inspection;
CRIMINAL INFORMATION DISSEMINATION - "Record or index" information publicly available;
DEFERRED PROSECUTIONS - Availability for public inspection when part of "record or index;"
DEFERRED SENTENCES - Availability for public inspection when part of "record or index;"
PUBLIC CRIMINAL JUSTICE INFORMATION - "Original documents" available for public inspection;
MONTANA CODE ANNOTATED - Sections 1-2-107, 44-3-101(12), 44-5-103, 44-5-301.

- HELD: 1. Before entries concerning convictions, deferred prosecutions or deferred sentences, which are contained in a "record or index," as such term is used in section 44-5-301, MCA, may be withheld from public inspection, two conditions must be met: (1) The involved conviction record must reflect only misdemeanors or deferred prosecutions, and (2) the conviction record must reflect no convictions of any kind for a period of five years from the last conviction, excluding convictions for traffic, regulatory or fish and game offenses.
2. The nondissemination provisions of section 44-5-301(1)(b), MCA, apply to information concerning convictions, deferred prosecutions or deferred sentences derived from a "record or index" which is compiled by name or universal identifier from a manual or automated system.
3. All "public criminal justice information," as that term is defined in section 44-3-101(12), MCA, is available under section 44-5-301(2), MCA, for public inspection from the originating criminal justice agency.

24 February 1984

Jim Nugent
City Attorney
201 West Spruce Street
Missoula MT 59801

Dear Mr. Nugent:

You have requested my opinion concerning the proper construction of section 44-5-301, MCA. I have phrased your questions as follows:

1. What are the conditions under which the nondissemination provisions of section 44-5-301(1)(b), MCA, apply?
2. To which documents or information do the nondissemination provisions of section 44-5-301(1)(b), MCA, apply?
3. Which documents and information are available from the originating criminal justice agency at any time under section 44-5-301(2), MCA?

I.

Section 44-5-301, MCA, reads:

Dissemination of public criminal justice information. (1) There are no restrictions on the dissemination of public criminal justice information except for the following:

(a) Whenever a record or index is compiled by name or universal identifier from a manual or automated system, only information about convictions, deferred prosecutions, or deferred sentences is available to the public.

(b) Whenever the conviction record reflects only misdemeanors or deferred prosecutions and whenever there are no convictions except for traffic, regulatory, or fish and game offenses for a period of 5 years from the date of the

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last conviction, no record or index may be disseminated pursuant to subsection (1)(a). However, the original documents are available to the public from the originating criminal justice agency.

(2) All public criminal justice information is available from the agency that is the source of the original documents and that is authorized to maintain the documents according to applicable law. These documents shall be open, subject to the restrictions in this section, during the normal business hours of the agency. A reasonable charge may be made by a criminal justice agency for providing a copy of public criminal justice information.

The Montana Supreme Court has not construed section 44-5-301, MCA, and thus ordinary principles of statutory construction must be applied. Accordingly, "[t]he primary tool for ascertaining intent is the plain meaning of the words used...." Dorn v. Board of Trustees, 40 St. Rptr. 348, 352, 661 P.2d 426, 430 (1983). Those words, moreover, "must be reasonably and logically interpreted according to grammatical and statutory rules...." State Bar v. Krivec, 38 St. Rptr. 1322, 1324, 632 P.2d 707, 710 (1981) (citation omitted). The term "and" is, therefore, ordinarily read conjunctively unless its context demands otherwise. 73 Am. Jur. 2d Statutes § 241 (1974). Finally, "[i]n the absence of anything in the statute clearly indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout." 82 C.J.S. Statutes § 348 (1953).

II.

With reference to your first question a literal reading of section 44-5-301(1)(b), MCA, establishes two conditions precedent to nondissemination of "record" or "index" information otherwise available to the public under section 44-5-301(1)(a), MCA: (1) The involved conviction record must reflect only misdemeanors or deferred prosecutions, and (2) the conviction record must reflect no convictions of any kind for a period of five years from the last conviction, excluding convictions for traffic, regulatory or fish and game

offenses. The term "misdemeanor" is not defined in section 44-5-103, MCA, but it should be assigned the same meaning used in section 45-2-101(36), MCA. See § 1-2-107, MCA.

Concerning your second question, the term "record or index" in section 44-5-301(1)(b), MCA, refers to any record or index "compiled by name or universal identifier from a manual or automated system." The only information publicly available from such a "record or index" are entries concerning convictions, deferred prosecutions or deferred sentences, and the dissemination restrictions in section 44-5-301(1)(b), MCA, apply to that information.

Finally, section 44-5-301(2), MCA, makes publicly available from the originating criminal justice agency all "public criminal justice information," as that term is defined in section 44-5-101(12), MCA. As stated above, sections 44-5-301(1)(a) and (b), MCA, govern the public availability of information from a "record or index" compilation. The term "original documents," as used in sections 44-5-301(1)(b) and (2), MCA, does not include the "record or index" compilation but rather refers to original documents falling within the scope of "public criminal justice information."

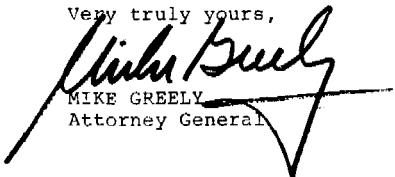
THEREFORE, IT IS MY OPINION:

1. Before entries concerning convictions, deferred prosecutions or deferred sentences, which are contained in a "record or index," as such term is used in section 44-5-301, MCA, may be withheld from public inspection, two conditions must be met: (1) The involved conviction record must reflect only misdemeanors or deferred prosecutions, and (2) the conviction record must reflect no convictions of any kind for a period of five years from the last conviction, excluding convictions for traffic, regulatory or fish and game offenses.
2. The nondissemination provisions of section 44-5-301(1)(b), MCA, apply to information concerning convictions, deferred prosecutions or deferred sentences derived from a "record or index" which is compiled by name or

universal identifier from a manual or automated system.

3. All "public criminal justice information," as that term is defined in section 44-3-101(12), MCA, is available under section 44-5-301(2), MCA, for public inspection from the originating criminal justice agency.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 40

OPINION NO. 36

FEES - Responsibility of mobile home park owners for refuse disposal district fees;
MOBILE HOMES - Responsibility of mobile home park owners for refuse disposal district fees;
REFUSE DISPOSAL DISTRICT - Responsibility of mobile home park owners for refuse disposal district fees;
MONTANA CODE ANNOTATED - Sections 7-13-201, 7-13-202, 7-13-204, 7-13-206, 7-13-208, 7-13-209, 7-13-211, 7-13-231, 7-13-233, 15-8-701, 15-8-705;
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 22 (1983).

HELD: Mobile home park owners, and not mobile home lessees, are responsible for payment of refuse disposal district fees under section 7-13-231, MCA.

2 March 1984

Keith D. Haker, Esq.
Custer County Attorney
Custer County Courthouse
Miles City MT 59301

Dear Mr. Haker:

You have requested my opinion concerning the following question:

Whether, in the case of trailer court owners and trailer court lessees, the authorized charge for services in a refuse disposal district as set forth in sections 7-13-231 through 7-13-233, MCA, calls for the assessment of the service charge against the trailer court owner and his real property, or whether such service charge is to be made against each individual space lessee and his trailer home.

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A response to your question requires review of sections 7-13-201 to 243, MCA, and 40 Op. Att'y Gen. No. 22 (1983).

Sections 7-13-201 to 243, MCA, set forth a detailed procedure for the formation of refuse disposal districts. Briefly summarized, that procedure involves (1) adoption of a resolution of intention to create the district by the involved board of county commissioners (§ 7-13-204, MCA); (2) transmittal of the resolution to affected municipal governments for concurrence or nonconcurrence (§ 7-13-206, MCA); (3) public notification of the resolution and municipal concurrence through publication of notice thereof in a local newspaper and through mailing copies of the notice "to every person, firm, or corporation having real property within the proposed district listed upon the last completed assessment list for county taxes" (§ 7-13-208, MCA); (4) a 30-day opportunity following newspaper publication for "any owner of property subject to be assessed for said service" to protest either the proposed service district or the associated fee (§ 7-13-209, MCA); and (5) a prohibition against further action by the board of county commissioners if protests against creation of the proposed district are "made by the owners of more than 50% of family residential units in the proposed district" (§ 7-13-211(1), MCA). Section 7-13-211(2), MCA, further requires the board of county commissioners to hold a hearing on an initially-proposed fee if objection to the fee "is made by owners of more than 50% of the family residential units in the proposed district." The term "family residence unit" is defined in section 7-13-202(3), MCA, as "the residence of a single family."

Once a refuse disposal district has been created, the board of county commissioners must appoint a board of directors for the district. The board of directors is authorized, after concurrence by the board of county commissioners, to increase service fees, subject to the notice and publication requirements in section 7-13-208(1) and (2), MCA, and the objection and hearing rights in sections 7-13-209 and 7-13-211, MCA. The service fee is "assessed to all units in the district that are receiving a service." § 7-13-231(2), MCA. The Department of Revenue or its agents are obligated, during the month service commences, to "insure that the amount of [the service] fee is placed on the tax

notices, to be collected with the tax. If a property owner fails to pay this fee, it shall become a lien upon the property." § 7-13-233, MCA.

The term "property," as used throughout sections 7-13-201 to 243, MCA, is not defined but clearly refers solely to real property. First, an expansive reading of the term "property" would include both real and personal property even though the benefit of the district's services principally flows only to real property. See 40 Op. Att'y Gen. No. 22 (1983). Such a broad interpretation thus conflicts with the general rule that, because "personal property can receive no special benefit from a public or local improvement," it is not subject to assessment for the service or improvement. 70 Am. Jur. 2d Special or Local Assessments § 49 (1973).

Second, the mailing required under section 7-13-208(3), MCA, is directed only to real property owners. Had the Legislature intended to subject other forms of property to the service fee assessment and lien provisions of section 7-13-233, MCA, it would presumably have required similar notice to personal property owners whose identities and interests are also listed in a county's assessment book. See §§ 15-8-701 and 15-8-705, MCA.

Third, sections 7-13-209 and 7-13-211, MCA, expressly restrict protest rights to owners "of residential units." The purpose of protest rights is to permit those persons whose property interests will be directly affected by a proposed district to challenge its creation or the proposed service fee. The negative inference of not according protest rights to persons who own property other than "residential units" is that their property will not be directly affected by the district's formation or fees. Although a mobile home could arguably fall within the term "residential unit," a more logical and consistent construction of that term relates it to ownership of the real property on which residences or businesses are situated. Any other interpretation expands the term "property" beyond "real property" to include one form of personal property but not others--a result incompatible with the overall legislative scheme and lacking any substantial textual support in the statute. It is well established that a "statute is to be construed in its entirety and [an ambiguous] phrase must be given a reasonable construction which will enable it to be harmonized with

the entire statute," and that "statutory construction should not lead to absurd results where reasonable construction will avoid it." McClanathan v. Smith, 37 St. Rptr. 113, 116, 606 P.2d 507, 510 (1980).

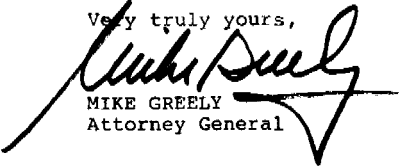
The statute, read as a whole, thus establishes that the term "property" is limited to real property. The service charges under sections 7-13-231 to 233, MCA, are, therefore, properly assessed only against the trailer court owners and their real properties.

Construing the term "property" in the statute as referring to real property is also directly supported by my opinion at 40 Op. Att'y Gen. No. 22 (1983). The question in that opinion was whether a property owner was "receiving a service" from a refuse disposal district even though choosing not to avail himself of the district's services. The opinion stated that "the benefit [of the district's services] does not go to the individual, but to the property itself," and that the "link [between the district's services and] property is underscored by the fact that unpaid service charge fees become a lien upon the property under the provision of section 7-13-233, MCA." This opinion clearly indicates that "property," as used in section 7-13-233, MCA, includes only real property. Last, the result in that opinion is consistent with the general rule, stated above, that personal property is not subject to assessment for public improvements which principally benefit real property.

THEREFORE, IT IS MY OPINION:

Mobile home park owners, and not mobile home lessees, are responsible for payment of refuse disposal district fees under section 7-13-231, MCA.

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 December 31, 1983. This table includes those rules adopted during the period October 1, 1983 through December 31, 1983, and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through December 31, 1983, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1983 and 1984 Montana Administrative Registers.

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