MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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

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SPECIAL NOTICE AND TABLE SECTION

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

IN THE MATTER OF The Repeal) NOTICE OF PROPOSED REPEAL AND
ARM 4.10.901 (Sale and Use) ADOPTION (Restricting Sale
of Endrin) and the Adoption) and Use of Endrin)
of a New Replacement Rule)
Restricting the Sale and Use) NO PUBLIC HEARING CONTEMPLATED
of Endrin)

TO: All Interested Persons:

1. On April 28, 1984 the Department of Agriculture proposes to repeal an existing rule on the sale and use of endrin and replace it with a new rule restricting the sale and use of endrin.

2. The rule proposed for repeal, ARM 4.10.901 Sale and Use of Endrin for Pale Western and Army Cutworm Control, is on page 4-257, Administrative Rules of Montana.

3. The new proposed rule, to replace the rule proposed for repeal, reads as follows:

RULE I ENDRIN (1) The right to sell or otherwise distribute, purchase or use endrin for use on small grains to control army and pale western cutworms in the State of Montana, except as provided below, is suspended on the effective date of this rule.

(2) Any existing stock for the registered use stated in No. 1 above purchased by and in the possession of a certified commercial or farm applicator on or before the effective date of this rule, may be applied only under the following conditions:

(a) That such use shall terminate no later than two (2) years from the effective date of this rule;

(b) That all such use shall strictly conform to the label requirements;

(c) That no aerial application shall be made within 1/4 mile, and no ground application shall be made within 1/8 mile of any lake, pond, river, stream, or irrigation system, whether public or private;

(d) That any intended use shall be reported by telephone or in writing by the applicator to the department prior to application, giving the following information:

(i) name of landowner;
(ii) name of applicator;
(iii) where the application will be made;
(iv) when the application will be made;
(v) number of acres to be treated;

In addition, certified commercial applicators shall make those post application reports as required by existing department rules.

(e) That at the end of the two (2) year period, any remaining stock shall be disposed of according to procedures established by the Pesticide Act and its rules, and the Hazardous Waste Act and its rules promulgated by the Department of Health and Environmental Sciences or returned to the manufacturer.

(3) Except as specified in No. 2 above, any other existing stock, including that held by dealers, shall be returned to the manufacturer or disposed of in accordance with the Pesticide Act and rules, and Hazardous Waste Act and rules no later than 30 days from the effective date of this rule.

(4) At such time as one or more of the alternatives to endrin, (now available through Sec. 18 FIFRA exemptions to registration) become registered by the EPA and the State of Montana, then the registration of endrin for purposes specified above shall be automatically cancelled. Existing stock may be used as specified in No. 2 above, if within the original two year period.

(5) If during the period of this suspension at least one effective and economical alternative for cutworm control does not remain available, then the department will reconsider this suspension, along with other options available under federal and state law.

(6) The cancellation of registration of endrin for grasshopper control, effective 3/31/82, is hereby continued.

(7) The registration of endrin for control of meadow voles in apple orchards is hereby cancelled.

(Auth. 80-8-105, MCA; IMP. 80-8-105 and 80-8-201, MCA)

4. The existing rule is proposed for repeal and the new replacement rule is proposed for adoption as a result of the conclusion of an Environmental Impact Statement (EIS) on the subject of the Restriction of Sales and Use of Endrin in Montana. The text of the Draft and Final EIS, amply reflects the purpose and justification for the proposed rule. Such text was made publicly available during the Draft EIS circulation and comment period, and is now being made available during the Final EIS adoption process. A copy of the Draft and Final EIS may be reviewed at the Department Office, Agriculture/Livestock Building, 6th and Roberts, Helena, Montana.

5. Any interested person desiring to express his data, views or arguments at a public hearing must make written request for hearing to the Department of Agriculture, Agriculture/ Livestock Building, 6th and Roberts, Helena, Montana, no later than April 26th, 1984.

If the department receives requests for a public hearing from either 10% or 25, whichever is less, of those persons directly affected, from the Administrative Code Committee

of the Legislature, from a government agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date.

The department hopes, however, that the reviewing public will consider the hearing requirement to already have been satisfied.

The text of the proposed rule, with minor changes was first proposed and publicly reviewed through an extensive comment period and hearing procedure as part of the Montana Environmental Policy Act comment process. The proposed rule was contained in Alternative Nine of the Draft EIS and the full text appeared as Appendix V thereof. Because of this extensive review and opportunity for public discussion, the department feels the opportunity for hearings required under the rule adoption process have essentially been met, and that to schedule further hearings would only be duplicative, expensive and cause further delay in resolving the Endrin issue.

This notice does, however, provide for the right, and in fact solicits written comments from all interested persons on the proposed repeal and adoption. Such comments should be submitted to the department in writing no later than April 26, 1984.

6. The authority of the department to make the proposed repeal and adoption is based on Sec. 80-8-105 MCA and implements Sec. 80-8-201 MCA.

Keith Kelly, Director
MT Department of Agriculture

Certified to the Secretary of State, March 19, 1984

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF BARBERS

In the matter of the proposed amendments of rules 8.10.405 concerning the fee schedule, 8.10.601 concerning qualifications, 8.10.1002 concerning teaching staff, 8.10.1003 concerning curriculum, 8.10.1004 concerning part time curriculum and proposed adoption of new rules concerning public participation and qualifications for examinations for out-of-state applicants.	NOTICE OF PROPOSED AMENDMENTS OF 8.10.405 FEE SCHEDULE, 8.10.601 QUALIFICATIONS, 8.10.1002 TEACHING STAFF, 8.10.1003 CURRICULUM, 8.10.1004 PART TIME CURRICULUM, and ADOPTION OF NEW RULES CONCERNING PUBLIC PARTICIPATION AND QUALIFICATIONS FOR OUT-OF-STATE APPLICANTS NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On April 28, 1984, the Board of Barbers proposes to amend and adopt the above-stated rules.

2. The proposed amendment of 8.10.405 will read as follows: (new matter underlined, deleted matter interlined)

"8.10.405 FEE SCHEDULE (1) ...

(5) Barber School License	
Original	$50.00
Renewal	~~30.00~~ 35.00
(6) Instructor license	
Original	50.00
Renewal	25.00
~~(6)~~ (7) Penalty fee	10.00
~~(7)~~ (8) Inspection fee	25.00
~~(8)~~ (9) Duplicate license	10.00
(10) Fee for advanced barber training program	
Yearly license	50.00
10 day license	25.00
(11) Temporary permit	10.00

*For those applications which are withdrawn or denied, $10.00 of this fee will be retained to cover administrative costs."

Auth: 37-1-134, 37-30-203, MCA Imp: 37-1-134, 37-30-303, 307, 310, 402, 404, 423, 424, MCA

3. The board is proposing the fee increase to cover additional program area costs. Section 37-1-134, MCA, allows licensing boards to set fees commensurate with program area costs. These are the fees the board determined necessary to cover the administrative costs.

4. The proposed amendment of 8.10.601 will read as follows: (new matter underlined, deleted matter interlined)

8.10.601 QUALIFICATIONS (1) Qualifications of applicants for certification as apprentice barbers are:

(a) Must be at least seventeen years of age.

(b) A course of study as required by section 37-30-406, MCA, ~~of at least 1500 hours in nine months~~ in a barber school or barber college, approved by the board, must be completed prior to examination."

Auth: 37-30-203, MCA Imp: 37-30-406, MCA

5. The board is proposing the amendment as the 1983 legislature changed the required number of hours of barber training from 1500 hours to 2000 hours. (section 37-30-406, MCA)

6. The proposed amendment of 8.10.1002 will read as follows: (new matter underlined, deleted matter interlined)

"8.10.1002 TEACHING STAFF (1) No person shall be permitted to teach or assist in teaching barbering in any barber college in Montana, except as a registered barber holding a current Montana barber instructor certificate and who has qualified as hereinafter provided.

(2) Barber colleges shall terminate the employment of any instructor or assistant instructor who fails to make the application for renewal."

Auth: 37-30-203, MCA Imp: 37-30-310, 404, MCA

7. The board is proposing the amendment to clarify the rule. The board now has the authority to license instructors. The clarification is to state clearly that only licensed instructors are to be permitted to teach.

8. The proposed amendment of 8.10.1003 will read as follows: (new matter underlined, deleted matter interlined)

"8.10.1003 CURRICULUM (1) Each barber college shall meet requirements for admission and graduation of students as set forth in Section 37-30-307 and 404, MCA, and these rules.

(2) Each barber college shall conduct a course of study and training as set forth in section 37-30-406, MCA, ~~which shall consist of not less than 1500 clock hours, for a minimum period of 9 months. (Section 37-30-404, MCA)~~ No student shall be permitted to spend more than 8 hours in the college in any one day. ~~College owners shall propose their own curriculum for submission to the board, subject to board approval. The following schedule is a suggested curriculum:~~

~~(a) one clock hour per day of theoretical study in a classroom;~~

~~(b) one clock hour per day of scientific barbering practice in a classroom other than general clinic; and~~

~~(c) six clock hours per day of general barber practice.~~

~~(3) Each barber college shall average a total of 5 1/2 haircuts and/or shaves per day per student.~~

~~(4) Each barber college shall teach not less than 1/3 of its total enrollment scientific barbering practice, theory or general barbering practice at one time. Each barber college shall submit a daily schedule of its course of study to the board for its approval and shall post a copy of such approved schedule in its general clinic where same can be easily read by all students.~~

~~(5) Theoretical Study.~~

~~(a) Scientific fundamentals of barbering~~

~~(b) Hygiene and bacteriology~~

~~(c) Histology of the hair, skin and nerves~~

~~(d) Structure of the head, face and neck~~

~~(e) Elementary chemistry relating to the sterilization and antiseptic and hair structure~~

~~(f) Disease of the skin, hair and glands~~

~~(g) Barber history~~

~~(h) Law pertaining to barbering~~

~~(i) Salesmanship, advertisement, public relations and human relations~~

~~(j) Barber shop management~~

~~(6) Scientific Barber Practice.~~

~~(a) Rolling cream facial~~

~~(b) Rest facial~~

~~(c) Oily skin facial~~

~~(d) Dry skin facial~~

~~(e) Acne skin facial~~

~~(f) Packs, bleach and clay~~

~~(g) Oily and dry scalp treatments~~

~~(h) Plain shampoo and tonic~~

~~(i) Hot oil shampoo~~

~~(j) Dandruff shampoo~~

~~(k) Egg shampoo~~

~~(l) Alopecia treatment~~

~~(m) Tinting~~

~~(n) Bleaching~~

~~(o) Dyeing~~

~~(7) General Barber Practice. Each barber college shall provide sufficient facilities for each student in general practice room and which shall consist of 6 clock hours of general practice and not less than 5 1/2 haircuts or shaves per day per student.~~

~~(8)~~ (3) Each barber college shall require that no patron be released from a chair after being served by a student until all the work performed has been thoroughly inspected and approved by the ~~teacher~~ instructor.

~~(9)~~ (4) Each barber college shall furnish each student upon enrollment, a copy of Title 37, Chapter 30 of the Montana Codes Annotated and a copy of the rules governing sanitary conditions of barber shops provided by the board."

Auth: 37-30-203, MCA Imp: 37-30-203, 404, 406, MCA

8. The board is proposing the amendment as the 1983 legislature enacted section 37-30-406, MCA, which sets out the required curriculum and hours.

9. The proposed amendment of 8.10.1004 will read as follows: (new matter underlined, deleted matter interlined)

"8.10.1004 PART TIME CURRICULUM (1) ~~The suggested part time curriculum shall be the same as the full time curriculum with the exception that the hours of general practice per day is reduced from 6 hours to 4 hours.~~

~~(2)~~ No part time curriculum will be deemed acceptable by the board of barbers unless it consists of a minimum course of training of not less than a total of 30 hours per student per week. Each barber college shall submit a schedule of this part time course of study to the board for ~~its~~ their approval, and shall post a copy of such approved schedule in its general clinic where the same can be easily read by all students. Such part time course will attempt to incorporate aspects of theoretical study, scientific barber practice, and general barber practice in each day's schedule."

Auth: 37-30-203, MCA Imp: 37-30-203, 406, MCA

10. This amendment is also proposed as section 37-30-406, MCA sets out the required curriculum and hours.

11. The proposed amendment of 8.10.1006 will read as follows: (new matter underlined, deleted matter interlined)

"8.10.1006 PROCEDURE UPON COMPLETION (1) Upon completion of the prescribed course of ~~1500 clock hours~~ study as set forth in section 37-30-406, MCA, the barber college shall certify to the board that each student has performed ~~not less than 800 haircuts and 100 shaves~~ the required hours of training. Each barber college, ~~upon completion of its prescribed course of 1500 clock hours,~~ shall present to each student successfully completing the course, a certificate of graduation.

(2) The student may make application for an examination conducted by the board to determine his or her fitness to practice in the state of Montana, upon completion of the hours of units of practices as prescribed in ~~the above paragraph (1)~~ section 37-30-406, MCA, and while pending the date of examination, the barber college shall permit the students to continue to attend the classes and practice.

(3) Any student who fails to pass the examination conducted by the board shall be required to complete a further course of study and training of not less than 250 clock hours, to be completed within 3 months before being eligible to take the examination again.

(4) Each barber college shall report to the board on or before the 10th day of each ~~quarter~~ month, the number of clock hours of each student in each specific category as set

forth in section 37-30-406, MCA. ~~and the total number of clock hours of all students in attendance during the preceding month, together with the total of all haircuts, the total of all shaves, and the total number of scientific barber practices given in said college during the preceding months.~~"
Auth: 37-30-203, MCA Imp: 37-30-406, MCA

12. Section 37-30-406, MCA changed the required number of hours of barber training from 1500 hours to 2000 hours. Section 37-30-406, MCA has also changed the required number of haircuts and shaves to required hours of training in those fields, therefore the rule has been changed to correspond with the law. The change in sub-section (4) is due to the fact that in the past the board requested quarterly reports, and found that because of the high rate of turnover with students, there were problems keeping up-to-date and accurate records. The board feels that monthly reporting will eliminate these problems.

13. The proposed new rule concerning citizen participation will read as follows:

I. "CITIZEN PARTICIPATION RULES (1) The board of barbers hereby adopts and incorporates the citizen participation rules of the department of commerce as listed in Chapter 2 of this title."
Auth: 37-30-203, MCA Imp: 2-3-103, MCA

14. Section 2-3-103, MCA charges all boards with the duty to adopt rules of citizen participation. The board has reviewed the citizen participation rules of the Department of Commerce and found the rules adequate to implement citizen participation in the board activities.

15. The proposed new rule concerning qualifications for examination for out-of-state applicants will read as follows:

II. "QUALIFICATIONS FOR EXAMINATION FOR OUT-OF-STATE APPLICANTS (1) A person who has practiced barbering in another state or country, upon payment of the required fee, shall be granted permission to take an examination for certificate of registration to practice barbering if he complies with each of the following:
(a) has successfully completed the eighth grade;
(b) is at least 18 years of age;
(c) submits signed statement from physician that applicant is free from contagious disease;
(d) has completed minimum of 2000 hours of training in barber school;
(e) has served minimum of three month apprenticeship under supervision of a barber;

(f) presents to the board a valid license or certificate of registration as a practicing barber in another state or country;

(g) submits one current 3" x 5" photo.

(2) Applicants with less than 2000 hours training in a barber school shall furnish affidavits from at least 2 persons stating that from their personal knowledge the applicant has practiced as a barber in another state or country for a period of at least 1 year."

Auth: 37-30-203, MCA Imp: 37-30-309, MCA

16. Section 37-30-309, MCA provides that a license may be issued to out-of-state applicants if the requirements in the applicants state are substantially equivalent to Montana requirements and the applicant is otherwise qualified. Subsection (1) contains the requirements set by section 37-30-303, MCA for licensure in Montana. Subsection (2) will provide for equivalent standards for an individual who has less than the required experience for Montana, but is otherwise qualified. For example, if the applicant has only 1500 hours of training in another state, the board feels that an additional year of actual practice would more than satisfy the other 500 hours of training.

17. Interested persons may submit their data, views or arguments concerning the proposed amendments and adoptions in writing to the Board of Barbers, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than April 26, 1984.

18. If a person who is directly affected by the proposed amendments and adoptions wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Board of Barbers, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than April 26, 1984.

19. If the board receives requests for a public hearing on the proposed amendments and adoptions from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments and adoptions, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

BOARD OF BARBERS
LAWRENCE SANDRETTO, CHAIRMAN

BY: _____
ROBERT WOOD, STAFF ATTORNEY
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 19, 1984.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF MORTICIANS

In the matter of the proposed amendments of ARM 8.30.402 subsection (1) concerning application fees and 8.30.407 concerning the fee schedule.	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENTS OF ARM 8.30.402 (1) APPLICATIONS and 8.30.407 FEE SCHEDULE

TO: All Interested Persons.

1. On April 19, 1984, at 9:30 a.m., a public hearing will be held in the downstairs conference room, Department of Commerce, 1430 9th Avenue, Helena, Montana, to consider the proposed amendments of ARM 8.30.402 subsection (1) concerning the application fee and 8.30.407 concerning the fee schedule.

2. The amendment of subsection (1) of 8.30.402 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is found at page 8-927, Administrative Rules of Montana)

"8.30.402 APPLICATIONS (1) All applicants for examinations must be in the hands of the department at least 30 days prior to the date set for the examination and accompanied by the ~~$55.00~~ application fee.

(2)..."

Auth: 37-19-202, MCA Imp: 37-19-303, MCA

3. The amendment is proposed to delete the specific fee reference from the rule. The fee is referred to in the fee schedule. The deletion will eliminate having to amend this rule whenever a fee is changed.

4. The proposed amendment of 8.30.407 will amend all fees and read as follows: (new matter underlined, deleted matter interlined)

"8.30.407 FEE SCHEDULE

(1)	Morticians application	~~$55.00~~ 70.00
(2)	Original mortuary application	~~35.00~~ 45.00
(3)	Intern license	~~25.00~~ 30.00
(4)	Mortuary inspection fee	~~55.00~~ 70.00
(5)	Annual renewals	
(a)	Funeral director	~~30.00~~ 40.00
(b)	Mortician	~~35.00~~ 45.00
(c)	Mortuary	~~30.00~~ 40.00
(d)	Late renewal penalty (paid in addition to renewal fee)	~~20.00~~ 25.00
(6)	Re-examination fee	~~35.00~~ 45.00"

Auth: 37-1-134, 37-19-202, MCA Imp: 37-1-134, 37-19-301, 303, 304, 306, 403, MCA

5. The board is proposing the fee increase to set fees commensurate with program area costs. Two budget amendments

in the past two years has raised the costs beyond what had been estimated to the total costs. This necessitates a fee increase at this time.

6. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Board of Morticians, 1424 9th Avenue, Helena, Montana 59620-0407, no later than April 26, 1984.

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

BOARD OF MORTICIANS
VERNON VIAL, CHAIRMAN

BY: _____
GARY BUCHANAN, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 19, 1984.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

In the matter of the proposed adoption of a new rule - outlining state special education complaint procedures	)))))	NOTICE OF PROPOSED ADOPTION OF A NEW RULE OUTLINING STATE COMPLAINT PROCEDURES NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On May 7, 1984 the Superintendent of Public Instruction proposes to adopt a new rule outlining State Complaint Procedures for special education complaints.

2. The proposed rule will read as follows:

RULE I STATE COMPLAINT PROCEDURES

(1) An organization or individual may file a written signed complaint that the State or a subgrantee is violating the Education of the Handicapped Act (20 U.S.C., Sections 1401-1461) or its implementing regulations (34 CFR Part 300), the Montana codes pertaining to special education for exceptional children (20 MCA, Chapter 7, part 4) or the Administrative Rules of the Superintendent of Public Instruction governing special education (10 A.R.M., Chapter 16).

(a) The complaint must include:

(i) A statement that the State or subgrantee has violated a requirement of a federal or state statute, regulation or rule that applies to special education.

(ii) The facts on which the statement is based.

(b) The complaint must be filed with the Department of Special Services, Office of Public Instruction, State Capitol, Helena, Montana 59620.

(2) Upon receipt of the written complaint, a confidential file shall be opened in the Department of Special Services.

(a) Information as to the exact nature of the complaint shall be secured from the person making the complaint and placed in the file. The complainant shall be informed of the right to secure a hearing under the provisions of Rules of Procedure for All School Controversy Contested Cases Before the County Superintendents of the State of Montana (A.R.M. 10.6.103).

(b) Department personnel shall also discuss the complaint with the school district or agency involved in the complaint. Confidentiality will be maintained unless it is waived by the complainant.

(3) The Department will write a report of preliminary information and send a copy to the complainant and to the school district or agency within 20 days of the receipt of the complaint.

(4) If the preliminary report indicates that further inquiry is justified and that the complainant has not been satisifed, a team of Department personnel shall conduct an on-site visit.

(a) If the team determines that the school district or agency is not in compliance with federal or state statutes, regulations or rules, a detailed compliance report will be written.

(b) The report will specify the problem, corrective actions and time lines and will be sent to the school district or agency and to the complainant within 30 calendar days after receipt of the complaint.

(5) In the event that within 60 days of the Department's receipt of the complaint, the school district or agency is not implementing the corrective actions within the time lines required by the compliance report, the Department will notify the school district or agency of the sanctions to be imposed.

(a) The Department will give the school district or agency an opportunity for a hearing prior to the execution of the sanctions. The hearing will be conducted according to the provisions of the Montana Administrative Procedures Act.

(b) An extension of time may be granted only if exceptional circumstances exist with respect to the complaint.

(6) At any time during this process, if the Department determines that the complaint has been resolved and compliance is achieved, it shall inform the complainant of that fact in writing. The complainant is given an opportunity to respond before the complaint is considered closed.

(7) The parties involved may request that the Secretary, U.S. Department of Education, review the final decision of the Department.

3. The Superintendent is proposing to adopt this rule because federal regulations mandate that complaint procedures be outlined.

4. Interested persons may submit their data, views or arguments concerning the proposed adoption in writing to Gail Gray, Special Education Director, Department of Special Services, Office of Public Instruction, State Capitol, Room 106, Helena, Montana 59620, no later than April 26, 1984.

5. If a person who is directly affected by the proposed rule adoption wishes to express data, views or arguments orally or in writing at a public hearing, he or she must make written request for a hearing and submit this request along with any written comments to Gail Gray, Special Education Director, Department of Special Services, Office of Public Instruction, State Capitol, Room 106, Helena, Montana 59620, no later than April 26, 1984.

6. If the superintendent receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendment; from the Administrative Code Committee of the legislature; from a governmental agency or subdivision; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

7. The authority of the superintendent to make the proposed adoption is based on section 20-7-403 and implements section 20-7-403(7).

Ed Argenbright
State Superintendent

Certified to the Secretary of State, March 19, 1984.

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption of Rules governing maternity leave under the Montana Human Rights Act	NOTICE OF PROPOSED ADOPTION OF RULES GOVERNING MATERNITY LEAVE (REPUBLICATION)
	NO PUBLIC HEARING CONTEMPLATED

To: All Interested Persons

1. On May 1, 1984, the Human Rights Commission proposes to adopt rules to govern maternity leave under the Montana Human Rights Act.

2. The proposed rules provide as follows:

Rule I. DEFINITIONS. (1) "Disability as a result of pregnancy" includes any condition certifiable by a medical doctor as disabling, whether the condition arises as a result of the normal course of pregnancy, or as a result of abnormal medical conditions which occur in the course of a pregnancy, and may cover the time period beginning with conception through termination of gestation and a reasonable period for recovery therefrom.

(2) "Maternity leave" means any leave of absence granted to or required of an employee because of such employee's disability due to pregnancy.

AUTH: 49-2-206, MCA; IMP: 49-2-310 and 49-2-311, MCA.

Rule II. TERMINATION OF EMPLOYMENT DUE TO PREGNANCY PROHIBITED. Section 49-2-310(1), MCA provides that it is unlawful for an employer or his agent to terminate a woman's employment because of her pregnancy. For purposes of this provision, "terminations" shall include all involuntary dismissals, all resignations in which the employees' resignation was required by the employer or permitted as the sole alternative to dismissal and those situations in which the totality of the circumstances surrounding a resignation by an employee indicate that the resignation was compelled by the conduct or policy of the employer or agent. Coercive conduct by an employer or his agent toward an employee in order to secure her resignation, when the employee's pregnancy constitutes a substantial reason for the conduct, shall be considered a violation of this provision.

AUTH: 49-2-206, MCA: IMP: 49-2-310 and 49-2-311, MCA.

Rule III. RIGHT TO REASONABLE LEAVE OF ABSENCE. Section 49-2-310(2), MCA provides that it is unlawful for an employer or his agent to refuse to grant to the employee a reasonable leave of absence for pregnancy. In determining the standards of reasonableness which shall apply to a request for a leave of absence for a pregnancy, an employer shall apply standards at least as inclusive as those which he applies to requests for leave of absence for any other valid medical reason.

AUTH: 49-2-206, MCA: IMP: 49-2-310 and 49-2-311, MCA.

Rule IV. MANDATORY LEAVE FOR UNREASONABLE LENGTH OF TIME PROHIBITED. Section 49-2-310(5), MCA provides that no employee take a mandatory maternity leave for an unreasonable length of time. The reasonableness of the length of time for which an employee is required to take a mandatory maternity leave shall be determined on a case by case basis. However, the employer shall have the burden of proving that a maternity leave for a longer period of time than that prescribed by the employee's medical doctor is reasonable, and in no case shall an employee be required to take an uncompensated maternity leave for a longer period of time than a medical doctor who has actually examined the employee shall certify that the employee is unable to perform her employment duties. Neither this section nor any other section of these regulations shall prohibit an employer and employee from mutually agreeing, in the case of the particular employee, to a longer period of maternity leave, either compensated or uncompensated than is permitted by this regulation. However, no employer may enter into a general agreement with any group or association of employees which requires a longer period of mandatory maternity leave than is permitted by this regulation.
AUTH: 49-2-206, MCA; IMP: 49-2-310 and 49-2-311, MCA.

Rule V. VERIFICATION OF DISABILITY. In any case where an employee makes a claim against her employer for any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer, including any insurance or other disability plans referred to in [Rule VI] and the claim is based on a disability covered by and defined in Title 49, Chapter 2, MCA, and these regulations, the employer may require that the disability be verified by medical certification by a physician competent to treat and diagnose the particular disability, that the employee is, or at the time for which the claim is made, was unable to perform her employment duties. For purposes of obtaining this medical certification the employer may require that the claimant submit to a physical or mental examination by a medical doctor to verify the claimed disability by medical certification. In cases where a dispute in medical evidence exists, the commission shall determine the weight and credibility of the testimony of the physicians involved.
AUTH: 49-2-206, MCA; IMP: 49-2-310 and 49-2-311, MCA.

Rule VI. PREGNANCY-RELATED DISABILITIES TO BE TREATED AS TEMPORARY DISABILITIES. Disabilities as a result of a pregnancy, childbirth or related medical condition are for all job-related purposes, temporary disabilities and shall not be treated less favorably than other temporary disabilities under any health, medical, or temporary disability insurance plan or sick leave plan maintained by employer. The question

of maintenance is one of fact which will be judged upon all of the evidence. No written or unwritten employment policies or practices involving matters such as commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement or payment under any health, medical, or temporary disability insurance plan, or under any sick leave, disability leave or disability benefit plan whatsoever, whether formal or informal, shall be applied to disability due to pregnancy, on terms or conditions less favorable than those applied to other temporary disabilities.
AUTH: 49-2-206, MCA; IMP: 49-2-310 and 49-2-311, MCA.

Rule VII. RETURN TO EMPLOYMENT AFTER MATERNITY LEAVE. Section 49-2-311, MCA requires that an employee who has signified her intent to return at the end of her maternity leave of absence shall be reinstated to her original job or an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other service credits unless, in the case of a private employer, the employer's circumstances have so changed as to make it unreasonable or impossible to do so. Any private employer who claims that his circumstances have so changed as to make compliance with Section 49-2-311, MCA impossible or unreasonable shall have the burden of proving his claim based upon all evidence.
AUTH: 49-2-206, MCA; IMP: 49-2-310 and 49-2-311, MCA.

3. The Commission proposes the rules in order to establish procedures and guidelines to govern the Commission's enforcement of the maternity leave provisions of the Montana Human Rights Act.

4. Interested parties may submit their data, views, or arguments concerning the proposed rules in writing to Anne L. MacIntyre, Human Rights Division, Capitol Station, Helena, Montana, 59620, no later than April 30, 1984.

5. If a person who is directly affected by the proposed rules wishes to express his data, views, and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Anne L. MacIntyre, Human Rights Division, Capitol Station, Helena, Montana, 59620, no later than April 30, 1984.

6. If the agency receives requests for a public hearing on the proposed rules from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed rules, from the Administrative Code Committee of the Legislature, from a governmental subdivision or agency, or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be more than 25 persons, based upon the number of potential complainants and respondents in Montana.

HUMAN RIGHTS COMMISSION
MARGERY H. BROWN, CHAIR

By: Anne L. MacIntyre
Anne L. MacIntyre
Administrator
Human Rights Division

Certified to the Secretary of State March 19, 1984

BEFORE THE DIVISION OF WORKERS' COMPENSATION
OF THE STATE OF MONTANA

In the matter of the proposed adoption of new rules and amending of and tranferring of rule 24.29.3201 concerning employer insurance requirements.	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION OF NEW RULES AND AMENDING AND TRANSFERRING OF RULE 24.29.3201 CONCERNING EMPLOYERS INSURANCE REQUIRMENTS

TO: All Interested Persons:

1. On April 18, 1984, at 9:30 a.m., a public hearing will be held in the Workers' Compensation Building conference room on the third floor located at 5 South Last Chance Gulch, Helena, Montana, to consider the proposed adoption of the above stated rules.

2. The proposed new rules, and the amendment and transfer of rule 24.29.3201, which are to be placed in a new subchapter 7, makes explicit the procedures the Division will follow carrying out the intent of the statutes relating to employer insurance requirements. These new rules include the independent contractor exemption procedures and the posting of notices requirements enacted by the 48th Legislature.

3. The proposed rules provide as follows:

RULE I. INTRODUCTION (1) With seven employment exceptions, section 39-71-401, MCA, requires employers who have any employee in service to obtain workers' compensation insurance. This insurance includes compensation for occupational diseases as required in section 39-72-301, MCA. The term "employer" is defined in section 39-71-117, MCA, and the term "employee" is defined in section 39-71-118, MCA.

(2) Insurance is also required for all but two classes of sole proprietors or working members of a partnership who hold themselves out as independent contractors as indicated in section 39-71-401(3), MCA. Insurance is also required for corporate officers as indicated in section 39-71-410, MCA. However, an independent contractor or corporate officer may elect, with workers' compensation division approval, to be exempt from the insurance requirements. The term "independent contractor" is generally defined in section 39-71-120, MCA.

(3) Employers who contract with independent contractors are liable for the payment of benefits to an independent contractor's employees under section 39-71-405, MCA, if the independent contractor has not properly complied with the insurance requirement.

(4) Employers who are not properly insured are subject to restrictions, penalties, and costs. These include orders to cease operations until insurance is obtained as indicated in section 39-71-507, MCA, the collection of penalties and costs of uninsured accidents as indicated in section 39-71-504, MCA, and the enforcement of liens on property as indicated in section 39-71-408, MCA.

(5) Employees who are injured while employed by an uninsured employer may take civil action against the employer or seek wage loss compensation and medical benefits from the uninsured employer's fund which is administered by the workers' compensation division, provided there are sufficient funds available as indicated in Title 39, Chapter 71, part 5, MCA.

(6) All employers, whether properly insured or not, are required to post a sign indicating insurance status for all employees to see as indicated in section 39-71-401(4), MCA.

AUTH: 39-71-203, MCA
IMP: 2-4-302, MCA.

RULE II. ELECTION TO BE BOUND BY COMPENSATION PLAN NO. 1 (1) Any employer, except state agencies specified in section 39-71-403, MCA, may elect to be bound as a self-insurer under plan No. 1, if in accordance with 39-71-2102, MCA, the employer submits, on forms provided by the division, satisfactory proof of solvency and financial ability to pay the compensation, benefits, and all liabilities which are reasonably likely to be incurred under the workers' compensation and occupational disease acts during the state's fiscal year or the portion of the state's fiscal year for which the election under this plan is effective, and if, in accordance with 39-71-2103, MCA, the division finds the employer to have the necessary finances.

(2) When the division finds the employer to have the necessary finances, it will issue the employer an order granting permission to carry on business as a self-insurer from the date the finding is made through the remaining portion of the fiscal year within which the election of this plan is made, or through the ensuing fiscal year when the employer renews this election. An election under this plan is effective only for the period specified in the order, or until the order is revoked in accordance with the section (4) of this rule.

(3) An employer who has effectively elected to be bound by plan No. 1 may renew the election for the next ensuing fiscal year by meeting the requirements of sections (1) and (2) of this rule at least 30 days before the expiration of the state's fiscal year.

(4) The division will revoke its order granting permission to carry on business as a self-insurer, after determining that the employer no longer has the necessary finances to pay the compensation, benefits, and all liabilities which have been or are reasonably likely to be incurred during the period the employer has been a self-insurer and through the remaining fiscal year. The division's revocation order is not effective unless contested case procedures have been conducted in accordance with ARM 24.29.207.

(5) If an employer seeking election to be bound by plan No. 1 under this rule does not agree with the division's decision, he may request an administrative review in accordance with ARM 24.29.206. If the employer does not agree with the division's decision after completion of administrative review procedures, he may request contested case procedures in accordance with ARM 24.29.207.

AUTH: 39-71-203, 39-71-2102, MCA
IMP: 39-71-2102, 39-71-2103, 39-71-2104, MCA

RULE III. ELECTION TO BE BOUND BY COMPENSATION PLAN NO. 2 OR 3 (1) Any employer, except state agencies specified in section 39-71-403, MCA, may elect coverage under plan No. 2 by owning an insurance policy that is in force, sold by a private insurance carrier authorized to sell workers' compensation insurance in Montana.

(2) Any employer may elect coverage under plan No. 3 by owning an insurance policy that is in force, sold by the state compensation insurance fund.

AUTH: 39-71-203, MCA
IMP: 39-71-2201 and 39-71-2301, MCA

RULE IV. WHO MUST BE BOUND (1) Each employer as defined in section 39-71-117, MCA, who has any employee in service as defined in section 39-71-118, MCA, for any length of time must be bound by the provisions of plans No. 1, 2, or 3, unless an employment is exempt under section 39-71-401, MCA. The employer, with the concurrence of his insurer, may elect to bind the employments that are exempt under section 39-71-401(2), MCA.

AUTH: 39-71-203, 39-71-401, MCA
IMP: 39-71-401, MCA

Rule 24.29.3201 will be amended as follows:

RULE V. ELECTION NOT TO BE BOUND - CORPORATE OFFICER (1) An officer of a private business corporation may elect not to be bound as an employee of that corporation for workers' compensation coverage under the workers' compensation and occupational disease acts, if the officer submits, on forms provided by the division, an appropriate notice as required by section 39-71-410, MCA, and the officer meets any one of the following four conditions:

(a) the officer is not engaged in performing the ordinary duties of a worker for the corporation and the officer does not receive any pay from the corporation for performing the ordinary duties of a worker for the corporation;

(b) the officer is engaged primarily in household employment for the corporation;

(c) the officer owns twenty percent (20%) or more of the number of shares of stock in the corporation;

(d) the officer is a member of the family of an individual who meets the conditions of section (1)(c) of this rule. For the purposes of this rule, the term family includes only a husband, wife, child, adopted child, step-child, mother, father, son-in-law, daughter-in-law, nephew, niece, brother and sister.

(2) Any officer of a private corporation who has elected not to be bound as an employee under section 39-71-410, MCA, and whose election was approved by the division under rules adopted and effective prior to November 3, 1975, continues not to be bound as an employee under the workers' compensation act.

(3) Any corporate officer of a nonprofit corporation may elect not to be bound as an employee of that corporation for workers' compensation coverage, if the officer submits, on forms provided by the division, an appropriate notice as required by section 39-71-410, MCA.

(4) An election under sections (1) or (3) of this rule is not valid until approved by the division.

(5) If a person seeking election not to be bound under this rule does not agree with the division's decision, he may request an administrative review in accordance with ARM 24.29.206. If the person does not agree with the division's decision after completion of administrative review procedures, he may request contested case procedures in accordance with ARM 24.29.207.

AUTH: 39-71-203, 39-71-410, MCA
IMP: 39-71-410, MCA

RULE VI. ELECTION NOT TO BE BOUND - INDEPENDENT CONTRACTOR (1) Sole proprietors or working members of a partnership who consider themselves or hold themselves out as independent contractors and who contract for agricultural services to be performed on a farm or ranch or for broker or salesman services performed under a license issued by the board of realty regulation are not required to elect to be bound under a compensation plan.

(2) Sole proprietors or working members of a partnership who consider themselves or hold themselves out as independent contractors, other than those in section (1) of this rule, must elect to be bound under a compensation plan, but may elect not to be bound under a compensation plan if the independent contractor submits, on forms provided by the division, an appropriate application as required by section 39-71-401(3), MCA, and the independent contractor meets all the following conditions:

(a) The independent contractor demonstrates he is engaged in an independently established trade, occupation, profession or business by providing the division with:

(i) evidence he pays social security or unemployment taxes on his employees; or

(ii) his business's workers' compensation insurance policy and name of insurer; or

(iii) his federal or state income tax statement for the most recent tax reporting period that shows income and expenses for his business; or

(iv) a copy of his sales dealer agreement signed by him and the hiring agent which indicates he is not an employee according to the internal revenue code rules implementing the 1982 federal tax equity and fiscal responsibility act and that his business activities fulfill the internal revenue service definition of a direct seller.

(b) The independent contractor demonstrates he considers himself or holds himself out to be an independent contractor by providing the division with:

(i) a copy of a current contract in which he is identified as an independent contractor who is free from control or direction over the performance of his services, other than control or direction required by government regulation, and which is signed by the hiring agent and himself; or

(ii) affidavits from at least three different hiring agents, each of which states that the independent contractor is currently, or was under contract during the independent contractor's most recent tax year

and that during the time of the contract he was free from control or direction over the performance of his services, other than control or direction required by government regulation.

(c) The independent contractor indicates he performs his services using the judgment that his trade, occupation, profession or business requires rather than the hiring agent's instruction on how those services must be provided.

(d) The independent contractor indicates he performs new or altered services under his contract only if the contract is amended with his consent before the new or altered services are performed.

(e) The independent contractor indicates he has a large, substantial investment in the tools, equipment or knowledge essential to the performance of his services. The division may require evidence of a large, substantial investment in tools or equipment, or of certification of his specialty knowledge.

(3) An election under this rule is not valid until approved by the division and the election only remains effective for one year while the independent contractor performs services consistent with the conditions under which the division granted its approval. An election may be renewed each year by meeting the requirements of section (2) of this rule.

(4) If a person seeking election not to be bound under this rule does not agree with the division's decision, he may request an administrative review in accordance with ARM 24.29.206. If the person does not agree with the division's decision after completion of administrative review procedures, he may request contested case procedures in accordance with ARM 24.29.207.

AUTH: 39-71-203, 39-71-401, MCA
IMP: 39-71-401, MCA

RULE VII INEFFECTIVE ELECTION TO BE BOUND, RESULTING DIVISION ACTION. (1) An employer specified in Rule IV who is not effectively bound by the provisions of plans No. 1, 2 or 3 for any period of time that he has an employee is an uninsured employer. The division will take the following action against a discovered uninsured employer:

(2) A closure order will be issued directing the uninsured employer to cease operations until he is bound by a compensation plan. The order will be served on the uninsured employer by the sheriff of the county in which the uninsured employer is doing business.

(3) An uninsured employer who does not comply with the division's closure order to cease operations is guilty of a misdemeanor and is subject to prosecution by the county attorney of the county in which he is doing business. The division will notify the county attorney of the county in which an uninsured employer is doing business if a closure order has been violated.

(4) When an uninsured employer is discovered, the division will conduct a payroll audit to determine total payroll paid during the period of time the uninsured employer was not properly insured. The uninsured period to be audited is limited to the three years prior to the date of discovery, or date of insurance coverage, whichever is the longest uninsured period. The division will assess a penalty of twice the premium which would have been due had the uninsured employer been insured under compensation plan No. 3 or $200, whichever is greater.

(5) When an uninsured employer is discovered and there is an injured employee, the division will collect, in addition to the penalty, an amount equal to all benefits paid or to be paid from the uninsured employers' fund to the injured employee, not to exceed $30,000 for each injury an employee sustains.

(6) The division will notify an uninsured employer of the amount of the penalty assessment and benefit payment and direct the penalty assessment and benefit payment be paid within thirty (30) days. If additional benefit payments are required over the amount in the initial notice, the division will issue additional notices.

(7) Upon failure of an uninsured employer to satisfy any obligations imposed by this rule, the division has a first lien upon property of the employer within the state.

(8) This lien will be enforced, if necessary, by instituting a civil action.

(9) If a person seeking election not to be bound under this rule does not agree with the division's decision, he may request an administrative review in accordance with ARM 24.29.206. If the person does not agree with the division's decision after completion of administrative review procedures, he may request contested case procedures in accordance with ARM 24.29.207.

AUTH: Sec. 39-71-203, MCA
IMP: Sec. 39-71-408, 39-71-504, 39-71-507, MCA

RULE VIII. POSTING INSURANCE STATUS IN WORKPLACE (1) Every insurer, upon issuing a policy for workers' compensation insurance, shall furnish the policyholder with a sign the division provides for posting in the workplace.

(2) The division will furnish every self-insured employer a sign for posting in the workplace.

(3) When a plan No. 2 insurer sends the division a twenty-day notice of cancellation in accordance with section 39-71-2205, MCA, the insurer will also send to the employer by mail a notice of cancellation and a cancellation sign the division provides for posting in the workplace.

(4) When the state compensation insurance fund has placed an employer in a pending cancellation status, the state compensation insurance fund will send the employer a sign referencing the pending cancellation at least 20 days prior to the final cancellation action.

(5) When a self-insured employer does not renew his application for self-insured status in accordance with section 39-71-2104, MCA, the division will send by mail a notice of failure to apply for renewal and sign to be posted on expiration of the fiscal year, notifying employees of expiration of self-insured status.

(6) Whenever a plan No. 2 or 3 insurer cancels coverage at an employer's request, the insurer shall send a sign indicating the date of cancellation.

(7) If an insurer reinstates an employer after giving notice of cancellation, the insurer will give the employer instructions about removing the cancellation notice and replacing it with a notice in accordance with section (1) of the rule.

(8) Each employer must post the sign furnished by the insurer or the division in the workplace where notices to employees are normally posted. If no such place exists, the sign will be posted in a conspicuous place for all employees to see. A workplace is defined as any location where an employee performs any work-related act in the course of employment regardless of whether the location is temporary or permanent and includes the place of business or property of a third person while the employer has access to or control over such place of business or property for the purpose of carrying on his usual trade, business or occupation. An employer will notify the insurer or the division of his need for additional signs to have enough signs for posting at all workplaces.

(9) An employer who purposely or knowingly fails immediately upon receipt to post a sign as provided in this rule or posts an altered sign is subject to a $50 fine for each violation. This fine is due and payable upon receipt of a notice from the division, and such fines shall be deposited in the workers' compensation administration fund.

(10) Upon failure of an employer to satisfy any obligations imposed by this rule, the division has a first lien upon property of the employer within the state.

(11) This lien will be enforced, if necessary, by instituting a civil action.

(12) If a person does not agree with the division's decision, he may request an administrative review in accordance with ARM 24.29.206. If the person does not agree with the division's decision after completion of administrative review procedures, he may request contested case procedures in accordance with ARM 24.29.207.

AUTH: 39-71-203, 39-71-401, MCA
IMP: 39-71-401, MCA

4. The Division is proposing these rules to set forth in one section the procedures that will be followed in enforcing the employer insurance requirements of the Workers' Compensation statutes. All rules are new except for rule V which is amended and moved to this section from 24.29.3201.

5. Interested persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Carla J. Smith, Workers' Compensation Building, 5 South Last Chance Gulch, Helena, Montana 59601, no later than April 30, 1984.

6. Carla J. Smith has been designated to preside over and conduct the hearing.

7. The authority of the Division to make the proposed rules and amendment is based on sections 39-71-203, 39-71-401, 39-71-701, 39-71-410, 39-71-507 and 39-71-2102, MCA. The rules implement 2-4-302, 39-71-401, 39-71-408, 3-71-410, 39-71-504, 39-71-507, 39-71-2102, 39-71-2103, 39-71-2104, 39-71-2201, and 39-71-2301, MCA.

GARY L. BLEWETT, Administrator
Division of Workers' Compensation

Certified to the Secretary of State March 19, 1984

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

In the matter of the amendment of ARM 36.12.102 and ARM 36.12.103 pertaining to revised forms and new application fees for various water-related applications	)))))	NOTICE OF PROPOSED AMENDMENTS OF ARM 36.12.102 FORMS AND ARM 36.12.103 APPLICATION AND SPECIAL FEES

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On May 11, 1984, the Board of Natural Resources and Conservation proposes to adopt the proposed amendments to present rules ARM 36.12.102 and ARM 36.12.103.

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

36.12.102 FORMS The following necessary forms for implementation of the act and these rules are available from the department of natural resources and conservation, 32 South Ewing, Helena, Montana. The department may revise as necessary, the following forms to improve the administration of these rules and applicable water laws:

(1) Form No. 600 "Application for Beneficial Water Use Permit"
(2) Form No. 601 "Permit to Appropriate Water"
(3) Form No. 602 "Notice of Completion of Groundwater Development" (for groundwater developments with a maximum use less than 100 gpm)"
(4) Form No. 603 "Well Log Report"
(5) Form No. 604 "Certificate of Water Right" (for groundwater less than 100 gpm)
(6) Form No. 605 "Application for Provisional Permit for Completed Stockwater Pit or Reservoir" (maximum capacity of the pit or reservoir must be less than 15 acre-feet)"
(7) Form No. 606 "Application for Change of Appropriation Water Right"
(8) Form No. 607 "Application for Extension of Time"
(9) Form No. 608 ~~"Notification of Transfer of Appropriation Water Right"~~ "Water Right Transfer Certificate"
(10) Form No. 609 "Application to Sever or Sell Appropriation Water Right"
(11) Form No. 611 "Objection to Application"
(12) Form No. 612 "Statement of Opinion"
(13) Form No. 613 "Fee Schedule for the Appropriation of Water in Montana"
(14) Form No. 614 "Statement of Conditional Agreement"
(15) Form No. 616 "Notice of Action on Application for Extension of Time"
(16) Form No. 617 "Notice of Completion of Permitted Water Development"

(17) Form No. 618 "Notice of Completion of Change of Appropriation Water Right"
(18) Form No. 619 "Cancellation of Recording of Certificate of Water Right"
(19) Form No. 620 "Authorization to Change Appropriation Water Right"
(20) Form No. 621 "Affidavit of Service for Notice of Hearing"
(21) Form No. 622 "Affidavit of Service for Notice of Appplication"
(22) Form No. 624 "Revocation of Permit to Appropriate Water"
(23) Form No. 625 "Acknowledgement of Water Right Transfer"
(24) Form No. 630 "Petition to the Board of Natural Resources and Conservation for Controlled Groundwater Area"
(25) Form No. 631 "Petition to the Department of Natural Resources and Conservation to Adopt Rules to Reject Permit Applications, or Modify or Condition Permits Issued in a Highly Appropriated Water Basin or Subbasin"
(26) Form No. 632 "Certificate of Water Right" (for perfected permits)
(27) Form No. 633 "Certificate of Water Right" (for decreed water rights)

AUTH. 85-2-113, MCA; IMP. 85-2-113, MCA

36.12.103 APPLICATION AND SPECIAL FEES (1) A fee, if required, shall be paid at the time the permit, change or sever-sell, notice of completion, transfer certificate, or petition application (hereafter singularly or collectively referred to as application) is filed with the department. The department will not process any application without the proper filing fee. Failure to submit the proper application fee with an application or within 30 days after notice shall result in a determination that the application is not in good faith and does not show a bona fide intent to appropriate water for a beneficial use, and the application shall be terminated. A fee paid on an application is a one-time filing and processing fee paid at the time of making the application, and the fee will not be returned once the application has been filed with the department, except as noted below. If an applicant withdraws an application, he shall be entitled to a refund, or, if an applicant inadvertently files the wrong form, the applicant may apply the fee paid to the correct form for his purpose and pay the difference due or be entitled to a refund, if overpayment is made. However, no refund upon withdrawal or no exchanges of fees from one form to another or a refund, if otherwise justified, will be made in any case once the newspaper publication of the application has been initiated, or substantial direct processing costs have been accrued in making the application correct and complete prior to publication or department waiver of publication. When an application needs to be republished due to an applicant's error or request for republication, the applicant shall pay the direct cost of the new republication. The fees cover direct costs for newspaper publication, individual notices, ~~county recording fees,~~ issuance of certificates of water right on perfected permits, hearing costs, computer processing, and other miscellaneous

direct costs connected with the permit process.

(a) For an Application For Beneficial Water Use Permit, Form No. 600, there shall be a fee charge based on the following rate schedule:

0 - less than 25	acre-feet per year . . .	$ 50
25 - less than 100	acre-feet per year . . .	100
100 - less than 500	acre-feet per year . . .	150
500 - less than 1,000	acre-feet per year . . .	200
1,000 or more	acre-feet per year . . .	250

For an application with only a diversion rate increase, and no acre-foot increase, the minimum fee shall apply.

(b) For an Application for Beneficial Water Use Permit, Form No. 600, there shall be a fee charge based on the following rate schedule when filing an application for non-consumptive uses:

0 - less than 1,000	acre-feet per year . . .	$ 50
1,000 - less than 10,000	acre-feet per year . . .	100
10,000 or more	acre-feet per year . . .	200

For any application with a combination of consumptive and non-consumptive uses the rate schedule shown in (a) above shall apply.

(c) For any request for an Interim Permit ~~to drill and test only~~, there shall be a fee of $10 in addition to the rate schedules shown in (a) or (b) above.

(d) For a Notice of Completion of Groundwater Development (for groundwater developments with a maximum use less than 100 gpm), Form No. 602, there shall be a ~~flat rate~~ fee of $10.

(e) For an Application for Provisional Permit for Completed Stockwater Pit or Reservoir (maximum capacity of the pit or reservoir must be less than 15 acre-feet), Form No. 605, there shall be a ~~flat rate~~ fee of $10.

(f) For an Application for Change of Appropriation Water Right, Form No. 606, there shall be a ~~flat rate~~ fee of $50, except for any change application concerning a replacement well or reservoir in the same source ~~for domestic or stockwatering purposes~~, there shall be a fee of $10.

(g) For a ~~Notice of Transfer of Appropriation Water Right~~ Water Right Transfer Certificate, Form No. 608, there shall be a ~~flat rate~~ fee of $5.

(h) For an Application to Sever or Sell Appropriation Water Right, Form No. 609, there shall be a ~~flat rate~~ fee of $50.

(i) For a Petition to the Board of Natural Resources and Conservation for Controlled Groundwater Area, Form No. 630, there shall be a fee of $100 for filing this petition form, plus the petitioner shall also pay reasonable costs of giving notice, holding the hearing, conducting investigations, and making records pursuant to Sections 85-2-506 and 85-2-507, MCA, except the cost of salaries of the department personnel.

(j) For a Petition to the Department of Natural Resources and Conservation to Adopt Rules to Reject Permit Applications, or Modify or Condition Permits Issued in a Highly Appropriated Water

Basin or Subbasin, Form No. 631, there shall be a fee of $100 for filing this petition form, plus the petitioners shall also pay reasonable costs of giving notice, holding the hearing, conducting investigations, and making records pursuant to Section 85-2-319, MCA, except the cost of salaries of the department personnel.

(k) For any correction to an issued permit, authorization, or certificate for an error caused by an applicant, there shall be a fee of $10. No fee shall be charged for corrections caused by the department.

(2) There shall be no fees charged for filing the following forms:

(a) Form No. 603, Well Log Report.
(b) Form No. 607, Application for Extension of Time.
(c) Form No. 611, Objection to Application.
(d) Form No. 614, Statement of Conditional Agreement.
(e) Form No. 617, Notice of Completion of Permitted Water Development.
(f) Form No. 618, Notice of Completion of Change of Appropriation Water Right.

(3) The following special fees must be paid for the described public service:

(a) For microfilm, reader-printer copies . . . . . $.25 per sheet
(b) For photostatic copy, letter and legal size . . $.15 per sheet
(c) For computer services requested . . . . reasonable costs
(d) For making a blueprint of any tracing . . . . $1.00 per sheet
(e) For making a hearing transcript . . . reasonable costs, not to exceed $1.00 per page

AUTH. 85-2-113, MCA; IMP. 85-2-113, MCA.

4. The Board is proposing to amend ARM 36.12.102 to incorporate new forms used by the Department of Natural Resources and Conservation in administering Title 85, Chapter 2, which pertains to the appropriation of water for beneficial use. The proposed new forms will reflect statutory and implementation changes. The Board proposes to amend ARM 36.12.103 by setting a new fee for the Form No. 631 petition to reflect statutory changes, to clarify several fee rules which have been problem areas, and eliminate unnecessary language.

5. Interested persons may present their data, views, or arguments concerning the proposed adoption of amendments in writing to Ronald J. Guse, Administrative Officer, 32 South Ewing, Helena, Montana 59620, no later than April 30, 1984.

6. If a person who is directly affected by the proposed adoption wishes to express his/her data, views, or arguments orally or in writing at a public hearing, he/she must make written request for a hearing and submit this request along with any written comments he/she has to Ronald J. Guse, Administrative Officer, 32 South Ewing, Helena, Montana 59620, no later than April 30, 1984.

7. If the Board receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the legislature; from a governmental agency or subdivision; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later data. Notice of the hearing will be published in the Montana Administrative Register. The number of persons to be possibly directly affected will be greater than 250.

8. The authority of the Board to make the proposed amendments is based on Section 85-2-113, MCA, and implements Section 85-2-113, MCA, for both rules.

Leo Berry, Director
Department of Natural Resources
and Conservation

Certified to the Secretary of State on March 12, 1984.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF ARCHITECTS

In the matter of the amendment of rule 8.6.413 concerning the fee schedule.	)))	NOTICE OF AMENDMENT OF ARM 8.16.413 FEE SCHEDULE

TO: All Interested Persons:

1. On February 16, 1984, the Board of Architects published a notice of amendment of the above-stated rule at pages 283 through 284, 1984 Montana Administrative Register, issue number 3.

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

3. No comments or testimony were received.

DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF CHIROPRACTORS

In the matter of the amendments of ARM 8.12.601 concerning applications and 8.12.806 concerning renewals and continuing education.	)))))	NOTICE OF AMENDMENT OF 8.12.601 APPLICATIONS, EDUCATIONAL REQUIREMENTS, and 8.12.606 RENEWALS - CONTINUING EDUCATION REQUIREMENTS

TO: All Interested Persons:

1. On February 16, 1984, the Board of Chiropractors published a notice of amendments of the above-stated rules at pages 285 through 286, 1984 Montana Administrative Register, issue number 3.

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

3. One comment was received from the Administrative Code Committee regarding the implementing sections. The amendment of rule 8.12.601 cited sections 37-12-302 and 303, MCA as implementing sections. Section 37-12-304 should have been cited as the appropriate section. No other comments or testimony were received.

DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF BOARD OF HORSE RACING

In the matter of the amendment of ARM 8.22.801 concerning preference.	)))	NOTICE OF AMENDMENT OF 8.22.801 GENERAL REQUIREMENTS

TO: All Interested Persons:

1. On February 16, 1984, the Board of Horse Racing published a notice of amendment of the above-stated rule at

pages 290 through 291, 1984 Montana Administrative Register, issue number 3.

2. The board has amended 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 19, 1984.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE MILK CONTROL BUREAU

In the matter of the amendment of rule 8.79.301 regarding licensee assessments	)))	NOTICE OF AMENDMENT OF RULE 8.79.301 LICENSEE ASSESSMENTS

DOCKET #68-84

TO: All Interested Persons:

1. On February 16, 1984, the Milk Control Bureau of the Department of Commerce, published a notice proposing to amend rule 8.79.301 regarding licensee assessments and reporting of those results at page 292 and 293, 1984 Montana Administrative Register, issue no. 3.

2. The bureau has amended the rule exactly as proposed. However, it should be noted that in the original notice the implementing section was noticed as the authority section and the authority section as the implementing section. The authority section should have been cited as section 81-23-104, MCA, and the implementing section should have been cited as section 81-23-202, MCA. The office of the Administrative Code Committee called regarding this change.

3. No comments or testimony were received.

GARY BUCHANAN, DIRECTOR
DEPARTMENT OF COMMERCE

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

Certified to Secretary of State March 19, 1984

BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the AMENDMENT OF ARM 12.6.801 relating to boating closures and ARM 12.6.901 relating to water safety regulations.	))))	NOTICE OF THE AMENDMENT OF ARM 12.6.801 RELATING TO BOATING REGULATION AND ARM 12.6.901 RELATING TO WATER SAFETY REGULATIONS

TO: All Interested Persons.

1. On November 10, 1983, the Fish and Game Commission published notice of proposed amendments to Rule 12.6.801, concerning boating regulations, and Rule 12.6.901, concerning water safety regulations, at pages 1597-1601 of the 1983 Montana Administrative Register, issue number 21.

2. The agency has amended the rules as proposed.

3. No comments or testimony were received.

4. The authorities for the rules are 87-1-301 and 87-1-303, MCA, and the rules implement 23-1-106(1) and 87-1-303, MCA.

By: Spencer S. Hegstad
SPENCER S. HEGSTAD, Chairman
Montana Fish and Game Commission

Certified to the Secretary of State: March 12, 1984

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

In the matter of the amendment of rule 16.8.1102, establishing when an air quality permit is required	))))	NOTICE OF THE AMENDMENT OF RULE ARM 16.8.1102 (Air Quality)

TO: All Interested Persons

1. On January 26, 1984, the board published notice of a proposed amendment of rule 16.8.1102, concerning provisions specifying when a source of airborne lead contamination must obtain an air quality permit, at page 239 of the 1984 Montana Administrative Register, issue number 2.

2. The board has amended the rule with the following changes:

16.8.1102 WHEN PERMIT REQUIRED -- EXCLUSIONS (1) Except as hereafter specified, no person shall construct, install, alter or use any air contaminant source or stack associated with any source without first obtaining a permit from the department or the board. A permit shall not be required for the following:

(a) - (l) Same as proposed.

(m) A new ~~or altered~~ stack or other source of airborne lead contamination whose potential to emit lead is less than 5 tons per year; and

(n) An alteration or modification of an already constructed stack or other source of lead contamination which results in an increase in the maximum potential of the source or stack to emit airborne lead contaminants by an amount less than 0.6 tons per year.

AUTHORITY: Sec. 75-2-111, 75-2-204, MCA
IMPLEMENTING: Sec. 75-2-204, 75-2-211, MCA

4. Brenda Desmond, a Legislative Council staff attorney assisting the Administrative Code Committee, pointed out that using the word "altered" in both subsections (m) and (n) might lead to confusion about which provision applied to an altered source. Since the language was confusing and the suggested amendment did not substantively change the effect of the proposed rule, the board agreed to delete "or altered" from subsection (m).

JOHN F. McGREGOR, M.D., Chairman

By: JOHN J. BRYNAN, M.D., Director

Certified to the Secretary of State March 19, 1984

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

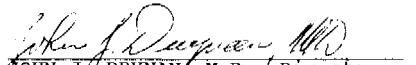
In the matter of the repeal of rules 16.14.801 through 16.14.805 relating to cleaning of cesspools, septic tanks and privies	))))	NOTICE OF REPEAL OF RULES 16.14.801 - 16.14.805 (Cesspools, Septic Tanks and Privies)

TO: All Interested Persons

1. On January 26, 1984, the department published notice of proposed repeal of rules 16.14.801 through 16.14.805 relating to cleaning of cesspools, septic tanks and privies at page 241 of the 1984 Montana Administrative Register, issue number 2.

2. The department has repealed rules 16.14.801 through 16.14.805, found on pages 16-797 and 16-798 of the Administrative Rules of Montana.

3. No comments or testimony were received.



JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State March 19, 1984

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE Adoption of Rule I (42.22.1208) relating to the deduction of the windfall profit tax from net proceeds.	)))))	NOTICE OF ADOPTION of Rule I (42.22.1208) relating to the deduction of the windfall profit tax from net proceeds.

TO: All Interested Persons:

1. On January 26, 1984, the Department of Revenue published notice of the proposed adoption of Rule I (42.22.1208) relating to the deduction of the windfall profit tax from net proceeds at pages 243 and 244 of the 1984 Montana Administrative Register, issue number 2. A public hearing was held on February 15, 1984.

2. The Department has adopted Rule I (42.22.1208) as proposed except for the following changes:

42.22.1208 WINDFALL ~~PROFITS~~ PROFIT TAX (1) Effective for production years beginning on or after January 1, 1980, the amount of the windfall ~~profits~~ profit tax deduction allowed in the computation of the oil net proceeds is:

(a) Seventy percent of the amount paid or withheld in satisfaction of the liability for windfall ~~profits~~ profit tax; or

(b) the actual windfall ~~profits~~ profit tax.

For the purpose of this rule, working interest owner's and royalty interest owner's windfall profit tax deduction in a particular property may be determined separately. Nothing in this rule shall preclude either the department or the taxpayer from adjusting the windfall profit tax deduction of all interests to the actual tax liability. The intent of the department, in the administration of the windfall profit tax deduction, will be to determine, whenever administratively feasible, an accurate value for all portions of an oil property, with all interests in a property having their windfall profit tax deduction calculated on an identical basis.

(2) The base to which the 70% factor will be applied is the amount withheld or payment made incident to a bona fide and orderly discharge of the actual tax liability during the production year. It will not include duplicate withholding or withholding for nontaxable royalty interests without regard to whether or not these interests have filed exemption certificates. It will include any ~~adjustments from~~ corrections for prior tax periods. ~~No attempt will be made to allocate adjustments to prior periods.~~

(3) ~~In lieu of adjusting amounts claimed as a deduction for windfall profits tax in production years 1980, 1981, and 1982, to the actual liability after refunds, credits, other adjustments, etc., the department will reduce the deductions~~

~~claimed for windfall profit tax in 1980, 1981, and 1982, by 30%. The retroactive adjustments will be assessed in 1984 using the mill levy in effect for the year adjusted.~~ When the windfall profit tax is reduced by 30% or adjusted to the actual liability for years 1980, 1981, or 1982, the reduction or adjustment will be assessed in 1984 using the mill levy in effect for the year adjusted.

(4)(a) For the purpose of requesting an adjustment under § 15-23-615, MCA, the request must be made by the taxpayer who for the purposes of this rule is the operator designated pursuant to § 42.22.1201(2) and (3), ARM.

(b) No adjustment by either the department or taxpayer to the windfall profit tax deduction can be made without considering either all working interests or all royalty interests in the property and their respective windfall profit tax liability.

(5) In the event of an adjustment ~~(by either the taxpayer or the department)~~ by either the working interests or royalty interests, the taxpayer-operator will provide the following ~~applicable~~ information , when applicable, for ~~each~~ either interest ~~owner~~ group in the producing ~~property~~ properties for which the adjustment is being made:

(a) Form 6248, Annual Information Return of Windfall ~~Profits~~ Profit Tax;

(b) Form 6249, Computation of Overpaid Windfall Profit Tax, or Form 6249-A, Royalty Owner's Credit for Overpaid Windfall Profit Tax;

(c) Form 720, Quarterly Federal Excise Tax Return;

(d) Form 843 Claim (for refund) and any other federal form documenting refund claims relating to the windfall ~~profits~~ profit tax liability; and

(e) Supporting workpapers for the above forms with sufficient detail and any other documentation necessary to enable the department to determine the amount of windfall ~~profits~~ profit tax paid and the amounts refunded or allowed as a credit for each ~~lease~~ property.

(6)(a) If under subsection (1) of this rule a taxpayer-operator elects to adjust only the working interest portion of the windfall profit tax to the actual liability, the following information must be provided for each royalty interest in the property(s) for which the actual calculation is proposed to be made:

(i) social security numbers and current addresses for each individual royalty owner in the property; or

(ii) if the royalties are held in a trust, the federal identification number and proper mailing address; or

(iii) if the royalties are held by a corporation, the federal employer's identification number and proper mailing address.

(b) If only the royalty owners elect to report actual windfall profit tax liability, the department may require the taxpayer-operator to provide the information for working interests as described in section (5).

(c) If the information described in (6)(a) and (6)(b) is not provided at the time the taxpayer-operator files the request for adjustment to actual, the request will not be processed by the department until such time as all information described above has been received.

(7)(a) In the event of an adjustment by the department of the working interests, the taxpayer-operator will provide for all the working interests the information described in (5)(a) through (5)(e) above.

(b) In the event of an adjustment by the department of the royalty interests, the taxpayer-operator will provide for all the royalty interests the information described in (6)(a) above.

(c) The taxpayer-operator shall also provide any other information that may be reasonably required by the department in either circumstance described above in this section.

3. The Department has reviewed the Hearing Examiner's Report and the oral and written testimony regarding the proposed windfall profit tax rule. The major issue, as described in page 6 (1) of the Hearing Examiner's Report, is the separation of working interests and royalty interests for the purposes of determining the actual windfall profit tax liability that can be claimed as a deduction on the net proceeds return.

The Department has amended the proposed rule to allow the separation of interests between working interests and royalty interests for the purposes of reporting the actual windfall profit tax liability.

Since the Department has provided for this change in the rules we feel it is unnecessary to address the numerous individual comments submitted to the hearing.

The general theme of those comments was that the Department was placing an unreasonable reporting burden on taxpayer-operators by requiring all interests in a lease to be adjusted together or not at all. Operators argued that they did not have the ability to secure from royalty owners the various federal tax return documents necessary to document actual windfall profit tax liabilities.

The rule, as adopted, will relieve taxpayer-operators, except in one limited case, of the task of securing and reporting for royalty interests the federal tax return documents. Instead, this task, in nearly all cases, will be carried out by the Department.

However, some more limited reporting requirements with respect to royalty interests will remain in the form of reporting the name and address and either social security or federal identification numbers of the royalty owners. The Department believes this requirement is consistent with the role of operator as the tax reporting agent for all interests in a property and is within the authority of the Department under § 15-23-615, MCA.

Further, the major public purpose for requiring this information is to enable the Department to discharge in an orderly and effective manner its responsibility to certify to counties a proper and accurate net proceeds value for each oil property in its entirety, with the same accounting rules applying to all portions of a property whenever possible.

The Department's original proposed rule was designed to ensure that a proper and accurate value for an entire oil property was determined. Accordingly, an adjustment of a windfall profit tax deduction would have been made simultaneously for all interests in a property through reporting by the operator. In the final adopted rule, the Department remains committed to achieving this result but through a means less burdensome to the operator. The Department will secure the necessary information to adjust the royalty interest portion of a property when an operator requests an adjustment for the working interest portion. However, to secure this information effectively and efficiently, the Department needs the information required from the operator in the final rule. Through this procedure, the Department can ensure an accurate and proper value for all portions of an oil property, with all interests in a property having their windfall profit tax deduction calculated on an identical basis.

For the same reason, the Department needs and may require detailed information on the windfall profit tax liability of working interests in the event that royalty interests request an adjustment from the 70% value.

An additional reason why it is important that adjustments to the windfall profit tax deduction be made for all interests in a property arises out of the legislative history of Ch. 383, L. 1983. As was presented in testimony by opponents at the hearing on the proposed rule, the 70% figure in Chapter 383 was based on the best available, but limited information that existed at the time the law was enacted. All of the parties involved in the development of this law -- the sponsors, the Department, and the industry -- agreed that the percentage figure would likely be changed in future legislative sessions based on more complete and accurate information concerning the ratio of actual windfall profit tax liability to initial withholding for the tax. To have accurate information for future legislative discussions, it is important that the Department implement a process that, as much as possible, adjusts the deduction for all interests in a property in those cases where adjustments are made.

The one remaining case where operators will be required to secure detailed federal tax documents from royalty owners is when one or more royalty owners initiate an adjustment from the 70% value for the windfall profit tax deduction. In this case, the initiative for revising an original report is coming from the owners of the property, and the responsibility for reporting on behalf of all interests in a property is the responsibility

of the operator under § 15-23-602, MCA. Section 15-23-602(8), MCA, specifically requires the operator to be responsible for the statements of the royalty interests windfall profit tax liability.

The second issue raised was set forth on page 6 (2) of the Hearing Examiner's Report. The issue was whether or not the 30% adjustment should be corrected in the present year instead of the year in which the original tax was levied. The Department will certify to the counties retroactive adjustments during 1984, however, the mill levied for the years in which the adjustment is being made must be used pursuant to Montana Law. The Department has no authority, nor was there any granted in Chapter 383, L. 1983 to allow or require county governments to place taxable value from retroactive adjustments in 1984 tax year, rather than in the year in which the adjustment related to.

Chapter 383, L. 1983, merely provided that the revisions for the prior years be reported with the return filed in 1984. This provision governs only the timing of the filing of reports, not the application of mill levies to revised values.

With respect to the retroactive adjustments, we will be adjusting the windfall profit tax deductions on the basis of a revised assessment, and because all properties and all years affected by windfall profit tax have been already assessed § 15-8-601 MCA, applies. Section 15-8-601(5), MCA, provides:

> Immediately upon receipt of a revised assessment, the county official possessing the assessment roll book shall enter the revised assessment. If the revised assessment corrects an original assessment, the previous entry shall be canceled upon order of the department.

If a revision cancels a previous assessment, it must be done in the year the original assessment was made.

Finally the last comment made was that the Department was attempting to prevent taxpayers from calculating their actual liability and to require only the 30% reduction. Our intent in subsection (3) of the proposed rule was not to preclude anyone from adjusting to actual, but to clarify for all procedurally how the retroactive adjustments would be made. We have amended subsection (3) of the rule in a manner we feel more clearly reflects our intent.

The illustration cited by and the situation described therein by the Hearing Examiner with regard to Mr. Nat Goodwin of Fair Oil Company has been alleviated by the rule changes.

4. The authority for the rule is § 15-23-108, MCA, and the rule implements §§ 15-23-603, 15-23-605, 15-23-615, and 15-23-616, MCA.

Ellen Feaver by
Dan K. Kuchs

ELLEN FEAVER, Director
Department of Revenue

Certified to Secretary of State 03/19/84

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

In the matter of the adoption of Rules 46.6.518, 46.6.705, 46.6.710, 46.6.908, 46.6.2601, 46.6.2603, and 46.6.2605 and the amendment of Rules 46.6.102, 46.6.302, 46.6.304, 46.6.305, 46.6.306, 46.6.517, 46.6.602, 46.6.605, 46.6.606, 46.6.701, 46.6.801, 46.6.901, 46.6.903, 46.6.906, 46.6.907, 46.6.1101, 46.6.1201, 46.6.1302, 46.6.1304, 46.6.1305, 46.6.1306 and 46.6.1309 and the repeal of Rules 46.6.603, 46.6.902, 46.6.1001, 46.6.1002, 46.6.1003, 46.6.1301, 46.6.1303, 46.6.1307, 46.6.1308, 46.6.1310, 46.6.1311, and 46.7.101 through 46.7.1901 pertaining to rehabilitative and visual services	) NOTICE OF THE ADOPTION OF) RULES 46.6.518, 46.6.705,) 46.6.710, 46.6.908,) 46.6.2601, 46.6.2603, AND) 46.6.2605 AND THE AMENDMENT) OF RULES 46.6.102, 46.6.302,) 46.6.304, 46.6.305, 46.6.306,) 46.6.517, 46.6.602, 46.6.605,) 46.6.606, 46.6.701, 46.6.801,) 46.6.901, 46.6.903, 46.6.906,) 46.6.907, 46.6.1101,) 46.6.1201, 46.6.1302,) 46.6.1304, 46.6.1305,) 46.6.1306, AND 46.6.1309 AND) THE REPEAL OF RULES 46.6.603,) 46.6.902, 46.6.1001,) 46.6.1002, 46.6.1003,) 46.6.1301, 46.6.1303,) 46.6.1307, 46.6.1308,) 46.6.1310, 46.6.1311 AND) 46.7.101 THROUGH 46.7.1901) PERTAINING TO REHABILITATIVE) AND VISUAL SERVICES

TO: All Interested Persons

1. On February 16, 1984, the Department of Social and Rehabilitation Services published notice of the proposed adoption of Rules 46.6.518, 46.6.705, 46.6.710, 46.6.908, 46.6.2601, 46.6.2603, and 46.6.2605, and the amendment of Rules 46.6.102, 46.6.302, 46.6.304, 46.6.305, 46.6.306, 46.6.517, 46.6.602, 46.6.605, 46.6.606, 46.6.701, 46.6.801, 46.6.901, 46.6.903, 46.6.906, 46.6.907, 46.6.1101, 46.6.1201, 46.6.1302, 46.6.1304, 46.6.1305, 46.6.1306, and 46.6.1309 and the repeal of Rules 46.6.603, 46.6.902, 46.6.1001, 46.6.1002, 46.6.1003, 46.6.1301, 46.6.1303, 46.6.1307, 46.6.1308, 46.6.1310, 46.6.1311, and 46.7.101 through 46.7.1901 pertaining to rehabilitative and visual services, at page 296 of the Montana Administrative Register, issue number 3.

2. The Department has repealed Rules 46.6.603, 46.6.902, 46.6.1001, 46.6.1002, 46.6.1003, 46.6.1301, 46.6.1303, 46.6.1307, 46.6.1308, 46.6.1310, 46.6.1311, and 46.7.101 through 46.7.1901 as proposed.

3. The Department has amended Rules 46.6.102, 46.6.302, 46.6.304, 46.6.305, 46.6.306, 46.6.517, 46.6.602, 46.6.605, 46.6.606, 46.6.701, 46.6.801, 46.6.901, 46.6.903, 46.6.906, 46.6.907, 46.6.1101, 46.6.1201, 46.6.1302, 46.6.1304, 46.6.1305, 46.6.1306, and 46.6.1309 as proposed.

4. The Department has adopted Rules 46.6.518, INSTRUCTIONAL SERVICES FOR BLIND AND VISUALLY IMPAIRED VOCATIONAL REHABILITATION CLIENTS; 46.6.908, STANDARDS FOR MEDICAL AND SCHOOL FACILITIES; 46.6.710, PROCEDURES FOR WORK ADJUSTMENT TRAINING; 46.6.2601, VISUAL MEDICAL PROGRAM: PURPOSES; 46.6.2603, VISUAL MEDICAL PROGRAM: SERVICES; and 46.6.2605, VISUAL MEDICAL PROGRAM: ELIGIBILITY REQUIREMENTS as proposed.

5. The Department has adopted Rule 46.6.705 as proposed with the following changes:

46.6.705 CERTIFICATION OF HANDICAPPED PERSONS FOR MINIMUM WAGE EXEMPTIONS (1) The department, in accordance with this rule, will certify those handicapped persons who qualify for exemption from federal minimum wage law.

(2) The purpose of certification is to foster employment opportunities for handicapped workers whose earning capacity is so severely impaired that they are unable to engage in competitive employment.

(3) A handicapped person or the employer of a handicapped person may apply to the department for certification.

(4) The department will determine whether the handicapped person is so severely impaired that he is unable to engage in competitive employment.

(5) Upon certifying the handicapped person, the department will notify the United States Department of Labor and the employer in order that they may implement that person's exemption from federal minimum wage.

(6) Those handicapped persons enrolled in work activity centers or sheltered workshops who therefore meet the productivity criteria governing enrollment in those facilities will be certified for the federal minimum wage exemption by the United States Department of Labor in accordance with its procedures.

6. No written comments or testimony were received.

7. The Department made changes to Rule 46.6.705 only to clarify that the minimum wage set out in the rule is the federal minimum wage.

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 19, 1984.

VOLUME NO. 40 OPINION NO. 37

CONTRACTS - Competitive bidding not required for purchasing health insurance for school district employees;
SCHOOL DISTRICTS - Approval by school district employees required for purchase of health insurance;
SCHOOL DISTRICTS - Group health insurance for employees;
MONTANA CODE ANNOTATED - Sections 2-18-702(1), 18-4-123(19), 18-4-124, 20-9-204(3).

HELD: 1. A school district is not required by section 20-9-204(3), MCA, to let bids on employer provided employee health insurance.

2. Insurance purchased by a school district is not a school supply for purposes of section 20-9-204(3), MCA.

8 March 1984

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

Dear Mr. Hanser:

You have requested my opinion on the following questions:

1. Is a school district required under section 20-9-204(3), MCA, to let bids on employer provided employee health insurance plans?

2. Is insurance purchased by a school district a school supply for purposes of section 20-9-204(3), MCA?

Section 20-9-204(3), MCA, provides:

> Whenever the estimated cost of any building, furnishing, repairing, or other work for the benefit of the district or purchasing of

> supplies for the district exceeds the sum of $7,500, the work done or the purchase made shall be by contract. Each such contract must be let to the lowest responsible bidder after advertisement for bids. Such advertisement shall be published in the newspaper which will give notice to the largest number of people of the district as determined by the trustees. Such advertisement shall be made once each week for 2 consecutive weeks and the second publication shall be made not less than 5 days or more than 12 days before consideration of bids. A contract not let pursuant to this section shall be void. [Emphasis added.]

The Legislature did not provide a definition for the term "supplies" in this statute, nor did it specifically include employee health insurance in the enumerated items that must be acquired through competitive bidding. The rules of statutory construction and existing case law lead me to conclude that employee health insurance plans are not "supplies" within the meaning of section 20-9-204(3), MCA, and the school district is not required to obtain the insurance through competitive bidding.

When the language of a statute is clear and unambiguous, no further construction may be employed to determine its meaning. State v. Weese, 37 St. Rptr. 1620, 616 P.2d 371 (1980). The term "supplies" is broad and unspecific. Thus, it is appropriate to apply rules of statutory construction.

Section 20-9-204(3), MCA, which was first enacted in 1971, has never been judicially interpreted with respect to the scope of the term "supplies." This statute's predecessors required competitive bidding for "any contract for building, furnishing, repairing, or other work for the benefit of the district," but did not require such bidding for "purchasing of supplies." See § 1016, R.C.M. 1935; 1913 Mont. Laws, ch. 76, § 509. In 1933 the Montana Supreme Court had occasion to interpret the scope of the term "supplies" within the context of a general state procurement statute. In Miller Insurance Agency v. Porter, 93 Mont. 567, 20 P.2d 643 (1933), the Court ruled that section 256, R.C.M. 1921, which required competitive bidding for a variety of things including "supplies," did not govern the purchase of

fire insurance policies. The Court's interpretation was based on the ambiguity existing in the term "supplies," and the practical application of the statute. It also considered the fact that for years the state board of examiners had interpreted the statute to exclude fire insurance and had been obtaining fire insurance without competitive bidding; the Court noted the sanction of the Legislature to such interpretation by reason of its inaction. Id. at 646.

The statute presently in question is similar to the one addressed in Miller Insurance Agency, supra, since it concerns purchasing items through competitive bidding, and presents an ambiguity with the term "supplies." Applying the reasoning of the Court in Miller Insurance Agency, I reach a similar conclusion with section 20-9-204(3), MCA. The rules of statutory construction require that statutes pertaining to the same subject be read together to give effect to them all whenever possible. State ex rel. Dick Irvin, Inc. v. Anderson, 164 Mont. 513, 525 P.2d 564 (1974). The compulsory bidding provisions in this statute must therefore be considered with the statutes pertaining to health insurance for school district employees. Section 2-18-702, MCA, states in pertinent part:

> (1) All...school districts...shall upon approval by two-thirds vote of their respective officers and employees enter into group hospitalization, medical, health... contracts or plans for the benefit of their...employees and their dependents. [Emphasis added.]

This statute requires a procedure not contemplated or provided for in the competitive bidding procedure, which requires that "the trustees shall award the contract to the lowest responsible bidder, except that the trustees may reject any or all bids." (Emphasis added.) § 20-9-204(4), MCA. No allowance exists for the employees to approve or reject the bids. This statutory conflict evidences legislative intent that purchase of health insurance not be governed by the competitive bidding requirements.

The required approval of a health insurance plan by the school district employees is a primary reason that the majority of school districts in Montana have interpreted

section 20-9-204(3), MCA, not to include employee health insurance plans. The inconsistencies of these two statutes render compliance with both statutes impractical if not impossible. Furthermore, the interpretation given by the school districts must be given great deference, especially in light of legislative inaction to specifically include health insurance in the competitive bidding statute. Miller Insurance Agency, supra; Assiniboine and Sioux Tribes v. Nordwick, 378 F.2d 426 (9th Cir.), cert. denied, 389 U.S. 1046 (1967).

I conclude that section 20-9-204(3), MCA, does not require competitive bidding for the purchase of employee health insurance plans. In the absence of a statutory requirement to do so, the school district is not required to purchase the health insurance plans through competitive bidding. Missoula County Free High School v. Smith, 91 Mont. 419, 8 P.2d 800, 802 (1932).

THEREFORE, IT IS MY OPINION:

1. A school district is not required by section 20-9-204(3), MCA, to let bids on employer provided employee health plans.

2. Insurance purchased by a school district is not a school supply for purposes of section 20-9-204(3), MCA.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 40 OPINION NO. 3

STATE AVERAGE WEEKLY WAGE INCREASES - Effect of state average weekly wage increases on existing workers' compensation awards;
WORKERS' COMPENSATION - Effect of state average weekly wage increases on existing workers' compensation awards;
MONTANA CODE ANNOTATED - Sections 39-71-116(1), 39-71-701(1), 39-71-702(1), 39-71-703(1).

HELD: The amount of an existing benefit award under sections 39-71-701(1), 39-71-702(1) or 39-71-703(1), MCA, is unaffected by increases in the state's average weekly wage level.

9 March 1984

Robert R. Ringwood
Legislative Auditor
State Capitol
Helena MT 59620

Dear Mr. Ringwood:

You have requested my opinion on the following question:

> Should the benefit payments under sections 39-71-701(1), 39-71-702(1) and 39-71-703(1), MCA, to an individual whose wages times two-thirds exceed the state's average weekly wage, as to sections 39-71-701(1) and 39-71-702(1), and one-half the state's average weekly wage, as to section 39-71-703(1), MCA, be increased when the state's average weekly wage increases?

A response to your question involves an analysis of pertinent statutory provisions, Montana Supreme Court decisions and administrative practice.

Sections 39-71-701(1), 39-71-702(1) and 39-71-703(1), MCA, read:

> 39-71-701. Compensation for injuries producing temporary total disability. (1) Weekly compensation benefits for injury producing total temporary disability shall be

$66^2/_3$% of the wages received at the time of the injury. The maximum weekly compensation benefits shall not exceed $110 beginning July 1, 1973. Beginning July 1, 1974, the maximum weekly compensation benefits shall not exceed the state's average weekly wage. Total temporary disability benefits shall be paid for the duration of the worker's temporary disability.

39-71-702. Compensation for injuries producing total permanent disability. (1) Weekly compensation benefits for injury producing total permanent disability shall be $66^2/_3$% of the wages received at the time of the injury. The maximum weekly compensation benefits shall not exceed the state's average weekly wage. Total permanent disability benefits shall be paid for the duration of the worker's total permanent disability.

39-71-703. Compensation for injuries causing partial disability. (1) Weekly compensation benefits for injury producing partial disability shall be $66^2/_3$% of the actual diminution in the worker's earning capacity measured in dollars, subject to a maximum weekly compensation of one-half the state's average weekly wage.

The term "average weekly wage" is defined in section 39-71-116(1), MCA, as "the mean weekly earnings of all employees under covered employment, as defined and established annually by the Montana department of labor and industry" and is redetermined by the Workers' Compensation Division to the nearest whole dollar prior to July 1 of each year.

The clear purpose of the "average weekly wage" limitation in sections 39-71-701(1), 39-71-702(1) and 39-71-703(1), MCA, is to restrict the compensation rate which otherwise would be applicable if a claimant's wage rate at the time of injury constituted the only determinative factor. The amount of compensation to which a claimant is entitled is thus calculated once and with initial reference only to his wage rate at the time of injury; the "average weekly wage" amount serves merely as a limiting factor and under no circumstances

increases the amount of compensation to which a claimant is entitled.

While the Montana Supreme Court has never addressed the precise question raised here, it has determined in several decisions that both entitlement to and the amount of benefits available under the Workers' Compensation Act are determined at the time of injury. Thus, in Yurkovich v. Industrial Accident Board, 132 Mont. 77, 86, 314 P.2d 866, 872 (1957), the Court modified a district court's award of permanent partial disability compensation calculated on the basis of a benefits schedule first effective five and one-half months after the involved injury.

> The act and schedule in force at the time of the accident, and applicable herein, was section 1 of chapter 38, Laws of 1953. It is an accepted canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made that such was the intention of the legislature....

(Citations omitted.)

Yurkovich is consistent with later Montana decisions. Gaffney v. Industrial Accident Board, 133 Mont. 448, 453, 324 P.2d 1063, 1065 (1958) (rejecting contention that amount of compensation paid should include increases in the compensation rate provided by subsequent statutory amendments); Profitt v. Watts Construction Company, 143 Mont. 210, 215, 387 P.2d 703, 705 (1963) (holding statutory amendments effective subsequent to date of injury inapplicable); Simons v. Bennett Lumber Company, 146 Mont. 129, 133, 404 P.2d 505, 507 (1965) (refusing to allow claimant to benefit from compensation increase effective after date of injury); Hutchinson v. General Host Corporation, 178 Mont. 81, 89, 582 P.2d 1203, 1208 (1978) (holding that district court erred in determining temporary total compensation amounts on basis of provision enacted after date of injury); Iverson v. Argonaut Insurance Company, 39 St. Rptr. 1040, 1041, 645 P.2d 1366, 1367 (1982) (beneficiary's right to lump sum death payment governed by provision in effect at time of spouse's death and not by subsequent statutory amendment). Yurkovich and the subsequent decisions, therefore, indicate that

modifications in the State's average weekly wage amount do not affect prior-determined compensation rates.

It must be further noted that "[t]he general rule is that benefit increases, whether automatic under escalator clauses or legislatively enacted, are not retroactive, and that the benefit level in effect at the time of the injury controls." 2 A. Larson, Workmen's Compensation Law § 60.50 (1982). Other jurisdictions have accordingly held that periodic increases in the maximum amount of disability compensation available under workmen's compensation provisions comparable to sections 39-71-701(1), 39-71-702(1) and 39-71-703(1), MCA, do not ordinarily serve to increase already established compensation rates. See, e.g., Cates v. T.I.M.E., DC, Inc., 513 S.W.2d 508, 510 (TBNC 1974); Frick v. Nevada Industrial Commission, 95 Nev. 263, 592 P.2d 942, 948 (1979). Although Cates and Frick dealt with legislative modification of specific minimum dollar amounts, the reasoning of those decisions is fully analogous: Unless otherwise specifically indicated, increases in compensation levels act only prospectively. Similarly, to conclude that the Montana Legislature intended annual modifications in the minimum amounts available under sections 39-71-701(1), 39-71-702(1) and 39-71-703(1), MCA, to affect existing compensation awards requires substantial textual support from the provisions of the Workers' Compensation Act; such textual support is not present. See generally § 1-2-109, MCA; City of Harlem v. State Highway Commission, 149 Mont. 281, 284-85, 425 P.2d 718, 720 (1967); Penrod v. Hoskinson, 170 Mont. 277, 281, 552 P.2d 325, 327 (1976); State v. Marsh, 175 Mont. 460, 469, 575 P.2d 38, 44 (1978).

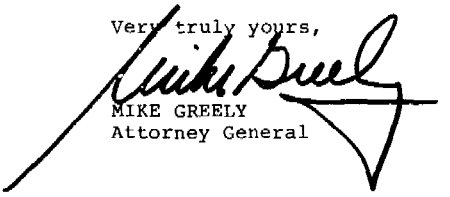
Last, I note the long-established administrative practice of the Workers' Compensation Division, Department of Labor and Industry, under which increases in the state average weekly wage rate have not been applied to existing compensation awards under sections 39-71-701(1), 39-71-702(1) or 39-71-703(1), MCA. That practice developed by the agency responsible for the administration of the Workers' Compensation Act is entitled to substantial deference. Bartels v. Miles City, 145 Mont. 116, 122, 399 P.2d 768, 771 (1965); Montana Consumer Counsel v. Public Service Commission, 168 Mont. 180, 187, 541 P.2d 770, 774 (1975) (per curiam). Consequently, on the basis of the statutory

language, pertinent decisions and administrative practice, your question must be answered negatively.

THEREFORE, IT IS MY OPINION:

The amount of an existing benefit award under sections 39-71-701(1), 39-71-702(1) or 39-71-703(1), MCA, is unaffected by increases in the state's average weekly wage level.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 40 OPINION NO. 39

DEPARTMENT OF COMMERCE - Responsibility to audit a state grant request for district courts under section 7-6-2352, MCA;
DISTRICT COURTS - Eligibility for state grants under section 7-6-2352, MCA;
MONTANA CODE ANNOTATED - Sections 1-2-101, 7-6-2352, 7-6-2341 to 2345.

HELD: Under section 7-6-2352, MCA, county governments may be eligible to receive state grants to district courts only after the completion of the fiscal year in which the need for assistance arose.

13 March 1984

J. Fred Bourdeau, Esq.
Cascade County Attorney
Cascade County Courthouse
Great Falls MT 59401

Dear Mr. Bourdeau:

You requested an opinion concerning whether county governments would be eligible to receive state grants to district courts under section 7-6-2352, MCA, before the end of the fiscal year in which the need for assistance arose.

This statute, enacted in 1979, was amended most recently in 1983 to clarify the language and facilitate financial assistance to the district courts. In regard to your question, the statute appears to be clear and unambiguous. I cannot construe the statute to contain matter which the Legislature failed to include. § 1-2-101, MCA. It is my opinion that the statute precludes a county from obtaining financial assistance prior to the close of the fiscal year in which the need for the assistance arose.

The statute in its entirety refers to the year in which the need for assistance arose as a county's previous fiscal year. Subsection (2) requires a county to submit

a written request to the Department of Commerce "by July 20 for the previous fiscal year." The manner in which the county must compute the amount of financial assistance necessitates using figures that represent all district court fund revenues received and expenditures made during the previous fiscal year. § 7-6-2352(3)(a), (b), MCA.

My conclusion is also based on the operative effect of subsection (1), which provides in part: "If the department approves grants in excess of the amount appropriated, each grant shall be reduced an equal percentage so the appropriation will not be exceeded." This pro rata distribution of the available funds necessarily precludes the Department from distributing any of the money until the requests from all counties are in and their proportionate shares can be computed.

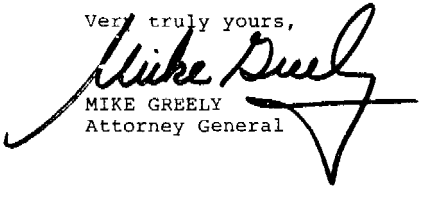
My conclusion is based on one further consideration. A county's application for the grant must certify that all expenditures from the district court fund have been lawful and statutorily authorized. § 7-6-2352(2), MCA. The statute provides for an audit by the Department of Commerce of each approved grant request. The purpose of the audit is to determine if the county received a grant in excess of the amount for which it was eligible, and to determine if the county owes the Department a refund for a prior year's overpayment. § 7-6-2352(7), (8), MCA. Through this audit, the Department is able to examine the past year's revenues and expenditures. However, if the grant is awarded in the middle of the fiscal year, the Department has neither the authority nor a means of monitoring expenditures and revenues that have yet to occur in the fiscal year.

In conclusion, it is clear that if the counties were to receive the funds during the fiscal year, the statutory eligibility requirements could not be met by the counties, the fiscal activities occurring in the remainder of the year could not be examined by the Department pursuant to the statute, and proportionate distribution to all applicants of the available funds would not be possible. The Legislature evidently intended the counties to issue registered warrants if necessary during the fiscal year, to be paid later by the grant money. See §§ 7-6-2341 to 2345, MCA.

THEREFORE, IT IS MY OPINION:

Under section 7-6-2352, MCA, county governments may be eligible to receive state grants to district courts only after the completion of the fiscal year in which the need for assistance arose.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 40 OPINION NO. 40

EMPLOYEES, PUBLIC - Application of nepotism laws, Human Rights Act and Governmental Code of Fair Practices to employment involving relationships by marriage;
EMPLOYMENT DISCRIMINATION - Application of nepotism laws, Human Rights Act and Governmental Code of Fair Practices to employment involving relationships by marriage;
NEPOTISM - Implied repeal of nepotism provision by Human Rights Act and Governmental Code of Fair Practices;
MONTANA CODE ANNOTATED - Sections 1-2-207, 2-2-302, 2-2-303, 49-2-303(1)(a), 49-2-303(1)(b), 49-3-103(1), 49-2-101 to 49-2-601, 49-3-101 to 49-3-312;
OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 67 (1982).

HELD: The 1983 amendments to the Montana Human Rights Act, §§ 49-2-101 to 49-2-601, MCA, and the Governmental Code of Fair Practices, §§ 49-3-101 to 49-3-312, MCA, did not revive the impliedly repealed portion of section 2-2-302, MCA, restricting employment on the basis of affinity.

13 March 1984

Donald Ranstrom, Esq.
Blaine County Attorney
Blaine County Courthouse
Chinook MT 59523

Dear Mr. Ranstrom:

You have requested my opinion concerning the following question:

> What is the effect of House Bill 501 on the holding in Thompson v. Board of Trustees and 39 Op. Att'y Gen. No. 67 as it regards "marital status" in the Human Rights Act and section 2-2-302, MCA?

During the 1983 session the Legislature amended sections 49-2-303(1)(a) and 49-2-303(1)(b), MCA, of the Montana Human Rights Act and section 49-3-103(1), MCA, of the

Governmental Code of Fair Practices. The amended provisions read:

49-2-303. Discrimination in employment. (1) It is an unlawful discriminatory practice for:

(a) an employer to refuse employment to a person, to bar him from employment, or to discriminate against him in compensation or in a term, condition, or privilege of employment because of his race, creed, religion, color, or national origin or because of his age, physical or mental handicap, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental handicap, marital status, or sex distinction;

(b) a labor organization or joint labor management committee controlling apprenticeship to exclude or expel any person from its membership or from an apprenticeship or training program or to discriminate in any way against a member of or an applicant to the labor organization or an employer or employee because of race, creed, religion, color, or national origin or because of his age, physical or mental handicap, marital status, or sex when the reasonable demands of the program do not require an age, physical or mental handicap, marital status, or sex distinction; [Emphasis added.]

49-3-103. Permitted distinctions. Nothing in this chapter shall prohibit any public or private employer:

(1) from enforcing a differentiation based on marital status, age, or physical or mental handicap when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age; [Emphasis added.]

The underlined portions of these statutes indicate the 1983 amendatory additions. These amendments permit assertion of the "reasonable demands" or "bona fide occupational qualification" defense to marital status discrimination; prior to the amendments such defense was not available. See Thompson v. Board of Trustees, 38 St. Rptr. 706, 708-09, 627 P.2d 1229, 1231-32 (1981).

In 39 Op. Att'y Gen. No. 67 (1982), I held that the affinity nepotism provision in section 2-2-302, MCA, was impliedly repealed by the enactment of the Human Rights Act and the Governmental Code of Fair Practices. Senate Bill 179 was introduced during the 1983 legislative session in an apparent attempt to eliminate any arguable conflict between those statutes' broad prohibition against marital status discrimination and the nepotism provisions in sections 2-2-302 and 2-2-303, MCA, by amending sections 49-2-303 and 49-3-201, MCA, to provide expressly that such sections were not intended to affect the nepotism prohibitions. In hearings before the Senate Committee on Judiciary, the sponsor of Senate Bill 179 explained "that it was requested by the Montana University System because of problems they were having with conflicts between the antidiscrimination and nepotism laws. He advised the Committee that HB501 was being introduced in the House which deals essentially with the same problem and requested that consideration of SB179 be deferred until passage of HB501...." (January 27, 1983 Senate Committee on Judiciary Minutes.) Senate Bill 179 was never reported out of committee, presumably because House Bill 501 was favorably acted upon by the Committee. House Bill 501 contained those amendments to sections 49-2-303(1)(a), 49-2-303(1)(b), and 49-3-103(1), MCA, quoted above.

For those reasons stated in 39 Op. Att'y Gen. No. 67 (1982), it is my opinion that section 2-2-302, MCA, has been impliedly repealed, to the extent it imposes employment prohibitions on the basis of affinity, by the Human Rights Act and the Governmental Code of Fair Practices. Even if it is assumed arguendo that the amendments to the Human Rights Act and the Governmental Code of Fair Practices effected by House Bill 501 were intended to revive the repealed aspects of section 2-2-302, MCA, the required specificity for revival was not present and, therefore, no revival has occurred. See § 1-2-207, MCA; State ex rel. Jenkins v. Carisch

Theatres, Inc., 172 Mont. 453, 460, 564 P.2d 1316, 1320 (1977).

THEREFORE, IT IS MY OPINION:

The 1983 amendments to the Montana Human Rights Act, §§ 49-2-101 to 49-2-501, MCA, and the Governmental Code of Fair Practices, §§ 49-3-101 to 49-3-312, MCA, did not revive the impliedly repealed portion of section 2-2-302, MCA, restricting employment on the basis of affinity.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 40 OPINION NO. 41

SCHOOL BOARDS - School board may delegate administrative nondiscretionary contracting responsibilities to the district superintendent;
SCHOOL DISTRICTS - District superintendent lacks the inherent authority to enter contracts on behalf of the school district;
MONTANA CODE ANNOTATED - Sections 20-4-402, 20-9-204(3), 20-9-204(4), 20-9-213;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 133 (1978).

HELD: 1. A school district superintendent does not have the inherent power to enter a contract on behalf of the school district.

2. A school district board of trustees may delegate a portion of its exclusive power to contract if the delegated power involves only the performance of administrative nondiscretionary acts.

15 March 1984

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

Dear Mr. Hanser:

You have requested my opinion on the following questions:

1. May a school district superintendent, without the prior approval of the district board of trustees, enter a contract for the provision of goods or services to the district if the amount of the contract does not exceed $7,500?

2. May a school district board of trustees delegate its statutory power to execute contracts on behalf of the school district to the district superintendent?

Your questions arise under section 20-9-213, MCA, which provides in part:

> The trustees of each district shall have the sole power and authority to transact all fiscal business and execute all contracts in the name of such district. No person other than the trustees acting as a governing board shall have the authority to expend moneys of the district.

(Emphasis added.) It is clear that this provision and section 20-9-204(3), (4), MCA, require the trustees to execute any contract for goods and services the value of which exceeds $7,500. Such a contract may only be entered following competitive bidding. However, the situation regarding contracts for less than $7,500 is less clear. Since such contracts are not covered by section 20-9-204(3), MCA, they need not be let for bids, see Missoula County Free High School v. Smith, 91 Mont. 419, 422-23, 8 P.2d 800, 802 (1932), and if the applicable statute of frauds permits, they need not be reduced to writing. Some of these contracts cover small everyday purchases, while others may involve more substantial capital assets.

Your first question is whether the provisions of section 20-9-204(3), MCA, requiring contracts for more than $7,500 to be let for bid, carry the negative implication that contracts for less than that amount may be entered by the school district superintendent without the prior approval of the board of trustees. Nothing in the statute suggests that the Legislature intended such a result. Moreover, section 20-9-213, MCA, states quite forcefully that the board of trustees possesses the "sole power and authority" to contract on behalf of the school district. The statutory powers of the district superintendent do not include the power to enter contracts without the approval of the trustees. I therefore conclude that the superintendent lacks the inherent statutory power to contract on behalf of the district.

Your second question is whether the trustees may delegate their statutory contracting power to the district superintendent. In 37 Op. Att'y Gen. No. 133 (1978), I noted that Montana law recognizes the power of a district board of trustees to delegate ministerial or

administrative duties to the superintendent. Two Montana Supreme Court cases illustrate this principle. In School District No. 4 v. Colburg, 169 Mont. 368, 374, 547 P.2d 84, 87 (1976), the Court held that although a statute required the trustees to deliver notice of termination to a teacher, the notice was not invalid simply because the trustees directed the district superintendent to make the delivery instead. The Court relied on the fact that the substantive decision was made by the trustees and that the superintendent performed only the ministerial act of delivering notice of the trustees' decision. In Wibaux Education Association v. Wibaux County High School, 175 Mont. 331, 336, 573 P.2d 1162, 1165 (1978), in contrast, the Court held that the trustees' statutory power to decide whether to terminate a teacher's contract could not be delegated to an arbitrator through collective bargaining.

The distinction illustrated by these cases is described in 37 Op. Att'y Gen. No. 133 at 563. There, I quoted with approval the opinion of the Colorado Supreme Court in Big Sandy School District No. 100-J v. Carroll, 164 Colo. 173, 433 P.2d 325, 328 (1967), where the court held that duties involving an exercise of discretion or judgment may not be delegated, while duties "which are ministerial or administrative in nature, where there is a fixed or certain standard or rule which leaves little or nothing to the judgment or discretion of the subordinate" may be delegated. Applying this standard to the question of the delegation of the trustees' power to contract, it is my opinion that there are circumstances in which the power may be delegable. If the discretionary elements of the proposed contract are considered and determined by the board of trustees and the board provides "fixed and certain" direction in how the contract is to be formed, the board may delegate to the superintendent the formal responsibility for the negotiation and execution of the contract. The superintendent is the "executive officer" of the board, section 20-4-402, MCA, and in this circumstance he merely acts to execute the policy adopted by the board.

It would appear that there are classes of contracts for which the board could establish policy guidelines within which the superintendent could contract without the explicit direction of the board for each and every contract. For example, the district office may require

certain fungible supplies such as pencils and paper. The board may determine that these supplies should be purchased on an "as needed" basis from a particular local merchant and allow the superintendent to contract for these purchases without requiring the superintendent to seek prior board approval for each and every purchase. In such a case, the board has performed its discretionary duty and left the ministerial performance of the duty to the superintendent.

It is clear that the Legislature intended to require the board of trustees to make the discretionary decisions in matters relating to school district contracts. Although the law allows the board to delegate the formalities of its contractual duties, it may be the better policy not to do so. Under Montana law, the board of trustees may refuse to pay a claim based on a contract unlawfully entered on the district's behalf by the superintendent, since such ultra vires contracts are legally unenforceable. Keller Brothers v. School District No. 3, 62 Mont. 356, 362, 205 P. 217, 219 (1922); see Sibert v. Community College, 179 Mont. 188, 191, 587 P.2d 26, 28 (1978). Unless the trustees establish guidelines of unusual clarity, questions will continually arise whether particular contracts entered by the superintendent on behalf of the district are lawful or unlawful. A school board should therefore exercise great care in deciding to delegate any portion of its contracting power to the district superintendent.

THEREFORE, IT IS MY OPINION:

1. A school district superintendent does not have the inherent power to enter a contract on behalf of the school district.

2. A school district board of trustees may delegate a portion of its exclusive power to contract if the delegated power involves only the performance of administrative nondiscretionary acts.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 40 OPINION NO. 42

CORPORATIONS - Eligibility of Subchapter S shareholder for tuition offset;
PARENT - Eligibility of Subchapter S shareholder for tuition offset;
SHAREHOLDER - Eligibility of Subchapter S shareholder for tuition offset;
TUITION OFFSET - Eligibility of Subchapter S shareholder for;
MONTANA CODE ANNOTATED - Sections 1-2-106, 20-5-303, 20-5-305, 35-1-510(1), 40-6-102, 41-5-103(9).

HELD: A shareholder in a closed, or family, type Subchapter S corporation is not eligible to claim tuition offset under section 20-5-303, MCA, when the corporation is the taxpayer responsible for the district and county property taxes referred to in that section.

16 March 1984

Ed Argenbright, Superintendent
Office of Public Instruction
Room 106, State Capitol
Helena MT 59620

Dear Mr. Argenbright:

You have requested my opinion concerning the following question:

> Whether a stockholder in a "family type" Subchapter S corporation is entitled to a tuition waiver for individual tuition for elementary pupils where a particular stockholder's portion of the corporation's tax exceeds the rate of tuition determined under section 20-5-305, MCA, in district and county property taxes during the immediately preceding school fiscal year for the benefit and support of the district in which a child will attend school.

Section 20-5-303, MCA, provides in part that, when a child attends public elementary school outside the

school district of his residence, tuition will be assessed but that it "shall be reduced by the amount the parent of the child paid in district and county property taxes during the immediately preceding school fiscal year for the benefit and support of the district in which the child will attend school." The issue presented is whether district and county property tax payments by a closely-held or family corporation constitute payments by a "parent" for tuition offset purposes under section 20-5-303, MCA.

The term "parent" is not defined in sections 20-5-301 to 314, MCA. "Parent" is commonly defined as "a father or mother...[and] is sometimes used popularly and in statutes to include persons standing in loco parentis other than the natural parent...." Webster's New International Dictionary 1776 (2d ed. 1941). See also §§ 40-6-102 and 41-5-103(9), MCA. The Legislature in enacting section 20-5-303, MCA, is presumed to have used nontechnical terms contained therein in their ordinary and usual meanings. See, e.g., § 1-2-106, MCA; Jones v. Judge, 176 Mont. 251, 254, 577 P.2d 846, 848 (1978); Montana Power Co. v. Cremer, 182 Mont. 277, 279-80, 596 P.2d 483, 484 (1979). Therefore, no plausible argument can be made that the term "parent," as used in section 20-5-303, MCA, includes a closely-held or family corporation.

Section 20-5-303, MCA, would logically extend to property tax payments made by a parent's agent on behalf of the parent. However, it is well established that "[a] corporation has a real individuality...and is in law an entity separate and distinct from its stockholders...." Noble v. Farmers Union Trading Co., 123 Mont. 518, 523, 216 P.2d 925, 927 (1950); Wortman v. Griff, 39 St. Rptr. 1916, 1920, 651 P.2d 998, 1001 (1982). This general rule applies equally to corporations with many shareholders and to those, commonly known as closed corporations, in which ownership and management are substantially identical. Thisted v. Tower Management Corp., 147 Mont. 1, 14, 409 P.2d 813, 820 (1966); see generally Flemmer v. Ming, 37 St. Rptr. 1916, 1919-20, 621 P.2d 1038, 1042 (1980); accord Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653, 662 (1982); Grayson v. Nordic Construction Company, Inc., 92 Wash. 2d 548, 599 P.2d 1271, 1274 (1979).

Further, while the corporate identity, or veil, may be pierced to assess liability directly against shareholders on either an "agency" or an "alter ego" theory, the circumstances attendant to going behind the "corporate cloak" must establish it "is [being] utilized as a subterfuge to defeat public convenience, to justify wrong, or to perpetrate fraud." Monarch Fire Insurance Company v. Holmes, 113 Mont. 303, 307-08, 124 P.2d 994, 996 (1942); see generally Comment, Piercing the Corporate Veil in Montana, 44 Mont. L. Rev. 91 (1983). The mere fact that a corporation is closely-held does not warrant piercing the corporate veil. Flemmer v. Ming, supra; accord Team Central Inc., v. Teamco, Inc., 271 N.W.2d 914, 923 (Iowa 1978); Amfac Foods, Inc. v. International Systems & Controls Corporation, 294 Or. 94, 654 P.2d 1092, 1100 (1982); Sampson v. Hunt, 233 Kan. 572, 665 P.2d 743, 751 (1983). Shareholders are, therefore, generally not liable for corporate debts. § 35-1-510(1), MCA. Consequently, no basis exists for finding agency status for tuition offset purposes under section 20-5-303, MCA, merely because a student's parent has vested property ownership in a closely-held corporation which makes school district and county property tax payments.

Election by a corporation of Subchapter S, or "small business corporation," status under the Internal Revenue Code, 26 U.S.C. § 1372, does not alter the above analysis. That status, while significantly impacting on income tax responsibilities normally applicable to corporations, does not merge the separate legal identities of the corporation and its shareholders. See D. L. Crumbley & P. M. Davis, Organizing, Operating and Terminating Subchapter S Corporations--Law, Taxation and Accounting § 12.6 (rev. ed. 1980); I. Grant, Subchapter S Taxation § 2.1 (2d ed. 1983). Most important, the property on which district and county taxes are assessed is owned by the corporation, and the taxpayer as to that property is the corporation and not its shareholders.

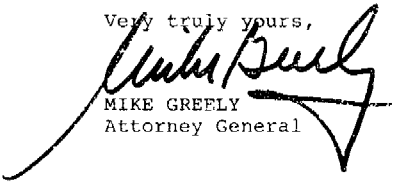
Lastly, "one who accepts the benefits of a corporation must also accept the burdens that flow from the use of a corporate structure.... [T]he corporate form may not be ignored merely because a stockholder could obtain a personal benefit from another form...." Lyon v. Barrett, 89 N.J. 294, 445 A.2d 1153, 1156 (1982) (citations omitted); see also State v. Barreiro, 432 So. 2d 138, 140 (Fla. Ct. App. 1983). A shareholder in a

closely-held corporation accordingly must bear any disadvantages resulting from corporate status. One disadvantage associated with incorporation in Montana is the unavailability of tuition offset under section 20-5-303, MCA, when the taxpayer, for property tax purposes, is a corporation and not the child's parent.

THEREFORE, IT IS MY OPINION:

> A shareholder in a closed, or family, type Subchapter S corporation is not eligible to claim tuition offset under section 20-5-303, MCA, when the corporation is the taxpayer responsible for the district and county property taxes referred to in that section.

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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