MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 12

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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

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BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of adoption of rules pertaining to the grading of certified seed potatoes.	)))))	NOTICE OF PROPOSED ADOPTION OF RULES PERTAINING TO THE GRADING OF CERTIFIED SEED POTATOES NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On August 5, 1985, the Department of Agriculture proposes to adopt rules pertaining to the grading of certified seed potatoes.

2. The proposed rules provide as follows:

RULE I GENERAL REQUIREMENTS (1) The Department of Agriculture, pursuant to Sections 80-3-104 and 80-3-110, MCA, adopts grade standards and inspection procedures to enforce those grades as further set out in these rules.

(2) All seed potatoes shall be shipped under tags that represent all grade and classes to which they were sorted and certified.

(3) Final Pack Inspection

(a) All Montana certified seed potatoes sold in bulk or offered for sale in bags shall be inspected by a Federal or Federal-State Inspector. The final inspection shall be made before potatoes are moved from the loading point. If the potatoes do not meet the final grade requirements, the grade certificate shall not be issued unless the potatoes are regraded to meet the requirements. Standard method of loading shall be used when loading trucks and/or railroad cars, or bulk shipments.

(b) Federal and Federal-State grade inspectors are granted authority at any or all times to call in a potato specialist from the Montana State University (MSU) Extension Potato Certification Program if they suspect grower(s) are not handling certified seed potatoes in accordance with guidelines set forth by the MSU Extension Potato Certification Program, or if they suspect potatoes inspected do not conform in other respects with the requirements of MSU Extension Potato Certification Program. However, under no circumstances shall the department be held responsible for enforcing MSU Extension Potato Certification Program guidelines and procedures, and any failure to review for such compliance shall not be construed as approving for MSU Extension Potato Certification Program guidelines.

(4) Issuance of an Official Grade Certificate by the department shall mean approval for department grading standards only.

(5) Official tags and seals shall be issued by MSU Extension Potato Certification Program officials to the applicant or a designated agent. No mutilation of official tags by writing or marking over, or otherwise altering original information printed thereon, shall be permitted

unless requested in writing by the grower and approved by the Department of Agriculture.

(6) The grower, to whom the official tags were issued, shall be responsible for the proper tagging and sealing of containers.

(7) Each lot of certified seed potatoes shall be inspected by either Federal or Federal-State inspectors at the time of shipment.

(8) Ungraded potatoes shall not be inspected.

(9) Washing of certified seed potatoes to be tagged with an official tag shall not be permissible unless requested by the buyer. Presence of soil on tubers shall not constitute reason for throwing them out of the grade. Grower should allow for weight of soil when packaging potatoes for sale.

(10) It shall be permissible to use official tags on potatoes containing an excess of oversize, undersize, hollow heart and/or sprouts providing official tags indicate excess tolerance. It shall be the responsibility of the grower to submit written evidence that the purchaser is willing to accept such a grade.

AUTH: 80-3-110, MCA IMP: 80-3-104, MCA

RULE II SEED CLASS DESIGNATION (1) At the time the tags are ordered by the grower, it shall be the responsibility of the MSU Extension Potato Certification Program to print clearly across the face of the appropriate grade tag the following: the proper class designation, growers name, address, and any other pertinent information necessary for shipment of the potato crop.

AUTH: 80-3-110, MCA IMP: 80-3-104, MCA

RULE III BLUE TAGS (1) The official blue tag shall be used to designate seed lots that are the equivalent of the U.S. No. 1 grade with the following exceptions:

(a) Size -- the minimum size shall be 1½ ounces and the maximum size shall be 12 ounces.

(b) Combined total length of growth cracks may extend two-thirds length of tuber and/or the depth of one-fourth the diameter of the tuber.

(c) Cuts and bruises shall be scored when removal causes loss of more than 10% of the total weight of a tuber.

(d) Air cracks shall be scored only if the depth exceeds ½ inch.

(e) Sunburn (greening) shall be permissible.

(f) Stem-end discoloration -- not more than 4% (by weight) of the potatoes shall have serious discoloration extending beyond a depth of ½ inch.

(g) Immaturity, as indicated by feathering of skin, shall not disqualify provided there is no undue loss of weight from wilting or shriveling of tubers.

(h) Sprouts -- not more than 10% of the lot may have sprouts more than 3/4 inch in length. Individual sprouts or

clusters shall not be scored on appearance or length if within the 10% tolerance.

(i) Oversize, undersize, and hollow heart shall be permissible provided the excess tolerance is indicated on the official grade tags.

AUTH: 80-3-110, MCA IMP: 80-3-104, MCA

RULE IV RED TAGS (1) The official red tag shall be used to designate seed lots that are the equivalent of U.S. No. 2 grade with the following exceptions:

(a) Size -- the minimum size shall be 1½ ounces and the maximum shall be 12 ounces.

(b) Growth cracks shall not be scored.

(c) Cuts and bruises shall be scored when removal causes loss of more than 15% of the total weight of a tuber.

(d) Second growth shall not be deliberately removed.

(e) The following blue tag exceptions shall also apply to red tags: air cracks, sunburn (greening), stem-end discoloration, immaturity, sprouts, oversize, undersize, and hollow heart.

AUTH: 80-3-110, MCA IMP: 80-3-104, MCA.

RULE V BULK SHIPMENTS (1) Potatoes shipped in bulk shall meet all official grade and MSU Extension Potato Certification Program requirements. All carriers shall be tagged and sealed in an appropriate manner.

(2) Official tags carrying information described in this section shall be used and, in addition, the following information must be filled out on the official bulk tag at the time of sealing the carriers:

(a) Seal number.

(b) Inspection certification number.

(c) Date inspected.

(d) Buyer's name.

(e) Date and time loaded.

(f) Trucking firm's name and driver's initials.

(g) Carrier license or car number.

(h) Approximate weight (100 lbs. occupies about 2.4 cubic feet, or .42 x cu. ft. = number of CWT's).

AUTH: 80-3-110, MCA IMP: 80-3-104, MCA

3. The reasons for the proposed adoption of these rules are as follow:

(a) to clarify the grading of certified seed potatoes.

(b) to clarify the department's responsibility in inspecting the seed potatoes.

4. Interested parties may submit their data, views or arguments concerning the proposed adoption in writing to the Department of Agriculture, Agriculture/Livestock Building, Capitol Station, Helena, Montana 59620, no later than August 2, 1985.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views and

arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to the Department of Agriculture, Agriculture/Livestock Building, Capitol Station, Helena, Montana 59620, no later than August 2, 1985.

6. If the agency receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 10 persons based on 100 seed potato growers in Montana.

By: 
W. Ralph Peck
Deputy Director

Certified to the secretary of state June 17, 1985

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF DENTISTRY

In the matter of the proposed amendments of 8.16.405 concerning dentists fee schedule, 8.16.602 concerning allowable functions for dental auxiliaries, 8.16.605 concerning examination, 8.16.606 concerning the fee schedule for dental auxiliaries, and proposed adoption of new rules concerning identification of dentures, application to convert inactive status license to an active status license for dentists and dental hygienists	)	NOTICE OF PROPOSED AMENDMENTS OF 8.16.405 FEE SCHEDULE, 8.56.602 ALLOWABLE FUNCTIONS FOR DENTAL AUXILIARIES, 8.16.605 EXAMINATION, 8.16.606 FEE SCHEDULE, and PROPOSED ADOPTION OF NEW RULES ENTITLED - IDENTIFICATION OF DENTURES, (Sub-Ch 4) APPLICATION TO CONVERT AN INACTIVE STATUS LICENSE TO AN ACTIVE STATUS LICENSE, (Sub-Ch 6) APPLICATION TO CONVERT AN INACTIVE STATUS LICENSE TO AN ACTIVE STATUS LICENSE NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On July 27, 1985, the Board of Dentistry proposes to amend and adopt the above-stated rules.

2. The amendment of 8.16.405 will read as follows:

8.16.405 FEE SCHEDULE

(1) Examination fee	~~$50.00~~	$75.00
(2) Re-examination fee (When re-examination does not occur at the same testing date and site as the initial examination.)	~~50.00~~	75.00
~~(3) Reciprocity~~	~~50.00~~	
~~(4)~~ (3) Licensure	~~30.00~~	35.00
~~(5)~~ (4) Active Renewal, in-state	~~35.00~~	70.00
~~(6)~~ (5) Inactive Renewal, out-of-state	~~35.00~~	70.00
~~(7)~~ (6) Duplicate licensure fee	~~10.00~~	30.00
~~(8)~~ (7) Late Renewal Penalty fee	50.00	
~~(9)~~ (8) Documents	~~20.00~~	30.00
(9) Certification of license		15.00"

Auth: 37-1-134, 37-4-205, MCA Imp: 37-1-134, 37-4-301 (4)(e),(f), (7), 303, 307, MCA

3. Section 37-1-134, MCA provides that the boards will set the fees commensurate with program area costs. These are the fees the board has determined necessary to cover the program costs budgeted for FY 86 and FY 87.

4. The proposed amendment of 8.16.602 will amend the catchphrase of the rule only and will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-509 - 8-511, Administrative Rules of Montana)

"8.16.602 ALLOWABLE FUNCTIONS FOR DENTAL HYGIENISTS AND DENTAL AUXILIARIES (1) Section 37-14-401, MCA requires ..."
Auth: 37-4-205, 37-4-408, MCA Imp: 37-4-401, 405, 408, MCA

5. The board is proposing the amendment to make the catchphrase consistent with the statutes.

6. The proposed amendment of 8.16.605 will amend subsection (3) of the rule and will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-511 and 8-512, Administrative Rules of Montana)

"8.16.605 EXAMINATION (1) ...

(3) Applications for the ~~oral interview and~~ jurisprudence examination must be submitted to the office of the board at least 20 days prior to the examination date.

(4) ..."

Auth: 37-4-205, MCA, (Section 3, Chapter 449, L. 1985) Imp: 37-4-402, MCA

7. Senate Bill 214, signed into law on April 12, 1985, removed the oral interview requirement for dental hygienists, therefore the board is amending that section out of the rule.

8. The proposed amendment of 8.16.606 will read as follows: (new matter underlined, deleted matter interlined)

8.16.606 FEE SCHEDULE

(1)	Examination fee	~~$50.00~~	$75.00
(2)	Re-examination fee (When re-examination does not occur at the same testing date and site as the initial examination)	~~50.00~~	75.00
~~(3)~~	~~Reciprocity~~	~~20.00~~	
~~(4)~~	(3) Active Renewal, in-state	~~30.00~~	50.00
~~(5)~~	(4) Inactive Renewal, out-of-state	~~30.00~~	50.00
~~(6)~~	(5) Licensure fee	~~30.00~~	35.00
~~(7)~~	(6) Duplicate license fee	~~10.00~~	30.00
~~(8)~~	(7) Late Renewal Penalty fee	50.00	
~~(9)~~	(8) Documents	~~20.00~~	30.00
(10)	Certification of License	15.00"	

Auth: 37-1-134, 37-4-205, MCA Imp: 37-1-134, 37-4-402 (5)(e)(f), (7), 403, 406 (1), MCA

9. Section 37-1-134, MCA provides that the boards will set the fees commensurate with program area costs. These are the fees the board has determined necessary to cover the program costs budgeted for FY 86 and FY 87.

10. The proposed new rules will read as follows:

"I. IDENTIFICATION OF DENTURES (1) In addition to the requirements set forth in section 37-4-503, MCA, all dentists shall be responsible for the placement of the following identification markings on all non-metal full dentures and partial dentures in an appropriate area:

(a) MTDDS and appropriate license number. (EXAMPLE MTDDS5000)"

Auth: 37-4-205, MCA Imp: 37-4-205, 502, MCA

II. (Dentists - Sub-Chapter 4) "APPLICATION TO CONVERT AN INACTIVE STATUS LICENSE TO AN ACTIVE STATUS LICENSE (1) An inactive status license does not entitle the holder to practice dentistry in the state of Montana. Upon application and payment of the appropriate fee, the board may reactivate an inactive license if the applicant does the following:

(a) signifies to the board in writing that, upon issuance of the active license, he or she intends to be an active practitioner in the state of Montana;

(b) presents satisfactory evidence of operative competency, which may include, but not be limited to;

(i) evidence that the applicant has actively and competently practiced in another jurisdiction during the year immediately prior to the application,

(ii) the applicant has not been out of active practice for more than four years; and that, during the immediately previous three years, the applicant has attended 20 hours of clinical continuing education that contributes directly to the applicant's basic clinical skills in the practice of dentistry. Such continuing education should not be limited in scope, but should reflect an attempt to retain competency throughout the entire field of dentistry.

(iii) evidence that, within the last year, the applicant has successfully passed the board's licensure examination.

(c) submits certification from the dental licensing body of all jurisdictions where the applicant is licensed or has practiced that the licensee is in good standing and has not had any disciplinary action taken against his or her license, or if the application is not in good standing by that jurisdiction or has had disciplinary action taken by that jurisdiction, an explanation of the nature of the violation or violations resulting in the licensee's not being in good standing or having disciplinary action against the license and the extent of the disciplinary treatment imposed;

(d) submits a certificate from a duly licensed physician verifying that the applicant is not subject to any advanced physical or mental disability which impairs the applicant's ability to perform the physical tasks required by practice of the profession, or impairs the applicant's judgment as to render it impossible for the applicant to efficiently and competently practice, which may include;

(i) paralytic malfunction,

(ii) vision impairment,
(iii) senility,
(iv) arthritis,
(v) M.S., M.D., Parkinsons,
(vi) or any other disease or condition that impairs ability to practice in an efficient and competent manner.
(e) presents evidence of having previously fulfilled the licensure requirements of the Montana state board of dentistry;
(f) submits such other information that the board or its staff deems necessary to fully evaluate the application."
Auth: 37-4-205, 37-4-307 (4)(c), MCA Imp: 37-4-307 (4)(c), MCA

III. (Dental hygiene - Sub-Chapter 6) "APPLICATION TO CONVERT AN INACTIVE STATUS LICENSE TO AN ACTIVE STATUS LICENSE (1) An inactive status license does not entitle the holder to practice dental hygiene in the state of Montana. Upon application and payment of the appropriate fee, the board may reactivate an inactive license if the applicant does the following:
(a) signifies to the board in writing that, upon issuance of the active license, he or she intends to be an active practitioner in the state of Montana;
(b) presents satisfactory evidence of operative competency, which may include, but not be limited to;
(i) evidence that the applicant has actively and competently practiced in another jurisdiction during the year immediately prior to the application,
(ii) the applicant has not been out of active practice for more than four years; and that, during the immediately previous three years, the applicant has attended 20 hours of clinical continuing education that contributes directly to the applicant's basic clinical skills in the practice of dental hygiene. Such continuing education should not be limited in scope, but should reflect an attempt to retain competency throughout the entire field of dental hygiene.
(iii) evidence that, within the last year, the applicant has successfully passed the board's licensure examination.
(c) submits certification from the dental hygiene licensing body of all jurisdictions where the applicant is licensed or has practiced that the licensee is in good standing and has not had any disciplinary action taken against his or her license, or, if the applicant is not in good standing in that jurisdiction or has had disciplinary action taken by that jurisdiction, an explanation of the nature of the violation or violations resulting in the licensee's not being in good standing or having disciplinary action against the license and the extent of the disciplinary treatment imposed;

(d) submits a certificate from a duly licensed physician verifying that the applicant is not subject to any advanced physical or mental disability which impairs the applicant's ability to perform the physical tasks required by practice of the profession, or impairs the applicant's judgment as to render it impossible for the applicant to efficiently and competently practice, which may include;

(i) paralytic malfunction,

(ii) vision impairment,

(iii) senility,

(iv) arthritis,

(v) M.S., M.D., Parkinsons,

(vi) or any other disease or condition that impairs ability to practice in an efficient and competent manner.

(e) presents evidence of having previously fulfilled the licensure requirements of the Montana state board of dentistry;

(f) submits such other information that the board or its staff deems necessary to fully evaluate the application."

Auth: 37-4-205, 406, MCA Imp: 37-4-406 (4)(c), MCA

11. Rule I is proposed because dentures can now be made by a denturist or dentist, the House Business and Labor Committee, at a hearing held February 19, 1985, requested that this identification be placed on all dentures and partials. The identification will assist both boards when complaints are filed regarding the construction and workmanship in this area.

Rule II and III are proposed to establish a method of converting an inactive status license to an active status.

12. Interested persons may submit their data, views or arguments concerning the proposed amendments and adoptions in writing to the Board of Dentistry, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than July 25, 1985.

13. 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 Dentistry, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than July 25, 1985.

14. 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. Ten percent of those persons directly affected has

been determined to be 120 based on the 1200 licensees in Montana.

BOARD OF DENTISTRY
JAMES OLSON, D.D.S,
PRESIDENT

BY: 
ROBERT WOOD, ATTORNEY
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, June 17, 1985.

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

In the matter of the proposed amendments of 8.56.402 concerning applications, 8.56.404 concerning certificate of licensure, 8.56.407 concerning renewals, 8.56.408 concerning duplicate or lost licenses, 8.56.409 fee schedule, 8.56.601 concerning definitions, 8.56.602 concerning permit applications 8.56.604 concerning temporary permits, 8.56.605 concerning verification of adequate evidence that the temporary permit applicant can safely perform x-rays without endangering the public, 8.56.606 concerning permit restrictions, proposed repeal of 8.56.603 concerning requirements for approval of a physician specializing in radiology, and proposed adoption of new rules concerning permits, course requirements for limited permit applicants, permit examinations, permit fees, and renewals.	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENTS OF 8.56.402 APPLICATIONS, 8.56.404 CERTIFICATE OF LICENSURE, 8.56.407 RENEWALS, 8.56.408 DUPLICATE OR LOST LICENSES, 8.56.409 FEES SCHEDULE, 8.56.601 DEFINITIONS, 8.56.602 PERMIT APPLICATIONS AS PER SECTION 37-14-306 (1), MCA, 8.56.604 TEMPORARY PERMITS, 8.56.605 VERIFICATION OF ADEQUATE EVIDENCE THAT THE TEMPORARY PERMIT APPLICANT CAN PERFORM X-RAY EXAMINATIONS WITHOUT ENDANGERING THE PUBLIC, 8.56.606 PERMIT RESTRICTIONS, PROPOSED REPEAL OF 8.56.603 REQUIREMENTS FOR APPROVAL OF PHYSICIAN SPECIALIZING IN RADIOLOGY, AND PROPOSED ADOPTION OF NEW RULES - PERMITS, COURSE REQUIREMENTS FOR LIMITED PERMIT APPLICANTS, PERMIT EXAMINATIONS, PERMIT FEES, AND RENEWALS

TO: All Interested Persons.

1. On Thursday, July 18, 1985, at 9:00 a.m., a public hearing will be held in the downstairs conference room of the Department of Commerce, 1424 9th Avenue, Helena, Montana, to consider the above-stated amendments, repeal and adoptions.

2. The proposed amendment of 8.56.402 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at 8-1561, Administrative Rules of Montana)

"8.56.402 APPLICATIONS (1) All applications for licensure ~~or permit~~ shall be made on printed forms provided by the board office. Completed applications shall be examined for compliance with the board rules. The information requirements which appear on the application form generally include applicant's educational history, work experience, and verification of license ~~or permits~~ in other states.

(2) All applications for a license shall be submitted to the board office with copies of the following documents:

(a) ...

(c) three ~~names and addresses of~~ statements from persons ~~who can~~ attesting to the applicant's good moral character;

(d) ~~original certificate~~ application fee; and

(e) ~~renewal license fee (based on biennial renewals)~~ original certificate fee.

(3) ..."

Auth: 37-14-202, MCA Imp: 37-14-302, 303, 304, MCA

3. The board is proposing the amendment to delete the reference to permits within the rule. The permit application requirements will be placed under sub-chapter 6. The application fee will replace the renewal fee. The renewal fee was based on biennual renewals which have been changed legislatively to annual. No application fee was charged previously.

4. The proposed amendment of 8.56.404 will amend subsection (1) (a) of the rule and will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-1561 and 8-1562, Administrative Rules of Montana)

"8.56.404 CERTIFICATE OF LICENSURE (1) ...

(a) Applicants approved for licensure as radiologic technologists will receive one permanent certificate along with a ~~biennial~~ an annual renewable license, authorizing the practice of radiologic technology."

Auth: 37-14-202, MCA, Section 6, Chapter 166, L. 1985 Imp: 37-14-305, MCA

5. The board is proposing the amendment to reflect the legislative change from annual to biennual renewals, Section 6, Chapter 166, L. 1985.

6. The proposed amendment of 8.56.407 will read as follows: (new matter underlined, deleted matter interlined)

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

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

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

Auth: 37-14-202, MCA, Section 6., Chapter 166, L. 1985 Imp: 37-14-310, MCA

7. The board is proposing the rule change to reflect the change from biennual to annual renewals, and to delete the reference to permit renewal, which will be addressed in the permit sub-chapter. (Chapter 166, Laws of 1985.)

8. The proposed amendment of 8.56.408 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-1562, Administrative Rules of Montana)

"8.56.408 DUPLICATE OR LOST LICENSES (1) A registrant requesting a replacement certificate of registration, ~~shall file with his request a sworn affidavit~~ must do so in writing, stating the reason for his request. A fee shall be charged for a replacement certificate.

(2) ..."

Auth: 37-14-202, MCA Imp: 37-14-309, MCA

9. The amendment is proposed to delete the reference to a sworn affidavit. The board felt a simple written statement would be sufficient.

10. The proposed amendment of 8.56.409 will read as follows: (new matter underlined, deleted matter interlined)

8.56.409 FEES SCHEDULE (1) Fees shall be transmitted by money order or check payable to the board of radiologic technologists. The board assumes no responsibility for loss in transit of such remittances. All fees are nonrefundable.

(a) Examination fee.....$65.00

(b) Application fee - radiologic technologist 60.00

(c) Original Certificate fee..... 35.00

~~(c) Permits~~

~~(i) Application..... 60.00~~

~~(ii) Certificate..... 25.00~~

~~(iii) Renewal..... 30.00~~

~~(d) Temporary permit ..... 65.00~~

~~(e)~~ (d) Renewal license fee - radiologic technologists..... ~~60.00~~ 30.00

~~(g)~~ (e) Late renewal fee (in addition to renewal fee..... 40.00

~~(f)~~ (f) Duplicate or lost licenses or certificates 25.00

Auth: 37-1-134, 37-14-202, MCA, (Section 6, Chapter 166, Laws of 1985) Imp: 37-1-134, 37-14-303, 37-14-210, MCA

11. The proposed amendment will delete references to permit fees, which will be placed in a permit fee schedule under sub-chapter 6 and will lower the radiologic technologists renewal fee from $60.00 biennually to $30.00 annually. The fees are those the board has determined necessary to cover administrative program area costs.

12. The proposed amendment of 8.56.601 will read as follows: (new matter underlined, deleted matter interlined)

"8.56.601 DEFINITIONS (1) Regional hardship is defined as a case when there is no other facility in the area ~~manned~~ staffed by a qualified radiologic technologist, radiologist, or permit holder."

Auth: 37-14-202, MCA (Section 4., Chapter 166, Laws 1985) Imp: 37-14-306, MCA

13. The board is proposing the amendment to substitute "staffed" for "manned" which is more grammatically accurate.

14. The proposed amendment of 8.56.602 will read as follows: (new matter underlined, deleted matter interlined)

8.56.602 PERMIT APPLICATIONS AS PER ~~SECTION 37-14-306(1), MCA~~ (1) Applications for a limited permit ~~under section 37-14-306 (1), MCA, must~~ shall be submitted to the board office ~~together~~ with ~~copies of~~ the following documents:

(a) ~~a statement from a board approved physician, specializing in radiology, that the applicant is capable of performing high-quality x-ray examinations without endangering the public health and safety. The statement must also specify these areas in which the applicant can safely perform x-ray examinations.~~ a copy of a certificate showing satisfactory completion of a board approved course;

(b) ~~original permit~~ application fee; and

(c) written statements attesting to the applicants good moral character from three individuals.

(2) After the applicant has been approved, the appropriate examination fee must be submitted.

(3) Upon passing the examination, an original certificate fee will be required."

Auth: 37-14-306, MCA (Section 4, Chapter 166, Laws 1985) Imp: 37-14-306, MCA

15. The board is proposing the rule to delete the reference to statements from a physician specializing in radiology, and specify what is required for permit applications under the legislative changes (Chapter 166, Laws 1985).

16. The proposed amendment of 8.56.604 will amend subsection (1)(a) and (2) and will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-1571 and 8-1572, Administrative Rules of Montana)

"8.56.604 TEMPORARY PERMITS (1) Any person applying for a temporary permit must file with the board office an application, which shall include:

(a) a letter from the health facility administrator or physician stating the regional hardship or emergency condition which exists in the area;

(b) ...

(2) The ~~entire~~ board shall review the application and information submitted ~~before voting on the issuance of the temporary permit~~.

(3) ..."

Auth: 37-14-306, MCA (Section 4., Chapter 166, Laws 1985) Imp: 37-14-306, MCA

17. The board is proposing the amendment to allow a physician to request a regional hardship, as well as a health facility administrator. The current rule is not clear as to who is to supply the information with regard to the hardship. The amendment will also allow for several of the board members to review the application, rather than the full board. Full board review is costly and time consuming, resulting in delays where conditions are such that a lengthy delay could adversely affect the public health and safety.

18. The proposed amendment of 8.56.605 will read as follows: (new matter underlined, deleted matter interlined)

8.56.605 VERIFICATION OF ADEQUATE EVIDENCE THAT THE TEMPORARY PERMIT APPLICANT CAN PERFORM X-RAY EXAMINATIONS WITHOUT ENDANGERING THE PUBLIC (1) Adequate evidence that the person is capable of performing high quality x-ray examinations without endangering ~~to~~ the public health and safety will be documentation of basic knowledge in the following areas: radiation protection and radiobiology, x-ray physics, anatomy, physiology, positioning, radiographic technique, darkroom procedures, and film critique.

(a) This documentation must include at least a sworn statement from a licensed practitioner and a written statement from the applicant setting forth the applicant's training and experience."

Auth: 37-14-306, MCA (Section 4, Chapter 166, Laws of 1985) Imp: 37-14-306, MCA

19. The amendment is proposed to correct poor grammar, add the word "basic" to knowledge. The board felt by adding "basic" the temporary permit applicant would have some knowledge of the work he was doing so that the public was adequately protected, but to let the individual know, as well as his employer, that he was not expected to have complete knowledge at this point. The requirement of the sworn statement from the licensed practitioner guarantees that the employer is familiar with the applicant's basic knowledge. The board has some concerns that persons applying for temporary permits will have no knowledge in the above areas. The board is expecting those persons who apply for temporary

permits to obtain the necessary education required of permit persons applying under subsection (1) of 37-14-306, MCA, and pass the examination required for those persons within a reasonable period of time. The additional training and examination will offer the public better protection from the dangers associated with x-rays.

20. The proposed amendment of 8.56.606 will read as follows: (new matter underlined, deleted matter interlined)

"8.56.606 PERMIT RESTRICTIONS (1) A permit holder shall be excluded from all portions of special procedures where injectable contrast media is used, as specified in 37-14-301 (3) MCA."

Auth: 37-14-202, MCA Imp: 37-14-301 (3), MCA

21. The board is proposing the amendment to clarify those procedures from which permit holders are excluded.

22. The proposed repeal of 8.56.603 will repeal the rule in its entirety. Full text of the rule is located at page 8-1571, Administrative Rules of Montana. The authority of the board to repeal the rule is based on section 37-14-202, MCA.

23. The board is proposing the repeal as Section 4 of Chapter 166, Laws of 1985, changed the requirement of an individual showing to the satisfaction of a board approved physician specializing in radiology that the individual could safely perform x-ray examinations to allowing the board to make that decision based on course work and examination as set by rule of the board.

24. The proposed new rules with regard to permits will read as follows:

I. "PERMITS (1) Applicants for permit to perform x-ray procedures must meet the following requirements for approval to take the examination for permit:

(a) must show evidence of employment from licensed practitioner or health facility administrator.

(b) must have completed the minimum formal training in a board approved course as outlined in rule II.

(2) Upon successful completion of the required formal training and the required examination, the board may issue a limited permit to the applicant which specifies the x-ray procedures the limited permit technician is authorized to perform. The limitations of the permit are as follows:

(a) Chest - Ap or PA, Lateral, and apcial lordotic routine chest exposures;

(b) Extremities - AP or PA, Lateral, and oblique routine exposures of the extremities;

(c) Spine - AP, Lateral, and oblique routine exposures of the cerival, thoracic, and lumbar spine;

(d) Skull - All routine views of the skull and sinuses, with the exception of internal auditory meatus series and mastoid series;

(e) Abdomen - routine supine and upright AP abdomen projection;

(f) G.I. Tract fluoroscopy and associated overhead films - the limited permit technician may assist the physician in fluoroscopic examination of the G.I. tract and may produce films of all associated overhead views.

Auth: 37-14-306, MCA (Section 4., Chapter 166, Laws of 1985) Imp: 37-14-306, MCA

II. "COURSE REQUIREMENTS FOR LIMITED PERMIT APPLICANTS

(1) All courses shall be approved by the board.

(a) Course approval shall be completed by board review of the course outline, agenda, and instructors' qualifications.

(b) Courses shall be reviewed by the board every two years following initial approval.

(2) A basic 40 hour course shall be required for all permit applicants, which shall include the following curriculum:

(a) Fundamentals of radiobiology

(b) Imaging equipment

(c) Fundamentals of radiation protection

(d) Fundamentals of x-ray physics

(e) Radiographic technique and principles of radiographic exposure

(f) Darkroom procedures

(g) Inter-relationship of the radiographic chain. (i.e. Technique vs Darkroom procedures)

(h) adverse contrast reaction.

(3) An additional course, to include anatomy, physiology, positioning, pathology, x-ray technique, and proper handling of trauma patients, shall be required for the applicant to qualify for examination in each of the specified limited x-ray procedures. Course length is specified for each limited x-ray procedure.

(a) Chest - 4 hours

(b) Extremities - 8 hours

(c) Spine - 16 hours

(d) Skull - 8 hours

(e) Abdomen - 4 hours

(f) G.I. Tract fluoroscopy and associated overhead films - 8 hours

(4) A portion of the required classroom hours may be substituted by a verifiable correspondence course subject to board approval. The portion of required classroom hours completed by correspondence may not exceed 40% of the total hours required for examination(s) requested by the applicant.

(5) To be exempt under section 37-14-301, (1)(a)(iii) from obtaining a permit, an 8 hour course in darkroom procedures shall be completed by any person performing only darkroom procedures."

Auth: 37-14-301, 306, MCA (Sections 3 and 4, Chapter 166, Laws of 1985) Imp: 37-14-301, 306, MCA

III. "PERMIT EXAMINATIONS (1) The general permit examination will encompass questions pertaining to basic radiobiology, radiation protection, imaging equipment, x-ray physics, radiographic technique and principles of radiographic exposure, darkroom procedures, and inter-relationship of the radiographic chain, in a basic format which is common to all of the areas of specified x-ray procedures. The general portion of the permit exam must be passed, as well as specific sections, prior to issuance of a permit. In addition, the applicant shall complete an examination for each specified x-ray procedure to be performed by the applicant, which shall include questions in anatomy, physiology, pathology, and x-ray technique common to the specified procedure.

(2) The permit examination will be administered by the board office at least twice a year. Applicants for examination will be notified at least 30 days in advance of the scheduled examination.

(a) Applicants for examination may request to take the examination in the board office any day of the working week. This request must be in writing and must be received in the board office at least ten days prior to the requested examination date.

(b) Board members may administer the examination to applicants. Applicants shall make the request directly to the board member. If the board member agrees to proctor the examination, the applicant shall notify the board office in writing of the board member who shall be proctoring the examination, the examination date, time and place. All requests shall be received in the board office at least 10 days prior to the scheduled examination.

(3) Examination results will be mailed out to each examinee by the board office within 10 days after the administration of the examination.

(4) Applicants may review their examination papers with board members at a regularly scheduled board meeting only.

(5) Applicants failing the examination must wait 30 days after the date of failure before retaking the examination.

(6) A non-refundable fee will be assessed for the examination. After failing the examination, the applicant will be required to submit another examination fee.

(7) An applicant who has failed an examination on two attempts, must complete that portion of the formal x-ray training before being allowed admission to a third examination. Upon completion of the additional course work,

the applicant must file a new application accompanied by the appropriate fees, with the board office.

(8) Passing scores for each section of the initial permit examination shall be deemed to be correct responses to no less than 70% of the total questions on each section. An attempt to achieve a passing score on any section of the permit examination subsequent to failing that section shall require correct response to a minimum of 75% of the total questions on that section."

Auth: 37-14-306, MCA (Section 4, Chapter 166, Laws of 1985) Imp: 37-14-306, MCA

IV. "PERMIT FEES

(1)	Application fee	$60.00
(2)	Examination fee & reexamination fee	
(a)	General exam	30.00
(b)	Each section	15.00
(3)	Original certificate fee	35.00
(4)	Renewal fee	30.00
(5)	Late renewal fee (in addition to renewal fee	40.00
(6)	Duplicate or lost license fee	25.00
(7)	Temporary permit	70.00"

Auth: 37-1-134, 37-14-202, 306, MCA (Section 4 and 6, Chapter 166, Laws of 1985) Imp: 37-1-134, 37-14-305, 306, 309, 310, MCA

V. "RENEWALS (1) Permits issued under section 37-14-306 (1) , MCA, shall expire on December 31st of each year.

(2) Permits issued under section 37-14-306 (4), MCA, shall expire on the date specified on the face of the permit."

Auth: 37-14-306, 310, MCA (Section 4 and 6, Chapter 166, Laws of 1985) Imp: 37-14-306, 310, MCA

25. The board has proposed the adoption of rule I. to set out minimum requirements for application for a permit and to specify the areas in which permits will be issued. The areas are spelled out very specifically to avoid any doubts as to what is allowable under each area.

Rule II proposes a minimum course requirement with specific hours in each area as well as 40 hours in an overview. These areas are those which the boards feel are necessary to offer proper protection to the public health and safety. The requirement of training for those individuals who work only in darkroom procedures is important as the individual developing the x-rays must also be knowledgeable to avoid repeat x-rays due to mistakes in developing.

Rule III sets out the areas of knowledge required for examination, as well as examination procedures. Procedures for reexamination are also specified. The board has based these rules on past experience with examinations for permits

and feels the requirements are minimum to provide adequate protection to the public.

Rule IV sets out the permit fees. These are the fees the board has determined necessary to cover the administrative costs in each area. It should be noted that there is one fee for the general exam and another for each section. These are separated as some individuals take only one part, in addition to the general. Their costs will be less than an individual who takes a larger number of portions.

Rule V sets the renewal date for permits under section 37-14-306 (1).

A renewal date has not been established for the temporary permits issued under 37-14-306 (4), MCA, as the board feels these permits should not be issued for more than one year. During that period of time, the individual will be expected to obtain the education and training required for a permit under section (1) of 37-14-306, MCA. The board does not feel it is in the best interest of public health and safety to have temporary permit persons with minimum educational training continuing to take x-rays for a long period of time. The temporary permit, the board feels, is a stop gap measure to allow those persons time to become better qualified by means of education and examination. Upon completion of the education and examination, the need for the temporary permit will not exist.

26. 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 Radiologic Technologists, 1424 9th Avenue, Helena, Montana 59620-0407, no later than July 25, 1985.

27. Geoffrey Brazier, Attorney, Helena, Montana, will preside over and conduct the hearing.

BOARD OF RADIOLOGIC
TECHNOLOGISTS
LON ROMINGER, R.T., A.R.R.T.
CHAIRMAN

BY: _____
ROBERT WOOD, ATTORNEY
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, June 17, 1985.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BUREAU OF WEIGHTS AND MEASURES

In the matter of the proposed adoption of a new rule concerning metric sizing of fluid milk containers	))))	NOTICE OF PROPOSED ADOPTION OF A NEW RULE METRIC PACKAGING OF FLUID MILK PRODUCTS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On July 27, 1985 the Bureau of Weights and Measures proposes to adopt the above-stated rule.

The rule as proposed will read as follows:

"I. METRIC PACKAGING OF FLUID MILK PRODUCTS (1) Fluid dairy products packaged for retail sales in units other than provided in section 30-12-404, MCA, shall be packaged in volumes of 125 milliliters, 250 milliliters, 500 milliliters, 1 liter or multiples of 1 liter, provided however that; (2) metric sizes of less than 100 milliliters shall be permitted."

Auth: 30-12-105, 202, MCA Imp: 30-12-202, MCA

3. The bureau is proposing the rule adoption at the request received from Gossner Foods, Inc., Logan, Utah for permission to market products in 250 ml packages of fluid milk and to satisfy market requests for metric package sizing.

4. Interested persons may submit their data, views or arguments concerning the proposed adoption in writing to the Bureau of Weights and Measures, 1424 9th Avenue, Helena, Montana, 59620, no later than July 25, 1985.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Bureau of Weights and Measures, 1424 9th Avenue, Helena, Montana, 59620, no later than July 25, 1985.

6. If the board 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 adoption, 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.

BUREAU OF WEIGHTS AND MEASURES
GARY DELANO, BUREAU CHIEF

BY: _____
ROBERT WOOD, ATTORNEY
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, June 17, 1985.

MAR Notice No. 8-77-3 12-6/27/85

BEFORE THE BOARD OF LABOR APPEALS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of proposed amendments of rules 24.7.301 through 24.7.306 concerning Board of Labor Appeals procedural guidelines.	)))))))	NOTICE OF PUPLIC HEARING ON PROPOSED AMENDMENTS OF ARM 24.7.301 POLICY, 24.7.302 GENERAL RULES GOVERNING APPEALS, 24.7.303 DEFINITIONS, 24.7.304 RIGHT TO APPEAL, 24.7.305 HEARING PROCEDURE, 24.7.306 DETERMINATION OF APPEALS.

TO: All Interested Persons.

1. The following dates and places have been designated for public hearings to consider the above captioned amendments.

July 29, 1985, 7:00 p.m., Glasgow Civic Center, Glasgow, Montana.

July 30, 1985, 7:00 p.m., Library, Room 252 Liberal Arts Building, Eastern Montana College, Billings, Montana.

July 31, 1985, 7:00 p.m., Gallery Room, Great Falls Civic Center, Great Falls, Montana.

August 1, 1985, 7:00 p.m., Montana Power Offices, 1903 Russell, Missoula, Montana.

August 2, 1985, 1:00 p.m., SRS Auditorium, Helena, Montana.

2. The proposed amendments that replace present rules 24.7.301 through 24.7.306 would delete references to lower level appeal procedures.

3. The rules as proposed to be amended are as follows:

24.7.301 POLICY (1) The Board of Labor Appeals adopts the following general statement as ~~one~~ the policy for the Board ~~and for the conduct of f hearings by referees~~.

Subsections (a) through (c)(vi) remain the same.

(vii) That the decisions ~~both~~ of the Board ~~and referee~~ shall be based solely on substantial evidence as revealed by the files, records, and evidence taken at the hearing to support it.

AUTH: Sec. 2-4-201 MCA
IMP: Sec. 2-4-201 MCA

24.7.302 GENERAL RULES GOVERNING APPEALS

Subsections (1) through (3) remain the same.

(4) The Administrator of the ~~Employment Security Division~~ Appeals Division of the Department of Labor and

Industry shall provide copies of these rules to any person requesting a copy of same.

AUTH: Sec. 2-4-103 MCA
IMP: Sec. 2-4-103 MCA

24.7.303 DEFINITIONS
Subsections (1) through (3) remain the same.
(4) "Division" means the ~~Employment Security Division~~ Appeals Division of the Department of Labor and Industry. ~~created in Section 2-15-1703 MCA~~.
(5) "Administrator" means the ~~Division head appointed by the Commissioner~~ Administrator of the Appeals Division of the Department of Labor and Industry.
Subsections (6) through (9) remain the same.

AUTH: Sec. 2-4-201 MCA
IMP: Sec. 2-4-201 MCA

24.7.304 RIGHT TO APPEAL
Subsections (1) (3) and (4) remain the same.
(2) Interested parties appealing to the Board from a decision of a referee, or from a determination of a contribution liability and classification and rate shall file with the Board within the time provided by law, at either a local office of the ~~Division~~ Department, the Board, or the central office of the ~~Division~~ Department, a notice of appeal setting forth the reasons thereon. Appropriate forms for filing such appeals shall be available to claimants and employers at all local offices of the ~~Division~~ Department.

AUTH: Sec. 2-4-201 MCA
IMP: Sec. 2-4-201 MCA

24.7.305 HEARING PROCEDURE (1) Hearings shall be conducted informally, and in such manner as to ascertain the substantial rights of the parties. All issues relevant to an appeal shall be considered and passed upon. Any interested party, his witness or witnesses, under oath, or affirmation, may present such evidence as may be pertinent, subject to examination by any member of the Board or ~~referee, as the case may be, and Division~~ Department Attorney and to cross-examination by any opposing interested parties or representative, subject to ARM 24.7.306.
(2) The parties to an appeal may stipulate the facts involved orally or in writing. Such stipulation shall be approved by the Board ~~or referee, whichever is to decide the case~~. Further hearing to take additional evidence shall be ordered, upon notice as set out in these rules, if such

stipulation is found inadequate for the determination of the case.

(3) If any party to any appeal fails to appear at the Board hearing and no good cause for continuance is shown, the Board shall render its decision on the basis of the best evidence available to it; provided, however, a hearing before the Board may be continued for good cause upon application to the Board orally or in writing before the hearing is concluded, and may be continued or reopened by the Board on application or on its own motion. Any party who fails to appear in person or by authorized representative at a hearing before the Board may, within ten (10) days after the scheduled date of the hearing, file an application for reopening, and such application for reopening shall be granted if good cause is shown for failing to appear. An application for reopening must be in writing; it must state the reason(s) believed to constitute good cause for failing to appear at the hearing; and it must be delivered or mailed within such ten (10) day period to the Board at either the local office where ~~they~~ the appeal was filed or to the Central Office of the ~~Division~~ Department, Employment Security Building, Corner of Lockey and Roberts Streets, P.O. Box 1728, Helena, Montana, 59601. If an application for reopening is not allowed, a copy of such decision shall be given or mailed to each party to the appeal, and in the reopening proceedings the allowance of the application may be contested. Where it appears that an appeal, or application for leave to appeal to the Board, or an application for reopening, or any other request or application may not have been filed within the period of time prescribed for filing, the appellant or applicant (as the case may be) shall be notified and be given an opportunity to show ~~that such appeal, application or request was timely~~ reasons for waiver of timeliness. If it is found that such appeal, application or request was not filed within the applicable time limit, it may be dismissed on such grounds. If it is found that ~~such~~ good cause excuses the timely filing of an appeal, application, or request ~~was timely~~, the matter shall be decided on the merits. Copies of a decision under this provision shall be given or mailed to all interested parties, together with a clear statement of right of appeal or judicial review.

Subsection (4) remains the same.

~~(5) In the case of referees' hearings, the referee shall have the same authority as the Board in respect to his hearing in carrying out the purpose and intent of this rule.~~

AUTH: Sec. 2-4-201 MCA
IMP: Sec. 2-4-201 MCA

24.7.306 DETERMINATION OF APPEALS (1) The Board shall include in the record and consider as evidence all records of the ~~Division~~ Department that are material to the issues. The Board shall ~~also~~ not consider any new ~~material~~ evidence introduced at the Board hearing ~~by interested parties~~ unless good cause is shown why it was not presented at the lower level appeal hearing. As soon as possible after the hearing, the Board shall render a written decision which shall state the findings of facts and the reasons for the decisions. Copies of such decision shall be mailed to all interested parties.

(2) In making its determination, the Board will consider arguments, on whether the referee erred in either law or fact as well as any new evidence pursuant to subsection (1).

AUTH: Sec. 2-4-201 MCA
IMP: Sec. 2-4-201 MCA

4. The Board of Labor Appeals is proposing the amendments to 24.7.301 through 24.7.306 because the Board's rule-making authority is limited to Board procedures and the amendments are aimed at providing consistency throughout the system.

5. Interested persons may present their data, views or arguments either orally or in writing at the hearing.

Written data, views or argument may also be submitted to Robert Jensen, Administrator of Appeals Division, Department of Labor and Industry, P.O. Box 1728, Helena, Montana, by August 2, 1985.

6. Robert Jensen, Administrator of Appeals Division, Department of Labor and Industry, P.O. Box 1728, Helena, Montana, has been designated to preside over and conduct the hearing.

7. The authority of the Board and agency to make the proposed amendments is based on sections 2-4-201 MCA, and implements 2-4-201 MCA, 39-51-301 MCA, and 39-51-302 MCA.

LEO BERRY
Chairman of the Board of
Labor Appeals

BEFORE THE DEPARTMENT
OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of proposed amendments to 24.11.303 hearing procedure-benefit determinations and the adoption of new rules governing: hearing procedure-tax appeal determinations; and disqualification due to 1) misconduct 2) voluntary leaving attributable to employment and 3) strike	))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENTS TO 24.11.303 HEARING PROCEDURE -BENEFIT DETERMINATIONS AND THE ADOPTION OF NEW RULES GOVERNING: HEARING PROCEDURE -TAX APPEAL DETERMINATIONS; AND DISQUALIFICATION DUE TO MISCONDUCT, LEAVING WORK WITHOUT GOOD CAUSE ATTRIBUTABLE TO EMPLOYMENT, AND STRIKE

TO: All Interested Persons.

1. The following dates and places have been designated for public hearings to consider the above captioned amendment and proposed new rules.

July 29, 1985, 7:00 p.m., Glasgow Civic Center, Glasgow, Montana.

July 30, 1985, 7:00 p.m., Library, Room 252 Liberal Arts Building, Eastern Montana College, Billings, Montana.

July 31, 1985, 7:00 p.m., Gallery Room, Great Falls Civic Center, Great Falls, Montana.

August 1, 1985, 7:00 p.m., Montana Power Offices, 1903 Russell, Missoula, Montana.

August 2, 1985, 1:00 p.m., SRS Auditorium, Helena, Montana.

2. The proposed amendment to rule 24.11.303 would apply only to hearing procedures to determine benefit disqualification. The proposed adoption of new rule I governs hearing procedures to determine the employer's contribution tax liability. New rules II through XV define and interpret disqualification due to misconduct. New rules XVI through XIX define and interpret disqualification for leaving work without good cause attributable to employment. New rule XX defines and interprets disqualification when unemployment is due to strike.

3. The rules as proposed to be amended and proposed new rules are as follows:

24.11.303 HEARING PROCEDURE -- BENEFIT DETERMINATIONS
Contents of rule remain the same.

AUTH & IMP: Sec. 39-51-2407, MCA

RULE I TAX APPEAL PROCEDURAL RULES

Scope: This rule implements 39-51-1109 and 39-51-2403, MCA, by setting forth procedural steps which shall be followed in contested matters involving unemployment insurance tax contribution determinations. Specifically exempted from this procedure are benefit determinations.

(1) Upon receipt of an appeal, the tax appeals referee (as defined in organizational rule 24.11.101) will promptly transmit to all interested parties a set of fact finding interrogatories. Interested parties will have (10) ten days from mailing to complete and return to the appeals referee (answers to the interrogatories). The appeals referee may at his discretion impose sanctions such as dismissal or default of the appeal for a party's failure to respond to interrogatories.

(2) (a) The tax appeals referee will review the responses to interrogatories and provide all interested parties with copies of proposed undisputed facts, and the responses to the interrogatories by the parties.

(b) Any interested party may object to the proposed statement of undisputed facts.

(3) (a) Based on information obtained through the pre-hearing interrogatories, the tax appeals referee may determine that there is no genuine issue as to any material fact. The referee will provide all interested parties with notice of summary disposition and proposed findings of fact and conclusions of law.

(b) Any interested party may object within (10) ten days from the date of mailing to the appeal referee's proposed findings and conclusions or may object to the basis for motion for summary disposition (i.e. there exists an issue as to a material fact) and within the prescribed time limits may present further evidence or argument to the referee by affidavit.

(c) An interested party objecting to the appeals referee's proposed order must set forth in writing, with specificity, any fact which is disputed and the reason the party objects to the particular fact contained in the referee's findings.

(d) Additionally, any interested party, after receiving the proposed findings of fact may petition to the appeals referee for a summary judgment or partial summary judgment and contested facts. The moving party shall set forth with specificity the ground for summary disposition

which is set forth in Rule 56 of Montana Civil Procedure which states that the basis of the motion is that "there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law, and may

request the appeals referee to make proposed findings of fact and conclusions of law".

(4) If the matter remains at issue, the appeals referee will review the petitions, objections, and supporting documentation of the parties and will either 1) modify the proposed findings of fact and conclusions of law, or 2) set the disputed issues of fact for hearing. Interested parties will be sent a copy of the revised findings and conclusions or notice of the factual issues in dispute which are to be determined in a hearing.

(5) The hearing will be confined to the factual issues set forth in the notice prepared by the appeals referee. No additional factual issues may be raised during the hearing except for good cause. The determination of good cause is within the discretion of the appeals referee.

(6) Interested parties dissatisfied with the final determination of the appeals referee may request, within the time prescribed by statute, a review by the Board of Labor Appeals of the matter.

(7) The review by the Board of Labor Appeals will be confined to the record before the appeals referee and no additional issues or supporting evidence not contained in the record may be introduced before the Board.

AUTH: Sec. 2-4-201(2), 39-51-301(2), 39-51-302, 39-51-1109, MCA.

IMP: Sec. 2-4-201(2), 39-51-301, 39-51-302, 39-51-1109, MCA.

RULE II DISQUALIFICATION FOR MISCONDUCT* - GENERAL GENERAL PRINCIPLES:

Scope: This rule defines and interprets disqualification for discharge due to a claimant's misconduct or misconduct affecting his employment as set forth in MCA 39-51-2303.

"Misconduct" defined: Conduct on the part of the employee evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional or substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertences or ordinary negligence in isolated instances, or good faith errors in judgment, or discretion are not to be deemed "misconduct" within the meaning of the statute. (Gaunce v. Board of Labor Appeals, 164 Mont. 442,

542 P.2d 1108, (1974, Boynton Cab Co. v. Neubeck et al, 237 Wis 249, 296 N.U. Reporter 636. (1941).)

* This rule relates solely to the issue of discharge for misconduct as it pertains to Unemployment Insurance Law and should not be used for any other purposes.

General: Unemployment Insurance benefits derived from the Department's collection of contributions from employers in the State of Montana are to be used for the benefit of persons unemployed through no fault of their own.

If a claimant is deemed by the department to have been discharged for "misconduct" in connection with his work or affecting his employment, the claimant will be denied unemployment benefits because he brought about his own unemployment.

The statutory term misconduct shall not be literally applied so as to operate as a forfeiture except in clear instances of wilful or wanton misconduct by the claimant which affects the employer's interest.

NOTE: The definition of misconduct and elements of proof contained herein apply to subsections (a) through (m) and should be considered in determining whether misconduct exists.

ELEMENTS OF MISCONDUCT:

Misconduct will be found if all the following elements are satisfied:

1. The claimant owes a duty to the employer due to an implied or expressed employment contract.
2. There is a substantial breach of that duty.
3. The breach is a wilful or wanton disregard of that duty.
4. The breach disregards the employer's interests and injures or tends to injure the employer's interest.

AUTH: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.
IMP: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether misconduct applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Has the employer shown by a preponderance of the evidence that the claimant committed the act of misconduct?
2. Did the claimant knowingly and willingly commit misconduct?
3. Was the claimant's conduct giving rise to the discharge of the type or nature which the reasonable person would find a serious breach of the employer/employee relationship?
4. Was the claimant's conduct giving rise to the discharge, not a serious breach but recurrent misconduct

which the claimant had previously been warned that its recurrence would result in discharge?

5. Did the claimant have the ability and capacity to perform satisfactorily?

6. Were the employer's actions following the discovery of the claimant's dischargeable offense prompt so as to indicate a causal relation between the employee's act and the discharge?

EXAMPLE A:

Employee A, aware of the company's rule against using the company's truck for personal business, used the truck during off hours to pick up a refrigerator, subsequently the employee was discharged for wilful violation of the company's rule.

Employee A's discharge was for "misconduct" insofar as the rule against using the company's car is a legitimate right of the employer to limit his potential liability. Further the employee was aware of the company rule prohibiting the personal use of the company car. Employee A would probably be denied benefits due to misconduct.

EXAMPLE B:

Employee B, a truck driver, stopped by his home, which was approximately one block off his normal route, to pick up a jacket. There were no company rules regarding route deviation and other co-workers were not disciplined for similar deviations.

Employee B's discharge in this case would probably not constitute "misconduct" inasmuch as the employee's conduct appears absent an intentional disregard of the company's interest, expectations and practices established by the company. Employee B would probably not be denied benefits due to misconduct.

RULE III MISCONDUCT IN CONNECTION WITH CLAIMANT'S WORK OR AFFECTING HIS EMPLOYMENT (off-duty conduct)

GENERAL:

Acts of misconduct are generally confined to conduct which takes place during the claimant's normal working hours. However, certain "off-duty conduct" may seriously impact the employment relationship and therefore may be grounds for a finding of misconduct. The fundamental issue is whether the result of the off-duty conduct adversely affects the employee's ability and capacity to perform his duties, and adversely affects the employer's business in an appreciable degree.

NOTE: The definition of misconduct and accompanying elements apply to the foregoing subsection of new Rule II.

AUTH: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether misconduct applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Would the reasonable claimant be aware that his off-duty conduct would jeopardize his employment?

2. Was the claimant's act of off-duty misconduct intentional, wilful, or a wanton disregard of the employer's interest?

3. Was the claimant's misconduct related to the claimant's work?

4. Was the claimant's misconduct likely to cause the employer financial loss, or loss of business, or property, or customers?

5. Is the employer's rule reasonable insofar as it expresses a legitimate business interest of the employer?

NOTE: The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs. Mere speculation as to adverse effect upon the business will not be sufficient.

It shall be the burden of the employer to demonstrate by a preponderance of the evidence that the off-duty conduct significantly impacted the employment relationship.

EXAMPLE A:

Employee A's employment as a school bus driver was conditioned on the requirement that he maintain a good driving record. During the course of his employment he was found guilty of several counts of driving under the influence. The school board discharged the claimant for misconduct.

Since employee A's employment was conditioned on his driving record and he was aware of the probable consequences of his acts, he would probably be denied benefits due to misconduct.

EXAMPLE B:

Employee B, employed as a janitor, was found guilty of several charges of drunkenness in a public place. The employer, a group medical practice, felt this conduct was unsavory and discharged him for misconduct.

Absent foreknowledge that this type of conduct would result in discharge and the lack of job relatedness of the offense, employee B would probably not be denied benefits due to misconduct.

RULE IV DISHONESTY

GENERAL:

There exists a reciprocal duty between the employer and employee to deal with one another fairly and honestly. Acts of dishonesty relating to employment may severely impact the relationship and constitute disqualification for benefits due to misconduct. "Dishonesty" includes acts such as deliberate falsification of company records, theft, deliberate deception, lying, and other statements or acts which demonstrate a wilful or wanton disregard of the employer's interest.

NOTE: The definition of misconduct and accompanying elements apply to the foregoing subsection of new Rule II.

AUTH: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether misconduct applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Has the employer proved by a preponderance of the evidence that the employee committed the dishonest act which caused the discharge?

2. Did the claimant knowingly and wilfully commit the dishonest act?

3. Did the dishonest act affect or relate to the employee's work?

4. Did the dishonest act adversely affect the employer's operations.

EXAMPLE A:

Employee A, a grocery checker, was observed receiving $14.75 for a purchase, and an hour later, received $5.18 for another purchase. When her shift was over and the cash register receipts were balanced, she was not over in cash and no ring-ups were recorded on the cash register tape for either amount.

In this example, employee A did not properly handle the sales or the employer's money and, in the absence of a suitable explanation, would probably be denied benefits due to misconduct.

Suppose, as in the above example, other checkers had also used the same cash register drawer and no witness observed employee A pilfering any money. Because of a lack of evidence that she was solely responsible for the missing sales receipts, she would probably receive benefits.

EXAMPLE B:

Employee B told his supervisor that he had an afternoon doctor's appointment. The supervisor recalls that employee B stated he wanted the afternoon off to attend a funeral.

The supervisor believed that the employee lied and discharged him for misconduct.

In this example, there appears to be a misunderstanding as to the reason why employee B would need the afternoon off. Employee B was able to verify his doctor's appointment and the supervisor testified that he would have given him the time off for the doctor's appointment. In this situation, absent an intentional act to deceive the employer, the employee would not be denied benefits due to misconduct.

EXAMPLE C:

Employee C, a motel maid, was charged with several criminal counts of theft of motel guests' property. She admitted taking the property and offered to return it. The employer discharged the employee.

In this example, the act of misconduct would constitute "gross misconduct" which is defined in 39-51-201(14), MCA. (1983) and the employee would be denied benefits. Since the period of disqualification for gross misconduct is severe, the legislature requires that the individual has been convicted in a criminal court or has admitted or shown conduct which demonstrates a flagrant and wanton disregard of and for the rights or title or interest of fellow employees or his employer.

RULE V DUTY TO EMPLOYER

GENERAL:

An employee owes an implicit duty to support and serve the interests of the employer and not to wantonly engage in statements or acts which show a wanton or wilful disregard of the employer's interest. Mere griping or processing of a complaint through normal channels, such as a union/management grievance procedure is not misconduct.

Among the other duties owed by the employee is to refrain from: competing with or aiding a competitor of the employer, or intentionally or wilfully damaging the equipment or material of the employer, or interfering with the operation of the business.

NOTE: The definition of misconduct and accompanying elements apply to the foregoing subsection of new Rule II.

AUTH: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether misconduct applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Has the employee breached a material duty to the employer, which should reasonably be expected of an employee?

2. Did the employee utilize normal channels to voice his dissatisfaction with superiors, e.g., discussions with supervisors, (or) union grievance procedures, (or) EEOC complaints, (or) OSHA complaints, etc?

3. Did the employer warn the employee that such conduct would lead to discharge?

4. Would the reasonable employee know that such conduct was adverse to the employer's interest and could lead to discharge?

EXAMPLE A:

Employee A, a waitress employed in a restaurant, was dissatisfied with her rate of pay and job duties. Although told to discontinue the acts, she continued to complain to the employer and her supervisor during working hours in the presence of customers. She was discharged for misconduct for disruption of the employer's operation and causing complaints from customers.

In this example the employee acted arbitrarily and unnecessarily in voicing her objections to the rate of pay and job duties causing interference with the work of other employees and complaints from customers. More appropriate channels of communications could have been used. Employee A would probably be denied benefits due to misconduct.

EXAMPLE B:

Employee B, while employed as an auto mechanic was repairing cars after work. He was discharged for misconduct when it was discovered that he joined with several other mechanics to compete with his primary employer and submitted bid proposals to obtain business, using contacts made at his place of employment.

In this example the employee's use of company property on company time to form a competing business of his own is a clear example of a serious breach by the employee of the duty of loyalty constituting misconduct. Employee C would probably be denied benefits due to misconduct.

RULE VI EXCESSIVE ABSENTEEISM

GENERAL:

Fundamental to the employment relationship is the duty of the employee to report and remain at the workplace according to the reasonable needs of the employer.

Absences beyond the control of the employee are generally not acts of misconduct, unless the employee was able to give advance warning of his absence and failed to do so, or the employee failed to report his absence at all and was physically able to do so.

NOTE: The definition of misconduct and accompanying elements apply to the foregoing subsection of new Rule VI.

AUTH: Sec. 39-51-2103, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether misconduct applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. What are the employer's expressed policies and practices regarding absenteeism? Have these policies been consistently applied to relevant members of the workforce?

2. Was the claimant's reason for being absent or not reporting "compelling", as judged by a reasonable person's standard?

3. Was the claimant given instructions or warnings that unexcused absences would lead to discharge?

4. Was the claimant physically or emotionally capable of altering his conduct in conformity with the employer's demands?

5. Did the acts of absenteeism and prior warnings occur in a relatively recent time span?

NOTE: An employee who fails to report to work and fails to make contact with the employer under circumstances which would justify an inference that the employee does not intend to return to work will be deemed to have voluntarily quit, not disqualified for misconduct.

Lengthy delays in time between warnings and an act of misconduct will not constitute a wilful or wanton disregard of the employer's interest.

EXAMPLE A:

Employee A, at the time of employment, was given an employee handbook setting forth the company's rules regarding absenteeism. Rule 15 requires that all employees call their supervisors if the employee cannot report to work. Employee A was discharged for misconduct when he failed to report his absences without having a justifiable excuse and had been warned by his supervisor that this conduct would result in discharge.

Since the employee was aware of the company policy and had received a warning and no extenuating circumstances existed, employee A would probably be denied benefits due to misconduct.

EXAMPLE B:

Employee B, habitually absent from work, was counseled by his supervisor that one more absence would result in discharge. The employee became violently ill with the flu. He called his supervisor that morning before his shift began to report his absence. The supervisor's response was to discharge employee B for misconduct.

In this example employee B's absence due to the flu is generally considered a factor beyond the employee's control.

Employee B would probably not be denied benefits due to misconduct.

EXAMPLE C:

Employee C, employed as a scaler for a logging company left the job site without notice to the employer, causing a serious disruption of the employer's entire operation. Employee C was discharged for misconduct because he knew that his conduct would cause a serious problem and no apparent good reason was offered by the employee as to why he didn't notify the employer.

In this situation employee C was aware that his absence would seriously impact the employer's operation and gave no reasonable excuse for his failure to notify the employer. In this instance, no advance warnings concerning the consequences of continued absences would be necessary. Employee C would probably be denied benefits due to misconduct.

RULE VII INSUBORDINATION

GENERAL:

The relationship between the employer and employee implies an agreement by the employee to comply with the reasonable demands of the employer. The term "insubordination" is defined here to mean a deliberate, or wilful, or purposeful refusal to follow the reasonable directions or instructions of the employer. Each case depends on a weighing of the particular facts involved.

NOTE: The definition of misconduct and accompanying elements apply to the foregoing subsection of new Rule II.

AUTH: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether misconduct applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Was the order by the supervisor reasonable?
2. Did the employee understand the order?
3. Did the employee knowingly and wilfully refuse to obey the reasonable order?

EXAMPLE A:

Employee A refused to train a new employee. Employee A was discharged for misconduct.

In this example the employee's refusal to follow the reasonable demands of the employer would constitute a wilful act. Employee A would probably be denied benefits due to misconduct.

EXAMPLE B:

Employee B, a long term employee, told the foreman to "go to hell" when the foreman made a wise crack about his girlfriend. Employee B was discharged for misconduct.

In this example employee B's statement may be characterized as a single act of comparatively non-serious misconduct, which under a totality of the circumstances would probably not constitute a wilful or wanton disregard of the employer's interest. Employee B would probably not be denied benefits due to misconduct.

RULE VIII INTOXICATION AND USE OF INTOXICANTS

GENERAL:

The use of intoxicants or being intoxicated by alcohol or non-prescription drugs during work hours poses a threat to the safety of the employee, the work place and customers and may expose the employer to liability for acts committed by the employee while in this condition.

Certain exceptions exist to this general rule for instances where the employer condones, or encourages the use of intoxicants during work hours (i.e., bartenders).

REASONABLE ACCOMMODATIONS FOR THE DISEASE OF ALCOHOLISM:

If an employee states to the employer that he is an alcoholic, the employer should offer to make reasonable accommodations for the employee. Accommodations may include the use of sick leave or leave of absence in order for the employee to obtain counselling or medical assistance. If the employer can demonstrate that such reasonable accommodations would constitute undue hardship on the business, the department will deem the employee to have left work for personal good cause.

NOTE: The definition of misconduct and accompanying elements apply to the foregoing subsection of new Rule II.

AUTH: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether misconduct applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Is there a company rule prohibiting the use of intoxicants at any time during the normal work hours, including lunch hours and breaks?

2. Does the company condone, by inaction, the use of intoxicants by the workforce during normal work hours?

3. Was the employee clearly under the influence of intoxicants as judged by a reasonable person observing the employee at the time of the event?

4. At the time of the event leading to discharge, was the employee's ability to perform his job interfered with by

the use of intoxicants (eg slurred speech, staggering, or other clear signs of physical disfunctioning).

5. Was there a danger or risk to other employees of the company?

EXAMPLE A:

A route delivery driver was instructed at the time of hire that he would be discharged if he consumed alcoholic beverages before or during his work hours including lunch breaks. Employee A was discharged when he reported for his scheduled shift in an intoxicated condition.

In this example employee A's employment was conditioned by his agreement to refrain from alcohol before and during work hours. The condition of employment was reasonable and it was his responsibility to carry out his duties in a safe manner. Thus in this situation employee A would probably be denied benefits due to misconduct.

RULE IX LEAVING IN ANTICIPATION OF DISCHARGE

GENERAL:

Leaving employment in anticipation of discharge for something other than misconduct is generally considered to be a voluntary leaving and should be examined under rules pertaining to voluntary leaving attributable to employment. Leaving employment in anticipation of discharge for misconduct should be examined under rules pertaining to discharge for misconduct.

NOTE: The definition of misconduct and accompanying elements apply to the foregoing subsection of new Rule II.

AUTH: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether misconduct applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Was the claimant impliedly or expressly told to resign or be discharged for cause?

2. Did the underlying cause for the separation constitute misconduct?

EXAMPLE A:

Employee A was told she could resign or be discharged when it was discovered that she had misappropriated company funds for her personal use. The employee agreed to resign, but later filed a claim for unemployment insurance benefits.

In this example, it seems apparent that the reason the claimant left her employment was attributable to the employer and that under the circumstance she had no reasonable alternatives. The second question that remains is a factual question as to whether the claimant can be shown to have

committed misconduct for the alleged act of dishonesty. If the employer is unable to carry his burden of proof, Employee A would probably not be denied benefits due to misconduct.

RULE X RELATIONS WITH FELLOW EMPLOYEES

GENERAL:

An employee's deliberate act to incite, agitate or create unrest with fellow workers may constitute a wanton disregard of the employer's interest. Such conduct may be divided into two categories. Minimal damage to co-workers such as bickering or routine gossiping or failure to cooperate will necessitate prior warnings by the employer in order to show wilful misconduct. Substantial damage to fellow employees such as assault, threats of violence, provoking a fight or stealing from a fellow employee will generally not necessitate a prior warning in order to show wilful misconduct.

NOTE: The definition of misconduct and accompanying elements apply to the foregoing subsection of new Rule II.

AUTH: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether misconduct applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Was the employee's conduct intentional or wilful?

2. Is the employee's interference with fellow workers serious as to cause a disruption of the normal operations of the business?

3. In cases of minimal interferences with fellow employees has the employer given prior warnings that such conduct will lead to discharge?

EXAMPLE A:

Employee A became irritated with a fellow worker and threw a chisel at him, which caused the other employee to suffer a serious cut.

In this example, even though the conduct was an isolated incident, it was not minor or mere carelessness, but instead the type of carelessness of such degree as to manifest fault, wrongful intent or evil design. Employee A would probably be denied benefits due to misconduct.

EXAMPLE B:

Employee B fooled around on the job playing various tricks on fellow employees. Most employees enjoyed the antics of employee B, except one employee who complained about a rubber snake placed in his lunch box by employee B. Employee B was summarily discharged for misconduct.

In this example the employee's conduct was not objectively serious in nature, so as to cause disruption of the employer's business. Minor interferences require some warnings by the employer that such conduct will result in discharge. Employee B would probably not be denied benefits due to misconduct.

EXAMPLE C:

Employee C, a shift supervisor, repeatedly made sexually explicit comments to several female employees. The affected female employees reported these actions to the plant superintendent, who warned employee C to cease his sexual harassment. Employee C was unaware that his conduct was offensive and characterized it as "just kidding around". Following the warning, employee C continued making sexually oriented comments to the female employees. He was discharged for misconduct.

In this example employee C's conduct could be viewed as poor judgment on his part. However, once the female employees complained and he was warned not to continue making sexually oriented comments, his subjective intent became irrelevant. His conduct manifests a wilful disregard of the employer's interest insofar as his continued sexual harassment could expose the employer to civil liability.

RULE XI TARDINESS

GENERAL:

The employer has a right to expect an employee to arrive at work on time. Repeated inexcusable tardiness following warnings by the employer tends to show a wilful or wanton disregard of the employer's interest and will constitute misconduct.

NOTE: The definition of misconduct and accompanying elements apply to the foregoing subsection of new Rule II.

AUTH: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether misconduct applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Was the claimant's reason for being tardy "compelling" as judged by a reasonable person's standard?

2. Did the tardiness adversely affect the employer's business operation?

3. Did the employer give previous warnings to the claimant for previous acts of tardiness?

4. Did the acts of tardiness and prior warnings occur in a relatively recent time span?

NOTE: Lengthy delays in time between warnings and an act of repeated minor misconduct will not constitute a wilful or wanton disregard of the employer's interest. However, as previously mentioned each case must be judged by a totality of the circumstances.

EXAMPLE A:

Employee A, employed as a nurse, was repeatedly late, despite several warnings. The hospital discharged her because her tardiness interfered with the normal operation of the hospital. Employee A offered no reasonable excuse for her tardiness, except that her alarm clock didn't always work.

In this example the claimant's conduct was repetitive which shows a wilful or wanton disregard of the employer's interest. Employee A would probably be denied benefits due to misconduct.

EXAMPLE B:

Employee B was required to clock in several minutes before the shift began. Several times he was late in clocking in and was warned that tardiness would lead to discharge. He was discharged for being in the vicinity of his post but not clocking in by 7:00.

In this example, B's tardiness appears to not have caused a disruption in the employer's operation and amounted to a minor infraction. Minor infractions are not the type of misconduct which will disqualify a claimant for benefits, even though the employer may have cause to terminate his employment. Employee B would probably not be denied benefits due to misconduct.

RULE XII UNION RELATIONS

GENERAL:

An employee who engages in lawful union activity cannot be disqualified for benefits due to misconduct. However, independent acts which are illegal or violative of the collective bargaining agreement even though characterized as "union activity", may constitute misconduct.

NOTE: The definition of misconduct and accompanying elements apply to the foregoing subsection of new Rule II.

AUTH: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether misconduct applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Was the claimant's act illegal?

2. Was the claimant's act a violation of the collective bargaining agreement?

3. Was the claimant's act a serious violation of the employer's standard which the employer has a right to expect?

EXAMPLE A:

Employee A's union called a strike due to a labor dispute. Employee A was observed by company personnel throwing rocks and slashing tires of workers' cars who did not observe the strike. He was discharged for misconduct.

In this example employee A had the right to go out on strike and to express his disagreement with the company's practices. However, his independent act of destroying fellow employee's property would not be protected union activity. Employee A would probably be denied benefits due to misconduct.

RULE XIII VIOLATION OF COMPANY RULE

GENERAL:

An employer has the right to promulgate reasonable rules in order to maintain order in the workplace. In determining whether an employee's violation of a rule is misconduct the following factors should be taken into account: 1) the rule should be reasonable, 2) the individual knew or should have known the existence of the rule, 3) the violation of the rule constitutes a wilful or wanton act which demonstrates a disregard of the employer's interest, 4) the rule violation is material such as to cause injury or likely to cause injury to the employer.

NOTE: The definition of misconduct and accompanying elements apply to the foregoing subsection of new Rule II.

AUTH: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether misconduct applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Is the company's rule reasonable insofar as it tends to further a legitimate business interest of the employer?

2. Was the claimant aware of the rule, either by actual or constructive notice?

3. Was the claimant's violation of the rule intentional, demonstrating a wilful or wanton disregard of the employer's interest?

4. Was the rule violation material so as to cause or be likely to cause a substantial injury to the employer's interest?

EXAMPLE A:

Employee A was warned several times not to make personal calls during work hours. The employee admitted making long distance phone calls following the warnings, however, he agreed to reimburse the employer. The employee indicated that the phone calls were not for emergency reasons.

In this situation the company's rule forbidding the use of the telephone by its employees for personal phone calls is reasonably related to a legitimate business purpose. Moreover, the employee was given several warnings, which he intentionally disobeyed. The employee's after-the-fact offer to pay for the phone calls is not relevant to the charge that he intentionally violated the company rule. Moreover, there did not exist any reasonable excuse as to why the employee could not wait until break or lunch to make his phone calls. Employee A would probably be denied benefits due to misconduct.

EXAMPLE B:

Employee B, a secretary, exchanged typewriters with a co-worker because she was more familiar with the other machine. A company rule, which the secretary was aware of, forbade employees from moving office equipment before receiving permission from the supervisor and filling out an equipment inventory form.

Employee B indicated that she intended to follow the necessary procedure, however, she was involved in a rush project and needed the other typewriter to finish the project on time. She was discharged for violating a company rule.

In this example, the employee's infraction does not appear to have caused a material injury to the employer. The infraction would be considered minor. Taken as a whole the employee's intent was to benefit the employer by completing the project on time. Her violation of the rule was not the type which demonstrates a wilful disregard of the employer's interest. Employee B would probably not be denied benefits due to misconduct.

RULE XIV VIOLATION OF LAW

GENERAL:

Violations of law while not acting in the scope of one's employment are not necessarily considered to be misconduct which would disqualify a claimant for benefits. Only matters which impact or affect the ability of the employee to perform his job duties or substantially injure the employer's ability to do business will constitute misconduct.

NOTE: The definition of misconduct and accompanying elements apply to the foregoing subsection of new Rule II.

AUTH: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether misconduct applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Can the employer show by a preponderance of the evidence that the claimant committed the act of misconduct?

2. Can the employer show by a preponderance of the evidence that the employee's conduct had some nexus with the employee's work?

3. Can the employer show by a preponderance of the evidence that as a result of the employee's conduct some harm to the employer's interest has occured or is likely to occur?

4. Can the employer show that the conduct was in fact conduct that the employer has a legitimate right to expect its employees to refrain from exercising?

EXAMPLE A:

Employee B, a warehouseman, often played cards during his lunch hour with friends away from work. During one card game a fight broke out and employee B was arrested and later convicted for assault. A great deal of publicity occured in the newspapers and the employer discharged employee B for the adverse publicity to his business.

In this example, the employer's concern regarding adverse publicity must be identifiable. Also, the conviction for assault during a card game bears little relationship to the employee's ability to injure the employer. Further, absent some specific agreement by the employer and its employees, the employer did not have a legitimate right to control the employee's off-duty hours. Employee B would probably not be denied benefits due to misconduct.

RULE XV WORK PERFORMED IN GROSSLY NEGLIGENT MANNER

GENERAL:

Ordinary negligence by an employee is not considered misconduct. However, an employee's failure to perform is wilful if he or she intentionally, knowingly, or deliberately fails to perform or performs in a grossly negligent manner, or repeatedly performs negligently after prior warnings or reprimands by the employer. An exception to this is where the employee is physically or mentally incapable of correcting his or her negligent acts.

NOTE: The definition of misconduct and accompanying elements apply to the foregoing subsection of new Rule II.

AUTH: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2303, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether misconduct applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Has the claimant been warned several times that his work performance is improper?
2. Was the employer's standard for measuring work performance reasonable?
3. Was the claimant afforded the opportunity and means to improve his work performance?
4. Was the claimant capable of improving his work performance?
5. Was there a similiarity of the incidences?
6. Were the acts of negligence serious?
7. Were the acts of negligence over a short or extended period of time?

It is impossible to establish arbitrary limits or descriptions in determining the number, time span, seriousness, or similarity of the occurrences, each case should be judged by a totality of the circumstances.

EXAMPLE A:

Employee A, employed as a clerk typist, was repeatedly warned that her work contained too many errors and her speed was slow compared to other clerk typists employed by the company. Her supervisor arranged for a typing and spelling class given during work hours. Employee A decided not to attend the class because it was boring. Following another warning that her inadequate performance would lead to discharge, the employee's performance did not improve and she was discharged.

In this example, A's refusal to attend the class or improve her performance after the employer's reprimands and the absence of a reasonable excuse by the employee is misconduct since the reason for the inefficiency was within employee A's power to control and the failure was wilful. Employee A would probably be denied benefits due to misconduct. If she had taken the class, but even when trying to do a good job, performed unsatisfactorily in typing thereafter and was then discharged, she would probably not be denied benefits due to misconduct.

EXAMPLE B:

Employee B, a rest home nurse aide, had been counseled about handling the residents in a rough manner. Several residents complained that she used excessive physical force while handling them and her supervisor had instructed her to be gentle. When the complaints continued and she was observed to be again roughly handling the residents, she was discharged. Employee B contends she was doing her job as

fast as she could so she would be able to complete all of her assigned duties and did not intend to hurt anyone.

Employee B, in this example, was aware she was mishandling patients as she had been counseled about it. She has no reasonable defense for her actions and would probably be denied benefits due to misconduct.

RULE XVI DISQUALIFICATION FOR LEAVING WORK WITHOUT GOOD CAUSE ATTRIBUTABLE TO THE EMPLOYMENT

GENERAL PRINCIPLES:

Scope: This rule defines and interprets disqualification for leaving work without good cause attributable to the employment as set forth in 39-51-2302, MCA.

"Good Cause Attributable to the Employment" defined: As a general rule the claimant's reason for leaving shall be for a compelling reason that originates or arises directly from the job.

UCC official interpretation, No. 97, 12-20-61.

Elements of Good Cause Attributable to Employment:

1) The claimant in fact left work.

2) That the leaving was voluntary.

3) That under the circumstances, the claimant left employment due to compelling reasons that originated or arose directly from the work environment.

4) That the claimant left employment for the reasons stated.

5) That the claimant attempted to adjust or control the problem in the work environment.

6) That the claimant informed the employer of the problem and gave the employer a reasonable opportunity to correct the situation.

AUTH: Sec. 39-51-2302, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2302, 39-51-301, 39-51-302, MCA.

EXAMPLE A:

Employee A, an oil field worker, discovered that he was being paid much less than workers in another state with the same skills. He complained to his supervisor who essentially told him "that's the breaks". Employee A walked off the job and applied for unemployment benefits.

Employee A's reason for quitting his employment was because he wanted higher wages, however, in these circumstances, the employer's actions were not arbitrary, since other states or localities may pay higher wages. The average worker interested in maintaining employment would not walk of the job without attempting to adjust or explore options with the employer.

EXAMPLE B:

Employee B, a meat packer, was not paid on time by the employer on three occasions within two months. Employee B

quit her employment when the employer informed her that he couldn't guarantee when her next pay check would be issued, because the company was in financial trouble.

In this example, Employee B would have a compelling reason for leaving her employment since she attempted to adjust the adverse circumstances, however, the average worker would quit if told that payment for work performed was this uncertain.

RULE XVII HEALTH, SAFETY, MORALS

GENERAL PRINCIPLES:

Scope: A claimant leaves work with good cause if the average person genuinely interested in maintaining employment would have left work due to an undue risk of injury, illness, physical impairments, or other working condition, or for reasonably foreseeable risk to his or her morals and the claimant has attempted to adjust to or control the circumstances, but to no avail. In circumstances where the individual has a reasonable belief that there exists an immediate serious threat of injury or illness, the claimant is not required to adjust and may refuse to do the work.

ELEMENTS:

The elements found in New Rule XVI are applicable to the foregoing rule.

AUTH: Sec. 39-51-2302, 39-51-301, 39-51-302, MCA.

IMP: Sec. 39-51-2302, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether good cause attributable to employment applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Did the claimant have a reasonable belief that the work environment created a serious risk of injury to his or her health, safety or morals?

2. Would the average worker in like or similar circumstances as the claimant believe the work to be serious risk to his or her health, safety or morals?

3. If applicable, did the claimant utilize a grievance, formal or informal, procedure prior to quitting his or her employment?

4. After hearing the employee's complaint, what, if anything, did the employer do to correct the situation?

EXAMPLE A:

Employee A, a clerk in a convenience store, was hired for the 3 p.m. to 11 p.m. shift. On the first night he developed a fear of being robbed. He told the employer he wanted the day shift. The manager was unable to change the shift assignment because other clerks with more seniority

preferred the day shift. The location of the store was not a high crime area and no robberies had occurred at this store. Employee A quit his job.

In this example, employee A would probably not have left employment for good cause, since the test of reasonableness is based on the average person not the uniquely sensitive.

EXAMPLE B:

Employee B, a worker in a lumber mill, developed a lung disorder. He requested a transfer to a location where the debris in the air would not aggravate his physical disorder. The employer could not find a suitable work location for him. Employee B quit his job based on his doctor's orders.

In this example, employee B quit based on a compelling reason, since his health was at stake. He attempted to work with the employer to resolve the situation but was unable to do so. Employee B quit for good cause attributable to the employment.

RULE XVIII HOURS, WAGES AND WORKING CONDITIONS

GENERAL PRINCIPLES:

Scope: A claimant who has voluntarily left employment due to unreasonable actions by the employer concerning hours, wages or working conditions will be deemed to have left for good cause, if the claimant made a reasonable attempt to resolve the problem with the employer and the employer was unable to adjust the situation.

ELEMENTS:

The elements found in New Rule XVI are applicable to the foregoing rule.

AUTH: Sec. 39-51-2302, 39-51-301, 39-51-302, MCA.
IMP: Sec. 39-51-2302, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether good cause attributable to employment applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Was there a compelling reason which prompted the claimant to leave employment?

2. Did the claimant inform the employer of the problem before leaving employment?

3. Did the claimant attempt to resolve the problem with the employer by giving him time to resolve the matter?

EXAMPLE A:

Employee A worked as a telephone operator for two years on the day shift. The employer, due to budget cut backs, assigned her a split shift schedule. This created a significant burden to employee A since she lived twenty miles from

work. Employee A discussed the problem with the employer, however, the employer was unable to accommodate employee A's request to stay on the day shift.

In this example employee A appears to have a compelling reason for leaving employment and the employee informed the employer of the problem before leaving. Since the employer was unable to accommodate the employee's compelling reason for leaving, the employee left work for good cause.

EXAMPLE B:

Employee B worked as a computer technician. She asked for a wage increase because other companies in a larger city were paying persons of like experience higher wages. The employer did not grant the wage increase and employee B quit her employment.

In this example, the employer's actions of not granting the wage increase would not be arbitrary or discriminatory so long as other workers in the company were paid the same rate for similar work. Thus the employee's reason for leaving would not be for good cause.

EXAMPLE C:

Employee C worked as a cook in a small restaurant. She was required to work her shift in an area where water settled due to a plumbing problem. After numerous requests to the employer to repair the problem the employee quit her employment.

In this example, the working conditions would be considered intolerable by most average workers. Thus the employee's reason for leaving would be for good cause.

RULE XIX EMPLOYER HARASSMENT

GENERAL PRINCIPLES:

Scope: An employer has the right to make reasonable rules in the work place. Also the employer may be required to exercise corrective discipline in order to gain the employee's compliance with said reasonable rules. A claimant leaves work for good cause when it appears that the rule is unreasonable or the corrective discipline is tantamount to harassment by the employer.

ELEMENTS:

The elements found in New Rule XVI are applicable to the foregoing rule.

AUTH: Sec. 39-51-2302, 39-51-301, 39-51-302, MCA.
IMP: Sec. 39-51-2302, 39-51-301, 39-51-302, MCA.

GUIDELINE:

The following section is intended only to assist the reader in assessing whether good cause attributable to employment applies to the facts at hand. This section is not a part of the rules and is therefore not legally binding on any party.

1. Was the policy of the company reasonable as judged by other like businesses in the same area?

2. Was the rule related to the employment?

3. Was the corrective discipline used by the employer violative of any practice of the company, state or federal law, collective bargaining agreement, or of the implied or expressed contract of hire?

EXAMPLE A:

Employee A, a receptionist, was required by the employer to answer the phone by identifying the company and transferring the call quickly to the appropriate person in the company. Various complaints by callers prompted the employer to reprimand the employee. The employer instructed her as to how to handle in-coming calls. The employer monitored her progress and when the complaints persisted during the following three month period, the employer assigned the receptionist filing duties only. Employee A quit because she believed that she was being harassed.

In this example, the employer had the right to expect the employee to answer the phone in a certain manner, since handling questions and doing business over the phone has become an integral part of most company's operations. The employee would not have left employment for good cause unless the reprimand and reassignment of duties was in violation of the practices of the company or was otherwise arbitrary or discriminating.

EXAMPLE B:

Employee B, a long-term employed waitress, reported health violations at the workplace and was then disciplined by the employer. She was immediately assigned to work the early morning shifts generally given to new employees. She tried to discuss the problem with the employer who simply refused to discuss the matter. She quit a month later after several additional unsuccessful attempts to discuss the problem with the employer.

In this example, employee B was disciplined for reporting health law violations. Her transfer to the undesirable shift immediately after the incident is sufficiently close in time to show a connection which appears to be a direct result of her actions in reporting the health violations. She had tried to discuss the matter but was refused that option. Thus, employee B would have good cause for terminating employment.

RULE XX DISQUALIFICATION WHEN UNEMPLOYMENT DUE TO STRIKE

GENERAL PRINCIPLES:

Scope: This rule defines and interprets disqualification when unemployment is due to a strike as set forth in

39-51-2305, MCA, and describes the procedural steps the department will follow as set forth in 39-51-2402 MCA and 39-51-2403 MCA.

"Strike" defined: A strike is a concerted cessation of work by employees of an establishment in an effort to obtain desirable terms from an employer.

Purpose: This rule is primarily concerned with explaining the procedure by which the department will determine whether a class of workers on strike are excepted under 39-51-2305(3), MCA. The department's authority to promulgate said procedural rules is derived from 39-51-2407 MCA.

General: The department is required by law to disqualify any individual who participates in a strike unless the department determines that the cause of the labor dispute which resulted in a strike is due to the employer's failure or refusal to conform to any state or federal law pertaining to collective bargaining matters or wage and hour laws or laws relating to conditions of work.

Class Determination: All claims filed by employees belonging to the same or similar grade or class of workers against a singular employer shall be consolidated as a class claim. This will prevent disparate treatment and promote uniformity in the administration of the claims.

DETERMINATION IF CLAIMANTS ALLEGE EMPLOYER'S UNLAWFUL CONDUCT CAUSED THE STRIKE.

Burden of Proof: It shall be the ultimate burden of the claimant or claimant representative to show by a preponderance of the evidence that the employer's failure or refusal to conform to any law of the state wherein the dispute arose or of the federal laws pertaining to collective bargaining, hours, wage or other conditions of work caused the claimants to strike.

Causal Relationship: There must be a causal relation between the alleged employer law violation and the employees' reasons for participating in the strike. The alleged law violation does not need to be the sole reason for the strike. However, it must be a factor in the claimant's decision to participate in the strike.

Department's procedure in determining alleged employer law violations:

1) If the claimants allege the reason for participating in the strike was caused by the employer's failure to conform to state or federal laws, they shall so specify on the initial claims form provided by the department, stating the alleged law violation and its relation to the claimant's decision to strike.

2) The department will forward the above claims forms to the employer. Within five (5) working days from mailing

the employer must respond to the allegations if there is a dispute. Failure to do so will be deemed an admission that the allegations contained in the claims form are true.

3) The department will review the claimant's allegations and the employer's response. If there is no genuine issue of fact in dispute, the claims examiner will determine whether, on the available facts, a preponderance of evidence shows the alleged law violation caused the strike. If so, benefits shall be awarded. The employer may exercise its right to appeal under 39-51-2403, MCA.

4) Factual Dispute Determinations: In the event a genuine issue of fact exists at the initial determination stage, the department may refer the questions of fact to an appeals referee for the initial determination. The employer or claimant may exercise its right of review by appealing the referee's decision directly to the Board of Labor Appeals.

5) The findings and conclusions of the department representative or the Board of Labor Appeals is limited to unemployment insurance cases and is not precedent in any other proceeding which may be initiated by the parties involving the same issues, parties, or facts.

AUTH: 2-4-201, 39-51-301, 39-51-302, 39-51-2402, 39-51-2403, 39-51-2305, 39-51-2407 MCA.

IMP: 2-4-201, 39-51-301, 39-51-302, 39-51-2402, 39-51-2403, 39-51-2305, 39-51-2407 MCA.

4. The Department of Labor and Industry is proposing the amendment to 24.11.303 and adopting a new rule I governing hearing procedures for employer contribution tax liability matters, because according to accepted administrative law principles and Montana law, benefit determination procedures should be kept separate from employer tax determination procedures.

The Department of Labor and Industry is proposing new rules II through XX to define and interpret disqualification due to misconduct, leaving work without good cause attributable to employment and disqualification when unemployment is due to strike because the Department believes that the unemployment insurance system credibility will be enhanced by the public's understanding of the aforementioned causes for disqualification for unemployment insurance benefits.

5. Interested persons may present their data, views or arguments either orally or in writing at the hearing.

Written data, views or argument may also be submitted to Robert Jensen, Administrator of Appeals Division, Department of Labor and Industry, P.O. Box 1728, Helena, Montana, by August 2, 1985.

6. Robert Jensen, Administrator of Appeals Division, Department of Labor and Industry, P.O. Box 1728, Helena, Montana, has been designated to preside over and conduct the hearing.

7. The authority of the Department to make the proposed amendments and proposed adoption of new rules is based on sections 2-4-201, 39-51-2302, 39-51-2303, 39-51-2403, 39-51-2305, 39-51-2407, and implements 2-4-201, 39-51-301, and 39-51-302 MCA.

DAVID E. WANZENRIED
Commissioner of Labor and Industry

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

In the matter of the repeal of Rule 46.8.110; the amendment of Rule 46.8.102; and the adoption of rules pertaining to standards for community services for developmentally disabled persons	)))))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED REPEAL OF RULE 46.8.110; THE AMENDMENT OF RULE 46.8.102; AND THE ADOPTION OF RULES PERTAINING TO STANDARDS FOR COMMUNITY SERVICES FOR DEVELOPMENTALLY DISABLED PERSONS

TO: All Interested Persons

1. On July 17, 1985, at 1:00 p.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana, to consider the proposed repeal of Rule 46.8.110; the amendment of Rule 46.8.102; and the adoption of rules pertaining to standards for community services for developmentally disabled persons.

2. The Department proposes to repeal 46.8.110 relating to minimum standards for providers of community services for developmentally disabled persons. The rule as proposed to be repealed may be found on pages 46-593, 46-594, 46-595, 46-596, 46-597, and 46-598 of the Administrative Rules of Montana.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

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

46.8.102 DEFINITIONS For purposes of this chapter, the following definitions apply: [Definitions (1) through (5) remain the same but will be renumbered.]

(1) "Accreditation organization" means an organization recognized by rule which establishes and publishes standards relating to the quality of services provided by providers of services to developmentally disabled persons, analyzes compliance with those standards and accredits providers based on those standards.

(2) "Accreditation report" means a report produced after a survey of a provider by an accreditation organization which states the extent of the provider's compliance with the standards of the accreditation organization and presents the determination of the accreditation organization as to whether the provider is accredited.

(3) "Adult community homes services" means those facilities licensed in accordance with section 53-20-301, et

seq., MCA providing age appropriate residential and habilitation services for two to eight persons who are 16 years of age and older.

(4) "Adult habilitation services" means the provision to developmentally disabled adults in non-residential settings of functional training and habilitation including basic life skills, pre-vocational skills, work activities and sheltered employment skills and other skills prerequisite or integral to vocational activities and which facilitate movement of persons to increasingly higher levels of independence.

(5) "Adult intensive training community homes services" means those facilities licensed in accordance with section 53-20-301, et seq., MCA providing habilitation and intensive residential training services to two to eight persons with intensive need who are 16 years of age and older.

~~(5)~~ (6) "Applicant" means a person who applies for services, but is not yet accepted into a service program.

~~(6) "Service standards" mean the Standards for Services for Developmentally Disabled Individuals, Accreditation Council for Service for Mentally Retarded and Other Developmentally Disabled Persons (AGMRDD) which is a manual published by Accreditation Council for Services for Mentally Retarded and Other Developmentally Disabled Persons, 1980.~~

(7) "At risk' means a child who is between birth and five years of age who may become developmentally delayed or developmentally disabled.

(8) "Children's community homes services" means those facilities licensed in accordance with section 53-20-301, et seq., MCA providing age appropriate residential and habilitation services for two to five persons who are between the ages of 5 and 22.

~~(7)~~ (9) "Client" means a person with a developmental disability who is enrolled in a provider service program.

~~(8)~~ (10) "Division" means the developmental disabilities division of the department of social and rehabilitation services.

(11) "Evaluation services" means a service through which determinations are made as to whether handicapping conditions are present and what individual needs are, and specific recommendations or treatment alternatives to address those needs are formulated or selected.

(12) "Family training and support services" means the provision of general information and support services to natural and foster families to assist in the development and care of a developmentally disabled or "at risk" child.

(13) "Habilitation" means assistance to an individual to acquire and maintain those life skills that enable the individual to cope more effectively with the demands of his or her own person and environment and to raise the level of his or her physical, mental and social functioning.

(14) "Independent living services" means the provision of functional residential training on a regular basis to persons who reside in unstructured and unsupervised situations.

~~(4)~~ (15) "Interdisciplinary team" means a group of persons that is drawn from or represents those professions, disciplines, or service areas that are relevant to identifying an individual's needs and designing a program to meet them, and that is responsible for evaluating the individual's needs, developing an individual habilitation plan to meet them, periodically reviewing the individual's response to the plan, and revising the plan accordingly.

~~(3)~~ (16) "Provider" means any person or entity furnishing services to persons with developmental disabilities under a contractual agreement with the department through the developmental disabilities division.

(17) "Respite care services" means the provision of temporary relief services to natural or foster families to relieve them from the continuous care of an eligible developmentally disabled or "at risk" child.

(18) "Senior adult community homes services" means those facilities licensed in accordance with section 53-20-301, et seq., MCA providing age appropriate residential and habilitation services to two to eight older persons.

(19) "Senior day services" means the provision to older developmentally disabled adults in non-residential settings of functional training and age appropriate activities including organized group activities, maintenance of previously acquired self-help and social skills, and formal training in leisure-type activities.

~~(7)~~ (20) "Standard" means ~~each statement preceded by a section number present in the service standards that is established as a rule or a basis of comparison in measuring quality.~~ criteria adopted by the department for the purpose of judging the adequacy of the quality and extent of service provided to developmentally disabled individuals by providers.

(21) "Survey" means a review of the provider's services by an accreditation organization for the purposes of determining the extent of compliance with the standards of the accreditation organization and for accrediting the provider's services.

(22) "Transitional living services" means the provision of functional training and habilitation on a regular basis to persons who reside in unstructured living situations and who require intermittent supervision and assistance.

(23) "Vocational placement services" means assistance in locating competitive employment as well as ongoing training and support to developmentally disabled individuals and their employers in order to maintain employment.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

4. The rules as proposed to be adopted provide as follows:

RULE I STANDARDS: ADOPTION AND APPLICABILITY (1) The department hereby adopts minimum standards to assure quality community-based services for developmentally disabled persons. Providers shall, by July 1, 1990, be accredited by the appropriate accreditation organization in accordance with these rules and based upon the applicable minimum standards.

(2) The department hereby adopts and incorporates by reference the standards for services for developmentally disabled individuals, a set of accreditation standards published by the accreditation council for services for mentally retarded and other developmentally disabled persons (ACMRDD) which set forth minimum standards for community-based services for developmentally disabled persons. A copy of the ACMRRD service standards may be obtained on temporary loan from the Department of Social and Rehabilitation Services, Developmental Disabilities Division, P.O. Box 4210, 111 Sanders, Helena, Montana 59604, or be purchased from the Accreditation Council for Services for Mentally Retarded and other Developmentally Disabled Persons, 4435 Wisconsin Avenue, N.W., Washington, D.C. 20016.

(a) Providers who are fully accredited by the commission on accreditation of rehabilitation facilities (CARF) on July 1, 1985, and who continue to maintain that accreditation shall be in compliance with the minimum standards for services and will not be subject to the accreditation surveys and standards of ACMRDD. The department hereby adopts and incorporates by reference the set of accreditation standards published by the commission on accreditation of rehabilitation facilities which set forth minimum standards for existing CARF-accredited facilities and facilities serving people with disabilities. A copy of the CARF service standards may be obtained on temporary loan from the Department of Social and Rehabilitation Services, Developmental Disabilities Division, P.O. Box 4210, 111 Sanders, Helena, Montana 59604, or be purchased from the Commission on Accreditation of Rehabilitation Facilities, 2500 North Pantano Road, Tucson, Arizona 85715.

(3) A provider not currently accredited by CARF contracting with the division for the provision of services at the time of adoption of this rule shall complete an ACMRDD survey within the period of July 1, 1985, to June 30, 1987, and shall complete another ACMRDD survey within the period of July 1, 1987, to June 30, 1989.

(4) Any provider not contracting with the division at the time of the adoption of this rule but who contracts with the division at a later date shall submit evidence to the division of ability to comply with standards prior to the

signing of a contract and shall be accredited by ACMRDD within the second year of contracting with the division.

(5) The division will not contract further for services with a provider that is not in compliance with the requirements of this rule concerning survey completion and standards compliance.

(6) A provider must provide to the division, either directly or by arrangement with the accreditation organization, all survey and accreditation reports.

(7) Providers who provide services in the following areas shall adhere to this rule:

(a) adult habilitation;
(b) senior day;
(c) adult community homes;
(d) children's community homes;
(e) adult intensive community homes;
(f) senior adult community homes;
(g) transitional living;
(h) independent living;
(i) family training and support;
(j) respite care;
(k) evaluation and diagnosis; or
(l) vocational placement.

(8) In cases where accreditation is not in the best interests of the individuals served and/or the state, the department may grant an exemption from this rule. Exemptions shall be based on the limited type or amount of services provided.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

RULE II DEPARTMENT ASSISTANCE (1) The department shall:

(a) provide to each provider by July 1, 1985, one manual entitled standards for services for developmentally disabled individuals which was developed by the accreditation council for services for mentally retarded and other developmentally disabled persons (ACMPDD) and published in 1984;

(b) notify each provider of the date they are to initiate the ACMRDD survey process. This notification shall occur at least three months prior to that initiation date;

(c) provide each provider with the necessary ACMRDD application forms;

(d) maintain copies of all provider survey and accreditation reports;

(e) provide to a provider such technical assistance as the department may offer and the provider has requested;

(f) provide information to the regional councils and the state planning and advisory council as requested about the

status of each provider in relation to the survey and accreditation process.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-203 and 53-20-205 MCA

5. The Department is directed specifically by statute at section 53-20-205(2), MCA, to set minimum standards for programs and establish appropriate qualifications for persons employed in such programs. The adoption as standards of nationally developed and recognized program accreditation standards will help assure the quality of services provided to persons who receive developmental disability services under the auspices of the State of Montana. The utilization of such established standards for this purpose will assure the providers of the appropriateness and equitableness of the standards and will provide the department with an existing system of standards, survey and accreditation upon which to rely.

6. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than July 25, 1985.

7. The Office of Legal Affairs, Department of Social and Rehabilitation Services has been designated to preside over and conduct the hearing.

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 17, 1985.

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

In the matter of the amendment of Rule 46.12.509 pertaining to all hospital reimbursement, general.	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.12.509 PERTAINING TO ALL HOSPITAL REIMBURSEMENT, GENERAL

TO: All Interested Persons

1. On July 17, 1985, at 10:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana, to consider the proposed amendment of Rule 46.12.509 pertaining to all hospital reimbursement, general.

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

46.12.509 ALL HOSPITAL REIMBURSEMENT, GENERAL

Subsections (1) through (3) remain the same.

(4) Hospital services provided to medicaid patients by facilities outside of the state will be limited to the ~~lower of the medicare~~ percentage of billed charges rate ~~or the medicaid rate established under the respective state's medicaid regulations~~ as computed for the hospital under the medicare reimbursement principles.

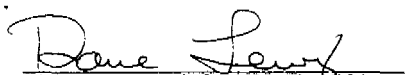
Subsections (5) through (8) remain the same.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-141 MCA

3. The current rule limits out-of-state hospital reimbursement to the Medicare rate or the state Medicaid rate, whichever is lower. The Medicaid agencies in some states have recently negotiated contracts for per diem rates based on the average cost of care of all patients. Hospitals in these states are unwilling to continue to accept Montana patients at this rate of reimbursement because the patients transferred out of Montana generally require a significantly different range of services than the average patient. These services are usually highly specialized and are significantly more expensive to provide. These services are usually not available in Montana hospitals and must be obtained from facilities in neighboring states, often on an emergency basis. In order to insure the continued availability of these needed services, a revised rate-setting mechanism must be implemented.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than July 25, 1985.

5. The Office of Legal Affairs, Department of Social and Rehabilitation Services has been designated to preside over and conduct the hearing.



Director, Social and Rehabilitation Services

Certified to the Secretary of State June 17, 1985.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the adoption of emergency rules pertaining to the Cropland Insect Detection and Spraying Program	))))	NOTICE OF THE ADOPTION OF EMERGENCY RULES PERTAINING TO THE CROPLAND INSECT AND SPRAYING PROGRAM

TO: All Interested Persons.

1. On June 11, 1985 Governor Schwinden declared a state of emergency regarding a grasshopper infestation in the state of Montana. This declaration utilizes Title 80, Chapter 7, Part 5, Montana Code Annotated (MCA), to provide a mechanism for the equitable distribution of funds to counties that participate in an insect pest control program.

The Department of Agriculture has determined that grasshoppers exist in such numbers that they are destroying, substantially damaging, or threatening to destroy agricultural crops.

The department must adopt the following rules immediately, without prior notice or hearing, in order to ensure equity in the distribution of the funds to participating counties. The department finds that an imminent peril to the public welfare requires adoption of these rules.

2. The text of the rules is as follows:

RULE I DECLARATION OF INFESTATION (1) The department shall make a declaration of infestation in a county before that county may participate in the cropland spraying program with the state.

(2) This declaration shall be based upon sampling standards acceptable to the department that demonstrate that insect pests exist in sufficient numbers so as to cause an economic impact on the crops in the county.

AUTH: 80-7-507, MCA IMP: 80-7-502, MCA

RULE II MANAGEMENT AGREEMENT (1) The department and county may enter into a pest-management agreement upon the county's demonstration that it meets all necessary requirements for participation in the program, including any requirement specified for the use of the state's available funding.

(2) The department shall enter into an agreement with each participating county which shall include the following provisions:

(a) Specify targeted pest(s).

(b) Specify that the state may provide up to a maximum dollar amount of that county's two-mill levy not to exceed the one-third limit established in 80-7-504, MCA. Final payment will be made as identified in Rule V.

(3) Specify that all applicators participating in the program must use federal/state registered pesticides specifically approved for the target pest.

(4) Specify the time for which all applicator operations must be completed in order to be part of the program.

(5) Specify the maximum dollar amount per acre of the state's share which shall not exceed $2.00 per acre of the acres that may qualify for state financial participation.

(6) Specify the deadline for parties to submit claims for reimbursement of payments.

(7) Designate the person(s) administering the program for the county.

(8) Specify any other provisions necessary to fulfill the requirements of the program.

AUTH: 80-7-507, MCA IMP: 80-7-503, 80-7-504, MCA

RULE III GRASSHOPPER TARGET PESTS (1) When grasshoppers are the target pests, then the agreement with the county shall specify that all contracts for applying the pesticide must be made on or before June 30 and all applications shall be completed on or before July 15th of the year.

AUTH: 80-7-507, MCA IMP: 80-7-503, 80-7-504, MCA

RULE IV LANDOWNER APPLICATION OF PESTICIDES (1) For the purpose of these rules, the definition of landowner includes the person responsible for the crop.

(2) In the event the county elects to have the landowner conduct the application of pesticides or have the landowner contract to have the pesticides applied on his lands, then:

(a) The landowner must comply with all requirements of these rules and he must pay for all chemical and application costs incurred on or before September 1 of the year.

(b) The landowner must:

(i) Submit proof of payment for the pesticide and/or the applicator services demonstrating that the application occurred on or before July 15 and that the contract for these services occurred on or before June 30.

(ii) Verify by affidavit that the application was made if the landowner applied the pesticide.

(iii) Specify the number of acres sprayed.

(iv) Specify the type of pesticide applied and if it was mixed with any other nontarget pesticide.

(v) Submit all the claims to the county on or before September 1.

(3) In the event the landowner fails to meet the requirements of these rules, then any application of pesticides to his land shall be considered outside of the program and he shall be ineligible for reimbursement.

AUTH: 80-7-507, MCA IMP: 80-7-503 80-7-504, MCA

RULE V DETERMINATION OF THE STATE'S PAYMENT TO THE COUNTY (1) The county shall submit to the department on or

before October 1 the number of acres sprayed in that county, number of participating landowners, and total costs submitted under the program.

(2) The department shall determine the total number of acres sprayed in the state under the program.

(3) The department shall pay each participating county a pro rata share of the 1985 biennium emergency appropriation fund balance as of June 30, 1985. Each county's share shall be based upon the percentage of that county's qualified acres to the total program acres qualified in the state. In no event shall the state pay the county an amount in excess of the stipulated maximum amount as provided in the agreement or more than $2.00 per acre or more than the limit established in Section 80-7-504, MCA.

AUTH: 80-7-507, MCA IMP: 80-7-503, 80-7-504, MCA

RULE VI REIMBURSEMENT TO LANDOWNERS (1) The landowner shall be reimbursed by the county following his compliance with Rule IV and the state's disbursement of money to the county.

(2) The county may determine the reimbursement of the landowners from the fund consisting of the state's share and the county's share.

(3) In no event shall the landowner be paid an amount greater than his cost of supplies and services.

(4) In the event the program costs fail to equal the actual costs of applying the pesticide, the added expenses shall be incurred by the landowner.

AUTH: 80-7-507, MCA IMP: 80-7-504, MCA

3. The rationale for the proposed rules are set forth in the statement of reasons for emergency.
4. These rules are authorized under section 80-7-507, MCA. They implement Title 80, Chapter 7, Part 5, MCA.

The emergency action is effective June 12, 1985.

Keith Kelly
Director

Certified to the secretary of state June 12, 1985

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF HORSE RACING

In the matter of the amendment of 8.22.612 concerning the the official or track veterinarian	))))	NOTICE OF AMENDMENT OF 8.22.612 VETERINARIAN: OFFICAL OR TRACK

TO: All Interested Persons:

1. On May 16, 1985, the Board of Horse Racing published a notice of amendment of the above-stated rule at pages 391 and 392, 1985 Montana Administrative Register, issue number 9.

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

3. No comments or testimony were received.

DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF VETERINARY MEDICINE

In the matter of the amendments of 8.64.101 board organization, 8.64.201 procedural rules, 8. 64.202 public participation rules, 8.64.502 concerning temporary permits, 8.64.504 concerning annual renewal of certificate or registration, 8.64.505 concerning continuing education and 8.64.506 concerning forfeiture of license and restoration	))))))))))	NOTICE OF AMENDMENTS OF 8.64.101 BOARD ORGANIZATION, 8.64.201 PROCEDURAL RULES, 8.64.202 PUBLIC PARTICIPATION RULES, 8.64.502 TEMPORARY PERMITS, 8.64.504 ANNUAL RENEWAL OF CERTIFICATE OF REGISTRATION, 8.64.505 CONTINUING EDUCATION, 8.64.506 FORFEITURE OF LICENSE AND RESTORATION

TO: All Interested Persons:

1. On May 16, 1985, the Board of Veterinary Medicine published a notice of amendments of the above-stated rules at pages 393 through 396, 1985 Montana Administrative Register, issue number 9.

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

3. No comments or testimony were received.

DEPARTMENT OF COMMERCE

BY: _____
ROBERT WOOD, ATTORNEY

Certified to the Secretary of State, June 17, 1985.

STATE OF MONTANA
BEFORE THE DEPARTMENT OF COMMERCE

In the matter of the amendment of 8.80.104 concerning the semi-annual assessments for state banks, trust companies, and investment companies	)))))	NOTICE OF AMENDMENT OF 8.80.104 SEMI-ANNUAL ASSESSMENT

TO: All Interested Persons:

1. On May 16, 1985, the Department of Commerce published a notice of amendment of the above-stated rule at page 397, 1985 Montana Administrative Register, issue number 9.

2. The department received several comments concerning the proposed assessment. The Stockmen's Bank of Cascade felt the fees were not uniform to all financial institutions, that there should be a public share of the expense and that federal and state supervisor fees tended to provide doubling or overlap of costs. The comments received from Ronan State Bank, Security Bank of Three Forks and Security State Bank of Plentywood similarly objected to the amount of the increase and the application of the assessment to certain classes of banks.

The department received a protest from First Security Bank of Helena and a request for hearing. It similarly received a request for hearing and protest from the Montana Independent Bankers Association. Though both parties withdrew their request for a hearing with stated desires for cooperation with the department, each maintains its protests of the assessment structure.

The proposed assessment is intended to be a logical extension of the amount of time spent by examiners in certain size banks. It does not discriminate against certain banks. Additionally, the assessment is necessary to comply with the mandate of the legislature that the bank examination be self-supporting.

An additional comment and request was received from the counsel for the Legislative Code Committee. That request was to include within this adoption the reference to section 9, Chapter 600, Laws of Montana, 1985 as providing an extension of the rulemaking authority of the department to provide for the new assessments.

No other comments or testimony were received.

3. The department has amended the rule exactly as proposed.

STATE OF MONTANA
BEFORE THE DEPARTMENT OF COMMERCE

In the matter of the adoption of a new rule pertaining to to supervisory fees for building and loan associations	))))	NOTICE OF ADOPTION OF A NEW RULE, 8.80.202 EXAMINATION AND SUPERVISORY FEES

TO: All Interested Persons:

1. On May 16, 1985, the Department of Commerce published a notice of adoption of the above-stated rule at pages 398, 1985 Montana Administrative Register, issue number 9.

2. The department has adopted the rule exactly as proposed.

3. The department did receive a phone call from Greg Petesch, attorney with the Administrative Code Committee reminding the department to include a cite to section 9, Chapter 600, Laws of 1985 in the history note when the rule is adopted. The cite refers to the extension of the rule making authority. No other comments or testimony were received.

DEPARTMENT OF COMMERCE

BY: _____
ROBERT WOOD, ATTORNEY

Certified to the Secretary of State, June 17, 1985.

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

In the matter of the amendment of ARM 12.6.502 and 12.6.512 and the adoption of a new rule relating to outfitters and professional guides	NOTICE OF THE AMENDMENT OF ARM 12.6.502 and 12.6.512 AND THE ADOPTION OF 12.6.517 - CONDUCT OF OUTFITTER EXAMINATION, LICENSING AND ENDORSEMENT OF GUIDES, AND DEFINITION OF HUNTING SUCCESS FOR ADVERTISING

TO: All Interested Persons

1. On April 11, 1985, the Department of Fish, Wildlife, and Parks (Department) published notice of proposed rule-making: to amend ARM 12.6.502 to require that applications to take the written outfitter examination be filed 7 days prior to the examination, to provide that no examinations will be conducted in Helena during the months of September, October and November, to provide the examination will be given in the regions in January only, to assess an administrative fee of $25; to amend ARM 12.6.512 to specify procedures for the licensing of guides and the endorsement of guide licenses; and to adopt a new rule defining how hunting success may be expressed in advertising. The notice was published at page 309 of the Montana Administrative Register, issue number 7.

2. The Department has amended ARM 12.6.502 and 12.6.512 and adopted 12.6.517 as proposed.

3. No comments or testimony were received.

4. The authority of the department to amend ARM 12.6.502 is based on Section 87-4-106 and the rule implements Section 87-4-127, 87-4-122, and 87-4-125, MCA. The authority of the department to amend ARM 12.6.512 is based on Section 87-4-106 and the rule implements Section 87-4-130, MCA. The authority of the department to adopt proposed Rule I is based on Section 87-4-106, MCA, and the rule implements Sections 87-4-122 and 87-4-141, MCA.

James W. Flynn, Director
Montana Department of Fish,
Wildlife and Parks

Certified to the Secretary of State June 17, 1985.

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

In the matter of the amendment of rules 16.10.634, structural requirements for public accommodations; 16.10.635, water supply system standards; 16.10.636, sewage system standards; 16.10.637, laundry facility requirements; and 16.10.638, housekeeping and maintenance standards	NOTICE OF AMENDMENT OF RULES ARM 16.10.634, 16.10.635, 16.10.636, 16.10.637, and 16.10.638 (Hotels, Motels, Tourist Homes, Roominghouses, Retirement Homes)

TO: All Interested Persons

1. On May 16, 1985, the department published notice of proposed amendment of rules 16.10.634, 16.10.635, 16.10.636, 16.10.637, and 16.10.638 concerning structural, water supply and sewage system, laundry facility, housekeeping, and maintenance standards for public accommodations at page 436 of the 1985 Montana Administrative Register, issue number 9.

2. The department has amended the rules with the following changes:

16.10.634 ~~STRUCTURAL~~ PHYSICAL REQUIREMENTS (1) An establishment must comply with the following ~~structural~~ physical requirements:

(a) - (c) Same as proposed.

(d) All rooms ~~and hallways~~ must be provided with at least 10 foot candles of light.

(e) - (g) Same as proposed.

16.10.635 WATER SUPPLY SYSTEM Same as proposed.

16.10.636 SEWAGE SYSTEM Same as proposed.

16.10.637 LAUNDRY FACILITIES Same as proposed.

16.10.638 HOUSEKEEPING AND MAINTENANCE Same as proposed.

3. The following comments were received:

Comment: Arlene Ayers, administrator of Sunrise Bluff Estates; Pat Schuller, vice-president for the Montana Association for the Aging; and Molly Munro, executive secretary of the same association; all protested application of the rules to retirement homes, which the representatives of the association characterized as basically individual apartments for retired persons in which the residents bore the responsibility for housekeeping, laundry, etc.

Response: Montana law defines the type of "retirement home" for which the department must establish standards as, in part, a building in which "separate sleeping rooms are rented providing sleeping accommodations. . . " (Sec. 50-51-102(5), MCA) "Sleeping accommodations" are defined by the department's rule 16.10.630(13) as "the provision of sleeping quarters and linen service or housekeeping service where the linen service and housekeeping service are provided by management or by the residents under the direct supervision of management." Since the types of retirement homes that were described by the commentors do not provide "sleeping accommodations" as defined, they are not the types of retirement homes which are subject to the law relating to public accommodations (Section 50-51-101, et seq.) and are therefore not subject to the department's rules. On the other hand, retirement homes which do in fact provide linen or housekeeping service are functionally little different from other public accommodations, and the department knows of no reason why application of the rules to them should be changed.

Comment: Jim Kembel, administrator of the Department of Administration's Building Codes Division, pointed out, as information rather than a suggested change, that the current building code contains a requirement similar to that in 16.10.634(1)(e) (i.e., smooth, non-absorbent walls and floors in water closets and showers) and requires only one foot candle of light at hallway floor level, whereas the proposed amendment would require 10 foot candles. In addition, H.S. Hanson of the Montana Technical Council questioned whether the department had the authority to adopt lighting standards at all, since he presumed that to be the sole responsibility of the Building Codes Division.

Response: Section 50-51-103, MCA, gives DHES the authority to adopt construction and furnishing standards considered necessary to public health and safety; Section 50-60-204, MCA, one of the statutes relating specifically to building code standards and administered by the Building Codes Division, recognizes the department's authority to adopt such rules and makes such a rule effective upon its approval as part of the state building code, a process which the department would pursue if it decided to adopt the proposed amendment. However, the department determined that the value of the increased lighting did not outweigh the difficulties inherent in amending the building code, and so decided not to add a lighting standard for hallways at this time.

Comment: Mr. Hanson also questioned the use of the existing word "structural" in the introduction to ARM 16.10.634 on grounds that it does not conform to the use of the term by contractors and design professionals.

Response: The department agreed to change "structural," wherever it appeared in 16.10.634, to the generally descriptive word "physical."

Comment: Mr. Hanson questioned the present limit of 120° F. for hand sink and shower water temperature, both because he alleged there is suspicion that low water temperature allows survival of the organism responsible for Legionnaire's Disease and because the 1985 legislature killed a bill which would have limited to 120° F. the water temperature in private residences, which Mr. Hanson suggested precluded DHES from requiring such a temperature limit in public accommodations.

Response: DHES has had such a temperature limit in its rules for some time and is empowered by statute to enact rules protecting the public health and safety. The temperature limit is intended to protect members of the public from burns in public accommodations where they have no control over, or advance knowledge of, water temperature. The bill Mr. Hanson referred to (HB-863) applied to private residence only, not public accommodations, and was intended both as a safety and as an energy conservation measure; therefore, there is no evidence the legislature intended to repeal the department's authority to set water temperature limits in public accommodations. Because of that and because, in addition, neither the department nor the Centers for Disease Control have firm evidence yet that low water temperature fosters development of the Legionnaire Disease organism, the department decided not to eliminate the water temperature restriction.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State June 17, 1985

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

In the matter of the adoption of rules I through XXX [to be codified 16.10.1501 - 16.10.1530] and the repeal of rules 16.10.1201 through 16.10.1229, all concerning standards for construction and operation of swimming pools and spas, and providing for regulation, inspection and enforcement	)	NOTICE OF ADOPTION OF RULES AND REPEAL OF RULES (Swimming Pools and Spas)

To: All Interested Persons

1. On May 16, 1985, the department published notice of a proposed adoption of rules I through XXX [to be codified 16.10.1501 - 16.10.1530], and the repeal of rules 16.10.1201 - 16.10.1229, all concerning standards for construction and operation of swimming pools and spas, and providing for regulation, inspection and enforcement, at page 411 of the 1985 Montana Administrative Register, issue number 9.

2. The department has repealed rules 16.10.1201 through 16.10.1229, found on pages 16-501 through 16-518 of the Administrative Rules of Montana.

3. The department has adopted rules 16.10.1501 through 16.10.1530 with the following changes:

RULE I (to be codified 16.10.1501) PURPOSE-APPLICABILITY

(1) This sub-chapter defines ~~public~~ swimming pools and spas; establishes minimum standards for the construction, maintenance and operation of swimming pools and spas and associated facilities; regulates the inspection of such facilities, and provides for the enforcement of this sub-chapter.

(2) The intent of these rules is to assure a safe and sanitary environment in and around the ~~public~~ swimming pool and spa.

~~(3) All new swimming pools or spas shall be constructed and operated in conformance with these rules. Any existing swimming pool or spa which is remodeled after [THE EFFECTIVE DATE OF THESE RULES] shall, as to each aspect of the pool facility which is remodeled, conform to the requirements of this sub-chapter.~~

(3) All swimming pools or spas constructed after June 28, 1985, shall be constructed in accordance with the requirements of this sub-chapter. Any swimming pool or spa in existence and in operation as of June 28, 1985, shall, as to any aspect of the pool or spa which is remodeled after June 28, 1985, conform to the requirements of this sub-chapter in effect at the time of the remodeling, provided that flow through pools shall comply with the requirements of Rule XXVII (to be codified 16.10.1527.)

RULE II (to be codified 16.10.1502) DEFINITIONS

(1) Same as proposed.

(2) "Bather" means any person using a ~~public~~ swimming pool, spa or adjoining deck area for the purpose of water sports, therapy, swimming, sunbathing or related activities.

(3) - (9) Same as proposed.

~~(10) "Public swimming pool or spa" means any indoor or outdoor structure, basin, chamber or tank containing an artificial body of water intended for recreational bathing, two feet or more in depth at any point, which is used by one or more persons for swimming,-- bathing, or other recreational activity, operated by a person as owner, licensee, lessee, or concessionaire, whether or not a fee is charged. The term "public swimming pool or spa" does not include:~~

~~(a) Swimming pools or spas located on private property used for swimming, bathing, or other recreational activities only by the homeowner, members of his family, or their invited guests, or~~

~~(b) medicinal hot water baths for individual use.~~

~~(11)~~ (10) "Regulatory authority" means the Department of Health and Environmental Sciences or local boards of health and their authorized representatives.

~~(12) "Semi-public swimming pool or spa" means any swimming pool or spa operated solely for and in conjunction with lodging facilities, e.g., motels, hotels, campgrounds, apartments and condominiums, provided that the use of the pool is restricted to bona fide occupants and their guests and provided that the pool or spa is within 200 feet, by a normal pedestrian route, of the individual's residence or quarters.~~

~~(13)~~ (11) "Shallow area" means any portion of the pool where the water depth ranges from three feet to five feet.

~~(14)~~ (12) "Spa" means a unit designed for recreational bathing or therapeutic use which is not drained, cleaned or refilled for individual use. It may include, but not be limited to, hydrojet circulation, hot water, cold water, air induction bubbles, or any combination thereof. Industry terminology for a spa includes, but is not limited to, therapeutic pool, hydrotherapy pool, whirlpool, hot spa, or jacuzzi. A spa is either public or privately owned public, as defined in subsections (14)(a) and (b) of this rule.

(13) "Superchlorination" means the rapid addition of a high dose of chlorine to swimming pool or spa waters for the purpose of eliminating combined chlorine levels.

~~(15)~~ (14) "Swimming pool" or "pool" means any structure, basin, chamber, or tank containing an artificial body of water intended for swimming, diving or recreational bathing having a water depth of two feet or more in any portion. ~~This does not include spa pools.~~ For purposes of this sub-chapter, a "swimming pool" or "pool" is either:

(a) "Privately owned public swimming pool or spa" means any swimming pool or spa operated in conjunction with lodging

facilities, (e.g., motels, hotels, campgrounds, apartments, condominiums), health or athletic clubs, or any other non-governmentally owned swimming or bathing facility, or

(b) "Public swimming pool or spa" means any indoor or outdoor structure, basin, chamber or tank containing an artificial body of water intended for recreational bathing, two feet or more in depth at any point, which is used by one or more persons for swimming, bathing, or other recreational activity, operated by a person as owner, licensee, lessee, or concessionaire, whether or not a fee is charged. The term "public swimming pool or spa" does not include swimming pools or spas located on private property used for swimming, bathing, or other recreational activities only by the homeowner, members of his family, or their invited guests; or medicinal hot water baths for individual use.

~~(16)~~ (15) "Turnover" means the period of time, usually expressed in hours, required to circulate a volume of water equal to the spa capacity.

~~(17)~~ (16) "Wading pool" means a pool in which the water depth is less than two feet.

~~(18)~~ (17) "Walls" means the interior pool wall surfaces with slope of no more than 45° from vertical.

~~(19)~~ (18) "Waterline" means:

(a) the middle point of the operating range of the skimmer system if the pool is so equipped; or

(b) the height of the overflow rim.

RULE III (to be codified 16.10.1503) REVIEW OF PLANS

(1) Whenever a ~~public~~ swimming pool, spa, or related facility is constructed, remodeled, or altered, plans and specifications for such construction, remodeling or alteration shall be submitted to the regulatory authority for review and approval before construction, alteration or remodeling is initiated.

(2) The pool or spa and related facilities shall be built in accordance with the plans as approved unless a modification of the approved plans is approved in writing by the regulatory authority. The plans and specifications shall be drawn to scale and accompanied by proper specifications so as to permit a comprehensive review of the plans including the structural detail and shall include, but not be limited to:

(a) A plan and sectional view of both the pool or spa and surrounding area.

(b) A piping diagram showing all appurtenances including treatment facilities in sufficient detail to permit hydraulic analysis of the system.

(c) Specifications containing details on all treatment equipment, including catalog identification of pumps, disinfection feeders, chemical feeders, filters, strainers, and related equipment.

(d) Materials and the finish of the pool or spa, including decks and walkways and details of their construction.

(e) Construction and design details related to bathhouses and other sanitary facilities.

(3) Before the regulatory authority may approve the plans and specifications, the same must be reviewed and approved by the local or state building official having jurisdiction in the area in which the pool or spa is located.

(4) Whenever plans and specifications are required by subsection (1) of this rule, and prior to the operation of the pool or spa, the regulatory authority shall inspect the pool or spa and related facilities to determine whether it was constructed in compliance with the applicable requirements of this sub-chapter and with the approved plans and specifications. On major facilities, (e.g. school, city, county pools or other large or complex facilities, the Department of Health and Environmental Sciences shall perform pre-opening inspections when requested by a local health authority and when the department determines that its own expertise is necessary for an adequate technical inspection.

RULE IV (to be codified 16.10.1504) WATER SUPPLY Same as proposed.

RULE V (to be codified 16.10.1505) SEWAGE Same as proposed.

RULE VI (to be codified 16.10.1506) CONSTRUCTION AND DESIGN (1) - (3)(f) Same as proposed.

(g) ~~Public swimming~~ Swimming pools ~~and semi-public swimming pools~~ having diving equipment shall be designed and provide for a minimum water depth as called for in Table I and Diagram 1, copies of which follow this rule and by this reference are made a part hereof.

(h) - (k) Same as proposed.

RULE VII (to be codified 16.10.1507) AREA REQUIREMENTS, DECK AREAS, HANDHOLDS (1) All swimming pools and spas shall be designed and constructed to withstand all anticipated bather loads. Consideration shall be given to the shape of the pool or spa from the standpoint of safety, the need to facilitate supervision of bathers using the pool or spa, and maintaining adequate recirculation of the pool or spa waters.

(2) The decks of all swimming pools shall have a minimum width of six feet of unobstructed deck area except that ~~semi-public pools~~ privately owned public pools may have a minimum width of four feet of unobstructed deck area, measured from the pool edge.

(3) - (4) Same as proposed.

(5) A fence or barrier shall be provided on the outside of the deck area of all outdoor ~~public~~ swimming pools. All such barriers shall:

(a) be at least 60 inches in height,

(b) have no openings larger than four inches in width, except for doors and gates,

(c) be located beyond the minimum deck space requirements, but shall be located so that the area intended for swimmers can be isolated,

(d) be constructed so that the pool shall be visible through the barrier, and

(e) be constructed so that all openings in the barrier are large enough to permit entry and are equipped with self-closing gates or doors with positive latching closers and locking mechanism at a height of at least four feet six inches above the ground.

(6) The entire deck area shall have a slope of not less than one-fourth inch per foot directed away from the swimming pool or spa edge or sloped to a deck drain. The deck area shall have a non-slip finish.

(7) Foreign material such as grass or dirt shall not be allowed in areas adjacent to ~~public~~ swimming pools or spas unless properly fenced off to prevent access on the part of the bathers. If access is allowed to such areas, facilities shall be provided for the proper cleaning of the bathers' feet before they again enter the bathing areas.

(8) Deck drains ~~Drains~~ shall be provided on all indoor pools and spas and shall be so located that the deck drain will not service more than 400 square feet of the deck. Outdoor pools shall utilize either deck or perimeter drain systems.

(9) - (11) Same as proposed.

RULE VIII (to be codified 16.10.1508) OVERFLOW GUTTERS Same as proposed.

RULE IX (to be codified 16.10.1509) SKIMMERS

(1) Skimmers may be used in place of overflow gutters as a means of skimming and recirculating the water. Skimmers are permitted on ~~public~~ swimming pools if at least one skimming device is provided for each 500 square feet of water surface area or fraction thereof, with a minimum of two skimmers required. The skimmers shall be located at least 30 feet apart. Skimming devices shall be built into the pool wall, shall develop sufficient velocity on the pool water surface to induce floating oils and wastes into the skimmer from the water surface of the entire pool area, and shall meet the following general specifications:

(a) The piping and other pertinent components of the skimmers shall be designed for a total capacity of at least 80% of the required filter flow of the recirculation system

and no skimmer shall be designed for a flow-through rate of less than 30 gallons per minute.

(b) The skimmer weir shall be automatically adjustable and shall operate freely with continuous action to variations in water level over a range of at least four inches. The weir shall be of such buoyancy and design so as to develop an effective velocity.

(c) An easily removable and cleanable basket or screen through which all overflow water must pass shall be provided to trap large solids. The skimmer shall be constructed of sturdy corrosion-resistant materials.

(2) All swimming pools shall be equipped for adding make-up water to the swimming pool as necessary for proper operation of skimmers and gutters.

(3) Spa pools require a minimum of one skimmer per unit.

(4) Each skimmer shall be equipped with an equalizer line or other device to prevent airlock in the suction line should the water of the pool drop below the weir level.

RULE X (to be codified 16.10.1510) STEPS, LADDERS AND HANDRAILS (1) - (4) Same as proposed.

(5) When steps, stepholes, or ladders are provided in the swimming pool or spa, handrails extending over the coping or edge of the deck are required. Where handrails are used in conjunction with steps or stairs, they must extend from the bottom of the last step leading into the pool, over the coping to the edge of the deck.

(6), (7) Same as proposed.

RULE XI (to be codified 16.10.1511) HOSE CONNECTIONS Same as proposed.

RULE XII (to be codified 16.10.1512) RECIRCULATION SYSTEM (1) - (9) Same as proposed.

(10) Drains must be covered by ~~a~~ an anti-vortex grating which is not readily removable by bathers.

(11) - (15) Same as proposed.

(16) No direct connections to sewers shall be permitted and all pool and spa drains to sewers shall be broken at a point where any sewage, which may back up from the sewer, ~~will not~~ can enter the pool or spa piping.

(17) Same as proposed.

RULE XIII (to be codified 16.10.1513) DISINFECTANT AND CHEMICAL FEEDERS The swimming pool or spa shall be equipped with a chlorinator or other continuous disinfectant feeder which meets the following applicable requirements:

(1) Same as proposed.

(2)(a) - (c) Same as proposed.

(d) The gas mask designed for use in a chlorine atmosphere and of a type approved by the ~~U. S. Bureau of Mines~~ Mine Safety and Health Administration (MSHA) or the National Institute of Occupational Safety and Health (NIOSH) shall be provided. In addition, replacement canisters shall be provided and a record shall be kept of gas mask usage to ensure that the mask will be serviceable when needed. The gas mask shall be kept in a closed cabinet, accessible without a key, located outside of the room in which the chlorinator is maintained.

(e) Chlorination equipment shall be installed and operated by or under the supervision of personnel experienced with installation and operation of such equipment.

(f) Chlorine use must also meet all local or other state requirements.

(3) A change in method or type of disinfection must be approved in writing by the regulatory authority.

RULE XIV (to be codified 16.10.1514) FILTRATION EQUIPMENT

(1) - (4) Same as proposed.

(5) All cartridge type filters must be approved by the National Sanitation Foundation or shall be approved as equivalent thereto by the regulatory authority. A minimum of three filters must be ~~present at the facility,~~ provided for each pool or spa, one in use, one which has been cleaned and is ready for use, and one which is being cleaned.

(6), (7) Same as proposed.

RULE XV (to be codified 16.10.1515) CROSS-CONNECTIONS Same as proposed.

RULE XVI (to be codified 16.10.1516) PIPING SYSTEM

(1) The piping system shall be designed to reduce friction losses so that adequate flows are maintained in the piping system. The piping system of the pool shall be painted in distinguishing colors to determine filtered water, make-up water, waste water, vacuum lines and heating lines. The color system for distinguishing the different piping systems in a swimming pool or spa shall be as follows:

(a) green -- filtered water
(b) yellow -- raw or make-up water
(c) black -- waste water
(d) red -- heating lines
(e) blue -- vacuum lines
(f) orange -- unfiltered water

RULE XVII (to be codified 16.10.1517) EQUIPMENT ROOM Same as proposed.

RULE XVIII (to be codified 16.10.1518) WATER TESTING EQUIPMENT Same as proposed.

RULE XIX (to be codified 16.10.1519) HEATING, VENTILATION AND LIGHTING (1) Bathhouses, dressing rooms, shower rooms, and toilet rooms shall be adequately ventilated. Ventilation of indoor swimming pools and spas shall be so designed that bathers will not be subjected to drafts and no buildup of condensation will occur.

(2) All indoor pools or spas and all outdoor pools or spas operated at night shall have artificial lighting sufficient to permit a six inch black disc on a white field to be visible in the deepest part of the pool or spa. Such lights shall be spaced to provide illumination so that all portions of the pool or spa, including the bottom, may be readily seen without glare.

~~(3) No overhead wiring shall pass within 10 feet of the pool or spa enclosure.~~

RULE XX (to be codified 16.10.1520) DRESSING ROOMS, TOILETS, AND SHOWER AREAS (1) The requirements set forth in this rule apply to all public swimming pools and spas and to any privately owned public pools or spas allowing non-members or non-lodging guests to utilize the facility.

(1) - (6) Same as proposed; renumbered (2) - (7).

~~(7)~~ (8) Toilet facilities shall be provided for each sex. Flush water closets and urinals shall be provided and shall be kept clean and properly maintained. The ratio of water closets shall be one closet and one urinal for each ~~70~~ 50 men or portion thereof and one water closet for each ~~40~~ 50 women or portion thereof.

(a) All fixtures shall be properly protected against back siphonage.

(b) All fixtures shall be so designed that they may be readily cleaned and maintained.

(c) Hand washing facilities must be provided and shall include either soap and disposable towels or hand blowers.

~~(8)~~ (9) Separate shower facilities shall be provided for men and women, and shall be so located that bathers must pass from the shower room directly into the swimming pool or spa area. The minimum number of showers provided shall be in proportion of one to 40 bathers or portion thereof.

(a) All showers must be equipped with a mixing valve.

(b) Soap shall be provided for each shower unit.

(c) Where shower booths are provided, the booth partitions shall be of a material which will not be damaged by shower water and shall have a minimum clearance of six inches above the floor.

(d) Shower curtains are not permitted.

~~(9) The requirements of this rule do not apply to semi-public swimming pools or spas.~~

RULE XXI (to be codified 16.10.1521) WASTE DISPOSAL (1) There shall be no direct physical connection between the sewer system and any drain from the swimming pool or spa recirculation system. Any swimming pool or spa ~~gutter drain or overflow from the recirculation system~~ when discharged to the sewer system, storm drain, or other approved drainage source shall connect through a suitable air break so as to preclude the possibility of backflow of sewage or other contaminant into the swimming pool piping system.

(2) Same as proposed.

RULE XXII (to be codified 16.10.1522) BACTERIOLOGICAL AND CHEMICAL QUALITY (1) ~~Public swimming~~ Swimming pool and ~~spas~~ spa waters shall be maintained with a chemical quality sufficient to prevent levels of bacteria from exceeding 200 bacteria per milliliter as determined by the total standard (35° C) agar plate count, or the presence of more than four coliform bacteria per 100 milliliters by the millipore filter method, or show a positive test (confirmed test) for coliform organisms in any of five 10-milliliter portions of a sample when the pool is in use. All samples shall be collected, dechlorinated, and examined in accordance with the procedures outlined in Standard Methods for the Examination of Water and Wastewater (APHA, AWA, WPCA). Not more than two consecutive samples in a one-month period shall exceed the levels specified.

(2) ~~The chemical quality of~~ Chemicals added to the swimming pool or spa water shall not cause irritation of the eyes, skin or mucous membranes of the bathers.

(3) All swimming pools and spas, when open or in use, shall be continuously disinfected by a chemical which imparts a residual effect and shall be maintained in an alkaline condition. Disinfection must be handled by mechanical means. A chlorine residual of 1.0 - 3.0 ppm must be maintained in the pool at all times. A difference of .5 ppm between free and total chlorine readings in swimming pools requires superchlorination. Spa pools shall be superchlorinated daily as necessary which will be indicated by use of a DPD test kit.

(4) - (10) Same as proposed.

RULE XXIII (to be codified 16.10.1523) OPERATION, CLEANING AND MAINTENANCE (1) An accurate report showing the daily operation of the swimming pool or spa shall be maintained at the facility. This report shall include information regarding the sanitation and safety aspects of the pool or spa, including but not limited to disinfectant residuals, pH, maintenance records, and bather load. These reports shall be kept on file for six months for review by the regulatory authority.

(2) All swimming pools , spas, and appurtenances thereto shall be maintained in a clean and sanitary condition at all times.

(3) Visible dirt on the bottom of the swimming pool or spa shall be removed once daily, or more often if necessary to keep the pool or spa bottom clean.

(4) Visible scum or floating material on the surface of the swimming pool or spa shall not be permitted and shall be removed by flushing or skimming or other effective means.

(5) The swimming pool or spa operator shall be responsible for maintaining the sanitary quality of the swimming pool or spa water at all times.

(6) - (8) Same as proposed.

RULE XXIV (to be codified 16.10.1524) SAFETY Same as proposed.

RULE XXV (to be codified 16.10.1525) EQUIPMENT AND PERSONNEL (1) All equipment used in conjunction with the operation of the swimming pool or spa shall be approved by the regulatory authority. An experimental installation may be permitted by the regulatory authority, but should the development fail to produce satisfactory results it shall be replaced with accepted design, equipment, and materials.

(2) Every public swimming pool shall have a trained lifeguard or lifeguards in complete charge of bathing facilities who shall have authority to enforce all rules of safety. The number of lifeguards required shall be based on one per ~~1,500~~ 2,000 square feet of pool area or fraction thereof, with a minimum of one lifeguard at all public pools regardless of size. ~~Semi-public swimming pools greater than 1,500 square feet in area shall also employ and maintain a lifeguard or lifeguards on duty.~~ Lifeguards shall be currently trained in American Red Cross methods of first aid and water safety or its equivalent. Each lifeguard shall be at least 16 years of age. Lifeguards shall be on duty at all times when a swimming pool or bathing place is open for use by the bathers.

(3) ~~Where no lifeguard service is required to be provided to a semi-public pool,~~ Privately owned public swimming pools and spas shall display warning signs ~~shall be placed~~ in plain view and which shall state "WARNING - NO LIFEGUARD ON DUTY" with clearly legible letters at least four inches high. In addition, the sign shall state "CHILDREN SHOULD NOT USE THE POOL WITHOUT AN ADULT IN ATTENDANCE."

(4) Owners and operators of ~~each public and semi-public~~ swimming ~~pool~~ pools or ~~spa~~ spas shall have a designated individual in charge of maintaining safe and sanitary pool conditions.

(5) Every swimming pool shall be equipped with one backboard and one or more ring buoys ~~and one S-hold hook~~ having a

maximum of 15 to 16 inches inside diameter with a one-fourth inch manila line at least equal in length to the maximum width of the swimming pool attached securely to it and kept in good repair. A shepherd's crook or reaching pole shall also be provided. In small swimming pools ~~no more than~~ not exceeding 15 feet in width, a ring buoy with a minimum length of 14 feet of manila throwing line attached may be substituted for a shepherd's crook or for a reaching pole with a minimum length of 14 feet. Such safety equipment must be accessible for immediate use in the pool area.

(6) When a lifeguard is required, an elevated seat for the lifeguard shall be provided in areas between the five feet depth and the deep water and within two feet of the edge of the swimming pool and shall be high enough to give the lifeguard a complete and unobstructed view of the water.

(7) A guard line separating the shallow portion from the deep portion of the swimming pool shall be provided across the pool at the five foot depth.

RULE XXVI (to be codified 16.10.1526) DISEASE CONTROL Same as proposed.

RULE XXVII (to be codified 16.10.1527) FLOW-THROUGH POOLS (1) All flow-through pools built, remodeled or altered after ~~[EFFECTIVE DATE OF THIS RULE]~~ June 28, 1985, shall be equipped with an approved disinfection system.

(2) Pools in existence on ~~[EFFECTIVE DATE OF THIS RULE]~~ June 28, 1985, which rely on a flow-through water exchange mechanism shall:

(a) provide sufficient water volume exchange that will produce a four-hour turnover of the entire volume of pool water to waste, and

(b) meet all bacteriological standards as set forth in subsection (1) of ~~RULE XXII (to be codified~~ 16.10.1522~~)~~. If standards cannot be met, a disinfection device must be installed and utilized.

(3) Flow-through pools in existence and in operation on ~~[EFFECTIVE DATE OF THIS RULE]~~, June 28, 1985, ~~especially hot water mineral pools,~~ shall be maintained to prevent corrosion, algae growth and other mineral accumulation on the pool walls, floor and equipment. Hot water mineral pools are particularly subject to such conditions.

(4) Discharge of pool waste water may be subject to the provisions of the Montana Pollutant Discharge Elimination System (MPDES), ARM Title 16, Chapter 20, sub-chapter 9. Persons whose discharges of pool waste water are subject to MPDES shall comply with ARM 16.20.901 et seq.

RULE XXVIII (to be codified 16.10.1528) WADING POOLS Same as proposed.

RULE XXIX (to be codified 16.10.1529) INSPECTIONS (1) The regulatory authority, after showing proper identification, shall be permitted to enter any ~~public~~ swimming pool or spa at any reasonable time for the purpose of making inspections to determine compliance with th requirement of this sub-chapter. The agent shall be permitted to examine any records pertaining to the operation, maintenance or personnel employed at the pool or spa, and to collect such samples of water as necessary to determine that every public swimming pool or spa complies with the requirements of this sub-chapter.

(2) Whenever an inspection of a ~~public~~ swimming pool or spa is made, the findings shall be recorded on an inspection form. The inspection form shall summarize the requirements of this sub-chapter. If one or more violations are determined to exist, the inspectional remarks shall be marked to reference the violations and shall specify the correction to be made and the date by which the correction is to be made. A copy of the completed inspection report form shall be furnished to the person in charge of the ~~public~~ swimming pool or spa at the conclusion of the inspection. The completed inspection form is a public document that shall be available for public review or distribution upon payment of copying cost to any person on request.

RULE XXX (to be codified 16.10.1530) MISCELLANEOUS Same as proposed.

4. Comments and testimony received by the department, as well as the department's responses, are set forth below.

Comment: Many older pools fall far short of meeting the up-to-date health and safety requirements established by the new rules. As written, Rule I(3) would require such older facilities to comply with the new requirements only if they were remodeled, even if they had been closed for many years, and even if they may have significant public health and safety problems. Rule I(3) should limit this grandfather clause to existing facilities which are in operation as of the effective date of the new rules.

Response: The department concurs with the comment and has amended the rule to require non-operating pools which have been closed for at least the previous swimming season to comply with all the new rule requirements. As amended, the rule will not allow reopening "as is" merely because a pool was in existence prior to adoption of the new rules.

Comment: The department has superceded its statutory authority in its definition of "semi-public swimming pools and

spas." The statute refers to those facilities as "privately owned public swimming pools" and requirements such as lifeguarding are significantly different for those "privately owned public facilities."

Response: The department concurs with this comment and has deleted the definition of "semi-public swimming pool or spa" in favor of a definition for "privately owned public swimming pool or spa."

Comment: The definition of "regulatory authority" should be changed to read "regulatory authority means the department of health and environmental sciences and/or local boards of health and their authorized representatives." Including the word "and" would eliminate the apparent right of a pool operator to demand that regulatory review be done by one or the other agency.

Response: The department declines to make the suggested change because (1) the language of sections 50-53-103 and 50-53-104 does not allow a pool operator to demand a regulatory review by the local official and (2) use of the word "and" would appear to require joint state/county action on all matters.

Comment: The term "superchlorination" is utilized in the proposed rule, however it is not defined. A definition for superchlorination should be written.

Response: The department concurs and a definition for superchlorination has been included.

Comment: Rule XIV, Section (5), should be changed to clarify that three cartridge filters must be kept on premises for each pool or spa unit.

Response: The department concurs and the section has been changed to specifically require three filters for each unit.

Comment: Wiring requirements found in Rule XIX(3) are not compatible with those found in the National Electrical Code.

Response: The department concurs and Section (3) of Rule XIX will be deleted since it is covered by the National Electrical Code, Rule 2.32.401, as adopted by the Montana Department of Administration, Building Codes Division.

Comment: The water closet fixture count found in Rule XX Section (7) is not in agreement with Rule 2.32.303, minimum requirements for plumbing fixtures, as adopted by the department of Administration. Ratios of water closets and urinals should be changed to agree with this rule.

Response: The department concurs and ratios will be changed to match Rule 2.32.303.

Comment: Rule XX, Section (9), will not be consistent with the definition section as the "semi-public" definition will be deleted and replaced by a definition for "privately owned public swimming pools and spas."
Response: The department concurs and subsection (9) of Rule XX has been relocated to subsection (1) and has been rewritten to reflect these definition changes.

Comment: Section (2) of Rule XXII is confusing as to the terms "the chemical quality of the swimming pool" and should be changed to read "chemicals added to the swimming pool or spa . . . " to clarify the intent of the section.
Response: The department concurs and has modified the language accordingly.

Comment: Section (3) of Rule XXII regarding mandatory daily superchlorination of all spas is not reasonable if DPD test kit does not show the need for superchlorination.
Response: The department concurs and will change the section to read "spa pools shall be superchlorinated daily as necessary which will be indicated by use of a DPD test kit."

Comment: Section (2) of Rule XXV regarding the ratio of lifeguards to the number of square feet of pool is too stringent and would unjustifiably increase costs for lifeguards.
Response: The department concurs and has increased the ratio from one lifeguard for each 1,500 square feet of pool area to one lifeguard for each 2,000 square feet of pool area.

Comment: Section (2) of Rule XXV is in conflict with the statute since it exempts "privately owned public" pools and spas from lifeguard requirements.
Response: The department concurs and the sentence requiring semi-public pools greater than 1,500 square feet to provide lifeguard service has been deleted.

Comment: The wording regarding safety equipment, specifically the use of a "S-hold hook" and its dimensions is confusing and should be clarified.
Response: The department concurs and has changed the rule to make it more understandable.

Comment: Rule III, Section(4), should be amended to say that the Department of Health and Environmental Sciences will do pre-opening inspections on all major facilities where the expertise of the local health authority is limited.
Response: The department concurs and the rule has been amended to include this provisions.

Comment: Rule XIII(2)(d) states that U.S. Bureau of Mines approved gas masks are required. The U.S. Bureau of Mines no longer is the approving group for respiratory equipment. The two approving agencies are now the "National Institute of Occupational Safety and Health (NIOSH) and the Mine Safety and Health Administration (MSHA).
Response: The department concurs and section (2)(d) of Rule XIII has been amended as to approving agencies.

Comment: Rule IX should require skimming devices to be equipped with an equalizer line to prevent air lock in the suction line if the water of the pool drops below the weir level.
Response: The department concurs and has amended the rule accordingly.

Comment: Rule XII should also state that drains must be covered by an anti-vortex grate which is not readily removable by bathers.
Response: The department concurs and has amended the rule accordingly.

Comment: The meaning of Rule XII(16) is confusing and the terms "will not" should be replaed with the term "can".
Response: The department concurs and has amended the rule accordingly.

Comment: In Rule X, the way section (5) is written, a facility could put in one small handrail but it would be inadequate to serve a large pool stair area.
Response: The department concurs and has added a new sentence to subsection (5).

Comment: In Rule VII, the current wording of section (6) does not provide for entire deck drainage.
Response: The department concurs and has amended subsection (6) accordingly.

JOHN J. DRYNAN, M.D.

Certified to the Secretary of State June 17, 1985

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

In the matter of the amendment of rules 16.38.301, 16.38.303, 16.38.304, and 16.38.305, setting laboratory fees for air, microbiological, solid and hazardous waste, and occupational health analyses	)	NOTICE OF AMENDMENTS OF RULES 16.38.301, 16.38.303, 16.38.304, AND 16.38.305 (Fees for Laboratory Analyses)

TO: All Interested Persons

1. On April 11, 1985, the department published notice of proposed amendment of rules 16.38.301, 16.38.303, 16.38.304, and 16.38.305, setting state laboratory fees for air, microbiological, solid and hazardous waste, and occupational health analyses, at page 316 of the 1985 Montana Administrative Register, issue number 7.

2. The department has amended the rules with the following changes:

16.38.301 LABORATORY FEES -- AIR (1) Effective July 1, 1985, ~~Fees~~ fees for air quality analyses are as follows:

Type of analysis	Cost
Total suspended particulate (TSP), hi-vol sampler	$ ~~3.50~~ ~~4.80~~ 3.70 per filter
TSP, dichotomous sampler	~~3.40~~ ~~4.60~~ 3.60 per filter
Sulfate in hi-vol filter	~~11.30~~ 14.80 per filter
Nitrate in hi-vol filter	~~11.30~~ 14.80 per filter
Trace metals-one metal	~~10.10~~ ~~11.50~~ 10.70 per filter
Trace metals-each additional metal	~~4.10~~ ~~4.70~~ 4.30 per filter
Fluoride: Paper	~~30.20~~ ~~36.90~~ 32.90
Fluoride: Plate	~~15.20~~ ~~18.60~~ 16.60 per plate
Fluoride: Vegetation	~~52.20~~ ~~63.80~~ 56.90
Sulfur and BTU in coal	~~167.90~~ ~~191.70~~ 177.30
Sulphation rate	~~11.50~~ ~~15.70~~ 12.20 per plate

16.38.303 LABORATORY FEES -- MICROBIOLOGICAL (1) As of July 1, 1985, ~~The~~ the handling fee is ~~$1.50~~ $1.75 per specimen for performance of any microbiological test other than a STAT RUBELLA TEST, FOR WHICH THE FEE IS $6.75, A test of drinking water which is covered by ARM 16.38.302 or the screening tests referred to in subsection (2) of this rule. Microbiological tests include, but are not limited to, diagnostic bacteriology, mycology, parasitology, virology, and immunology analyses.

16.38.304 LABORATORY FEES -- SOLID WASTE AND HAZARDOUS WASTE Effective July 1, 1985, ~~Fees~~ fees for solid and hazardous waste analyses are as follows:

Type of analysis	Cost
EP Toxicity, metals only	~~$63.10~~ ~~73.30~~ 72.20
Ignitability	~~25.20~~ ~~29.30~~ 28.80
~~Vegetable Digestion~~	~~6.00~~

16.38.305 LABORATORY FEES -- OCCUPATIONAL HEALTH Effective July 1, 1985, ~~Fees~~ fees for occupational health analyses are as follows:

Type of analysis	Cost
Blood	~~$22.00~~ ~~25.10~~ 24.00
Cholinesterase	~~1.50~~ 1.75
Formaldehyde	~~11.60~~ ~~14.20~~ 12.60

3. No comments or testimony were received from anyone other than Yvonne Sylva, administrator of the department's Management Services Division, who noted that the originally proposed fee schedule was based, in part, upon an average labor cost, whereas recalculation of the actual cost of each individual test, taking into account the skill and salary level of the person who would actually be assigned to do the particular analysis in question, allowed a reduction in the proposed fee in most cases. She therefore proposed a revised fee schedule based upon the actual cost of conducting each individual test, which was adopted by the department.

JOHN F. McGREGOR, M.D., Chairman

By JOHN J. DRYNAN, M.D., Director
Department of Health and
Environmental Sciences

Certified to the Secretary of State June 17, 1985

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

In the matter of the amendment of rule 16.38.302, laboratory fees for water analyses) NOTICE OF AMENDMENT OF ARM 16.38.302 (Laboratory Fees--Water)

TO: All Interested Persons

1. On April 11, 1985, the board published notice of proposed amendment of rule 16.38.302, concerning state laboratory fees for water analyses, at page 313 of the 1985 Montana Administrative Register, issue number 7.

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

16.38.302 LABORATORY FEES -- WATER Effective July 1, 1985, ~~Fees~~ fees for analysis of water by the department of health and environmental sciences are as follows:

(1) The fee for a standard microbiological (total coliform) analysis is ~~$6.~~ $6.50.

(2) The fee for a fecal coliform analysis is $10.

(3) The fee for a plate count is ~~$20.25.~~ $12.50.

~~(4) The fee for a complete inorganic chemical analysis, consisting of an analysis for arsenic, barium, cadmium, chromium, lead, mercury, nitrate, selenium, silver, fluoride, calcium, sodium, pH, and total alkalinity, is $95.20.~~

~~(5)~~ (4) The fee for a nitrate analysis is ~~$8.50, $11.10,~~ $11.20.

~~(6)~~ (5) The fee for a pesticide-herbicide analysis, consisting of an analysis for endrin, lindane, methoxychlor, toxaphene, 2,4-D, and 2,4,5-TP Silvex, is ~~$204.90, $247.90,~~ $223.10.

~~(7)~~ (6) The fee for a total trihalomethane analysis is as follows:

(a) one analysis, 4 sites: ~~$256.40 $310.20~~ $279.20

(b) one analysis, 1 site: ~~$85.10 $103.00~~ $92.70

~~(8)~~ (7) The fees per analysis to determine the concentration of individual constituents are as follows:

Analysis	Cost per Analysis		
Acidity	$ ~~23.70~~	~~27.50~~	27.10
Alkalinity	~~12.60~~	~~14.60~~	14.40
Aluminum	~~4.10~~	~~4.70~~	4.30
Ammonia	~~8.50~~	~~11.10~~	11.20
Antimony	~~4.10~~	~~4.70~~	4.30
Arsenic	~~10.90~~	~~12.40~~	11.50
Barium	~~4.10~~	~~4.70~~	4.30
Beryllium	~~4.10~~	~~4.70~~	4.30
Biochemical Oxygen Demand (BOD)	~~56.20~~	~~68.70~~	61.20
Boron	~~4.10~~	~~4.70~~	4.30
Cadmium	~~4.10~~	~~4.70~~	4.30
Calcium	~~4.10~~	~~4.70~~	4.30

Chloride	~~13.70~~	~~15.99~~	15.70
Chromium	~~4.10~~	~~4.70~~	4.30
Chromium Hexavalent	~~75.70~~	~~92.50~~	82.60
Cobalt	~~4.10~~	~~4.70~~	4.30
Chemical Oxygen Demand (COD)	~~46.20~~	~~56.40~~	50.40
Color (2 tests - pH adjusted)	~~47.00~~	~~57.40~~	51.30
Copper	~~4.10~~	~~4.70~~	4.30
Cyanide	~~64.40~~	~~73.80~~	65.90
Fluoride	~~13.90~~	~~17.00~~	15.20
Iron	~~4.10~~	~~4.70~~	4.30
Lead	~~4.10~~	~~4.70~~	4.30
Lithium	~~4.10~~	~~4.70~~	4.30
Magnesium	~~4.10~~	~~4.70~~	4.30
Manganese	~~4.10~~	~~4.70~~	4.30
Mercury	~~8.30~~	~~9.50~~	8.80
Mercury Digestion	~~56.80~~	~~64.80~~	60.00
Metals Concentration (per sample)	~~2.40~~	~~2.70~~	2.50
Metals Digestion (except Mercury)	~~9.20~~	~~12.70~~	9.70
Metals scan	~~3.00~~	~~3.40~~	3.20
Molybdenum	~~4.10~~	~~4.70~~	4.30
Nickel	~~4.10~~	~~4.70~~	4.30
Nitrate	~~8.50~~	~~11.10~~	11.20
Nitrogen Kjeldahl	~~19.70~~	~~25.70~~	26.00
Oil and Grease	~~32.10~~	~~39.20~~	35.00
Ortho-Phosphorus	~~6.00~~	~~7.80~~	7.90
PCB	~~70.50~~	~~85.30~~	76.80
PCP	~~102.50~~	~~124.00~~	111.60
Petroleum	~~70.50~~	~~85.30~~	76.80
pH	~~1.46~~	~~1.90~~	1.50
Phenols	~~82.30~~	~~100.60~~	89.80
Total-Phosphorus	~~10.10~~	~~13.20~~	13.30
Potassium	~~4.10~~	~~4.70~~	4.30
Presumptive cyanide	~~7.00~~	~~8.50~~	7.60
Purgable organic	~~85.10~~	~~103.00~~	92.70
Selenium	~~10.90~~	~~12.40~~	11.50
Silica	~~4.10~~	~~4.70~~	4.30
Silver	~~4.10~~	~~4.70~~	4.30
Sodium	~~4.10~~	~~4.70~~	4.30
Specific Conductance	~~2.00~~	~~2.70~~	2.10
Strontium	~~4.10~~	~~4.70~~	4.30
Sulfate	~~9.30~~	~~12.20~~	12.30
Sulfide	~~85.90~~	~~105.00~~	93.70
Tin	~~4.10~~	~~4.70~~	4.30
Total Suspended Solids	~~14.39~~	~~19.50~~	15.20
Turbidity	~~4.50~~	~~6.10~~	4.30
Vanadium	~~4.10~~	~~4.70~~	4.30
Zinc	~~4.10~~	~~4.70~~	4.30
Pesticides (Lindane, Endrin, Toxaphene, Methoxychlor) - first analysis per sample	~~70.50~~	~~85.30~~	76.80

each additional analysis per sample	~~6.40~~	~~7.70~~ 7.00
Herbicides (2,4-D, Silvex) - first analysis per sample	~~102.50~~	~~124.00~~ 111.60
each additional analysis per sample	~~12.70~~	~~15.40~~ 13.80
Total organic carbons (TOC)	~~15.80~~	~~18.46~~ 18.10
Total organic halogens (TOX)	~~12.80~~	~~16.70~~ 16.90

~~(9)~~ (8) The fees specified in subsections (1) through ~~(8)~~ (7) of this rule may be lowered by the department of health and environmental sciences when larger batches of samples warrant lower fees.

3. No comments or testimony were received from anyone other than Yvonne Sylva, administrator of the department's Management Services Division, who noted that the originally proposed fee schedule was based, in part, upon an average labor cost, whereas recalculation of the actual cost of each individual test, taking into account the skill and salary level of the person who would actually be assigned to do the particular analysis in question, allowed a reduction in the proposed fee in most cases. She therefore proposed a revised fee schedule based upon the actual cost of conducting each individual test, which was adopted by the board.

JOHN F. McGREGOR, M.D., Chairman

By
JOHN J. DRYNAN, M.D., Director
Department of Health and
Environmental Sciences

Certified to the Secretary of State June 17, 1985

BEFORE THE BOARD OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the adoption of an emergency rule pertaining to a brucellosis test performed on livestock before they are moved or sold in Montana.	NOTICE OF THE ADOPTION OF AN EMERGENCY RULE WAIVING IN FLATHEAD COUNTY THE REQUIRED BRUCELLOSIS TEST ON CATTLE BEFORE CHANGE OF OWNERSHIP OR MOVEMENT WITHIN THE STATE.

TO: All Interested Persons.

1. On October 4, 1983, and November 21, 1984 the Board of Livestock took emergency action for economic reasons to the livestock industry, eliminating intrastate change of ownership and change of movement testing in the 55 counties recommended for USDA recognition as a brucellosis "FREE" area. This change relieved cattlemen of the economic burden of testing, which had cost upwards of 15 million dollars in eight years.

According to federal regulations, before an area may be granted a federal classification of BRUCELLOSIS "FREE", it must have had no known natural brucellosis infections for 12 months or longer.

Montana was subsequently granted federal dual status brucellosis recognition, with 55 counties "FREE" and one county "A". This recognition then eliminated the test requirement for both interstate and intrastate sales. Montana has now been notified that effective June 1, 1985 Flathead county was accepted for inclusion in the federally recognized "FREE" area. Continued requirement of brucellosis testing in the proposed BRUCELLOSIS "FREE" area would therefore be an unnecessary economic hardship.

The Board of Livestock finds this matter to be an economic emergency, and in the interests of eliminating or preventing a peril to the welfare of the cattle industry of Montana, and in order to allow cattle producers in the new "FREE" area the same economic relief being enjoyed by producers in the 55 county area, the Board of Livestock proposes to take emergency action. The Board can, by their action of dropping test requirements in Flathead county relieve these producers of the economic burden of meeting change of ownership and change of movement brucellosis tests. Therefore, for the reasons stated above, the Board of Livestock intends to adopt the following emergency rule removing the test requirement.

2. The text of the rule is as follows:

32.3.407A CHANGE OF OWNERSHIP TEST (1) In the county of ~~Flathead~~ (none as of June 6, 1985) before ownership of animals listed in (2) is changed or before the animals are moved to Montana premises located in a Class Free area they must undergo an official test for brucellosis and must be determined negative. The test must be performed not more than 30 days prior to the date they are sold or moved and the results must be entered on a department official test form.

(2). Remains the same.
(3). Remains the same.
(4). Remains the same.

AUTH: 81-2-102, 81-2-103 MCA IMP: 81-2-102, MCA

The emergency action is effective June 6, 1985.

NANCY ESPY, Chairman
Board of Livestock

By:
LES GRAHAM
Executive Secretary to Board of Livestock

DONALD P. PERLICKA, D.V.M.
Administrator & State Veterinarian
Animal Health Division

Certified to the Secretary of State June 6, 1985.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of rules to implement the Video Draw Poker Machine Control Law of 1985.	NOTICE OF THE ADOPTION OF EMERGENCY RULES

TO: All Interested Persons:

1. Statement of reasons for emergency: On May 13, 1985, the Governor signed House Bill No. 236, which enacted the Video Draw Poker Machine Control Law of 1985. House Bill No. 236 makes the use of certain specific types of video draw poker machines legal in Montana and provides for a license fee, a part of which will be apportioned to the local governing entity of the county, city, or town in which the machine is located. House Bill No. 236 is effective July 1, 1985.

The Department of Revenue is required by House Bill No. 236 to adopt rules to administer and enforce the provisions of the law. The Department has had insufficient time between the close of the legislative session and the effective date of the law to promulgate permanent rules. The Montana Administrative Procedure Act's provisions for promulgating administrative rules prevents the adoption of permanent rules before August 19, 1985.

The Department finds that the lack of permanent rules between the effective date of the law and the adoption of permanent rules poses an imminent peril to public health, safety, and welfare. The Department therefore adopts these rules as emergency rules in order to protect the health, safety, and welfare of the public, to prevent economic hardship to potential licensees and local governments, and to provide the video draw poker machine industry with guidelines in this new area of law.

Permanent rules will be promulgated by the Department at a later date with opportunity for public comment and a public hearing.

2. The emergency rules as adopted provide as follows:

RULE I STATEMENT OF DEPARTMENT POLICY The public health, safety, and welfare, is the primary consideration in promulgating electronic video draw poker machine rules and shall continue to be the primary consideration in their application and enforcement.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Sec. 7, Ch. 720, L. 1985.

RULE II DEFINITIONS (1) As used throughout this chapter, the following definitions apply:

(a) "Act" means the Video Draw Poker Machine Control Law of 1985.

(b) "Applicant" means any person who has applied for or is about to apply for a license for a video draw poker machine.

(c) "Draw poker" means a game of poker in which each player makes a wager, then is dealt 5 cards. After the initial deal, the player may raise his wager (if that option is available), discard one or all unwanted cards and then receive in return that same number of cards prior to playing out the hand.

(d) "License" means machine license.

(e) "Machine" means an electronic video draw poker device (as defined in the act) or any other electronic or mechanical device which simulates the game of poker.

(f) "Machine license" means a license issued by the state of Montana which authorizes a specific machine to be operated as an electronic video draw poker machine.

(g) "Simulates the game of poker" means plays by or mimics the generally accepted rules or methods of any of the various card games known as "poker", whether played against another player or the house. Methods include, but are not limited to, symbols used for or in place of images of playing cards, description, and wagering techniques. For purposes of this definition, a determination that a machine plays the game of poker is not solely based on the name of the game.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Sec. 7, Ch. 720, L. 1985.

RULE III APPLICATION FOR LICENSE, LICENSE FEE, AND LICENSE (1) An application to license an electronic video draw poker machine must be submitted to the video draw poker program of the department of revenue upon forms prescribed by the department. The application is not complete unless it is dated and signed by the applicant, and contains all information and statements required by the department.

(2) A separate application must be completed for each machine.

(3) The license fee required by section 10, chapter 720, L. 1985, must accompany each license application.

(4)(a) A machine licensed under section 12, chapter 720, L. 1985, must comply with all required specifications in these rules and the act except section 3, subsections (4)(j), (k), and (o), chapter 720, L. 1985.

(b) A license issued under section 12, chapter 720, L. 1985, will be issued for one year from the date of issuance.

(c) Further licensure of a machine licensed for one year under section 12, chapter 720, L. 1985, requires adding the ticket voucher printer required at section 3, subsections (4)(j), (k), and (o), chapter 720, L. 1985.

(5) A machine licensed under section 10, chapter 720, L. 1985, must comply with all specifications of section 3, chapter 720, L. 1985 of the act and these rules.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7, 8, and 10, Ch. 720, L. 1985.

RULE IV PRORATION OF LICENSE FEE (1) An applicant must state the month the electronic video draw poker machine is intended to be placed in service.

(2) The license fee paid must be equal to the number of months remaining in the license year multiplied by $125. The license year commences July 1 and expires at midnight of June 30.

(3) No proration is allowed which would cause the license to expire before June 30. No license shall be issued for a partial year or seasonal period which expires before June 30.
AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7, 10, Ch. 720, L. 1985.

RULE V REFUND OF LICENSE FEE Refund of a license fee will be allowed only if the application for license is denied or withdrawn before issuance of the license. No license fee, in part or whole, will be refunded after a license is issued, regardless of whether the license is used after issuance.
AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs 7, 10, Ch. 720, L. 1985.

RULE VI DISTRIBUTION OF LICENSE FEE TO LOCAL GOVERNING BODY The department shall pay quarterly to each treasurer of the local governing body the proportion of the license fee provided by section 10, subsection (2), Chapter 720, L. 1985.
AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs 7, 10, Ch. 720, L. 1985.

RULE VII ISSUANCE OF LICENSE DECAL (1) Upon approval of an application and payment of a license fee, the department will issue a license decal.

(2) The licensee must affix the license decal to the machine cabinet as instructed by the department so that the decal is visible and easily read. The machine may not abut another machine, wall, or other obstruction which would obscure a person's ability to see and read the license decal.

(3) The license decal must be affixed to a machine before a machine is placed in service.

(4) A license decal may only be affixed to the machine licensed and is not transferable to any other machine.
AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7, 10, Ch. 720, L. 1985.

RULE VIII AUTHORITY TO OPERATE (1) When temporary authority to operate an establishment licensed for on-premises consumption of alcoholic beverages is granted by the department of revenue, liquor division, pursuant to § 16-4-404(6), MCA, and ARM 42.12.208, the recorded owner of the alcoholic beverages license in transfer remains responsible for the legal operation of electronic video draw poker machines licensed under his name until the day the alcoholic beverage license transfers to the new owner.

(2) Issuance of temporary authority to operate does not entitle the recipient of that authority to be a licensee under the act. The person issued temporary authority must apply for a machine license. The application shall not be approved until the alcoholic beverages license transfers from the recorded owner.

(3) The licensee may permit the person issued temporary authority to manage the licensee's machines pending transfer of the alcoholic beverages license. However, the licensee remains responsible for the legal operation of a machine and the person issued temporary authority may only act as the licensee's agent. AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7, 8, 10, Ch. 720, L. 1985.

RULE IX LICENSE NOT TRANSFERABLE (1) A license to operate an electronic video draw poker machine is only valid for the licensee and the premises identified on the license application.

(2) A license is further restricted to the particular machine approved by the department and identified on the license application.

(3) A license issued pursuant to the act and these rules is a privilege and not personal property.

(4) A machine may not be moved from a licensee's establishment and placed in service at another establishment unless application is made for an electronic video draw poker machine license describing the new location, the machine is inspected, the license fee is paid, and a new license is issued. A new license is required even if a machine has a current, unexpired license for the former location.

(5) If a machine is destroyed and then replaced by a newly licensed machine, the unused portion of the fee paid on the destroyed machine will be applied as a credit to the fee due on the replacement machine. The department may require proof of destruction before credit is applied.
AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7, 8, 10, Ch. 720, L. 1985.

RULE X EXPIRATION -- RENEWAL OF LICENSE (1) All licenses, except licenses originally issued under section 12, chapter 720, L. 1985, expire at midnight of June 30.

(2) An application for a new license must be submitted to the video draw poker program of the department upon forms prescribed by the department, the license fee paid, new license issued, and a new license decal affixed to the machine before a previously licensed machine may be operated after midnight of June 30.

(3) The department will consider the same criteria for renewal of license as for the original issuance of license. Failure to satisfy licensing criteria contained in the act and these rules may result in denial of renewal of license.
AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7, 10, Ch. 720, L. 1985.

RULE XI LICENSEE BUSINESS RELATIONSHIPS (1) The department may deny an application or revoke, suspend, restrict, or limit a license or approval of a machine when it finds that a business relationship between a licensee and another person or business entity is unsuitable or endangers the health, safety, or welfare of the citizens of this state. In determining the suitability of

other persons or business entities in a business relationship, the department may consider the person or business entity's:

(a) general character, including honesty and integrity;

(b) financial security and stability, competency, and business experience in the capacity of the relationship;

(c) record, if any, of violations which may affect the legal and proper operation of a machine including a violation affecting another licensee and any violation of the laws of this state, other states, and countries without limitations as to the nature of the violation;

(d) refusal to provide access to records, information, equipment, or premises to the department or peace officers when such access is reasonably necessary to ensure or protect public health, safety, or welfare.

(2) The licensee remains responsible for the legal operation of a machine and is liable for any violation involving a machine or its operation.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7, 11, Ch. 720, L. 1985.

RULES XII LICENSEE QUALIFICATIONS - DENIAL OF APPLICATION -- NONRENEWAL OF LICENSE - FAIR HEARING -- JUDICIAL REVIEW (1) When the department's video draw poker program denies an application for license or renewal of license, the applicant may request a fair hearing. Upon the department's receipt of written request, a fair hearing shall be conducted in accordance with the provisions of the Montana Administrative Procedure Act.

(2) Administrative procedures conducted by the department are subject to judicial review in accordance with the provisions of the Montana Administrative Procedure Act, title 2, chapter 4, part 7, MCA.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7, 8, 10, Ch. 720, L. 1985.

RULE XIII QUARTERLY REPORTING REQUIREMENTS Licensee quarterly reporting requirements are as follows:

(1) For each machine the licensee or his representative must file with the department a quarterly video draw poker machine meter report signed by the licensee. The forms prescribed and supplied by the department require readings from the mechanical meters as required by section (3), subsection (4)(l), chapter 720, L. 1985, and the electronic meters as required by section (3), subsection (4)(m), chapter 720, L. 1985. The report will be used by the department to verify the winning percentage of the machine as required by section 4, chapter 720, L. 1985. The following requirements apply:

(a) the report must be delivered to the department of revenue, video draw poker program, Mitchell Building, Helena, Montana 59620, or bear a United States postal service postmark not later than midnight of the 15th of each month following the quarters ending March 31, June 30, September 30, and December 31 of each calendar year;

(b) the meter reading must be taken and recorded for the report within 7 days of the close of the licensee's last day of business in the reporting quarter; and

(c) the report is due on each machine after it has been licensed regardless of whether the machine was in use during a subsequent quarter of the licensed year.

(2) If a licensee leases, rents, or shares machine ownership, or a machine's revenues with another person or business entity, the licensee or his representative must provide upon the same form prescribed by the department in subsection (1) above, quarterly information for each machine as follows:

(a) full identification including name, address, and social security number (or federal identification number) of all persons or business entities involved in the above-mentioned business relationship;

(b) percentages of participation in machine income by each person or business entity involved in the above-mentioned business relationship; and

(c) specific machine income (total collections less amounts paid to players without adjustment for expenses) paid to or received by each person or business entity involved in the above-mentioned business relationship.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Sec. 7, Ch. 720, L. 1985.

RULE XIV RECORD RETENTION REQUIREMENTS Record requirements are as follows:

(1) Machine operation records must be maintained and made available for inspection by the department upon request. The records must provide all necessary information the department may require to ensure operation of machines in compliance with the law.

(2) The records must, but are not limited to, include:

(a) the accounting ticket provided by section 3, subsection (4)(o), chapter 720, L. 1985, and corresponding licensee records containing the performance synopsis of the machine;

(b) the auditor copy of the printed ticket voucher as provided by section 3, subsection (4)(k), chapter 720, L. 1985; and

(c) in the event a licensed machine qualifies as a used video machine which will not require the ticket copies, records and books necessary to provide the performance synopsis of the machine. The information shall be obtained from the electronic and mechanical meters required by section 3, chapter 720, L. 1985, and must be recorded each time the cash area is accessed.

(3) The licensee's records required by this rule must be maintained in the state of Montana by the licensee or his representative for a minimum of 3 years.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Sec. 7, Ch. 720, L. 1985.

RULE XV GENERAL SPECIFICATIONS OF VIDEO DRAW POKER MACHINE Detailed specifications for video draw poker machines are required by the department in addition to those specifications provided at chapter 720, L. 1985. Such specifications are required to ensure the legal operation and integrity of each

machine and provide the department with methods to monitor the machines.

(1) All hardware and software modifications made to a licensed video draw poker machine must be submitted to the department for approval prior to installation.

(2) The department may revoke, suspend, restrict, or limit license or approval at any time when it finds that any machine or machine component does not comply with statutes and rules governing electronic video draw poker machines. The department may also revoke, suspend, restrict, or limit the licenses or approval of other similar model machines or machine components in use in the state.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Sec. 3, Ch. 720, L. 1985.

RULE XVI HARDWARE SPECIFICATIONS A video draw poker machine must include the following hardware specifications:

(1) All electrical and mechanical parts and design principles shall follow acceptable industrial codes and standards in both design and manufacture.

(2) A video draw poker machine shall be designed to ensure that the player will not be subjected to any physical, electrical, or mechanical hazards.

(3) A machine shall be equipped with a surge protector that will feed all A.C. electrical current to the machine and a battery backup power supply to maintain the accuracy of all electronic meters displaying information required by the act and these rules during power fluctuations and loss. The battery must be in a state of charge during normal operation of the machine.

(4) The design of a machine shall ensure there are no readily accessible game function related points which would allow any input and that there is no access to input or output circuits unless it is necessary for the proper operation of the machine.

(5) The nonresetable mechanical meters required by section 3, subsection (4)(1), chapter 720, L. 1985, must meet the following specifications:

(a) either the meters must be located so they can be viewed and read externally from the front of the machine or the keys to the cash area must be immediately available at the licensed premises;

(b) the meters shall be situated in a left to right or top to bottom configuration according to function and visibly labeled as follows:

(i) coins in;

(ii) credits played;

(iii) credits won;

(iv) credits paid; and

(c) the mechanical meters shall be manufactured in such a way as to prevent access to the internal parts of the meter.

(6) The department may require and provide a validating identification sticker to be attached to the mechanical meters to verify the meters are assigned to a specific licensed machine.

(7) A machine must have a separate and locked area for the logic board and software as provided by section 3, subsection

(4)(g), chapter 720, L. 1985. The department must be allowed immediate access to this locked area. Access may be provided by retaining a key for the locked area immediately available at the licensed premises.

(8) The ticket printing mechanism provided in section 3, subsection (4)(j), chapter 720, L. 1985, must be located in the locked logic area to ensure the safekeeping of the audit copy provided by section 3, subsection (4)(k), chapter 720, L. 1985. The printing mechanism must produce a printed original and duplicate that will remain legible throughout the retention period required by these rules.

(9) The logic and printer interface boards shall be mounted within the logic area so they are not visible upon opening the logic area door.

(10) A machine must have a nonremovable identification device externally attached to the machine which shall include the following information about the machine:

(a) manufacturer;
(b) serial number;
(c) model or make; and
(d) any other information required by the department.

(11) The logic board must have a unique serial number that may be used to identify the board for approval and inspection purposes. The serial number shall be in 10 symbol configuration. The first 4 symbols shall identify the manufacturer and the last 6 symbols shall identify the board.

(12)(a) The electronic meters provided in section 3, subsection (4)(m), chapter 720, L. 1985, shall be able to maintain totals no less than 8 digits in length with the exception of the following which shall be at least 6 digits in length:

(i) one pair;
(ii) two pair;
(iii) three of a kind;
(iv) straight;
(v) flush;
(vi) full house;
(vii) four of a kind;
(viii) straight flush;
(ix) five of a kind; and
(x) errors from the logic board random access memory.

(b) In addition to the above totals, the electronic meters for all machines not licensed under section 12, chapter 720, L. 1985, must keep 2 additional 6 digit totals:

(i) the number of times the logic board was accessed; and
(ii) the number of times the cash area was accessed.

(13) Printing of all totals from the electronic meters shall occur automatically, by means of a switch attached to either the door or the lock for that door each time access to either the logic compartment or the cash area occurs.

(14) Any necessary resetting of electronic meters shall be done in a manner that is easily verifiable by the department.

(15) The face of each machine shall be clearly labelled so as to inform the public that no one under the age of 18 years is allowed to play.

(16) The printer mechanism shall have a paper sensing device that will prevent play if there is insufficient paper to print a ticket for a customer or an audit ticket. Upon sensing a "paper low" or "paper out" condition, the machine must display a message to that effect on the monitor.
AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 3, 4, Ch. 720, L. 1985.

RULE XVII SOFTWARE SPECIFICATIONS A machine is required to possess software specifications that enable it to play the game of draw poker with the operation set forth by section 3, subsection (4), chapter 720, L. 1985. The software logic must have the following characteristics:

(1) The logic of the program must not intervene in any way with expected random play.

(2) The random number selection process shall conform to an acceptable random order of occurrence and uniformity of distribution.

(3) The deck of cards used must consist of 52 standard playing cards. Jokers may also be used as long as the payback odds are set to meet the 80% minimum payback.

(4) After the shuffle and before the deal, the deck is to be frozen, with all cards used for play taken in order from the top of the deck. For the initial 5 card deal, all possible 5 card combinations from the original playing deck must have equal probability of being dealt. All unused cards must have equal probability of replacing discarded cards.

(5) The logic must be programmed to have an identifiable routine that:

(a) shuffles one deck of cards after each hand by using a random number generator;

(b) deals the first 5 cards from the top of that deck; and

(c) replaces discarded cards with remaining cards in that deck starting with the sixth card and drawing any additional cards in the order of that deck.

(6) If there is a distinction made for payoff purposes between a straight flush and a royal flush, provisions must be made in the electronic meters to track those totals separately.

(7) Any variable data, e.g., location name at top of display shall not reside on the PROM modules that contain the poker program.
AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs 3, 4, Ch. 720, L. 1985.

RULE XVIII SOFTWARE INFORMATION TO BE PROVIDED TO THE DEPARTMENT A licensee may be required to provide information to the department necessary to ensure the machine's software and logic are in compliance with the act and these rules. The information may be provided directly by the licensee, the distributor or the manufacturer of the machine. The information shall include, but not be limited to:

(1) all technical manuals, instructions, wiring, and logic diagrams for the machine;

(2) all microprocessor manuals;

(3) all source listings, including programmer's comments, and flow charts for the poker programs and printer routines;

(4) a hexadecimal dump of all compiled programs;

(5) model PROM's containing compiled poker programs, character sets, including those that may reside on the printer interface board;

(6) access to a compiler for the programming language used if the department is unable to compile the program with the equipment it has available;

(7) the algorithm for the random number generator along with a written description;

(8) a photo or drawing of the display which shows all setup, test modes with detailed written descriptions and instructions;

(9) a listing of the payback values and the probabilities of the outcome of winning hands for the program logic used;

(10) the schedule of proposed payout odds and overall payback percentage;

(11) tabulated results of 5 separate simulations of not less than 200,000 hands of poker using the poker program;

(12) instructions on the means, including assumptions made, by which the simulations in subsection (11) were created so the department can verify the simulation results; and

(13) a description of the methods of all testing criteria if performed and the results of the tests for the following:

(i) random number generator;

(ii) electromechanical interference;

(iii) radio frequency interference;

(iv) FCC standards;

(v) A.C. line noise;

(vi) static electricity; and

(vii) extreme temperature conditions.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 3, 4, 7, Ch. 720, L. 1985.

RULE XIX RESTRICTIONS ON OPTIONAL GAME FORMAT OR FEATURES (1) A machine shall only offer the game of draw poker as provided by the act and these rules and shall not offer any other game or variant which will award free games or credits that may be redeemed by a player. This restriction applies to bonus, progressive, or any other means of awarding games or credits which deviates from the award of games or credits for a winning hand of draw poker.

(2) The department shall determine what optional features may be allowed and such features must be approved by the department prior to inclusion in a machine's game format.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP. Secs. 3, 4, Ch. 720, L. 1985.

RULE XX PROHIBITED MACHINES (1) Any machine including amusement machines which, in substance, simulates the game of poker without conforming to the requirements of the act and is placed in service for play by the public is prohibited. The

machine is subject to immediate seizure and destruction in accordance with the provisions of §§ 23-5-121 and 23-5-122, MCA.

(2) Any person who owns or operates a machine described in subsection (1) is in violation of the act, these rules and title 23, part 3, MCA. The civil and criminal penalties provided in those titles shall apply.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 3, 4, 5, 7, 11, Ch. 720, L. 1985.

RULE XXI POSSESSION OF UNLICENSED MACHINES BY MANUFACTURER, SUPPLIER, DISTRIBUTOR, OWNER, OR REPAIR SERVICE A manufacturer, supplier, distributor, owner, or repair service may possess or own unlicensed machines, logic boards, meters, and machine components which conform to the statutory requirements and rules relating to electronic video draw poker machines. Such machines possessed or owned may not be operated except when inspected, licensed, and placed on a licensee's premises.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Sec. 7, Ch. 720, L. 1985.

RULE XXII LOCATION OF MACHINES ON PREMISES (1) An electronic video draw poker machine must be placed in such a manner that:

(a) each machine remains within the sight and control of the licensee or employees of the licensee;

(b) each machine is segregated from amusement machines in such a manner that a minor who tries to play a machine is immediately observed by the licensee or the licensee's employees; and

(c) public access is, to the greatest extent possible, limited to persons over the age of 18.

(2) If a licensee's premises are operated in conjunction with another business, a machine must be confined to that part of the premises that is used primarily for the consumption of alcoholic beverages.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7, 9, Ch. 720, L. 1985.

RULE XXIII CONDITIONAL APPROVAL OF VIDEO DRAW POKER MACHINES BY DEPARTMENT (1) The department may conditionally approve specific models of machines based on its finding that the machines conform to the act and these rules.

(a) Final approval of each machine is required even if a machine has been conditionally approved.

(b) Conditional or final approval may be withdrawn by the department subsequent to finding that a machine does not conform to specifications, including new or revised requirements that differ from those in effect at the time conditional or final approval was granted.

(2) Approval includes inspection of the hardware and software and all information provided to the department under rule XVIII to determine whether a machine meets all requirements of the act and these rules.

(3) The department may accept shipment of a machine for the purpose of providing conditional approval of that particular make or model provided the following conditions are met:

(a) the department will not be responsible for any purchase, shipping, or handling charges;

(b) all the information required in rule XVIII must accompany the machine; and

(c) prior to shipment, the department approved such shipment of a machine for scheduled testing and approval.

(4) New rules may be adopted which redefine or set forth new specifications that previously approved machines do not comply with. In such cases, and only in such cases, the department shall allow up to 90 days for a licensee to bring a machine into compliance with a new or modified specification.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 3, 7, Ch. 720, L. of 1985.

RULE XXIV DISSEMINATION OF INFORMATION (1) Certain information collected by the department is known to contain confidential information. The information in subsection (2) is confidential and may not be revealed by the department except under order of a court of competent jurisdiction.

(2) Information designated as confidential includes but is not limited to the following:

(a) technical manuals, instructions, wiring, or logic diagrams for the machine;

(b) listings of source codes and flow charts;

(c) results of simulations and related information explaining simulation methodology;

(d) model PROMS or logic boards containing compiled programs; or

(e) background information on applicants, licensees, and business relationships.

(3) Information relating to the results of actual operations as shown on a machine's meters is not confidential and may be used to compile studies or reports.

(4) Persons with access to confidential information as described in subsection (2) may not use or reveal anything of a confidential nature outside the scope of its intended purpose.

(5) The department shall secure confidential information and restrict all persons from access, except designated employees whose duties include testing and interpretation of the information. Such information is not public record and may not be released to any member of the public.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 3, 7, Ch. 720, L. 1985.

RULE XXV REPAIRING MACHINES - APPROVAL (1) When the department approves the software and logic board of a machine, it may use a prescribed security seal process to guard against any unauthorized tampering or changes to the method by which the game of draw poker is played on the machine.

(2) Any repair made to a machine's logic board which requires the breaking of a department seal must be reported to the department before the seal is removed or broken. At that time, readings of the machine's electronic meters and mechanical

meters must be provided to the department. After repair, the logic board must be reapproved by the department and initial electronic and mechanical meter readings provided to the department before the machine is again placed in operation on the licensee's premises.

(3) Any repair or replacement made to a machine's meters must be reported to the department before a seal is removed or broken and the readings of the machine's electronic and mechanical meters must be provided to the department. After repair, the initial readings of the electronic and mechanical meters must be provided before the machine is again placed in operation. The department must subsequently be given access to the machine to reseal the meters and verify their proper operation.

(4) To assure the integrity, security, and monitoring of machines in service, a licensed machine may not be substituted or replaced until the replacement machine has been licensed by the department.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 3, 7, Ch. 720, L. 1985.

RULE XXVI DEPARTMENT INVESTIGATORS - PEACE OFFICER STATUS In accordance with section 7, subsection (4), chapter 720, L. 1985, the department designates all its investigations program investigators as "peace officers" for the purpose of this act.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7(4), Ch. 720, L. 1985.

RULE XXVII INSPECTION AND SEIZURE OF MACHINES (1) The department or its duly authorized representative has the right at all times to make an examination of any machine being used to play or simulate video draw poker. Such right of inspection includes immediate access to all machines and unlimited inspection of all machine parts. The department or its authorized representatives may immediately seize and remove any machine or device which violates state law or these rules.

(2) Given reasonable cause, the department may remove a machine or parts from a machine for laboratory testing and analysis. When parts are removed, the department may seal any machine left on the licensee's premises pending the department's investigation. The breaking or removal of the department's seal will subject the licensee to seizure of the entire machine and suspension or revocation of the license.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7, 11, Ch. 720, L. 1985.

RULE XXVIII INVESTIGATION OF LICENSEE The department may, upon its own motion, and shall upon receipt of a written, verified complaint of any person, investigate the actions of any licensee and the operations of any machine. The investigation shall be undertaken for the purpose of gathering evidence and determining whether a violation of the act or these rules has occurred.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 11, Ch. 720, L. 1985.

RULE XXIX CIVIL VIOLATIONS -- CRIMINAL CITATIONS (1) When the department determines a licensee has violated the act or these rules, the department shall issue a civil violation to the licensee.

(2) A violation may be issued for, but is not limited to the following acts:

(a) the operation of an unlicensed machine;

(b) the use of more than 5 electronic video draw poker machines on a premises;

(c) allowing a person under the age of 18 years to play a machine;

(d) the falsification of application or reporting documents;

(e) the refusal to allow inspection of a machine;

(f) the failure to comply with documentary reporting requirements;

(g) the destruction of printed ticket voucher and accounting ticket copies as referred to in section 3, subsections (4)(k) and (o), chapter 720, L. 1985; or

(h) the failure to comply with any provision of the act or these rules.

(3) Any person, including licensees, their agents, servants, or employees may be arrested by a peace officer of this state for tampering with a machine, attempting or conspiring to manipulate the outcome or payoff of a machine by physical tampering or other interference with the proper functioning of a machine.

(4) When the department's investigator has reasonable cause to believe a person has committed a crime as provided at section 11, subsection (2), chapter 720, L. 1985, the investigator may exercise his powers as a peace officer, in accordance with the provisions of the act, and issue criminal citation.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs. 7, 11, Ch. 720, L. 1985.

RULE XXX PENALTIES FOR CIVIL VIOLATION ISSUED BY DEPARTMENT (1) The department may suspend a license after opportunity for fair hearing when:

(a) the department receives:

(i) a certified copy (or other credible evidence) of any judgment or conviction of any licensee or his agent, servant, or employee for any violation of any criminal law or ordinance of the United States, the state of Montana or of any Montana county, city, or town relating to video draw poker machines; or

(ii) a certified copy of the record (or other credible evidence) of the forfeiture by any licensee or his agent or employee of bond to appear to answer charges of violating any law or ordinance relating to video draw poker machines; or

(b) the department, after investigation, has reasonable cause to believe that any licensee, his agent or employee has

violated the provisions of the act or these rules and issue violation or citation.

(2) The department may suspend a license prior to the opportunity for fair hearing when the department, after investigation, has reasonable cause to believe continued operation of the licensed machine endangers public health, safety, and welfare. During the period of suspension, the licensee shall not operate such machine.

(3) A license may be revoked, subsequent to opportunity for a fair hearing, as penalty for violation of the act or these rules. In addition to the penalties provided in this section, a machine may be seized and treated in accordance with §§ 23-5-121 and 23-5-122, MCA, when reasonable cause exists to believe the machine is being operated in violation of the act or these rules. AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs 7, 11, Ch. 720, L. 1985.

RULE XXXI ADMINISTRATIVE PROCEEDINGS AND JUDICIAL REVIEW (1) The department shall conduct a fair hearing:

(a) following the emergency suspension of a license, and

(b) prior to the revocation of a license.

(2) All fair hearings must be held in accordance with the Montana Administrative Procedure Act.

(3) Administrative procedures conducted by the department are subject to judicial review in accordance with the provisions of the Montana Administrative Procedure Act, title 2, chapter 4, part 7, MCA.
AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Secs 8, 11, Ch. 720, L. 1985.

RULE XXXII TRANSPORTATION OF MACHINES INTO STATE All shipments of video draw poker machines into this state must comply with the act of the congress of the United States entitled "An act to prohibit transportation of gambling devices in interstate and foreign commerce," approved January 2, 1951, being Ch. 1194, 64 Stat. 1134, and also designated as 15 U.S.C. §§ 1171-1177.
AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Sec. 7, Ch. 720, L. 1985.

RULE XXXIII REGISTRATION OF MANUFACTURERS, SUPPLIERS, OR DISTRIBUTORS OF VIDEO DRAW POKER MACHINES (1) Any person desiring to sell or distribute video draw poker machines in this state must:

(a) be issued and maintain all required federal, state, county, and municipal licenses;

(b) apply to the department on forms prescribed by the department for registration; and

(c) furnish to the department monthly reports identifying the quantities and models of machines the manufacturer, supplier, or distributor ships into Montana, and such other information the department may determine is necessary to regulate and control video draw poker machines in accordance with the act and these rules.

(2) No person shall ship video draw poker machines into this state until his application for registration is granted by the department.

(3) Registration may be suspended or revoked by the department upon the department's determination, after notice and opportunity for fair hearing, that the registrant has not complied with the conditions of registration.

AUTH: Sec. 7, Ch. 720, L. 1985; IMP: Sec. 7, Ch. 720, L. 1985.

3. These emergency rules become effective on July 1, 1985, and will remain effective until permanent rules are adopted, but no longer than 120 days.

4. The authority for the Department to adopt these emergency rules is found in section 7, Chapter 720, L. 1985. The rules implement Chapter 720, L. 1985.

JOHN D. LaFAVER,
Director of Revenue

Certified to Secretary of State 06/17/85

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the adoption of rules pertaining to fees for filing documents and issuing certificates.	))))))	NOTICE OF THE ADOPTION OF RULES 44.6.101, FEES FOR FILING UNIFORM COMMERCIAL CODE DOCUMENTS, AND 44.6.102, ISSUING CERTIFICATES RELATED TO AGRICULTURE

TO: All Interested Persons.

1. On May 16, 1985, the Secretary of State published notice of the proposed rules pertaining to fees for filing uniform commercial code documents and issuing certificates relating to agriculture at page 458 of the Montana Administrative Register, issue number 9.

2. The Secretary of State has adopted 44.6.101 as proposed and 44.6.102 with the following changes:

44.6.102 FEES FOR REFILING EXISTING UNIFORM COMMERCIAL CODE SECURED TRANSACTIONS DOCUMENTS COVERING AGRICULTURAL PROPERTY (1) The Secretary of State shall charge and collect a fee of $2.00 per document for the refiling of any financing or continuation statement, release, assignment or amendment covering farm products or accounts, livestock, general intangibles arising from or relating to the sale of farm products by a farmer, crops growing or to be grown, or equipment used in farming operations which was filed with a county clerk and recorder prior to July 1, 1985.

(2) The county clerks and recorders shall charge and collect for:

(a) each certification of a refiling form listing secured transactions documents filed prior to July 1, 1985 covering agricultural property in a form prescribed by the secretary of state, $2.00.

(b) filing a notice of refiling of secured transactions documents filed prior to July 1, 1985 covering agricultural property in a form prescribed by the secretary of state, ~~$1.00~~ $2.00.

AUTH & IMP: Chapter 683, 1985 Montana Session Laws

3. The Secretary of State considered all comments:

COMMENT: Sue Bartlett, Lewis and Clark County Clerk and Recorder, representing Montana Association of Clerks and Recorders, requested changes in Rule II(2); first, that the standard form be designed to accommodate a maximum of no more than ten secured transactions documents in a single certification; and second, that the fee be changed to $2.00 rather than $1.00, since clerks will process the notice of refiling exactly as a financing statement is processed.

RESPONSE: The Secretary of State agrees, and these changes have been made.

COMMENT: Mike Cronin, representing the Montana Bankers' Association, supported the proposed rules.

Dated this seventeenth day of June, 1985.

JIM WALTERMIRE
Secretary of State

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

In the matter of the emergency amendment of Rule 46.12.509 pertaining to all hospital reimbursement, general.	))))	NOTICE OF EMERGENCY AMENDMENT OF RULE 46.12.509 PERTAINING TO ALL HOSPITAL REIMBURSEMENT, GENERAL

TO: All Interested Persons

1. Statement of reasons for emergency:

The current rule limits out-of-state hospital reimbursement to the Medicare rate or the state Medicaid rate, whichever is lower. The Medicaid agencies in some states have recently negotiated contracts for per diem rates based on the average cost of care of all patients. Hospitals in these states are unwilling to continue to accept Montana patients at this rate of reimbursement because the patients transferred out of Montana generally require a significantly different range of services than the average patient. These services are usually highly specialized and are significantly more expensive to provide. These services are usually not available in Montana hospitals and must be obtained from facilities in neighboring states, often on an emergency basis. In order to insure the continued availability of these needed services, a revised rate-setting mechanism must be implemented immediately.

2. Rule 46.12.509 is amended as follows:

46.12.509 ALL HOSPITAL REIMBURSEMENT, GENERAL

Subsections (1) through (3) remain the same.

(4) Hospital services provided to medicaid patients by facilities outside of the state will be limited to the ~~lower of the medicare~~ percentage of billed charges rate ~~or the medicaid rate established under the respective state's medicaid regulations~~ as computed for the hospital under the medicare reimbursement principles.

Subsections (5) through (8) remain the same.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-141 MCA

3. This rule will become effective on the date certified to the Secretary of State, as indicated below, and will remain in effect until permanent rules are adopted, but no longer than 120 days.

Dave Lewis
Director, Social and Rehabilitation Services

Certified to the Secretary of State June 17, 1985.

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

In the matter of the amendment of Rules 46.12.1201, 46.12.1202, 46.12.1203, 46.12.1204, 46.12.1205, 46.12.1206, 46.12.1207, 46.12.1208, and 46.12.1209 pertaining to the reimbursement for skilled nursing and intermediate care services	)	NOTICE OF THE AMENDMENT OF RULES 46.12.1201, 46.12.1202, 46.12.1203, 46.12.1204, 46.12.1205, 46.12.1206, 46.12.1207, 46.12.1208, AND 46.12.1209 PERTAINING TO THE REIMBURSEMENT FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES

TO: All Interested Persons

1. On May 16, 1985, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.12.1201, 46.12.1202, 46.12.1203, 46.12.1204, 46.12.1205, 46.12.1206, 46.12.1207, 46.12.1208 and 46.12.1209 pertaining to the reimbursement for skilled nursing and intermediate care services, at page 460 of the 1985 Montana Administrative Register, issue number 9.

2. The Department has amended Rules 46.12.1206, 46.12.1208 and 46.12.1209 as proposed.

3. The Department has amended the following rules as proposed with the following changes:

46.12.1201 TRANSITION FROM RULES IN EFFECT SINCE JULY 1, 1982~~3~~ Subsections (1) and (2) remain as proposed.

(3) The payment rate is a result of computing the formula:

R=RO+RP

~~For facilities purchased prior to June 30, 1982:~~ FOR FACILITIES WHOSE PROVIDERS ARE OWNERS ON JUNE 30, 1982, UNTIL OWNERSHIP CHANGES, AND FOR FACILITIES WHOSE PROVIDERS ARE NOT OWNERS ON JUNE 30, 1982, UNTIL THE JUNE 30, 1982 PROVIDER CHANGES:

RO=T, if A-T is less than 0
RO=A, if A-T is equal to or greater than 0
RP=S, if M-S is ~~equal to or~~ less than 0
RP=M, if M-S is equal to or greater than 0

~~For facilities purchased after June 30, 1982:~~ FOR ALL OTHER FACILITIES AND FOR ALL FACILITIES NEWLY CONSTRUCTED AFTER JUNE 30, 1982, REGARDLESS OF PROVIDER:

RO=A
RP=M

where:

R is the payment rate for the ~~respective rate periods~~ current year,

S is the interim property rate in effect on June 30, 1982,

T is the interim operating rate plus estimated incentive factor in effect on June 30, 1982,
A is the operating rate effective July 1, ~~1984~~, of the current year in accordance with ARM 46.12.1204(2), and revised annually in accordance with ARM 46.12.1204(5),
M is the property rate effective July 1, ~~1984~~, of the current year in accordance with ARM 46.12.1204(3), and revised annually in accordance with ARM 46.12.1204(5).
M_1 = THE M CALCULATED UNDER 1204(3) IN EFFECT 6/30/85.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-141 MCA

46.12.1202 PURPOSE AND DEFINITIONS Subsections (1) through (2)(a)(ii) remain as proposed.

(iii) items ~~stocked at nursing stations or on the floor in gross supply and~~ distributed or used individually in small quantities ~~without charge; such as alcohol, applicators, cotton balls, bandaids, antacids, aspirin (and other non-legend drugs ordinarily kept on hand), suppositories, and tongue depressors;~~ including but not limited to:

(A) anti-bacterial/bacteriostatic solutions, including betadine, hydrogen peroxide, 70% alcohol, merthiolate, zepherin solution;

(B) cotton;

(C) derture cups;

(D) deodorizers (room-type);

~~(E) diagnostic agents used to measure sugar and acetones in urine, blood glucose, and occult blood;~~

(FE) disposable diapers;

(GF) distilled water;

(HG) enema equipment and/or solutions;

(IH) facial tissues and paper toweling;

(JI) finger cots;

(KJ) first aid supplies;

(LK) foot soaks;

(ML) gloves (sterile and nonsterile);

(NM) hot water bottles;

(ON) hypodermic needles (disposable and non-disposable);

(PO) ice bags;

(QP) incontinent pads;

(RQ) linens for bed and bathing;

(SR) lotions (for general skin care);

(TS) medication - dispensing cups and envelopes;

(UT) ointments for general protective skin care;

(VU) ointments (anti-bacterial);

~~(W) personal hygiene products;~~

(XV) safety pins;

(YW) sanitary pads;

(ZX) sterile water and normal saline for irrigating;

(AAY) sheepskins and other fleece-type pads;

(AB7) soaps (hand or bacteriostatic);
(A8A) supplies necessary to maintain infection control, including those required for isolation-type services;
(ABB) surgical dressings;
(ABC) surgical tape;
(ABD) ~~stock--medications--including~~ the following ~~items~~ OVER-THE-COUNTER MEDICATIONS (or their equivalents):
(I) acetaminophen (regular and extra-strength);
(II) aspirin (regular and extra-strength);
(III) milk of magnesia;
(IV) mineral oil;
(V) suppositories for evacuation (dulcolax and glycerine);
(VI) maalox;
(VII) mylanta;
(ABE) straw/tubes for drinking;
(ABF) suture removal kits;
(ABG) swabs (including alcohol swab);
(ABH) syringes (disposable or non-disposable hypodermic; insulin; irrigating);
(ABI) thermometers, clinical ;
(ABJ) tongue blades;
(ABK) water pitchers;
(ABL) waste bags;
(ABM) wound-cleansing beads or paste;
(iv) items ~~which--are~~ used by individual patients which are reusable and expected to be available, ~~such--as--ice--bags, bed-rails,--canes,-crutches,--walkers,--wheelchairs,--traction equipment,--and-other-durable-medical-equipment,~~ including but not limited to:
(A) bathtub accessories (seat, stool, rail);
(B) beds, mattresses, and bedside furniture;
(C) bedboards, foot boards, cradles;
(D) bedside equipment, including bedpans, urinals, emesis basins, water pitchers, serving trays;
(E) bedside safety rails;
(F) blood-glucose testing equipment;
(G) blood pressure equipment, including stethoscope;
(H) canes, crutches;
(I) cervical collar;
(J) commode chairs;
(K) enteral feeding pumps;
(L) geriatric chairs;
~~(M)--handheld-nebulizer;~~
(NM) heat lamps, including infrared lamps;
(ON) humidifiers;
~~(P)--infusion-pumps;~~
(QO) isolation cart;
(RP) IV poles;
(SQ) mattress (foam-type and water);
(TP) patient lift apparatus;

(US) physical examination equipment;
(VT) postural drainage board;
(WU) raised toilet seat;
~~(X)--respirator;~~
(XV) sitz bath;
(YW) suction machines;
(ZAX) tourniquets;
(ABY) traction equipment;
(ACZ) trapeze bars;
(ADA) vaporizers, steam-type;
(AEB) walkers (regular and wheeled);
~~(AF)--waterpik;~~
(AGC) wheelchairs (standard);
(AHD) whirlpool bath ~~(portable)~~;
~~(v)--special-dietary-supplements-used-for-tube-feeding-or oral-feeding-such-as-elemental-high-nitrogen-diet;-and~~

(~~v~~iv) laundry services whether provided by the facility or by a hired firm, except for patients' personal clothing which is dry cleaned outside of the facility~~;~~;

(vi) transportation of patients for routine services as defined in ARM 46.12.1202(2)(~~v~~t); and

(vii) any items not specifically included in these rules which are allowed on an individual basis by the department.

Subsections (2)(b) through (2)(f) remain as proposed.

(g) "Average nursing care time" means the sum of management hours of care for medicaid recipients identified by the department in its most recent patient assessment survey, divided by the total number of medicaid recipients surveyed. ~~For--fiscal--years--beginning-July--1,--1983,--t~~The ~~most--recent survey-shall-include-a-survey-period-of-not-less-than-three months-nor-more-than-six-months.~~ EACH SURVEY SHALL INCLUDE THE MOST RECENT SIX MONTHS AVAILABLE.

(h) "Provider's average nursing care time" means the sum of management hours of care EXPRESSED IN NURSING AIDE HOURS for medicaid recipients in a specific facility as identified by the department in its most recent patient assessment survey, divided by the number of medicaid recipients in that facility~~;~~ subject to the provisions of ARM 46.12.1206(4). ~~For fiscal-years-beginning--July-1,-1983,-t~~The most recent survey shall include a survey period of not less than three months nor more than six months.

Subsections (2)(i) through (2)(u) remain as proposed.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-141 MCA

46.12.1203 PARTICIPATION REQUIREMENTS The providers participating in the Montana medicaid program shall meet the following basic requirements to receive payments for services:

(1) maintain a current license under the rules of the

department of health and environmental sciences for the category of care being provided;

(2) maintain a current certification for Montana medicaid under the rules of the department for the category of care being provided;

(3) maintain a current agreement with the department to provide the care for which payment is being made;

(4) have a licensed nursing home administrator or other qualified supervisor for the facility as statutes or regulations may require; ~~and~~

(5) accept, as payment in full for all operating and property costs, the amounts calculated and paid in accordance with the reimbursement method set forth in these rules; ~~and~~

(6) for a providers maintaining patient trust accounts, ~~must~~ insure that any funds maintained in those accounts are used only for those purposes for which the patient, legal guardian, or personal representative of the patient has given written delegation. A provider may not borrow funds from these accounts for any purpose~~;~~ ~~and~~ .

~~(7)--be-currently-participating-in-the-medicare-program.~~

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-141 MCA

46.12.1204 PAYMENT RATE Subsection (1) remains as proposed.

(2) The operating rate A, in dollars per patient-day, is given by:

A=A(1), if T_1 is equal to or greater than A(1), or
A=A(2), if T_1 is equal to or less than A(2), or
A=T_1, if T_1 is less than A(1) and greater than A(2), or
A=A(3) if the facility was constructed after 6/30/82
where:

A(1) = B times ((C times ((~~$30.17~~ 28.80 + ($54,627 divided by D)) divided by .9)) + E), effective July 1, 1985 and B times ((C times ((28.12 + ($54,627 divided by D)) divided by .9)) + E), effective July 1, 1986

A(2) = B times ((C times ((~~$24.69~~ 26.06 + ($54,627 divided by D)) divided by .9)) + E), effective July 1, 1985 and B times ((C times ((26.74 + ($54,627 divided by D)) divided by .9)) + E), effective July 1, 1986

A3 = B times ((C times ((27.43 + ($54,627 divided by D)) divided by .9)) + E),

B is the area wage adjustment for a provider,

~~C-is-1.0-effective-July-1,-1982,-1.06-effective-July-1,-1983,-and-1.1395-effective-July-1,-1984,--(The-inflator-target-rate-for-FY-1985.--The-July-1,-1984-inflator-will-be-discussed-by-the-department-and-representatives-of-the-nursing-home-industry-prior-to-April,-1984).~~

C is the inflation factor used to compute the per diem rates.

D is the number of licensed beds for a provider ~~or 25, whichever is greater~~, times 366 days,
OR D IS THE NUMBER OF LICENSED BEDS FOR A PROVIDER OR 25, WHICHEVER IS GREATER, TIMES 366 FOR FACILITIES NEWLY CONSTRUCTED AFTER JUNE 30, 1985 OR NOT IN THE PROGRAM ON JUNE 30, 1985 OR PARTICIPATING IN THE PROGRAM WITH GREATER THAN 25 LICENSED BEDS ON JUNE 30, 1985.
E is the patient care adjustment for a provider,
T_1 is C times the interim operating rate in effect on June 30, 1982, indexed to December 31, 1982.
Subsections (2)(a) through (5) remain as proposed.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-141 MCA

46.12.1205 PAYMENT PROCEDURES Subsections (1) through (2)(e) remain as proposed.

(ef) Nonemergency (exclusive of those outlined in ARM 46.12.1202(2)(vt)) transportation may ~~not~~ be billed additionally IN ACCORDANCE WITH ARM 46.12.1012 AND ARM 46.12.1015. Emergency transportation may be billed additionally by an ambulance service in accordance with ARM 46.12.1021-1022 and ARM 46.12.1025.

Subsections (2)(g) through (6) remain as proposed.

(7) NO ITEM OR SERVICE MAY BE BILLED TO THE MEDICAID PROGRAM IF THAT ITEM COULD BE PAID BY ANY OTHER PAYER SUCH AS PRIVATE INSURANCE, MEDICARE, ETC., REGARDLESS OF WHETHER THE FACILITY PARTICIPATES IN THAT PROGRAM. IF THE DEPARTMENT FINDS THAT MEDICAID HAS MADE PAYMENTS IN SUCH AN INSTANCE, RETROACTIVE COLLECTIONS WILL BE MADE FROM THE PROVIDER.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-141 MCA

46.12.1207 INCLUDABLE COSTS Subsections (1) through (1)(j) remain as proposed.

(k) Travel costs related to patient care are includable to the extent that such costs are allowable under Sections 162 and 274 of the internal revenue codes and section 1.162-2 of the income tax regulations, which are federal statutes and regulations dealing with allowable travel expenses and transportation costs. The above-cited sections of the internal revenue code and income tax regulations are hereby adopted and incorporated herein by reference. A copy of the statutes and regulations may be obtained from the Department of Social and Rehabilitation Services, P.O. Box 4210, 111 Sanders, Helena, Montana 59604. Vehicle operating costs will be prorated between business and personal use based on mileage logs or a prior approved percentage derived from a sample mileage log or other approved method acceptable to the department. ~~Mileage logs--shall--include--odometer--readings.~~ For vehicles used

primarily by the administrator any portion of vehicle costs disallowed on pro-ration shall be included as compensation subject to the limits specified in ARM 46.12.1207. Depreciation shall be included on a straight-line basis (subject to salvage value) with a minimum of 3 years. Depreciation and interest, or comparable lease costs may not exceed $3200 per year. Other reasonable vehicle operating expenses may be included. Public transportation costs will be allowable at tourist or other available commercial rate (not first class).

Subsection (1)(l) and (1)(m) remain as proposed.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-2-201, 53-6-111 and 53-6-141 MCA

4. The Department has thoroughly considered all commentary received:

COMMENT: Several commenters objected to the elimination of a facility's grandfathered operating and property rate because they considered this to be a retroactive application.

RESPONSE: The Department does not consider this to be retroactive. This has been consistent with Department interpretation, policy and action since the rule's inception. The Department has been consistent in its application in this area. No rates therefore will be retroactively adjusted as a result of this action.

COMMENT: Several commenters asked why the Department was willing to pay the grandfathered rates to the current owner and not to the new owner.

RESPONSE: Owner/providers in existence prior to July 1, 1982 incurred property cost obligations under a different rate system. When the department changed rate systems, it decided to insure that existing obligations previously reimbursed by the Medicaid program would continue to be met under the new system. Since owner/providers entering the program after June 30, 1982 have full knowledge of the property rate paid, they need not be offered this protection. Operating rates were grandfathered and frozen to minimize the effect of a sudden rate reduction on high cost facilities. These facilities were therefore afforded time to adjust their systems to live with the formula rate. Although these rates were not decreased neither have these facilities received a rate increase since 7/1/82. Since these rates have a historical basis, owners/providers new to the program have no basis for grandfathering.

COMMENT: One commenter asked that her facility's rate be raised to a specific level. Also it was suggested that no

facility should get a decreasing rate in any future periods.

RESPONSE: The Department has no authority to grant a rate other than the one resulting from placing the appropriate variable into the formula specified in the Administrative Rules. If computation of these rates results in a decreasing rate for a specific facility the Department has no authority to change that rate.

COMMENT: One provider commented that the 366 days used in the operating-rate calculation should be charged to 365 during non-leap years.

RESPONSE: Since the base year from which this data was taken (1980) was a leap year, it is appropriate to use 366 days in the operating rate calculation.

COMMENT: ARM 46.12.1202 (1)(d) prevents the department from changing the nursing home reimbursement rules for arbitrary reasons or to effect budgeting solutions.

RESPONSE: The purpose of ARM Section 46.12.1202 (1)(d) was never to self-impose limitations on the department which were in addition to the limitations required by state and federal law. The state administrative procedure act requires that all proposed changes to existing rules be made public and that the public be allowed an opportunity to comment. The department intends to fully comply with the administrative procedure act and the requirements of state and federal law in revising its rules, but since this section has been misconstrued by providers in the past, it is being deleted to eliminate confusion.

COMMENT: One commenter asked for a clarification of Section 46.12.1202(2)(a)(vii) relative to treatment of nursing service items not specifically listed as routine or non-routine.

RESPONSE: Although the Department has attempted to make section 1202(2)(a) all inclusive we believe that from time to time questions may arise regarding whether or not a specific item or service is routine. In such event, the Department will determine whether an item is routine on an individual basis and may notify all providers as appropriate.

COMMENT: One commenter suggested that since the rule is not specific as to the amounts of supplies and services which shall be considered to be routine, patients might be billed improperly for routine services.

RESPONSE: Since providers may not bill the patient, the program, or any other provider for routine items or services, we do not consider this to be a potential problem. The only

exception occurs when the provider attempts to bill the Medicaid program for routine items provided in extraordinary amounts.

COMMENT: Several commerters raised questions about the items included under section 46.12.1202(2)(a)(iii).

RESPONSE: In reviewing this section, in light of comments from several providers, the department has made revisions. Some providers were confused by language regarding "items routinely stocked". It is the department's intention that this item should be provided by the facility as part of the routine rate. We have, therefore, clarified this language.

Regarding Section 46.12.1202(2)(a)(iii)(4)&(v), ointments, it is the department's intention that these items be provided to patients by the facility on an intermittent basis and for preventive maintenance at no additional charge. In cases where these items are used in extraordinary amounts, these items may be billed to the Medicaid program if prior approved by the department.

"Over the counter" medications included under section 46.12.1202(2)(a)(iii)(AF) must be available to patients for intermittent use and must be provided at no additional charge. In cases where these items are used in extraordinary amounts, these items are not covered and may not be billed to the Medicaid program with the exception of physician prescribed antacids and laxatives used in large quantities.

COMMENT: Two commenters opposed language limiting the cost of ancillary items in combined facilities to the cost to the hospital if the hospital is supplying these services. The commenter considered this to be discriminatory.

RESPONSE: This is not a discriminatory practice and has been applied to all facilities in the past. This language was only included to prevent the hospital a related party to the nursing home, from marking up these items and circumventing the ancillary reimbursement procedures. Not to do this would, in fact, be discriminatory to free-standing facilities.

COMMENT: Two commenters suggested that 46.12.1202(2)(h) should be revised to define "providers average nursing care hourly wage" "as the sum of management hours of care expressed in nursing aide hours".

RESPONSE: The Department agrees and has revised the final rules to reflect this comment.

COMMENT: Several providers requested that the 1.699 ratio of non-licensed to licensed time be placed in the administrative rules.

RESPONSE: Since this is an item that may from time to time be subject to revision, the department does not believe that the department or the provider would be well served by its placement in the rules.

COMMENT: Several providers requested the ratio of licensed to non-licensed time be updated to reflect the most current practices.

RESPONSE: The department feels the current ratio is sufficient for purposes of this rule period. It will analyze ratio for future periods.

COMMENT: Two providers requested that rules providing for the computation of the providers average nursing care time "be revised to utilize a 12 month period of May 1 through April 30 rather than the current 3 to 6 month period".

RESPONSE: The department does not believe it would be in the providers or the patients best interest to include data in the computation that is 12 months old. The Department is willing, however, to change the survey period to the latest available six (6) month period and has revised the rules to reflect this.

COMMENT: One commenter suggested that to change the "Average Nursing Care Hourly Wage" was to dilute the cost of providing care by not including licensed and nonlicensed time.

RESPONSE: The deletion of R.N. and Aide time from the "Average Nursing Care Hourly Wage" computation is appropriate since Patient Assessment Scores are expressed in aide hours. R.N. and aide time is already considered in the computation by weighting the patient assessment score heavily for its inclusion.

COMMENT: Two commenters noted that the reference to routine transportation at 46.12.1202(2)(a)(vi) and at 46.12.1205(2)(f) should be to 46.12.1202(2)(t) rather than 46.12.1205(2)(v).

RESPONSE: The Department agrees and has corrected both sections.

COMMENT: Several commenters stated the routine transportation language was not a clarification, but a change of policy.

RESPONSE: The Department disagrees. Although this may have been handled a variety of ways by some providers, the inclusion of this as a routine service has consistently been the

Department's policy. As with any required service, providers have the flexibility to provide the service in a variety of ways so long as the service is provided and no one is billed additionally for it.

COMMENT: One provider asked if families that had in the past chosen to provide transportation could continue to do so.

RESPONSE: The Department has no objection to this practice as long as it is made clear to the family that it is not required to provide this service and that transportation will be provided by the facility if the family chooses not to provide it.

COMMENT: Two commenters suggested that some transportation could become a financial hardship to the provider in cases where medical visits were required each day such as with chemotherapy treatment.

RESPONSE: In cases where medically necessary transportation is required in a frequency so as to be unreasonably burdensome to the provider this transportation may be billed separately under the Medicaid transportation rules. Prior to billing however, such transportation would need to be approved by the County Director. Unreasonably burdensome would be multiple visits during the week to the same provider of medical care.

COMMENT: One commenter was concerned that current physician and family practices would be changed by this policy clarification, placing an additional burden on the provider.

RESPONSE: We see no need for these practices to change. As long as the travel requirements are made clear to physicians and families facilities may continue to coordinate arrangements as appropriate.

COMMENT: One commenter suggested that facilities be required to provide transportation for such things as outings and other social visits, but felt transportation to physicians and other medical purposes should be billable to the Medicaid program.

RESPONSE: The department believes the routine rate covers medical visits of a routine nature. Such a distinction is therefore inappropriate.

COMMENT: One commenter asked if transportation for wheelchair-bound patients would be provided under the routine rate, or if appropriate transportation could be reimbursed separately by Medicaid.

RESPONSE: In cases where patients may not be transported by an ordinary vehicle, but must be transported with a lift

equipped van or an ambulance, appropriate transportation may be billed to the program under appropriate transportation rules.

COMMENT: Two commenters believe that the property rate for a newly constructed facility should be $7.79 rather than the $7.60 indicated in the proposed rule. Those commenters calculation were: $6.09 times 1.06 times 1.06 times 1.025 divided by .9 equals $7.79.

RESPONSE: The Department disagrees. If the intent of $7.60 were to reflect a 1986 rate $7.79 would be correct. Since the intent is to give the 1985 base by which the new facilities' rates will be indexed the correct calculation is: $6.09 times 1.06 times 1.06 divided by .9 equals $7.60.

COMMENT: Several commenters objected to the deletion of the adjusting provision of a facility's rate based upon the remodeling of that facility.

RESPONSE: The Department feels that its elimination of references to remodeling adjustments is consistent with the out-of-court settlement reached between the Department and the Montana nursing homes class. Since that settlement implemented a property reimbursement that did not consider age of the facility to be a factor any longer, deletion of such references are appropriate. The Department does plan however, to begin review and research of the proposal presented by the representative of the Montana Health Care Association within the near future. Any rule change determined by the department to be necessary as a result of that review will be proposed at a later time. Any provider who remodels its facility between July 1, 1985 and the implementation of a rule will be treated in accordance with the change proposed. Any changes proposed will be in compliance with the court ordered settlement.

COMMENT: Many providers objected to the certification requirement of Medicare participation. It was suggested that assurance of full Medicare participation be accomplished through audit and edits placed in the claims payment system.

RESPONSE: The department believes that it is in the best interest of the State of Montana and its taxpayers to insure that all other payment sources are exhausted prior to billing the Medicaid program. We do, however, understand providers concerns as expressed in their comments. We have therefore, revised the language in this section to insure that Medicare coverable costs are not billed to the Medicaid program inappropriately, in accordance with the suggestion of the Montana Health Care Association.

COMMENT: Several commenters supported the Department's narrowing of the "band" used in the computation of the operating rate. They felt however, that the Department's action did not go far enough and urged a total elimination of the "band".

RESPONSE: It is the Department's intention to eventually eliminate the band bringing provider rates into line with each other. We believe that a gradual elimination of the band as proposed by the Department rather than the total elimination is the best course. Such a change will minimize any sudden drastic changes to individual provider rates, thereby eliminating the impact on patient care that could result.

COMMENT: Two commenters objected to the decrease of the band and suggested it either be continued at the present 20% or phased in over a larger period of time.

RESPONSE: The department believes care provided in long-term care facilities should be reimbursed at levels which are consistent among the industry. We concede that there are some differences among facilities that would require the cost of care to be higher at one facility than another. Such factors as patient mix, facility location and number of beds could affect the cost of care provided. We believe that our reimbursement system addresses these differences and makes rate adjustments that are sensitive to these factors. Since the inception of this system, the department has been phasing facilities into this system. We believe that a 5-year period is sufficient for facilities to adjust.

COMMENT: Several providers agreed with the imposition of a 25 bed minimum in the computation of the operating rate but requested that facilities currently enrolled in the program with less than 25 beds be "grandfathered".

RESPONSE: The Department agrees and has revised the final rule to reflect this. The facilities which would be grandfathered under this provision are: Teton Medical Center, Dahl Memorial, Choteau County, Garfield County, Granite County, Community of Poplar, Carbon County Memorial, Roundup Memorial, Prairie Nursing Home, and Broadwater County.

COMMENT: Two commenters supported the 25 bed minimum in computation of an operating rate but felt the number should be higher at approximately 40 beds.

RESPONSE: According to the Department's analysis 25 beds is approximately the point at which rates increase substantially. We believe this to be the appropriate minimum.

COMMENT: One commenter suggested the minimum bed number used in the computation of the operating rate be changed from the 25 proposed by the Department to 20 beds.

RESPONSE: According to the department's analysis, 25 beds is approximately the point at which rates increase substantially. We believe this to be the appropriate minimum.

COMMENT: Several commenters objected to the change in the date of rate issuance from the current July 1 date to August 1 of each year.

RESPONSE: The Department has withdrawn its proposed change and reinstated the original July 1 date.

COMMENT: One commenter objected to the provision requiring the holding of a bed during a temporary hospitalization. He believed providers should have the ability to choose which patients it wants to admit without governmental interference.

RESPONSE: The Department believes it is not in the best interest of Medicaid residents to allow their unwarranted transfer and/or discharge. Such transfers can result in emotional strain, disorientation, and behavior problems as well as severe transfer trauma. The Department also believes such practices would violate the provider agreement and federal and state discrimination statutes.

COMMENT: One commenter suggested the wording of the provision to require the holding of a bed in cases of temporary hospitalization be made more clear.

RESPONSE: The Department feels the intent and requirement for holding the bed is clear. In reviewing the suggested change we find it to be only a restatement of the current wording.

COMMENT: One commenter was unclear under what circumstances the Department might allow the patient to be discharged.

RESPONSE: Since the Department will have to consider each case on its own, it does not consider it appropriate to list each consideration that might be made in this case. Substantial weight would be given in all cases to the physician's opinion of a patient's prognosis.

COMMENT: One commenter suggested that we revise the process of patient assessment review to include a notice whether or not any discrepancies are found.

RESPONSE: The Department believes such a process would only serve to create an unnecessary administrative burden upon the Department.

COMMENT: Two commenters suggested that in cases of adverse patient assessment review findings the Department should do follow-up findings and review the entire year's findings before it considers the provider's patient assessment score to be unreliable.

RESPONSE: The Department believes that such a proposal would not only be an unreasonable administrative burden but also prohibitively expensive to perform. The burden is on the provider to provide accurate and complete data to the department in all months and the department has no responsibility to review numerous months in an attempt to determine whether any discrepancies found in the review were general problems or not. Where the department has patient assessment review information indicating that the patient assessment score submitted by the provider is unreliable, it must obviously use the score from the review, a score which it knows to be reliable.

COMMENT: One commenter suggested an appeals mechanism should be included for objections to review findings or the Department's use of the patient assessment score.

RESPONSE: We believe the Administrative review and Fair Hearings proceedings contained in Section 46.12.1210 adequately provides for the airings of any objections to this process.

COMMENT: One commenter suggested the Department compute the ratio of staffing to patient assessment and report it to the facility each month with the patient assessment report.

RESPONSE: The Department as a matter of practice has informed providers when the staffing level is below the required level. We believe this to be the least burdensome alternative with the staff resources available.

COMMENT: A number of commenters objected to the proposed change in the staffing level at which providers will be determined to be deficient from 75% of the patient assessment score used to compute the rate to 10% of the patient assessment score.

RESPONSE: The department believes that patient care will best be served by the 10% deficiency level. This still allows providers some flexibility to deal with staff turnover problems while keeping staffing at a level reasonably close to the

required level of the patient assessment score at which the provider is paid.

COMMENT: Several commenters objected to the requirement of odometer readings in mileage logs.

RESPONSE: The department believes the reliability of mileage logs can be greatly improved by the inclusion of odometer readings. We agree, however, that this may not be necessary in each provider's case. The department has removed this requirement, however, we continue to believe the odometer readings may be the best audit evidence to support provider mileage logs.

COMMENT: Several commenters objected to the proposed elimination of the time limit on completion of desk reviews.

RESPONSE: It is the Department's intention to continue with its efforts to complete desk reviews as quickly as possible. The limit contained in these rules however serves no purpose other than to place an unnecessary time frame on desk review completion that would possibly jeopardize Federal Program Participation if the deadline is for some reason not met. We do not feel this would be in anyone's best interest.

COMMENT: Two commenters requested the reason for the elimination of the 30 day limit for correction of a cost report error.

RESPONSE: It is not the department's intention to prevent providers from making such corrections. We believe that such changes can be handled through the normal appeals process and this section only confuses that process.

COMMENT: Several commenters suggested the geographic wage factor no longer be computed based on one standard deviation from the statewide mean but and the actual mean.

RESPONSE: The department believes the geographic wage factor computation adequately provides for differences in these areas as it is proposed. Since it is possible for one provider in an individual area to influence the mean in this area, the department feels one standard deviation is necessary to minimize the possibility. Additionally, since geographic wage areas are not completely autonomous, interaction between the areas results in competition for labor. Low cost areas could draw from high cost areas and vice versa. The standard deviation minimizes that effect.

COMMENT: One commenter suggested the .71 ratio of labor to other operating costs used in computation of the geographic

wage factor is an obsolete figure. He suggested that the .71 should be reviewed and perhaps adjusted depending upon what is discovered.

RESPONSE: The department believes the .71 figure is adequate for this period. We will evaluate this item for future periods.

COMMENT: One commenter asked for an explanation of the expenditure increase contained in the notice of public hearing.

RESPONSE: The increase in the FY86 expenditures reflect an anticipated addition of 150 new nursing home beds. Additional beds can not be predicted during FY87, thus accounting for the decreasing increase in FY87.

COMMENT: One commenter suggested the rate increases resulting from department rate estimates were not consistent with the Legislative Appropriation.

RESPONSE: The rate estimated increases shared with the various nursing home associations were consistent with the court-ordered nursing home settlement. The legislative appropriations were made with full knowledge of and consistent with that settlement.

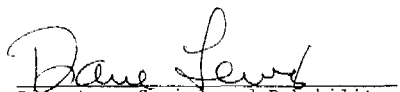
COMMENT: One commenter stated that the payment rate methodology and calculation was indecipherable.

RESPONSE: The department believes the language is quite understandable. When rules and formulas as complicated as this are written, complicated mathematical calculations are needed. Unfortunately these calculations can appear rather confusing to the layman. The department, however, is always willing to help any interested party to understand the rate calculation.

COMMENT: One commenter was concerned that sole proprietors would be unable to transfer a facility to their heirs without losing their grandfathered operating and property rates.

RESPONSE: The department believes that the eventuality raised in the comment is remote for purposes of the rule period proposed and is unwilling to change this section of the rule without further consideration and research. A change in the rules to effect the suggestion raised in the comment will be considered for a future rule. Until then, the application of the grandfathered rates to family-operated facilities must be in accordance with the rule or, in cases requiring interpretation, will be dealt with on a case-by-case basis by the department. The department, it should be noted, is receptive

to the suggestion that the heir of an owner of a family-operated facility be able to operate the facility at the owner's grandfathered rate.



Director, Social and Rehabilitation Services

Certified to the Secretary of State June 17, 1985.

VOLUME NO. 41 OPINION NO. 16

DEPARTMENT OF REVENUE - Oil and gas well casings are taxable property;
IMPROVEMENTS - Oil and gas well casings are improvements;
MINES AND MINING - Oil and gas well casings are not mining fixtures;
OIL AND GAS - Well casings are taxable property;
PROPERTY, REAL - Oil and gas well casings are taxable as improvements to real property;
MONTANA CODE ANNOTATED - Sections 15-1-101(1)(e), 15-6-101, 15-6-134, 15-6-134(1)(b), 15-6-138(1)(b), 15-23-611, 70-15-103, 70-15-104;
1889 MONTANA CONSTITUTION of 1889 - article XII, section 3;
SESSION LAWS OF 1985 - Chapter 583;
SESSION LAWS OF 1975 - Chapter 693, section 4;
SESSION LAWS OF 1955 - Chapter 135.

HELD: Oil and gas well casings, which are permanently fixed in the well, are taxable property. Further, they are properly taxed as class four property. However, oil and gas well casings are exempt from taxation after December 31, 1984.

12 June 1985

John LaFaver, Director
Department of Revenue
Room 455
Sam W. Mitchell Building
Helena MT 59620

Dear Mr. LaFaver:

Your predecessor requested my opinion on the following questions:

1. Are oil and gas well casings, which are permanently fixed in the well, taxable?

2. If the oil and gas well casings are taxable, under what class of property should they be placed?

The relevant case law in this area has been outdated by the 1972 Montana Constitution and statutory amendments. Therefore, your question can best be answered by analysis of the current statutes.

Section 15-6-101, MCA, clearly provides that all property is subject to taxation unless otherwise exempt. This is consistent with accepted principles of statutory construction which only recognize tax exemptions expressed in clear and unequivocal terms. See Flathead Lake Methodist Camp v. Webb, 144 Mont. 565, 399 P.2d 90 (1965); Cruse v. Fischl, 55 Mont. 28, 175 P. 878 (1918); 3 Sands, Sutherland Statutory Construction § 66.09, at 207 (1974). Further, the oil and gas net proceeds tax states specifically that improvements or supplies used in connection with oil and gas production are taxable. § 15-23-611, MCA. Thus, oil and gas well casings are taxable property.

This was clarified by the 1985 Montana Legislature which approved Senate Bill 67, specifically exempting down-hole oil and gas wells from future taxation. 1985 Mont. Laws, ch. 583. Testimony during the March 25, 1985, House Taxation Committee hearing on SB 67 indicated that each county was taxing oil and gas well casings differently. Thus, the purpose of the bill was to uniformly exempt oil and gas well casings from taxation, effective December 31, 1984. While this tax amendment clearly indicates that oil and gas well casings cannot be taxed after December 31, 1984, it also indicates they should be taxed prior to December 31, 1984. When the Legislature creates a new right, such as a tax exemption, there is a presumption that the right did not exist prior to the amendment. Montana Milk Control Board v. Community Creamery Co., 139 Mont. 523, 366 P.2d 151 (1961). Consequently, oil and gas well casings were taxable prior to December 31, 1984. The question then is, under what class of property should oil and gas well casings be taxed?

Oil well casings are "improvements" under the definition of section 15-1-101(1)(e), MCA, which provides that "the term 'improvements' includes all buildings, structures, fixtures, fences, and improvements situated upon, erected upon, or affixed to land." See also § 70-15-103, MCA (defining fixtures); cf. § 70-15-104, MCA (defining mining fixtures).

Under the property classification scheme adopted in 1979, "improvements" which are not classified otherwise are taxed under class four property. See 1979 Mont. Laws, ch. 693, § 4, codified as § 15-6-134, MCA. Arguably, oil well casings could be classified with mining fixtures under section 15-6-138(1)(b), MCA, but the courts have not classified gas and oil production with mining production since enactment of the oil and gas net proceeds tax, or since the 1972 Montana Constitution deleted the mineral tax provisions of the 1889 Montana Constitution. See 1955 Mont. Laws, ch. 135, codified as tit. 15, ch. 23, pt. 6, MCA; Mont. Const. of 1889, art. XII, § 3; Dye, Taxation of Mineral Interests Under Article XII, Section 3 of the Montana State Constitution, 32 Mont. L. Rev. 47, 57 (1971). Consequently, oil and gas well casings should not be classified with mining fixtures, but do fall under class four property. See § 15-6-134(1)(b), MCA.

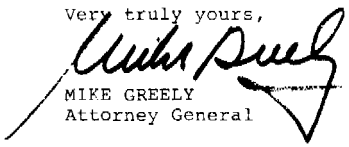
Old Montana cases have held that mining improvements and oil well casings have no value independent of the mine or well, and therefore presumably are not taxable as separate property. See Hale v. County of Jefferson, 39 Mont. 137, 101 P. 973 (1909); Callender v. Crossfield Oil Syndicate, 84 Mont. 263, 275 P. 273 (1929), overruled on other grounds, 113 Mont. 392, 130 P.2d 685 (1942). These cases were decided prior to enactment of the oil and gas net proceeds tax, and under the 1889 Montana Constitution which prohibited taxation of mining improvements unless they had a value separate and independent of mining. See tit. 15, ch. 23, pt. 6, MCA; Mont. Const. of 1889, art. XII, § 3. The 1972 Montana Constitutional Convention eliminated the old mineral tax provision in order to give the Legislature more discretion in taxing minerals. See II Mont. Const. Conv. 580. Revenue and Finance Committee, February 18, 1972. The Legislature exercised that discretion in 1979 with the restructuring of the property tax classification system. See 1979 Mont. Laws, ch. 693, codified at tit. 15, ch. 6, MCA.

THEREFORE, IT IS MY OPINION:

> Oil and gas well casings, which are permanently fixed in the well, are taxable property. Further, they are properly taxed as class four property.

However, oil and gas well casings are exempt from taxation after December 31, 1984.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 41 OPINION NO. 17

AGRICULTURE - Irrigation district property, not used for or related to irrigation work, is not tax exempt;
DEPARTMENT OF REVENUE - Irrigation district property, not used for or related to irrigation work, is not tax exempt;
TAXATION AND REVENUE - Irrigation district property, which is not used for or related to irrigation work, is not tax exempt;
MONTANA CODE ANNOTATED - Sections 15-6-201(1), 85-7-2011;
MONTANA CONSTITUTION - Article VIII, section 5;
SESSION LAWS OF 1977 - Chapter 492.

HELD: Irrigation district property, which is not related to or used in irrigation work, is not exempt from taxation under the general irrigation district exemptions in sections 15-6-201(1)(a)(ii) and 85-7-2011, MCA.

13 June 1985

Harold Hanser
County Attorney
Yellowstone County Courthouse
Billings MT 59101

Dear Mr. Hanser:

You have requested my opinion on the following question:

> Is irrigation district property, which is not used in or related to irrigation work, exempt from taxation under the general irrigation district tax exemptions in sections 15-6-201(1)(a)(ii) and 85-7-2011, MCA?

Your question involves an interpretation of the following statutes:

> Section 15-6-201. Exempt Categories. (1) The following categories of property are exempt from taxation:

....

(ii) irrigation districts organized under the laws of Montana and not operating for profit.

Section 85-7-2011. Exemption of irrigation district property. The bonds issued under the provisions of this part, rights-of-way, ditches, flumes, pipelines, dams, water rights, reservoirs, equipment, machinery, motor vehicles, and all other personal property belonging to any irrigation district organized under the laws of Montana and not operating for profit may not be taxed for state, county, or municipal purposes.

As I understand the facts in your situation, an irrigation district has purchased a home for use by the district manager. However, the current manager has his own home, and the irrigation district is renting its house to a private party.

Your question can be answered by analyzing the pertinent constitutional provisions, statutes, legislative history, and case law.

Montana's 1972 Constitution authorized the Legislature to exempt certain property from taxation. Mont. Const. art. VIII, § 5. However, the Constitution specifically notes that private interest in public property, such as libraries and municipal corporations, is taxable separately from the exempt property. Mont. Const. art. VIII, § 5(1)(a). Consequently, there is no constitutional justification for a blanket exemption for all property owned or used by an otherwise tax exempt entity. This is consistent with the legislative history of the above-referenced statutes.

The two statutes noted above, §§ 15-6-201(1)(a)(ii) and 85-7-2011, MCA, were most recently amended by the same bill in the 1977 Legislature. 1977 Mont. Laws, ch. 492. Section 2 of that bill, now section 85-7-2011, MCA, exempts bonds, rights-of-way, flumes, pipelines, dams, water rights, reservoirs, equipment, machinery, motor vehicles, and all other personal property, but does not exempt homes and other real property, not used in or related to irrigation work. This is significant because an express mention of certain items in a statute implies

the exclusion of items not mentioned, a principle of law known as "expressio unius est exclusio alterius." State ex. rel. Jones v. Giles, 168 Mont. 130, 133, 541 P.2d 355, 357 (1975); Stephens v. City of Great Falls, 119 Mont. 368, 381, 175 P.2d 408, 415 (1946). Further, section 1 of that bill, now section 15-6-201(1)(a)(ii), MCA, exempts only those districts which are nonprofit. It is certainly arguable that renting a house is profitable, and therefore outside the scope of the exemption.

Minutes from the February 2, 1977, Senate Taxation Committee hearing on Senate Bill 155, (now 1977 Mont. Laws, ch. 492, containing the above-referenced amendments) and the March 8, 1977, House Taxation Committee also indicate that the exemption was intended for equipment actually used by the irrigation districts in their work.

In addition, Montana has a long history of case law denying questionable tax exemptions in general, and questionable tax exemptions for nonprofit entities in particular. Taxation is the rule, and exemption in the exception. Cruse v. Fischl, 55 Mont. 258, 263, 175 P. 878, 880 (1918). "Every claim for exemption from taxation should be denied unless the exception is granted so clearly as to leave no room for any fair doubt." Buffalo Rapids Irrigation District v. Colleran, 85 Mont. 466, 471, 279 P. 369, 370 (1929). Vague exemptions are generally construed strictly against the taxpayer claiming them. Montana Bankers Ass'n. v. Montana Department of Revenue, 177 Mont. 112, 117, 580 P.2d 909, 912 (1978); State ex rel. Whitlock v. State Board of Equalization, 100 Mont. 72, 84, 45 P.2d 684, 687 (1935). "[V]igilance should be exerted to prevent the broadening of exemptions beyond the contemplation of the framers of our Constitution." Buffalo Rapids Irrigation District, 85 Mont. at 471, 279 P. at 370. Clearly, these general provisions dealing with tax exemptions indicate that this exemption should be denied. Other case law is even more convincing.

In Buffalo, an irrigation district was claiming a tax exemption of farmland that it acquired by tax deed, but which was not used for irrigation work. The court held that "[O]nly such property of an irrigation district as is used for governmental purposes should be exempt. ..."

85 Mont. at 477, 279 P. at 372. The court then went on to note that:

> It is within the realm of possibility that the affairs of an irrigation district may be so conducted that a large portion, or all, of the land within the district should be acquired by the district by tax deed, as was the land in question; these lands might thereafter be operated by the district through the agency of croppers or leasers, and, if plaintiff's position were tenable, the entire district be thus relieved of paying its just proportion of the expense of the government which has rendered its existence possible and continues to protect its property at the expense of the people at large."

85 Mont. at 480, 279 P. at 373.

The Buffalo decision is consistent with other decisions involving nonprofit groups. See Old Fashion Baptist Church v. Montana Department of Revenue, 40 St. Rptr. 1774, 671 P.2d 625 (1983) (church owned several vacant lots adjacent to church building, but only the property occupied by the church and its access road is tax exempt); Montana Catholic Missions v. Lewis and Clarke [sic] County, 13 Mont. 559, 35 P. 2 (1893) (land which was purchased for, and intended for, charitable purposes, but which is currently unused, is not tax exempt).

THEREFORE, IT IS MY OPINION:

> Irrigation district property which is not related to or used in irrigation work is not exempt from taxation under the general irrigation district exemptions in sections 15-6-201(1)(a)(ii) and 85-7-2011, MCA.

Very truly yours,

MIKE GREELY
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules or amendment or repeal of existing rules filed with the Secretary of State. Proposals of the Department of Revenue are reviewed only in regard to the procedural requirements of the Montana Administrative Procedure Act. The Committee has the authority to make recommendations to an agency regarding the adoption, amendment or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. In addition, the Committee may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt or amend a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with existing or proposed rules. The address is Room 138, Montana State Capitol, Helena, Montana 59620.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statute and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter

1. Consult ARM topical index, volume 16. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute Number and Department

2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 1985. This table includes those rules adopted during the period January 1, 1985 through June 30, 1985, 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 March 31, 1985, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1984 and 1985 Montana Administrative Registers.

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