

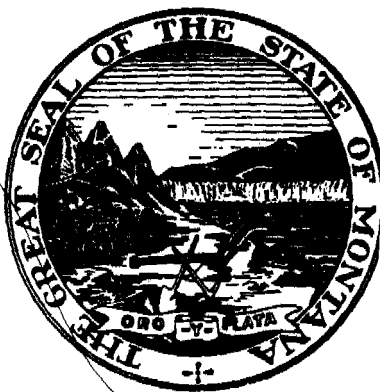
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MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 22

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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

In the matter of the proposed) NOTICE OF PROPOSED AMENDMENTS
amendments of existing cosme-) OF RULES EXPANDING COSMETOLOGY
tology rules to incorporate) TO COVER MANICURISTS
manicuring specifications)
granted by the 1985 legislature)

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On December 29, 1985, the Board of Cosmetologists proposes to amend the following rules: 8.14.401 GENERAL REQUIREMENTS; 8.14.601 APPLICATION; 8.14.602 INSPECTION; 8.14.603 SCHOOL REQUIREMENTS; 8.14.605 CURRICULUM - STUDENTS; 8.14.606 STUDENT REGISTRATION; 8.14.608 INSTRUCTOR REQUIREMENTS - TEACHER-TRAINING UNITS; 8.14.801 INSTRUCTORS; 8.14.802 EXAMINERS - STUDENT EXAMINATION; 8.14.803 QUALIFICATIONS FOR EXAMINATION - MONTANA STUDENTS; 8.14.804 EXAMINATION - OUT-OF-STATE STUDENTS; 8.14.805 APPLICATION - OUT-OF-STATE OPERATORS; 8.14.807 TRANSFER STUDENTS - OUT-OF-STATE; 8.14.810 ITINERANT COSMETOLOGISTS; 8.14.812 DUPLICATE LICENSES; 8.14.813 LAPSED LICENSES; 8.14.814 FEES, INITIAL, RENEWAL, PENALTY AND REFUND FEES; 8.14.816 SALONS; 8.14.1206 TOILET FACILITIES.

2. The proposed amendment of 8.14.401 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-403, Administrative Rules of Montana)

"8.14.401 GENERAL REQUIREMENTS (1) through (3) remain the same.

(4) Any person doing manicuring must have an a cosmetology license or manicurist license."

Auth: 37-31-203, MCA Imp: 37-31-101, MCA

3. The proposed amendment of 8.14.601 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-409, Administrative Rules of Montana)

"8.14.601 APPLICATION (1) and (2) remain the same.

(3) If the information submitted on the personal survey form is satisfactory to the board, the department shall mail the necessary blanks and a copy of the law and rules governing the licensing of a school of cosmetology or manicuring to the applicant.

(4) and (4)(a) remain the same.

(b) a detailed floor plan of a cosmetology school shall show ~~showing~~ adequate floor space of at least 1,500 square feet for the first 25 students and 60 square feet for each additional student which may include locker room and office

space, with an effective date of 14 months from date of rule adoption.

(1) a detailed floor plan of a manicuring school shall show adequate floor space of a minimum of 450 square feet for the first 10 students and 45 square feet for each additional student, which may include locker room and office space.

(4)(c) through (6) remain the same."

Auth: 37-31-203, MCA Imp: 37-31-302, 310, MCA

4. The proposed amendment of 8.14.602 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-410, Administrative Rules of Montana)

"8.14.602 SCHOOL REQUIREMENTS (1) through (3) remain the same.

(4) A practice workroom for cosmetology students is required with the following equipment for each 10 students:

(4)(a) through (4)(q) remain the same.

(5) A practice workroom for manicuring students is required for each 5 students:

(a) 5 manicuring nippers

(b) 5 nail files

(c) 5 cuticle pushers

(d) 50 emery boards

(e) 5 orangewood sticks

(f) 5 manicuring sterilizers

(g) 5 manicure tables

(h) 5 containers for accessories

(i) 1 cabinet for clean linens

(j) 5 trays for manicuring supplies

(k) 1 covered container for soiled linens

(l) 1 locker for each student

(m) 1 waste container for each station

(n) separate rest rooms for male and female persons which shall include lavatories with hot and cold running water and toilet facilities

(o) sufficient equipment, supplies, manicure textbooks and manicuring kits necessary to teach the minimum number of students"

Auth: 37-31-203, MCA Imp: 37-31-311, MCA

5. The proposed amendment of 8.14.603 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-410 through 8-413, Administrative Rules of Montana)

"8.14.603 SCHOOL REQUIREMENTS (1) Proposed schools of cosmetology and manicuring may not advertise in any manner until they have received their license and registration

certificate. Schools shall advertise under designation of "School" only.

(2) through (7) remain the same.

(8) There shall be a qualified instructor supervising students on the school premises at all times. There may not be more than 25 cosmetology students to each teacher and there may not be more than 20 manicuring students to each teacher. Any school found violating this regulation is declared to be in violation of Montana Law.

(9) and (10) remain the same.

(11) Each cosmetology student must complete 300 hours of basic training and each manicuring student must complete 80 hours of basic training before they shall be allowed to work on the public.

(a) Cosmetology students shall not be allowed more than 8 hours per day for the first 300 hours of basic training and manicuring students shall not be allowed more than 8 hours per day for the first 80 hours of basic training.

(b) Cosmetology students shall not be allowed more than 16 hours of overtime per month and manicuring students shall not be allowed more than 16 hours of overtime per month.

(12) through (17) remain the same.

(a) The cosmetology student's required time continues on the date of the re-enrollment unless over 60 days has lapsed from the last date of attendance. The manicuring student's required time continues on the date of the re-enrollment unless over 7 days has lapsed from the last-date of attendance.

(18) Schools of cosmetology and manicuring may have demonstrators and lecturers other than their instructors appear for class upon approval of the board. Such demonstrators or lecturers may or may not hold Montana cosmetologist or instructor licenses, but must confine all demonstrations and lectures to explanation of cosmetics, hair products, procedures of cosmetology, manicuring, pedicuring and manicuring products, or health sanitation. Such demonstrators or lecturers shall not teach or give any personal assistance to students and must use students and models when demonstrating in the school.

(19) will remain the same.

(20) At the entrance of each school, a large legible sign with the words "School of Cosmetology", or "School of Manicuring" shall be displayed. Each classroom shall have similar signs with the words "Student Work Only" posted.

(21) through (23) will remain the same.

(24) The board shall, in its discretion, determine whether the beauty salons, manicuring salons and schools of cosmetology and manicuring are operated by the same person, firm, co-partnership or corporation as separate and distinct businesses and in arriving at such determination shall include such factors as:

(24)(a) through (25) will remain the same."
Auth: 37-31-203, MCA Imp: 37-31-311, MCA

6. The proposed amendment of 8.14.605 will amend the title and text and will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-413, Administrative Rules of Montana)

8.14.605 CURRICULUM - STUDENTS COSMETOLOGY/MANICURING STUDENTS (1) The hours for training courses for cosmetologists shall be distributed as follows:

The hour schedule for cosmetologists will remain the same.

(2) through (4)(a) will remain the same.

(5) The hours for training courses for manicurists shall be 350 hours and distributed as follows:

<u>Subject</u>	<u>Minimum Hours of Technical Instruction</u>	<u>Minimum Practical Operations</u>
<u>Shop management, business methods, law, rules and shop etiquette</u>	<u>5</u>	
<u>Cosmetology Chemistry related to manicuring practices. (Shall in- clude the chemical compos- ition and purpose of nail care preparations.)</u>	<u>20</u>	
<u>Bacteriology, sanitation and sterilization, safety precautions, anatomy and physiology.</u>	<u>20</u>	
<u>Water and oil manicures, including hand and arm massage.</u>	<u>20</u>	<u>40</u>
<u>Complete pedicure, including foot and ankle massage.</u>	<u>15</u>	<u>5</u>
<u>Application of artificial nails, liquid and powder brush-ons.</u>	<u>15</u>	<u>40 Nails</u>
<u>Nail tips.</u>	<u>15</u>	<u>20 Nails</u>
<u>Nail wraps and repairs</u>	<u>10</u>	<u>15 Nails</u>

Additional Training
(May include profes-
sional ethics, personal
hygiene, good grooming,
salesmanship, normal
cleanup duties, required
keeping of student daily
records, modeling, desk
and reception.) May
also include not more
than 8 hours credit for
field trips. Such field
trips must be under the
direct supervision of a
licensed cosmetology in-
structor. Date, time and
description of field trip
shall be recorded on
student's daily record.

Maximum Hours
of Additional
Training

25

All students shall have completed the specified minimum required hours and operations upon completion of the three hundred fifty hour course in not less than 9 weeks or more than 12 weeks of training.

No credit of any type shall be given for time spent in laundering towels or in washing or scrubbing floors, walls, woodwork, toilets or windows.

All curriculum requirements set by the board shall be strictly complied with until rescinded or revised.

(6) Any applicant who has completed 350 hours of training for a manicurist license, and transfers to a school of cosmetology will be granted 125 hours of credit towards the required 2000 hour course for a cosmetologist license."

Auth: 37-31-203, MCA Imp: 37-31-311, MCA

7. The proposed amendment of 8.14.606 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-414 and 8-415, Administrative Rules of Montana)

"8.14.606 STUDENT REGISTRATION (1) will remain the same.

(a) Cosmetology students must submit Pproof of an eighth grade graduation (diploma or certification);

(i) manicuring students must submit copy of high school diploma or equivalency.

(b) will remain the same;

(e) certificate of health issued by a licensed physician;

(d) (c) transfer students must submit a transcript of hours; and

~~(e)~~ (d) each student enrolling in a registered school of cosmetology or manicuring shall pay a registration fee which will be made payable to the board of cosmetologists.

(2) and (3) will remain the same.

~~(4)~~ A student who transfers to another school within the same city will forfeit 80 hours of accumulated credit.

~~(5)~~ (4) A student enrolling in a school for the first time must pay the registration fee.

(a) If a student withdraws and re-enrolls in another school, he is required to pay the registration fee again.

(b) Each time a student withdraws and re-enrolls in the same school, he is required to pay the registration fee again.

~~(6)~~ (5) All cosmetology students who have been out of school for a period of time in excess of 60 calendar days would forfeit 80 hours of accumulated credit for each month or fraction thereof since the last day of attendance in a beauty school.

(a) All manicuring students who have been out of school for a period of time in excess of 7 calendar days would forfeit 20 hours of accumulated credit for each week or fraction thereof since the last day of attendance in a manicuring school.

~~(7)~~ (6) Students of cosmetology or manicuring may lose credit for training time during which a school of cosmetology license is invalid.

~~(8)~~ (7) Students entering into the Armed Forces of the United States may retain credit for their training time.

~~(9)~~ (8) Students must comply with the rules of the school of cosmetology and the state board.

~~(10)~~ (9) Any student in any school of cosmetology may file a complaint with the department concerning the school in which they are enrolled, provided the information follows the board rules and is clearly and concisely given in writing and signed by the complainant."

Auth: 37-31-203, MCA Imp: 37-31-311, MCA

8. The proposed amendment of 8.14.608 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-415 and 8-416, Administrative Rules of Montana)

"8.14.608 INSTRUCTOR REQUIREMENTS - TEACHER-TRAINING

UNITS

(1) through (5) will remain the same.

(6) All cadet teachers must register with the department naming the teacher-training unit and school in which they are enrolling and no credit for time will be allowed until the office of the department has received his or her medical certificate and enrollment application.

(7) will remain the same.

(8) Upon completion of ~~500~~ 650 hours of teacher-training, cadet teachers must apply and take the first available instructor examination."

Auth: 37-31-203, MCA Imp: 37-31-305, MCA

9. The proposed amendment of 8.14.801 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-427, Administrative Rules of Montana)

"8.14.801 INSTRUCTORS (1) through (9) will remain the same.

(i0) Applicants registered for examination but for good cause cannot appear, must notify the office of the department before the examination date or forfeit their fee.

(ii) (10) No temporary license shall be issued to instructors."

Auth: 37-31-203, MCA Imp: 37-31-303, MCA

10. The proposed amendment of 8.14.802 will amend the title and read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-427 and 8-428, Administrative Rules of Montana)

"8.14.802 EXAMINERS - STUDENT EXAMINATIONS (1)

Examinations for operator licenses shall be conducted by the board or by examiners appointed by the majority of the board at least 2 times a year and not more than 5 times a year at a place and time at places and times specified by the board.

(2) through (4) will remain the same.

(5) Practical examinations for cosmetologists shall consist of actual demonstrations in dressing the hair and other phases of cosmetology on live models manikins.

(a) Practical examinations for manicurists shall consist of actual demonstrations in nail care of the hands and feet and the application and maintenance of artificial nails.

(6) Written examinations shall cover each of the branches of cosmetology or manicuring and cosmetology law and rules taught in this state.

(7) and (8) will remain the same.

(9) Any Applicants who have has taken the examination and failed any part thereof, must notify the office of the department of their desire to be re-examined ~~20~~ 25 days before the next examination and pay the fee.

(i0) Applicants registered for the ~~examination~~, but for good cause cannot appear, must notify the office of the department before the next examination date or forfeit the fee.

(10) Any manicurist applicant, failing twice to pass the examination for a license to practice must take 35 hours of

additional training at a registered school of manicuring, approved by the board.

(11) In order to pass the examination given by the board to practice cosmetology or manicuring an applicant must obtain a grade of not less than 75% in the practical examination and not less than 75% on the written theory.

(12) and (13) will remain the same."

Auth: 37-31-203, MCA Imp: 37-31-303, 308, MCA

11. The proposed amendment of 8.14.803 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-428 and 8-429, Administrative Rules of Montana)

"8.14.803 QUALIFICATIONS FOR EXAMINATION - MONTANA

STUDENTS

(1) COSMETOLOGY STUDENTS

(1) (a) To be eligible to take the examination the applicant must be 18 years of age, a graduate of the eighth grade and be of good moral character.

(2) (b) Applicants must have completed a continuous course of theoretical study and actual practice of at least 2,000 hours, be in good standing and have received a diploma from a registered school of cosmetology.

(3) (c) No application for examination will be accepted unless accompanied by the proper fees, credentials, final examination grades received in the school, the hours record showing that the 2,000 hours have been completed and records showing that the student has been enrolled for at least 10 months.

(d) Temporary licenses must be returned to the office of the department immediately if the applicant is unable to take the examination and are not renewable.

(e) No temporary license to practice as an operator shall be issued to any person who has taken the examination and failed to pass.

(2) MANICURING STUDENTS

(a) To be eligible to take the examination, the applicant must be 18 years of age, a graduate of high school or equivalent and must be of good moral character.

(b) Applicants must have completed a continuous course of theoretical study and actual practice of 350 hours, be in good standing and have received a diploma from a registered school of manicuring.

(c) No application for examination will be accepted unless accompanied by the proper fees, credentials, final examination grades received in the school, the hours record showing that 350 hours have been completed and records showing that the student has been enrolled for at least 9 weeks.

(d) No temporary license shall be issued to manicurists.

(4) (3) All Applications must be received by the department at least 20 25 days prior to the examination date and incomplete applications will be returned to the applicant.

(5) (4) Applications received after closing date for registration will be held until the following examination.

(6) (5) Applicants may not appear for examination unless they have been notified.

(7) Temporary licenses must be returned to the office of the department immediately if the applicant is unable to take the examination and are not renewable.

(8) No temporary license to practise as an operator shall be issued to any person who has taken the examination and failed to pass."

Auth: 37-31-203, MCA Imp: 37-31-304, MCA

12. The proposed amendment of 8.14.804 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-429, Administrative Rules of Montana)

"8.14.804 EXAMINATION - OUT-OF-STATE STUDENTS (1) Applications for out-of-state students must be filed with the office of the department at least 20 days prior to the examination date.

(1) Student applicants from out-of-state must meet the same requirements as Montana cosmetology or manicuring students.

(2) Applications will not be accepted if the applicant is under 18 years of age and does not have an eighth grade education.

(2) Temporary licenses may be issued to out-of-state cosmetology students, pending examination.

(3) Applications must be completed properly and accompanied with proper fees, certified hours record from either the school where the student attended or a state board record showing the student completed 2,000 hours of study in a registered cosmetology school and a certificate of health issued by a registered licensed physician.

(4) Applicants will be notified by the office of the department when they may appear for the examination.

(5) Temporary licenses may be issued to out-of-state students, pending examination."

Auth: 37-31-203, MCA Imp: 37-31-307, MCA

13. The proposed amendment of 8.14.805 will amend the title and text and will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-429 and 8-430, Administrative Rules of Montana)

"8.14.805 APPLICATION - OUT-OF-STATE OPERATORS
COSMETOLOGISTS/MANICURISTS

(1) COSMETOLOGISTS

(1) (a) To qualify for a license by examination, an out-of-state operator cosmetologist must submit an application supplied by the department, a health certificate birth certificate, proof of completing the eighth grade, current out-of-state license and a board transcript. The applicant will be credited for the number of hours currently required in that state or the number of hours in the transcript.

(2) (b) Operators Cosmetologists with 2000 hours of training are eligible for examination with the above credentials plus the required fees.

(3) (c) Operators Cosmetologists with 1500 hours of training, plus the above credentials must also furnish a notarized statement from a former employer showing credit for at least 1 year experience as a cosmetologist, as approved by the board.

(4) (d) Operators Cosmetologists with 1000 hours of training, plus the above credentials must furnish a notarized statement from a former employer showing credit of at least 2 years experience as a cosmetologist, as approved by the board.

(e) A temporary license may be issued to out-of-state cosmetologists pending the next scheduled examination.

(2) MANICURISTS

(a) To qualify for examination, out-of-state manicurists must submit an application supplied by the department, birth certificate, high school diploma, or equivalent and a board transcript. The applicant will be credited for the number of hours currently required in that state or the number of hours in the transcript.

(b) Manicurists with 350 hours of training or more, are eligible for examination with the above credentials plus the required fees.

(c) Manicurists with less than 350 hours of training shall furnish a notarized statement from a former employer showing proof of 6 months of continuous experience as a manicurist. The board has the right to give final approval to such experience.

(5) (3) The Applicants shall take the practical and written examinations covering each of the branches of cosmetology or manicuring and cosmetology law and rules, administered by the board.

(6) (4) Operators Applicants tested and licensed in a state which administers the examination provided by the National Interstate Council of State Boards of Cosmetology, Inc., and the applicant received a score which was in excess of the minimum score required for licensure in Montana, the applicant need not take the written examination but shall take

the cosmetology law and rules portion of the written examination and the practical examination.

{7} (5) An Any applicant from out-of-state whose license has lapsed, must meet the requirements of the state of Montana and satisfy the rules of the board. They must apply and take the written and practical examination.

{8} A temporary license may be issued to out-of-state operators pending the next scheduled examination.

{9} (6) Operators Applicants from foreign countries will be granted a license on the same basis as out-of-state operators applicants."

Auth: 37-31-203, MCA Imp: 37-31-304, MCA

14. The proposed amendment of 8.14.807 will amend the title and text and will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-431, Administrative Rules of Montana)

"8.14.807 TRANSFER STUDENTS - OUT-OF-STATE - COSMETOLOGY/MANICURING

(1) will remain the same.

(2) Out-of-state students will be considered as being on probationary training until the department has received and reviewed their transcript of hours, registration card, health certificate and/or any other papers or documents which the board may deem necessary.

(3) will remain the same.

(4) Cosmetology T transfer students from other states completing the necessary hours of training in Montana are eligible to apply for a temporary license.

(5) Cosmetology G graduates or licensed operators from other states that are enrolled in cosmetology schools in order to receive the necessary amount of hours of training to take the state board examination are eligible to apply for a temporary license."

Auth: 37-31-203, MCA Imp: 37-31-304, MCA

15. The proposed amendment of 8.14.810 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located page 8-432, Administrative Rules of Montana)

"8.14.810 ITINERANT COSMETOLOGISTS (1) and (2) will remain the same.

(3) Itinerant cosmetologists performing their services for compensation for demonstration, instructing, or selling products or teaching methods or cosmetology skills are required to apply and be licensed by the board, unless under the auspices of the State Association of Cosmetology or its affiliated units.

(4) and (5) will remain the same.

(6) An itinerant license is valid until December 31st of the year in which it is issued, however, each time the licensed itinerant cosmetologist is in the state of Montana performing their services or skills, they must file their agenda with the office of the department, limited to 30 days from date of issue."

Auth: 37-31-203, MCA Imp: 37-31-101, MCA

16. The proposed amendment of 8.14.812 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-433, Administrative Rules of Montana)

"8.14.812 DUPLICATE LICENSES (1) will remain the same.

(2) Any ~~cosmetologist~~ licensee may receive a duplicate of their ~~manager, operator, or instructor~~ license upon payment of a proper fee and a verified statement as to why such a duplicate license is needed."

Auth: 37-31-203, MCA Imp: 37-31-304, MCA

17. The proposed amendment of 8.14.813 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-433, Administrative Rules of Montana)

"8.14.813 LAPSED LICENSE (1) will remain the same.

(a) If a manicurist license has lapsed for a period of up to 3 years, but no longer than 3 years, the license may be renewed upon payment of license fees plus penalty fees for years due.

(b) In the event that a manicurist license has lapsed for over 3 years, for any reason, it is required that such a person must take a course of 60 hours of training in a properly licensed school of cosmetology or manicuring, providing certification thereof, make application, pay proper fees and take the written and practical examination.

(2) through (6) will remain the same."

Auth: 37-31-203, MCA Imp: 37-31-322, MCA

18. The proposed amendment of 8.14.814 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-434 and 8-435, Administrative Rules of Montana)

8.14.814 FEES, INITIAL, RENEWAL, PENALTY AND REFUND FEES

(1) and (2) will remain the same.

(3) Temporary license fee for cosmetologists shall be \$10.00.

(4) Examination to practice shall be \$40.00, plus \$25.00 manager-operator or manicurist license fee.

(5) will remain the same.

(6) Itinerant processing license fee shall be \$70.00
\$30.00 plus \$25.00 \$5.00 manager-operator license fee.

(7) Reciprocal license shall be \$100.00, plus \$25.00
manager-operator or manicurist license fee.

(8) through (10) will remain the same.

(11) Manager-operator and manicurist license fee shall
be \$25.00.

(12) Cosmetologist S salon and manicure salon license
fee shall be \$35.00.

(13) will remain the same.

(a) manicuring school license fee shall be \$100.00.

(14) through (22) will remain the same."

Auth: 37-31-203, MCA Imp: 37-31-323, MCA

19. The proposed amendment of 8.14.816 will amend the title and the text and will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-435 and 8-436, Administrative Rules of Montana)

"8.14.816 SALONS - COSMETOLOGICAL/MANICURING (1)

Definition: A cosmetology or manicurist salon is an establishment or area wherein any branch of cosmetology or manicuring is performed for compensation other than a school of cosmetology or manicuring and no other function or service shall be performed other than those described in 37-31-301, MCA.

(a) a licensed manicurist may work in a cosmetological establishment without a manicure salon license, providing their service is limited to manicuring only.

(2) will remain the same.

(3) Cosmetology or manicuring S salons either classified as residential or business area salons must have a separate entrance closed by a door.

(4) In order to guarantee adequate service to the public, there shall be in every cosmetology salon a minimum of 120 square feet per operator and there shall be in every manicuring salon a minimum of 30 square feet plus a supply area, per manicurist. The applicant must furnish the board with a blueprint or scale drawing of the floor plan.

(5) will remain the same.

(a) After December 31, 1972, all new residential cosmetology or manicuring salons shall have only outside entrances and no open entrance into the residence.

(6) will remain the same.

(a) Cosmetology or manicurist S salons housed in a multi-purpose building are required to be completely separate from other established businesses.

(7) A salon registration permits the operation of a beauty or manicurist salon only in the premises which have

been described on the salon application required by the department.

(8) will remain the same.

(a) All applications for registration for a beauty or manicuring salon must be completed in its entirety, notarized and sent into the office of the department.

(9) and (10) will remain the same.

(11) Every beauty or manicuring salon is required to have at least 1 licensed manager-operator cosmetologist or manicurist in attendance at all times that it is open for business.

(12) will remain the same.

(13) It is the responsibility of the manager-operator cosmetologist or manicurist in charge to see that all rules are complied with by all personnel.

(14) will remain the same."

Auth: 37-31-203, MCA Imp: 37-31-302, MCA

20. The proposed amendment of 8.14.1206 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-466, Administrative Rules of Montana)

8.14.1206 TOILET FACILITIES (1) and (2) will remain the same.

(3) Toilet rooms ~~should~~ shall be at least 35 square feet in area completely closed by walls and ceilings and plumbing must comply with the Montana plumbing code.

(3)(a) through (4)(a) will remain the same."

Auth: 37-31-203, MCA Imp: 37-31-204, MCA

21. The amendments of numbers 2 through 17, 19 and 20 are proposed to conform with the authority to promulgate rules for the qualification and training of manicurists as a separate licensing function granted to the Board of Cosmetologists by the 1985 Legislature. The manicuring rules are being incorporated within the current rule structure of cosmetology to make them compatible with the present cosmetology rules.

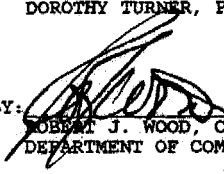
22. The amendment to number 18 regarding fees is proposed because the board is setting fees for manicurists and manicure establishments the same as for cosmetologists. At this time, the board is unable to anticipate the number of applicants that may apply for this separate phase of licensing. The board has been requested to lower the Itinerant License fee by the Suppliers or Jobbers. At this time, the board is unable to determine the effect this will have on their overall fee structure. During the last 10 to 14 years, this license has been requested and issued to only approximately 8 to 10 applicants.

23. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Cosmetologists, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than December 27, 1985.

24. If a person who is directly affected by the proposed amendments 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 Cosmetologists, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than December 27, 1985.

25. If the board receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments, 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 600 based on the 6000 licensees in Montana.

BOARD OF COSMETOLOGISTS
DOROTHY TURNER, PRESIDENT

BY: 
ROBERT J. WOOD, COUNSEL
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 18, 1985

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF HEARING AID DISPENSERS

In the matter of the proposed	)	NOTICE OF PUBLIC HEARING
amendments of 8.20.401 con-	)	ON PROPOSED AMENDMENTS AND
cerning traineeship require-	)	NEW RULES UNDER SUB-CHAPTER
ment and standards, 8.20.402	)	4 and NEW SUB-CHAPTER 5
concerning fees, 8.20.403	)	CONCERNING CONTINUING
concerning examination, 8.20	)	EDUCATION
404 concerning renewals, 8.)	
20.405 concerning address)	
change, 8.20.408 concerning)	
code of ethics, 8.20.410 con-)	
cerning hearings, and pro-)	
posed adoption of new rules)	
under sub-chapter 4 concern-)	
ing disciplinary actions -)	
finer, purchaser rescission)	
rights and proposed adoption)	
of new rules under sub-)	
chapter 5 concerning contin-)	
uing education)	

TO: All Interested Persons.

1. On January 8, 1986, at 10:00 a.m. a public hearing will be held in the conference room of the Department of Commerce, at 1424 9th Avenue, Helena, Montana, to consider the amendment and adoption of the above-stated rules.

2. The proposed amendment of 8.20.401 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-583, Administrative Rules of Montana)

"8.20.401 TRAINEESHIP REQUIREMENT AND STANDARDS (1)

The traineeship apprenticeship period shall work be for 6 12 months as follows: beginning upon notification of successfully passing the written examination.

(a) Stage i The trainee shall work for 30 60 days under in the direct control physical presence of a licensed hearing aid dealer dispenser (sponsor). He cannot in any way fit or test the customer.

(b) Stage ii This trainee stage lasts for After 60 days, the trainee may engage in all activities allowed a licensed hearing aid dispenser, but must work under, and be responsible to, the sponsor. During this period, the trainee may do the testing necessary for the proper selection and fitting of a hearing aid and make the impressions. During this period the sponsor-dealer will make delivery and final fitting.

(c) Stage iii The A trainee may engage in all activities of a licensed hearing aid dealer. licensed less than 90 days shall not make house calls, test the hearing or dispense hearing aids unless his sponsor is physically present

with and supervising the trainees actions at all times. He must, however, work under and be responsible to his sponsor for the following 90 days.

(d) The above stages must be completed with no interim time lapse between stages. In the event the trainee leaves his place of training, he loses seniority and must revert to Stage I. This rule is subject to the approval of the board.

(i) For purposes of determining whether an applicant has properly qualified as a trainee, the apprenticeship shall be in the office of a licensed dealer which office shall be open 40 weeks of the year at least 6 hours a day, 5 days a week and the licensed dealer must be available in that office at least 1 and 1/2 days per week unless otherwise authorized in specific cases by the board.

(e)(2) Supervision of trainee. The dispenser (sponsor) will:

(i)(a) peruse every fitting made by the trainee. He/she The sponsor shall approve the selection of the ear mold, aid and choice of ear to fit.

(i)(b) The dispenser shall periodically go with the trainee to see the fitting by a follow-up visit.

(i)(c) The dispenser shall have personal contact with the all customers of the trainee who is experience difficulty to satisfy in his/her fitting.

(i)(d) The number of trainees shall be limited to no more than two trainees for each licensed dispenser at any given time.

(3) Both the trainee and the sponsor must notify the board in writing, of any break in training program, stating reasons for such break in training or termination.

(4) A trainee who loses his or her sponsor for any reason shall not continue in a trainee status with a new sponsor until written notification is received by the board, within 10 days of change, stating the reasons for such change in sponsor.

(5) A sponsor of a trainee who desires to terminate the responsibility of sponsorship shall give the trainee written notice of such termination, giving reasons, and shall immediately notify the board, in writing of such termination of sponsorship.

(6) When there is any break in a training program lasting more than 30 days, the trainee status terminates and the trainee must make new application for original trainee status and pay fees as required.

(7) Trainees shall, if completing a sales contract, purchase agreement, etc., sign his or her name, "trainee" after the name and license number on contract.

(8) Trainees shall affix the designation "trainee" after his or her name on all business cards, correspondence, advertising or any written material concerning the hearing aid field."

Auth: 37-16-202, MCA Imp: 37-16-301, 405, MCA

3. The Board of Hearing Aid Dispensers is proposing to amend 8.20.401 Traineeship Requirements for compliance with revisions in 37-16-405, MCA, which changed the time of training period from 6 months to 12 months, requiring a written examination to be passed prior to starting training period to determine the qualifications, ability and determination of a trainee. The board feels that requiring the written examination prior to the start of training will eliminate those persons who enter into the hearing aid field for a brief time and also those persons who do not have the ability to deal with the public and the hard-of-hearing or the skills necessary for a profession in the hearing aid industry. The majority of complaints received by the board in the past year have been against trainees.

This rule also makes provisions for termination of training period and procedures in notifying the board of such break in training period by both the trainee and licensed sponsor providing for protection of both parties during this critical training stage.

The provision requiring a person to show his "trainee" status on business cards, correspondence, etc. will alert those prospective customers to the trainee's status in case they wish a dispenser with more experience, which is for the protection of the public.

4. The proposed amendment of 8.20.402 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-583 and 8-583.1, Administrative Rules of Montana)

"8.20.402 FEES (1) Copies of the law furnished by the board will cost \$5.00 per copy.

Application Fee (includes initial written and practical examination)	\$125.00
Re-examination--written	40.00
Re-examination--practical (includes renewal of trainee license)	55.00
Original license (upon passing examinations)	80.00
Renewal license	80.00
Copies of law and rules	5.00

(2) The \$35.00 fee paid by a trainee covers his period of traineeship and his first test. Failure of the test will require an additional \$45.00 to renew his trainee license. \$100 of the application fee is refundable within first 60 days after application, with \$25.00 being retained for board administrative costs.

(a) When he passes the test and is licensed, he must buy an \$80.00 regular license.

(3) All other fees payable to the board are non-refundable. Fees paid for a temporary or permanent license are not refundable."

Auth: 37-16-202, MCA Imp: 37-16-202, 402, 405, MCA

5. Section 37-1-134, MCA allows licensing boards to set fees commensurate with program area costs. The above fees are those the board has determined necessary to cover administrative costs.

6. The proposed amendment of 8.20.403 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-583.1, Administrative Rules of Montana)

"8.20.403 EXAMINATION - PASS/FAIL POINT (1) The passing score on the written examination shall be 80%. Applicants must pass both the written and oral portion. A pass/fail on the oral portion shall be determined by a majority vote of board members present. All applications for examination must be received in the office of the board 15 days prior to examination date.

(2) The passing score on the written examination shall be 70%.

(3) Each section of the oral and practical examination must be passed by a minimum grade of 70%. An applicant who fails any section only has to retake section(s) failed."

Auth: 37-16-202, MCA Imp: 37-16-403, MCA

7. The board changed the examination written score to 70% to comply with passing score on national and 37-16-405, MCA as revised and to set a passing score on the oral/practical portion of the examination.

8. The proposed amendment of 8.20.404 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-584, Administrative Rules of Montana)

"8.20.404 RENEWALS (1) The licenses will run from July 1st to June 30th.

(2) If a dealer is licensed during the month of June, he will not be charged a year's fees. The month of June will be included in the following year's fees."

9. The board did not feel that this was consistent with new trainee and examination schedule that there will no longer be anyone licensed in the month of June.

10. The amendment of 8.20.405 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-584, Administrative Rules of Montana)

" 8.20.405 NOTIFICATION OF ADDRESS CHANGE (1) All licensed dispensers shall notify the board of any change of business address within 30 days after actual relocation and shall notify the board when they have ceased doing business within 90 days of the dissolution. A trainee must notify the board within 10 days of his change of address. Failure to so provide notification in each case shall constitute cause for suspension or revocation of license."

11. This sentence is being deleted as all references to trainees change of address are now covered in 8.20.401 Traineeship Rules.

12. The proposed amendment of 8.20.408 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-584 through 8-586, Administrative Rules of Montana)

"8.20.408 CODE OF ETHICS (1) ...

(6) It shall be understood that any hearing aid dispenser who shall engage in a home solicitation sale shall be expected and subject to the statutory requirements of the Door to Door Sales Act as set out in Section 30-14-501 et seq MCA. In these instances where the sale of a hearing aid is not subject to the Door to Door Sales Act, the hearing aid dispenser shall be subject to the following standards of conduct:

(a) The client shall have a 3 day period commencing with the consummation of the contract within which time to cancel such contract. In this case and in the event that the client elects his option to cancel such contract, the hearing aid dispenser must then refund the full down payment. However, if such client does not elect to cancel within this time but rather at time of delivery of the hearing aid decides to refuse to accept such hearing aid then, the hearing aid dealer shall be entitled to keep up to, but no more than \$65.00 out of the down payment or may keep any amount less in sum at the discretion of the dealer."

Auth: 37-16-202, MCA Imp: 37-16-411, MCA

13. The board is proposing to amend this section to eliminate reference to standards of conduct which are now covered under new rule entitled Purchase Recision Rights which provides protection to the public by requiring specific information be supplied to the hearing aid customer and providing cancellation of contract with refunding methods and dispenser retention of fees for expenses incurred.

14. The proposed amendment of 8.20.410 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-586, Administrative Rules of Montana)

"8.20.410 HEARINGS (1) Any person appearing before the board for a hearing in the denial or revocation of a license, or a fine is entitled to counsel, witnesses and all documents they may choose to present. They shall be notified of the time, place and date of such hearing and shall receive copies of all charges by certified mail, at least 30 days prior to the hearing date. They shall be allowed proper time and consideration for the presentation of their case, during the hearing. All correspondence with any individual appearing before the board will be by certified mail."

Auth: 37-16-202, MCA Imp: 37-16-411, 412, MCA

15. To allow the board to discipline a trainee or licensee and to implement provisions on fines provided under Section 37-16-411, MCA.

16. The proposed new rules will read as follows:

"1. DISCIPLINARY ACTIONS - FINES (1) The board reserves the discretion to take appropriate disciplinary action provided for in Section 37-1-136 and 37-16-411, MCA, against a licensee who has violated any law or rule of the board, and to decide on a case by case basis the type and extent of disciplinary action it deems appropriate applying the following considerations:

(a) the seriousness of the infraction;
(b) the detriment to the health, safety and welfare of the people of Montana; and
(c) past or pending disciplinary actions relating to the licensee.

(2) The board may impose one or more of the following sanctions in appropriate cases:

(a) revocation of a license;
(b) suspension of its judgment of revocation on terms and conditions determined by the board;
(c) suspension of the right to practice for a period not exceeding 1 year;

(d) placing a licensee on probation;
(e) public or private reprimand or censure of a licensee;

(f) limitation or restriction of the scope of the license and the licensee's practice;

(g) deferral of disciplinary proceedings or imposition of disciplinary sanctions;

(h) ordering the licensee to successfully complete appropriate professional training; or

(j) imposition of a fine or fines not to exceed \$500 per incident of violation.

(i) fines will be determined by the board on an individual per case basis.

(ii) fines must be paid within 30 days of notification from the board.

(iii) failure to pay the fine and assessments for violation(s) may result in non-renewal of license or an additional 10% of the amount of fine assessment for each month that the fine is not paid.

(iv) fines imposed against a trainee are the responsibility of the sponsoring licensed hearing aid dispenser in accordance with (iii) above.

(3) When a license is revoked or suspended, the licensee must surrender the license to the board."

Auth: 37-1-136, 37-16-202, MCA Imp: 37-16-411, MCA

"II. PURCHASER RECISION RIGHTS (1) The client shall have a 3-day period commencing with the consummation of the contract within which time to cancel such contract. In this case and in the event that the client elects his option to cancel such contract, the hearing aid dispenser must then refund the full down payment.

(2) If the client does not elect to cancel within 3 days, but, rather at time of delivery of the hearing aid, decides to refuse to accept such hearing aid, then the hearing aid dispenser shall be entitled to keep up to, but no more than, 10% of the purchase price or may keep any amount less in sum at the discretion of the dealer.

(3) Every retail agreement for the sale of a hearing aid shall contain or have attached the following notice in ten point boldface type or larger. 'Notice to Buyer (1) Do not sign this agreement before you read it or if any spaces intended for the agreed terms, except as to unavailable information, are blank. (2) You are entitled to a copy of this agreement at the time you sign it. (3) You may cancel this agreement if it was solicited in person, and you sign it, at a place other than the seller's business address shown on the agreement, by sending notice of such cancellation by certified mail, return receipt requested, to the seller at his address shown on the agreement, which notice shall be posted not later than the third day (excluding Sundays and holidays) following your signing this agreement; you must return or make available to the seller at the place of delivery any hearing aid, in its original condition, received by you under this agreement.' 'Additional Rights: In addition to the rights and remedies provided for under the above circumstances, you, the purchaser, have the right to rescind the transaction for other than the seller's breach if: (a) you consult a licensed physician and such licensed physician advises you against the purchase or use of a hearing aid and specifies in writing the medical reason for such advice. (b) You return the hearing aid or hold it at the seller's disposal and the hearing aid is in its original condition less normal wear and tear, and you send a notice to the licensee at his regular place of business by certified mail, return receipt requested. The notice should state that the transaction is cancelled and must be

mailed not later than 30 days following the date of delivery. Such notice shall include a copy of the physician's signed statement. (c) In the event of cancellation, the licensee must, without further request, refund to you within 10 days after such cancellation, all deposits, including down payment, less 10% of the total purchase price and less the reasonable price of ear molds if any. He must also return all goods traded in by you on account or in contemplation of the sale less any reasonable costs actually incurred in making all such goods so traded in ready for resale. (d) You the buyer, shall incur no additional liability for such cancellation."

Auth: 37-16-202, MCA Imp: 37-16-303, MCA

"III. CONTINUING EDUCATION REQUIREMENTS (1) The licensee must present evidence satisfactory to the board of having completed at least 4 clock hours of continuing education. Such evidence must be presented by June 30th of each year.

(2) Continuing education courses recognized by the board pertaining to fitting and dispensing hearing aids include those sponsored by the Montana Hearing Aid Society, the National Hearing Aid Society, the National Institute of Hearing Instruments Studies, the American Speech-Language Hearing Association, the American Conference of Audioprosthology, the Montana Speech and Hearing Association, college courses, and other such programs approved by the board.

(3) A dispenser who is first licensed within the 12 months immediately preceding the annual renewal date will not be required to meet the continuing education requirements during that 12 month period.

(4) Four clock hours credit will be recognized for published books and articles which contribute to the professional competence of the licensee.

(5) Four clock hours will be recognized for each year of full time research by the licensee.

(6) Credit recognition will not be granted for coursework which is substantially similar to coursework which was successfully completed in the preceding 2 years and used to meet the continuing education requirements of the board.

(7) Clock hours cannot be accumulated and transferred to another fiscal year."

Auth: 37-16-202, MCA Imp: 37-16-407, MCA

"IV. STANDARDS FOR APPROVAL (1) Summaries of the courses and resumes of those teaching must be submitted to the board for approval.

(2) The course content shall be related to the use of hearing aids for aiding or compensating the hearing impaired and shall include subject matter related to current

developments in the practice of fitting, testing or dispensing hearing aids.

(3) Teaching methods for each course or program shall be described, e.g. lecture, seminar, audiovisual, simulation, pretest, posttest, etc.

(4) Each course or program shall clearly state the educational objective that can be realistically accomplished within the course and the number of clock hours which may be obtained by completion of a specified course.

(5) Instructors shall be qualified to teach the specified course content by virtue of their prior education, training, and experience. A resume of each instructor's qualifications shall be forwarded with the application for approval 30 days prior to the occurrence of the course.

(6) New product seminars are subject to approval by the board.

(7) Sales training seminars will not be accepted for continuing education credit."

Auth: 37-16-202, MCA Imp: 37-16-407, MCA

"V. EXCEPTIONS (1) Licensees who have not complied with the education requirements may not be issued a renewal license unless such person is granted an exception upon written application to, and approved by, the board.

(2) The board reserves authority to make written exception for reasons of individual hardship including health, military service, foreign residence, retirement or inaccessibility to programs.

(3) A licensee who submits medical proof from his or her attending physician that he or she or a member of the licensee's immediate family suffered a serious or disabling illness or physical disability which prevented the licensee from complying with the requirements of the board during the 12 months immediately preceding the annual license renewal date, may be granted an exception."

Auth: 37-16-202, MCA Imp: 37-16-407, MCA

"VI. PROOF OF ATTENDANCE (1) Licensees must provide written proof of attendance and completion of approved course for renewal of license. Proof must include a statement giving the sponsoring organization; location and dates; course name; instructor; name of licensee; number of clock hours completed.

(2) Forms must be properly signed by the course instructor, monitor and licensee verifying attendance at the particular course.

(3) Forms are available from the board office.

(a) application for course approval

(b) verification of continuing education attendance

(c) request for exception and waiver."

Auth: 37-16-202, MCA Imp: 37-16-407, MCA

17. The proposed adoption of the new rule on Disciplinary Actions - Fines is to allow the board to discipline a trainee or licensee and to implement provisions on fines provided under Section 37-16-411, MCA.

The board is proposing the adoption of the Continuing Education rule to implement new statutory authority in Section 37-16-407, MCA, requiring four hours of continuing education annually. The proposed rule grants broad approval to certain organizations for continuing education programs, provides standards for approval, allows exceptions to meeting the continuing education for health or hardship reasons and requires proof of attendance to be filed with the board for monitoring licensees continuing education credits per year.

18. Interested persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Hearing Aid Dispensers, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than December 27, 1985.

BOARD OF HEARING AID
DISPENSERS
DUDLEY ANDERSON
CHAIRMAN

BY: 

ROBERT J. WOOD, COUNSEL
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 18, 1985.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF REALTY REGULATION

In the matter of the proposed) NOTICE OF PROPOSED ADOPTION
adoption of a new rule con-) OF NEW RULE CONCERNING CON-
cerning continuing education) TINUING EDUCATION

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On December 29, 1985, the Board of Realty Regulation proposes to adopt a new rule concerning continuing education.
2. The proposed new rule will read as follows:

"1. CONTINUING EDUCATION (1) Each and every real estate licensee is hereby required to receive and successfully complete a minimum of 15 classroom or equivalent hours of continuing education in any two (2) year period.

(2) Proof of conformance must be submitted to the Board prior to issuance of the licensee's renewal license at the conclusion of (any) two (2) year period.

(3) Only those courses approved by the board may be counted as and considered for continuing education purposes.

(4) Passage of an examination may not be required for the successful completion of an approved course for continuing education purposes."

Auth: 37-51-202, 203, 204 (3), MCA Imp: 37-51-202, MCA

3. The new rule is being proposed to conform with Senate Bill 146 (Chapter 269 of the Laws of 1985) which contained authorization for the board of realty regulation to adopt continuing education requirements for all licensees.

The board of realty regulation believes that in order to fulfill the purpose of the board to "safeguard the public interest . . . and to require the maintenance of high standards in ethical practices by all real estate licensees" that the foregoing rule be adopted.

4. Interested persons may submit their data, views or arguments concerning the proposed adoption in writing to the Board of Realty Regulation, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than December 27, 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 Board of Realty Regulation, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than December 27, 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. Ten percent of those persons directly affected has been determined to be 510 based on the 5100 licensees in Montana.

BOARD OF REALTY REGULATION
GEORGE PIERCE, CHAIRMAN

BY: 

ROBERT S. WOOD, COUNSEL
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 18, 1985.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE MONTANA BOARD OF HOUSING

In the matter of the publishing of)	
an annual policy statement report by)	
the Montana Board of Housing with)	
respect to housing, development,)	NOTICE OF
and low income housing assistance)	PUBLIC HEARING
which such board will follow for)	
issuing qualified mortgage bonds)	
and mortgage credit certificates.)	

TO: All interested persons.

1. On December 17, 1985, at 10 o'clock a.m., a public hearing will be held in the conference room of the Board, 2001 Eleventh Avenue, Helena, Montana, to consider the publishing of an annual policy statement report by the Montana Board of Housing (the "board") with respect to housing, development, and low income housing assistance which the board will follow in issuing qualified mortgage bonds and mortgage credit certificates.

2. The proposed annual policy statement report does not replace or modify any section currently found in the Administrative Rules of Montana.

3. (a) Section 103A of the Internal Revenue Code provides in substance that the Governor, as elected representative of the Montana Board of Housing, shall publish and file with the Secretary of the U.S. Treasury a report which includes (i) a statement of the policies with respect to housing development and low-income housing assistance which the board is to follow in issuing qualified mortgage bonds and mortgage credit certificates and (ii) an assessment of such governmental unit during the preceding 1-year period preceding the date of the report with (I) the statement of policy on qualified mortgage bonds and mortgage credit certificates that was set forth in the previous report, if any, of an applicable elected representative of such governmental unit, and (II) the intent of Congress that state and local governments are expected to use their authority to issue qualified mortgage bonds and mortgage credit certificates to the greatest extent feasible (taking into account prevailing interest rates and conditions in the housing market) to assist lower income families to afford home ownership before assisting higher income families.

(b) A copy of the entire proposed annual policy statement report may be obtained by contacting Jay F. McLeod, the administrator of the Montana Board of Housing, 2001 Eleventh Avenue, Helena, Montana.

4. The board is proposing to publish an annual policy statement report to comply with the United States Tax Reform Act of 1984, (Pub. L. 98-369, 98 Stat. 901)

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to

Jay F. McLeod, the administrator of the Montana Board of Housing, 2001 Eleventh Avenue, Helena, Montana 59620, no later than December 24, 1985.

6. Jay F. McLeod, the administrator of the Montana Board of Housing has been designated to preside over and conduct the hearing.

7. The authority of the board to make the proposed annual policy statement report is based on section 90-6-104, MCA, and the report implements section 90-6-106, MCA.

MONTANA BOARD OF HOUSING

By: Jay F. McLeod
Jay F. McLeod, Administrator

Certified to the Secretary of State November 18, 1985.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE SCIENCE AND TECHNOLOGY DEVELOPMENT BOARD

In the matter of the proposed	)	NOTICE OF PUBLIC HEARING ON
adoption of rules pertaining	)	THE PROPOSED ADOPTION OF RULES
to the operations of the	)	I THROUGH XXXVIX PERTAINING
Science and Technology Develop-	)	TO THE OPERATIONS OF THE
ment Board	)	SCIENCE AND TECHNOLOGY
	)	DEVELOPMENT BOARD

TO: All Interested Persons.

1. On December 19, 1985, at 10:00 a.m., a public hearing will be held in the conference room of the Department of Commerce, at 1424 9th Avenue, Helena, Montana, to consider the adoption of new rules I through XXXVIX pertaining to the operations of the Science and Technology Development Board.

2. The proposed new rules will read as follows:

"I. ORGANIZATIONAL RULE (1) The Montana science and technology development board (the "board") was created in 1985 by section 90-3-101 through 90-3-304 and 2-15-1810, MCA.

(2) The board consists of 15 members appointed by the governor in the manner proscribed in section 2-15-124, MCA. By statute the board must be chosen from people with broad interest and experience in science and technology and the application of such interest and experience to economic development in Montana. At least 11 members of the board must be from the private sector.

(3) The board is attached to the department of commerce (the "department") for administrative purposes. The department selects, prescribes the duties for, and supervises staff to administer board activities.

(4) The board is designated a quasi-judicial board for purposes of section 2-15-124, MCA, except that section 2-15-124(1) does not apply.

(5) Inquiries regarding the board may be addressed to the Montana Science and Technology Development Board, Department of Commerce, Capitol Station, Helena, Montana 59620. The board's street address is 1424 Ninth Avenue, Helena, Montana."

Auth: 2-4-201, MCA Imp: 2-4-201, MCA

"II. PROCEDURAL RULES The board hereby adopts and incorporates by reference the attorney general's model procedural rules (ARM 1.3.101 through 1.3.233). A copy of these rules may be obtained from the board's offices. The review of proposals for and the making of technology investments by the board will not be considered contested cases as contemplated by the model procedural rules or for purposes of sections 2-4-601 through 2-4-711, MCA, of the Montana Administrative Procedure Act."

Auth: 2-4-201, MCA Imp: 2-4-201, MCA

"III. CITIZEN PARTICIPATION RULES The board hereby adopts and incorporates by reference the department's citizen participation rules as set forth in ARM 8.2.201 through 8.2.206; except that information relating to trade secrets and other proprietary matters and private financial information will be held in confidence as specified in following provisions of these rules. A copy of the department's rules regarding citizen participation may be obtained from the board's offices."

Auth: 2-3-103, MCA Imp: 2-3-103, MCA

"IV. DEFINITIONS As used in these rules, unless the context or subject matter clearly requires otherwise, the following words and phrases have the following meanings:

- (1) 'Administrator' means the person selected by the department to administer technology investments or his designee.
- (2) 'Board' means the Montana science and technology development board created by section 2-15-1810, MCA.
- (3) 'Department' means the department of commerce created by section 2-15-1801, MCA.
- (4) 'Executive committee' means the committee composed of board members and appointed by the board chairman which makes recommendations to the board as to the funding of technology development projects.
- (5) 'Investment agreement' means the final formal agreement between the board and an applicant for technology investment.
- (6) 'Investment committee' means the committee composed of board members appointed by the board chairman which makes technological and financial evaluations of technology development projects proposed to the board for a technology investment.
- (7) 'Technology development project' means an activity designed to discover, develop, transfer, utilize, or commercialize new technology in order to strengthen and enhance economic development in Montana.
- (8) 'Technology investment' means an award of funds for a technology development project to stimulate Montana's economy. Technology investments are not investments of public funds for purposes of Article VIII, Section 13, of the Montana Constitution, or Title 17, Chapter 6, Montana Code Annotated, relating to the unified investment of public funds, but are investments of public resources intended to encourage technologically based economic development that may eventually result in a financial return on those investments.
- (9) 'Technology transfer committee' means the committee composed of board members and appointed by the board chairman which makes recommendations to the board as to the need for

and funding of technology transfer projects and technical assistance activities."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"V. PURPOSE The purpose of the board is to strengthen and diversify Montana's economy by establishing a public/private sector partnership to encourage scientific and technological development within the state in order to keep pace with a transforming economic structure and to create new jobs or preserve existing jobs and to expand small business opportunities."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"VI. OFFICES AND COMMITTEES In addition to the chairmanship, the board may establish other offices and committees and select board members to fill these positions."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"VII. TECHNICAL ADVISORY COUNCILS (1) The chairman of the board may recommend to the governor the appointment of technical advisory councils pursuant to section 2-15-122, MCA, for the purpose of providing advice to the board on selected topics. In making these recommendations, the chairman will consider the scientific and technological expertise of candidates and seek appropriate representation from the scientific and academic community.

(2) Advisory council members are entitled to receive reimbursement for travel expenses as provided in section 2-15-122, MCA."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"VIII. POWERS AND DUTIES The Board will:

(1) establish policies and priorities that will expand and develop the use of science and technology for economic development in Montana;

(2) provide technical assistance for the transfer of technology to Montana businesses in order to encourage the use of new technology by Montana business and industry;

(3) make technology investments in technology development projects in the following areas that have short- or long-term potential to stimulate economic development in Montana:

- (a) research capability development,
 - (b) applied technology research,
 - (c) technical assistance and technology transfer, and
 - (d) seed capital awards for development and commercialization of new products and processes;
- (4) accept grants or receive devises of money or property to be used in Montana for technology investments described in these rules;

(5) submit to the governor and the legislature a report describing the board's programs and accomplishments by November 1 of each even-numbered year or at the request of the governor."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"IX. ELIGIBILITY Applicants eligible for technology investment by the board include non-profit and for-profit institutions, businesses or industries located in or planning to locate in Montana, and educational institutions incorporated or unincorporated within the state."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"X. USE IN MONTANA All projects funded by the board shall be carried out in Montana. Investment agreements will provide penalties for the violation of this requirement."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XI. INVESTMENT RESTRICTION Technology investments may only be used by the funding recipient to carry out the purpose for which the technology development project was funded, and the funding recipient must agree to use its best efforts to undertake all actions required to carry out the purpose for which the projects were funded."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XII. PROJECT SOLICITATION Proposals for technology investments will be accepted by the board on a continuous basis and may be submitted at any time."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XIII. PRELIMINARY PROCEDURES Any applicant seeking a technology investment shall schedule an appointment with the administrator prior to submitting a formal written proposal. The administrator will advise the applicant in the preparation of the formal proposal."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XIV. FORMAL PROPOSAL Formal proposals for technology investments shall be made by delivering 16 copies of a proposal to the Montana Science and Technology Alliance, Department of Commerce, 1424 Ninth Avenue, Helena, Montana 59620. Guidelines for preparing formal proposals to the board are available at the board's office."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XV. ADMINISTRATOR REVIEW The administrator will review each proposal in a timely manner to determine whether it is complete and satisfactorily meets board eligibility guidelines and will notify the applicant of any deficiencies in the proposal."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XVI. ELIGIBLE APPLICANT If a completed proposal is determined by the administrator to be eligible for board consideration the administrator will transmit the proposal, together with a summary of issues and recommendations for action, to the investment committee."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XVII. INVESTMENT COMMITTEE (1) The investment committee will conduct both a technical evaluation and a financial evaluation of the proposal. Upon completion of this review the committee will decide whether to recommend approval, modification or disapproval of the proposal.

(2) If the committee does not recommend the proposal for funding, the applicant may request full review of the proposal by the executive committee.

(3) If the committee recommends that a proposal be approved, it will forward the proposal to the executive committee.

(4) If the committee recommends that a proposal be modified, the applicant will be consulted as to whether the modifications are acceptable. If the modifications are acceptable, the modified proposal will be forwarded to the executive committee with a recommendation of approval. If the modifications are not acceptable to the applicant, the investment committee will recommend the withdrawal or approval of the unmodified proposal."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XVIII. EXECUTIVE COMMITTEE The executive committee of the board will meet at the call of the chair prior to full board meetings and will process all proposals for technology investments to be considered for action by the board. The executive committee will schedule proposals forwarded to it by the investment committee for consideration by the board at its next regularly scheduled meeting. If a proposal has been deemed to be ineligible or inappropriate for board investment, the executive committee, upon request of the applicant, will conduct a full review of the proposal to determine whether the decision of the investment committee should be concurred in. If the executive committee disagrees with the investment committee's recommendation, the executive committee may schedule the proposal for consideration by the board.

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XIX. BOARD ACTION (1) If the investment committee recommends that the board approve a proposal, the executive committee will place the proposal on the agenda for the board's next meeting. The board will meet at least quarterly for the purpose of considering these proposals.

(2) The meetings of the board are open to the public with the exception that procedures will be followed to protect the confidentiality of any information considered proprietary and confidential by the applicant as hereinafter set forth.

(3) After the board has duly considered a proposal, it will make a decision by open ballot as to whether the project will be funded. The board may vote to:

(a) invest in the proposal as recommended;

(b) invest in the proposal provided certain conditions are met;

(c) invest in the proposal for a larger or smaller amount;

(d) refer the proposal back to the applicant for revisions; or

(e) reject the proposal as not appropriate for technology investment.

All decisions by the board are final."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XX. APPLICANT PARTICIPATION (1) At all stages of the review process, the applicant will be kept fully informed of the progress of the application. The applicant may attend or be asked to attend the committee meetings when the application is being considered and reviewed.

(2) The applicant will be expected to attend the board meeting at which the application will be given final consideration. The applicant should be prepared to answer questions concerning the proposal at any stage of the application review process."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXI. INVESTMENT AGREEMENT Upon approval of a proposal by the board, the applicant must enter into a formal investment agreement with the board before any technology investment will be made by the board. Each agreement will be negotiated on a case-by-case basis. Sample contract documents will be available at the board's office for review by applicants."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXII. PAYBACK OF INVESTMENT As part of the investment agreement, the board will require payment of a return that it considers commensurate with the risk of its original technology investment. The terms of the payback arrangement will be negotiated as part of the investment agreement."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXIII. MONTHLY/QUARTERLY REPORTS (1) Once a technology investment has been made, the funding recipient shall, at the discretion of the administrator, submit to the board monthly or quarterly financial reports or both

containing comparisons of budget expenditures to actual expenditures. These reports must be prepared in accordance with generally acceptable accounting procedures. Further, the monthly or quarterly reports must briefly describe the progress made in meeting the objectives of the project. These reports are due within 15 days of the end of each calendar month or quarter."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXIV. ANNUAL REPORTS Within 60 days of the expiration of each calendar year, funding recipient shall submit to the board an annual financial statement compiled and reviewed by an independent certified public accountant or appropriate public official. At the discretion of the administrator an annual technical report describing the project's progress in meeting its objectives may also be required."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXV. FINAL REPORT The funding recipient shall submit to the board a final project report within 60 days of the termination of the investment agreement."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXVI. ANNUAL COMMERCIALIZATION REPORT Once a project has reached commercialization, a recipient shall submit an annual report which describes the commercial results of the product, process, or system which has resulted from the project."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXVII. FAILURE TO COMPLY The failure by a funding recipient to comply with the reporting requirements of the investment agreement will be considered a breach of the agreement and may result in its termination by the board."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXVIII. MONITORING OF PROJECT In addition to the required reports, board members and department staff may visit the location of the funded project to observe firsthand the progress of the project. Such visits will be conducted with a view toward protecting the confidentiality of confidential and proprietary information designated as such by the funding recipient as hereinafter set forth."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXVIX. MATCHING FUNDS (1) Matching funds are required for all technology investments except those for technology transfer and technical assistance.

(2) To qualify as matching funds a proposed contribution must consist of private or governmental funds other than funds appropriated from state sources.

(3) The matching contribution required by this rule must have a value of at least 100 percent of the investment requested from the board."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXX. DOCUMENTATION After a proposal is approved for a technology investment by the board but before any state funds are dispersed, the applicant must document the receipt of matching funds."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXXI. RIGHTS TO INTELLECTUAL PROPERTY All intellectual property rights including any patents, copyrights, trademarks, and trade secrets developed by the funding recipient with use of funds provided by the board will be owned by the recipient."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXXII. RESTRICTION ON INVESTMENT No portion of the technology investment received by the recipient may be used by persons other than the recipient to develop intellectual property rights."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXXIII. EMPLOYEE AGREEMENTS The funding recipient shall require each of its employees, agents, independent contractors and others who might reasonably be expected to acquire intellectual property rights in connection with a technology investment to sign an agreement with the funding recipient, subject to approval by the board, whereby these persons assign any and all such rights to the funding recipient where any invention, discovery, improvement or other intellectual property is conceived, created, or reduced to practice during the term of the investment agreement."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXXIV. PROPERTY OWNERSHIP In the event that any board funds are used to purchase equipment, title to such equipment will reside with the recipient, but the board may require that it be assigned a purchase money security interest in the equipment."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXXV. CONFIDENTIAL INFORMATION (1) It is understood that the funding recipient may develop business, technical and other information which the recipient deems proprietary and confidential. (hereinafter referred to collectively as "proprietary information".)

(2) Proprietary information delivered to the board or department with a proposal or otherwise shall be designated in

writing or by appropriate stamps or legends, to be of a proprietary or confidential nature.

(3) The board and employees of the department having access to confidential information will use their best efforts to keep in confidence and to prevent the disclosure to any unauthorized person of this information."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXXVII. NON-PROTECTABLE PROPRIETARY INFORMATION

Proprietary information does not include information which is:

(1) in the public domain at the time it was disclosed or later becomes part of the public domain without disclosure of such information by the board or the department; or

(2) was known to the board or department at the time of disclosure; or

(3) is disclosed with the written approval of the applicant or funding recipient; or

(4) becomes known to the board or department from a source other than the applicant or funding recipient."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXXVIII. OPEN MEETING EXCEPTIONS Any meetings of the board, any members thereof, or department personnel where persons other than the applicant, or funding recipient or their agents or employees are present will be held under the condition that proprietary information will not be disclosed to such other persons without the prior written consent of the owner of the proprietary information. Except where this consent has been given, the public will be excluded from the portion of meetings during which proprietary information is being discussed."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXXVIII. INVESTMENTS PROHIBITED Board members may not personally apply for or receive board funds, except as provided in section 2-15-124, MCA. If an organization with which a member is affiliated applies for board funds, the member must disclose the nature of the affiliation and may not participate in the decision-making process of the board regarding the application."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

"XXXVIX. NONAPPLICABILITY The provisions of section 2-2-201, MCA, do not apply to board members."

Auth: 90-3-203, MCA Imp: 90-3-203, MCA

3. The board is proposing these rules pursuant to the mandate of section 90-3-203(6), MCA, to implement the science and technology development investment program established by sections 90-3-101 through 90-3-303, MCA. These rules are needed to, among other things: a) establish procedures for

the conduct of board business; b) provide for technology investments; c) protect the confidentiality of trade secrets and business and financial information provided by applicants; and d) establish eligibility and matching fund requirements for technology investments.

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 Science and Technology Development Board, Department of Commerce, Capitol Station, Helena, Montana 59620-0407, no later than December 27, 1985.

5. The hearing will be presided over by the board or its designee.

SCIENCE AND TECHNOLOGY
DEVELOPMENT BOARD
R. STEPHEN BROWNING
CHAIRMAN

BY: 

ROBERT S. WOOD, COUNSEL
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 18, 1985.

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

In the matter of the proposed)	NOTICE OF PROPOSED
adoption of minimum wage rates) ADOPTION OF MINIMUM WAGE	
to be paid on public contracts) RATES ON PUBLIC CONTRACTS	
(standard prevailing rate of)	NO PUBLIC HEARING
wages), pursuant to 18-2-402,)	CONTEMPLATED
MCA.)	

TO: All Interested Persons.

1. The commissioner of labor and industry proposes to adopt his determination of standard prevailing rates of wages under the authority of 18-2-402 MCA on January 6, 1986. Such determination is the minimum rate of wages that must be paid by a contractor to employees performing labor on a public works project. New Rule I provides for the interim adoption and continuance in effect of wage rates determined in 1984 until superceded by wage rates regularly adopted in accordance with ARM 24.16.9003.

2. The proposed rule provides as follows:

RULE I ANNUAL ADOPTION OF STANDARD PREVAILING RATE OF WAGES. The commissioner's determination of minimum wage rates to be paid on public works projects shall be adopted in accordance with The Montana Administrative Procedures Act and rules implementing the act.

(a) A notice of proposed adoption of the commissioner's determination shall be published in the Montana Administrative Register on the regular publication next preceding the first day of September.

(b) A notice of adoption of minimum wage rates by project character, by courts or locality and by craft, classification and type of worker shall be published in the Montana Administrative Register on the regular publication date next preceding the first day of October.

(c) Such minimum wage rates shall become effective on the first day of October and shall supercede and replace all previously adopted wage rates for corresponding classifications. Adopted wage rates shall remain in effect until superceded and replaced by a subsequent adoption.

(d) An adoption of wage rates shall have no effect on contracts for public works awarded during the effective period of a previous adoption of rates under these rules.

(e) The commissioner's determination of minimum wage rates proposed and the wage rates adopted shall be incorporated by reference in the above respective notices and copies of either the proposed wage rates or adopted wage rates will be mailed to all interested persons or agencies as evidenced by their inclusion on a mailing list maintained by the commissioner. All others may obtain a copy of the determination of proposed wage rates or adopted wage rates,

or be included on the commissioner's mailing list by request made to the Office of the Commissioner, attention Labor Standards Division at the address shown in Section 24.16.9003(3), above.

(f) During the transition and initial determination of standard prevailing wage rates pursuant to these rules, the commissioner will propose for adoption as interim rates, his previous determination as follows:

- (i) Building construction rates,
Date of publication: 08-27-84.
- (ii) Heavy and highway rates,
Date of publication: 08-27-84.
- (iii) General Rates,
Effective date: 6-11-84.

Such wage rates shall be enforced under applicable law on public works contracts awarded on or after the indicated dates and hereafter until the same are superceded and replaced by a subsequent adoption. ARM 24.16.9003(5) supra. (AUTH: Sec. 18-2-431, MCA; IMP, Sec. 18-2-402, MCA)

3. The commissioner's rule making authority was granted by the 1985 legislature. By law, contracting agencies are required to include minimum wage rate in bid specifications and contracts. The interim adoption of 1984 rate determinations is necessary in order that such agencies not be unduly delayed in advertising planned projects for bidding.

4. Interested persons may submit their data views or arguments concerning the commissioner's determination in writing to the address shown in paragraph 2, above, no later than December 30, 1985. View points and advice of interested persons may also be presented at either of two informal conferences held pursuant to 2-4-304, MCA, at the following times and places.

- (a) Butte, Montana on December 11, 1985 at 7:30 p.m.
at the Civic Center conference room.
- (b) Glasgow, Montana on December 10, 1985 at 7:30 p.m.
at the Cottonwood Inn.

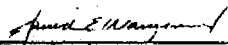
5. Any person directly affected by the proposed adoption who wishes to express his data, views or arguments orally or in writing at a public hearing, must in writing request a hearing and submit his request with any written comment he has to the address shown in paragraph 2, above, not later than December 30, 1985.

6. If the commissioner receives requests for a public hearing on the proposed adoption from either 10% of 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.

7. The authority of the department to propose this action is based on 18-2-402 and 18-2-431, MCA, and implements 18-2-402, MCA.

DAVID E. WANZENRIED



Commissioner

Certified to the Secretary of State this 18th day of November, 1985.

BEFORE THE DEPARTMENT OF STATE
LANDS OF THE STATE OF MONTANA

In the matter of the adoption)	
of rules for consultation of)	NOTICE OF PUBLIC HEARING
the Department of State Lands)	FOR PROPOSED ADOPTION
with the State Historic Preser-) OF RULES FOR CONSULTATION	
vation Office under the)	OF DSL WITH SHPO
Antiquities Act.)	

TO: All Interested Persons

1. On December 30, 1985, at 7:30 P.M., a public hearing will be held at the main conference room of the Montana Department of State Lands, 1625 11th Avenue, Helena, Montana, to consider the adoption of rules concerning the Department of State Lands consultation with the State Historic Preservation Office concerning actions which may substantially alter heritage properties or paleontological remains under the Montana Antiquities Act.

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

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

RULE I POLICY STATEMENT The purpose of this subchapter is to implement Title 22, Chapter 1, Part 4, MCA, the Montana Antiquities Act, through the establishment of administrative procedures. The department shall conform to the following rules in the systematic consideration of antiquities on state lands prior to reaching a final decision on actions requiring compliance with the Montana Antiquities Act. These rules are not intended to require absolute protection of all antiquities but are meant to avoid or mitigate damage to antiquities when feasible.

AUTH: 22-3-424, MCA. IMP: 22-3-424, MCA.

RULE II DEFINITION OF TERMS As used in this subchapter, unless the context clearly indicates otherwise, the additional definitions apply:

(1) "Antiquities" means heritage properties or paleontological remains.

(2) "Department" means the Montana department of state lands.

(3) "Emergency actions" include, but are not limited to:
(a) projects to repair or restore property or facilities damaged or destroyed as a result of a disaster when a disaster has been declared by the governor or other appropriate government entity;

(b) repairs to public service facilities immediately necessary to maintain service; or

(c) projects, whether public or private, undertaken to prevent or mitigate immediate threats to public health, safety, welfare, or the environment.

(4) "Department action" means the department's decision to deny or approve an application for an easement, lease, or other certificate necessary for conducting activity upon or beneath the surface of state lands or under water on state lands if the activity would result in substantial physical change below or on the surface of the earth, including buildings, structures or sites.

(5) "Heritage property" means any district, site, building, structure or object located upon or beneath the earth or under water that is significant in American history, architecture, archaeology or culture.

(6) "Paleontological remains" means fossilized plants and animals of a geological nature found upon or beneath the earth or under water which are rare and critical to scientific research.

AUTH: 22-3-424, MCA. IMP. 22-3-421, 424, MCA.

RULE III INITIAL CONSULTATION (1) The department shall consult with SHPO early in any decision making process leading to a department action. The department's initial request to SHPO for consultation shall include the following information:

(a) a description of the proposed department action;
(b) a legal description of the state-owned lands affected by the proposed action;

(c) a description of the previous use and classification of the lands;

(d) the slope and vegetation of the proposed action area, if known;

(e) known or possible antiquities on the affected state lands; and

(f) proposed mitigation or evaluation measures to be taken by the department on known cultural resources, if any, prior to or following the approval of the action.

(2) If the proposed action involves changes to, or removal of an existing building or structure, the department shall also provide the following to SHPO:

(a) photographs of the building or structure; and

(b) information, including dates, on construction, previous use, and alterations, if available.

(3) In the initial consultation, the department shall request SHPO to:

(a) determine whether the lands to be affected by the department action have been professionally surveyed in a systematic manner and a record of antiquities prepared;

(b) recommend whether a professional systematic survey of the lands to be affected by the department action should be conducted prior to the proposed action;

(c) review the department's proposed mitigation plan, if any, and recommend appropriate mitigation or avoidance actions, if any, necessary to protect known antiquities on state lands, including:

(i) monitoring of the proposed action;

(ii) special protective stipulations to the project approval;

(iii) modification of project design to avoid disturbances of known antiquities sites; or

(iv) abandonment of the proposed project; and

(d) determine the relative value of any previously identified sites or buildings.

(4) If the department receives no consultation response from SHPO within 10 working days from its request, the department shall consider SHPO consultation complete and may proceed with consideration of the proposed department action. The department may extend this deadline for large or complex consultation requests.

AUTH: 22-3-424, MCA. IMP: 22-3-424, MCA.

RULE IV DEPARTMENT CONSIDERATION OF SHPO RECOMMENDATION

If SHPO responds to the department's initial consultation request, the department shall consider that response and determine if actions other than those proposed in its initial consultation request pursuant to Rule III(1)(f) are appropriate. The determination of whether to implement SHPO's recommendations rests solely with the department. The department shall follow the following procedure:

(1) If SHPO recommends a professional cultural resource survey and:

(a) the department accepts that recommendation, the department shall cause a survey to be conducted and conduct a post-survey consultation in accordance with Rules V and VI; or

(b) the department rejects that recommendation, the department shall notify SHPO of its determination in writing and document therein its reasons. The department may not proceed with the proposed action until five working days after written notice to SHPO.

(2) If SHPO's response does not include a recommendation for a professional cultural resource survey and:

(a) the department's determination is to implement all SHPO's recommendations, the department shall notify SHPO of its determination in writing, proceed with the department action, and implement the recommendations; or

(b) the department's determination is to not implement all or part of SHPO's recommendations, the department shall notify SHPO of its determination in writing and document therein its reasons. The department may not proceed with the proposed action until five working days after written notice to SHPO.

AUTH: 22-3-424, MCA. IMP: 22-3-424, MCA.

RULE V PROFESSIONAL CULTURAL RESOURCE SURVEY

(1) If the department requires a professional survey, it shall file with the SHPO all survey reports, including maps, photographs and site forms, immediately upon completion of the survey. The department shall also request a written determination from SHPO of which properties, if any, identified in the survey are antiquities and which antiquities, if any, may be affected by the department action.

(2) Unless it receives a determination from SHPO within 15 working days of its request, the department may consider the assessment complete and may proceed with implementation of mitigating measures, as appropriate. The department may extend

this deadline for those assessments that involve large or complex proposals.

AUTH: 22-3-424, MCA. IMP: 22-3-424, MCA.

RULE VI POST-SURVEY CONSULTATION (1) If, within the time limits of Rule V(2), SHPO notifies the department that the professional cultural resource survey has identified antiquities as present and potentially affected by the department's proposed action, the department shall provide SHPO with its assessment of the proposed action's effect and either a proposal for mitigation or avoidance or documentation that mitigation or avoidance is not necessary or not feasible.

(2) Unless the department receives comments from SHPO regarding its assessment and proposal for mitigation or avoidance within 10 working days of the delivery of the department's assessment and proposal to SHPO, the department may consider the consultation complete and may proceed with its consideration of the proposed action. The department may extend this deadline for those assessments that involve large or complex proposals.

(3) If SHPO responds to the consultation request within the time limits and

(a) the department's determination is to implement all SHPO's recommendations, the department shall notify SHPO of its determination in writing, proceed with the department action, and implement the recommendations; or

(b) the department's determination is to not implement all or part of SHPO's recommendations, the department shall notify SHPO of its determination in writing documenting therein its reasons. The department may not proceed with the proposed action until five working days after written notice to SHPO.

(4) The determination of whether to implement SHPO's recommendations rests solely with the department.

AUTH: 22-3-424, MCA. IMP: 22-3-424, MCA.

RULE VII DISCOVERY OF ANTIQUITIES AFTER COMMENCEMENT OF PROJECT (1) Any person who discovers antiquities on state lands or who finds that an operation licensed or otherwise entitled by the state may damage antiquities on state lands shall promptly report the discovery or finding to SHPO and the department and shall take all reasonable steps to preserve the antiquities.

(2) If a determination that no antiquities are present was made prior to commencement of a project, but possible antiquities are subsequently discovered during implementation of the agency action, the department shall:

(a) cause work on the project that could alter the antiquities to immediately halt and not resume until the consultation process is completed;

(b) conduct a preliminary evaluation to determine whether antiquities are present; and

(c) notify SHPO of the discovery and make a request for an assessment of whether antiquities are present.

(3) If the department does not receive a response from SHPO within five working days, the department may consider the consultation complete and may resume the project with whatever

mitigation or protective measures it considers appropriate. The department may extend this deadline for these assessments that involve large or complex discoveries.

(4) If SHPO files with the department within five days an assessment identifying antiquities, the department shall follow the procedures for the consideration of antiquities contained in Rule IV prior to resumption of the project.

AUTH: 22-3-424, MCA. IMP: 22-3-435, MCA.

RULE VIII DEPOSIT OF MATERIALS RELATED TO ANTIQUITIES

SITES The department shall deposit with SHPO all inventory reports produced during site or building identification and evaluation, and other pertinent materials generated during mitigation, unless otherwise agreed by SHPO. These materials include maps, architectural plans, photographs, inventory site forms, and cultural materials that may be processed and labeled for archival and museum storage by SHPO.

AUTH: 22-3-424, MCA. IMP: 22-3-424, 432, MCA.

RULE IX ANTIQUITIES PERMIT REQUIREMENT

No person may excavate, remove, or restore any antiquities on state land unless he has secured an antiquities permit from SHPO. An antiquities permit is required for any cultural resource testing activity on state lands that exceeds a routine investigation by means of standard testing procedures to determine the presence of antiquities.

AUTH: 22-3-424, MCA. IMP: 22-3-432, MCA.

RULE X PROGRAMMATIC MEMORANDUM OF UNDERSTANDING

On a site-specific or project-type basis and with good cause, the department may propose to SHPO procedures which differ from those outlined above. Alternative procedures agreed to by the department and SHPO may be incorporated into a memorandum of agreement signed by both parties.

AUTH: 22-3-424, MCA. IMP: 22-3-424, MCA.

RULE XI EMERGENCY ACTION

The department may take or permit action substantially altering antiquities on state lands without consultation with the SHPO in an emergency situation. Within 30 days following initiation of the action, the department shall notify SHPO of the need for and the results of the action.

AUTH: 22-3-424, MCA. IMP: 22-3-424, MCA.

4. The department is proposing these rules to implement Title 22, Chapter 3, Part 4, MCA, the Montana Antiquities Act.

5. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to John F. North, Chief Legal Counsel, Department of State Lands, Capitol Station, Helena, Montana 59620. To be considered, the written comments must be received by January 8, 1986.

6. Dennis Hemmer, Commissioner of State Lands will serve as hearing officer.

7. The authority of the department to make the proposed rules is based on section 22-3-424, MCA, and the rules implement 22-3-421, 22-3-424, 22-3-432, and 22-3-435.

John F. North
John F. North
Acting Commissioner
Department of State Lands

Certified to the Secretary of State this 18th day of
November, 1985.

BEFORE THE DEPARTMENT OF AGRICULTURE
STATE OF MONTANA

In the matter of adoption	)	NOTICE OF ADOPTION OF
of rules concerning	)	ARM 4.12.608 AND 4.12.609
fertilizer assessment and	)	CONCERNING FERTILIZER ASSESS-
reporting	)	MENTS AND REPORTING

TO ALL INTERESTED PERSONS:

1. On October 17, 1985 the Department of Agriculture published notice of hearing pertaining to fertilizer assessments and reporting, at page 1448, of the Montana Administrative Register issue number 19. The notice advised that a hearing would be held on the proposed rules on November 18, 1985 at 10 a.m. at Room 225 at the Agriculture/Livestock Building, Helena, Montana. The hearing was held with no comments or testimony received.

2. After due consideration of the comments received prior to the hearing the department has adopted the rules as follows:

4.12.608 REPORTING OF FERTILIZER AND FEE SCHEDULES

(1) Every Manufacturer or person responsible for registering and paying the fees for a commercial fertilizer and/or soil amendment except specialty fertilizers in packages at 10 pounds or less and unmanipulated manures, shall file on or before the 30th calendar day after the end of a month, a monthly statement setting forth the number of tons of each commercial fertilizer and/or soil amendment except specialty fertilizers in packages of 10 pounds or less and unmanipulated manures, distributed in this state during the past month and to whom it was distributed or indicate if no sales or distributions occurred.

(2) through (5) remain the same

4.12.609 REPORTS OF NON-FEE PAYING FERTILIZER DEALERS

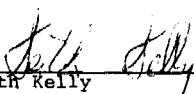
1. Every person who distributed commercial fertilizers and/or soil amendments except specialty fertilizers in packages of 10 pounds or less and unmanipulated manures, who is not responsible for payment of the fees prescribed in section 80-10-207(1) shall file with the department on forms furnished or approved by the department, semiannual statements for the periods ending June 30 and December 31, setting forth the number of net tons of each commercial fertilizer and/or soil amendment except specialty fertilizers in packages of 10 pounds or less and unmanipulated manures, received during the 6th month period and the amount of the ending inventory. The reports shall be filed on or before the 30th calendar day of the month following the close of each 6 month period.

(2) remains the same

3. The amendment to the proposed rules are made in response to a written objection by O. M. Scott and Sons in which it requests that specialty fertilizer be excluded. This change reiterates the statutory language. The department also received comments from John McMaster, of the Legislative Counsel. He recommended further citing of

statutory authority for these rules. His recommendations will be implemented when the department prepares the replacement pages for the Administrative Rules of Montana Update.

4. The Authority for the rules is 80-10-301 MCA and the rule implements 80-10-103; 207, 211, MCA, Sec. 7 Chapter 197 L Mont. 1985 and Sec. 10 Chapter 310 L Mont. 1985.



Keith Kelly
Department of Agriculture

Certified to the Secretary of State November 18, 1985

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

In the matter of the amendment	)	NOTICE OF THE AMENDMENT
of rule 16.32.501 designating	)	OF RULE 16.32.501
reportable tumors and the	)	AND THE ADOPTION
adoption of a new rule stating	)	OF RULE 16.32.504
the tumor records which must be)	
kept by an independent laboratory)		(Tumor Registry)

To: All Interested Persons

1. On October 17, 1985, the department published notice of a proposed amendment of rule 16.32.501 concerning designation of reportable tumors and a proposed adoption of a rule specifying the tumor records which must be kept by an independent laboratory, at page 1480 of the 1985 Montana Administrative Register, issue number 19.

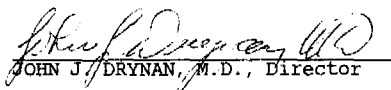
2. The department has adopted rule 16.32.504 (Rule I) as proposed and has amended rule 16.32.501 with the following change:

16.32.501 REPORTABLE TUMORS (1) Same as existing rule.

(2) A benign tumor other than one of those listed in subsection (1) of this rule may be reported to the department for inclusion in the tumor registry if prior approval has been obtained from the department [Preventive Health Services Bureau, Tumor Registry, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana, 59620; phone: 449-4740 444-2614].

(3), (4) Same as existing rule.

3. No comments or testimony were received. The phone number change was made to reflect the new number soon to be assigned to the registry.


JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State November 18, 1985

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the	)	NOTICE OF THE ADOPTION OF
adoption of rule 23.3.420	)	RULE 23.3.420 ON SAFETY
regarding safety equipment	)	EQUIPMENT FOR FERTILIZER
requirements for trailers	)	TRAILERS
used for hauling and)	
spreading fertilizer.)	
)	

TO: All Interested Persons.

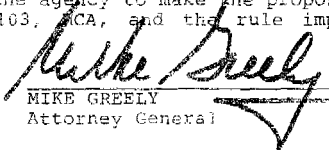
1. On June 13, 1985, the Department of Justice published notice of the proposed adoption of Rule 23.3.420 which provides the requirements for safety equipment for trailers used for hauling and dispersing fertilizer, at pages 643 through 644 of the 1985 Montana Administrative Register, issue number 11.

2. No comments or testimony were received.

3. The Department has adopted proposed Rule I as 23.3.420.

4. The department is adopting this rule because utilization of fertilizer trailers has increased on public highways, and there are currently no laws or regulations which specifically address the need for safety equipment or restrictions which are necessary in lieu of such equipment.

5. The authority of the agency to make the proposed rule is based on section 61-2-103, MCA, and the rule implements section 61-9-504, MCA.


MIKE GREELY
Attorney General

Certified to the Secretary of State November 18, 1985.

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

In the matter of the adoption)	NOTICE OF THE
of rules pertaining to the)	ADOPTION OF
procedure for determining)	ARM 24.16.9001
minimum wage rates to be paid)	THROUGH
to laborers on public works)	ARM 24.16.9006
projects and to specific)	
obligations of contractors)	
and agencies entering into)	
contracts for public works.)	

TC: All Interested Persons.

1. On September 12, 1985, the Department of Labor and Industry published notice of public hearing on proposed adoption of rules I through VI concerning procedures and obligations pertaining to minimum wage rates to be paid on public works projects at page 1306 of the 1985 Montana Administrative Register, issue number 17.

2. The agency has adopted rules I through VI with changes plus the implementation and transition rule VII comprising a new sub-chapter to be titled "minimum wages on public contracts", as follows (text of the rules with stricken matter interlined and new matter underlined):

24.16.9001 PURPOSE AND SCOPE (1) These rules are adopted pursuant to 18-2-409 and 18-2-431, MCA, giving the commissioner rulemaking authority to implement the Montana Prevailing Wage law, commonly known as Montana's "Little Davis-Bacon" Act. (18-2-401, et seq., MCA). The purpose of the above referenced statutes and these rules is to protect local labor markets, and to maintain the general welfare of Montana workers on public works projects, by to eliminate wage cutting as a method of competing for public contracts, to maintain wages and rates paid on public works at a level sufficient to attract highly skilled laborers performing quality workmanship and to prevent the rate of wages from adversely affecting the equal opportunity of Montana contractors to bid on public works.

(2) In 1931, the legislature enacted the Montana "Little Davis-Bacon" Act. The act requires a hiring preference for Montana workers in all contracts let for public works, a 50% preference on state or federally funded projects, and empowers the Commissioner of the Department of Labor and Industry to determine the minimum wage rates to be paid to all workers on public work contracts. (AUTH: Sec. 18-2-409, and 18-2-431 MCA; IMP, Sec. 18-2-402, 18-2-403, and 18-2-409 MCA)

24.16.9002 DEFINITIONS As used in these rules, the following definitions apply: (1) "Act" means Section 18-2-401 through ~~400~~ 432 MCA.

(2) "Apprentice" means a worker employed to learn a skilled trade under a written apprenticeship agreement registered with the department's Apprenticeship Bureau or complying with the provisions of ARM 24.21.401.

(3) "Bona fide resident of Montana" is defined at Section 18-2-401(4), MCA.

(4) "Commissioner" means the Commissioner of Labor and Industry.

(5) "County or locality" means an area determined by the commissioner comprised of a single county, or a group of contiguous counties within which there exists a competitive labor market with a sufficient number of contractors and competent skilled workers of a particular craft, classification, or type such that a wage rate for the craft, classification or type of work may reasonably be determined to prevail.

(6) "Department" means the Department of Labor and Industry.

(7) "Labor" is defined at 18-2-401, MCA.

(8) "Public contracting agency" includes:

(a) the State of Montana or any political subdivision thereof;

(b) the Montana University System;

(c) any local government or political subdivision thereof;

(d) school districts, irrigation districts, or other public authorities organized under the laws of the State of Montana; or,

(e) any board, council, commission, trustees or other public body acting as or on behalf of a public agency.

(9) "Public contractor" means a contractor holding a valid public contractors license issued by the Montana Department of Commerce as provided for in Section 37-71-201, et seq., MCA, or having entered into a contract for the performance of construction, service, repair or maintenance work with the federal government or a public contracting agency.

(10) "Public works" means construction, repair and maintenance performed for a public contracting agency paid for wholly or in part by the funds of any public agency.

(11) "Standard prevailing rate of wages" means those wages determined by the commissioner, in accordance with 18-2-401(5) and 18-2-402, MCA, to be the common or predominate rate of wages paid by contractors for work on projects of a similar character in the county or locality where a contract for public works is performed. It does is not mean the necessarily an average or mean wage paid. A standard prevailing rate of wages determined according to these rules is not a prescribed wage rate, but is rather, it is a minimum below at or above which an individual performing labor on a public work project shall not be compensated.

(AUTH: Sec. 18-2-409 and 18-2-431, MCA; IMP, Sec. 18-2-402 MCA)

24.16.9003 ESTABLISHING THE STANDARD PREVAILING RATE OF WAGES

(1) When deemed necessary, but no more frequent than once a year, the commissioner will establish standard rates and delineate the county or locality where the standard applies for each craft, classification or type of worker traditionally needed to complete a public works project.

(2) The commissioner will compile wage rate information that reflects wage rates actually paid to workers on various types of construction state wide.

(a) In setting a prevailing rate of wages for a craft classification or type of worker in a county or locality, the commissioner shall consider:

(i) the established and special project rates of the previous year,

(ii) valid collective bargaining agreements,

(iii) wage rates determined by the federal government under the Davis-Bacon Act and the Federal Service Contract Act,

(iv) wage rate information compiled on a regular basis by the department,

(v) appropriate information from such wage surveys as may be conducted by the department,

(vi) other pertinent information.

(b) The commissioner may also consider submissions of wage information reflecting wages paid on projects ongoing or completed within a year prior to its consideration. This information must be supported by adequate documentation and also include the following information:

(i) the project name or identification, location and a brief description of the type of construction performed,

(ii) the date construction began and the completion date, if any,

(iii) the approximate cost of the project,

(iv) the names and addresses for the contractor, ~~all subcontractors and the contracting authority or principal, party letting the contract,~~

(v) a statement of whether wages were subject to federal prevailing wage laws, Montana prevailing wage laws, a negotiated collective bargaining agreement, or otherwise removed from the immediate and unilateral control of the employer, and

(vi) the number of workers employed to perform labor on the project, how they were classified and the rate of wages paid each worker or classification of worker.

(vii) wage rate information may be submitted to the commissioner either on form DLI-PC-1 "Wage Information Survey", available from the Office of the Commissioner, at the address shown in subsection (3) below or by calling

(406) 444-5600. Information may be submitted in any form substantially conforming to form DLI-PC-1.

(c) The commissioner may request clarification, additional information or independent verification of information submitted pursuant to this rule.

(d) The commissioner may conduct a survey of wage rates paid to workers on construction projects in one or more counties.

(e) It is the obligation of any person having possession or knowledge of wage rate information, including collective bargaining agreements that the commissioner should consider, or it is desired that he consider, to timely deliver such information to the commissioner.

(3) Wage information may be considered by the commissioner only if such information is delivered at the Office of the Commissioner, Department of Labor and Industry Building, corner of Roberts and Lockey, P.O. Box 1728, Helena, Montana 59624, by or before the close of business on the first day of July or on the next business day, if the first day of July falls on a Saturday, Sunday or state holiday. After the this deadline for submission of wage information has passed, the commissioner will review each craft, classification or type of work by a county or locality and establish standard prevailing rates of wages.

(a) The boundaries of each county or locality will approximate as closely as practical, a unique labor market for a particular craft, classification, or type of worker.

(b) Within each county or locality delineated, the commissioner will consider current wage rate information on file and set the standard prevailing rate of wages for each craft, classification or type of worker for each county or locality.

(4) A determination of standard prevailing wage rates made pursuant to this section does not apply to:

(a) a building constructed solely for use as a residence by one or two families, or,

(b) projects not required by law to be publicly bid and the total cost of the project does not exceed \$7,500.00.

(AUTH: Sec. 2-4-201, 18-2-409 and 18-2-431, MCA; IMP, Sec. 18-2-402, MCA)

24.16.9004 DEPARTMENT ASSISTANCE AND SPECIAL PROJECT RATES (1) At least thirty (30) days prior to advertising for bids or letting a contract for a public works project, a public contracting agency may request that a special job classification and commensurate rate of wages be established for a particular craft, classification or type of worker needed for that particular project. The commissioner will establish a standard prevailing rate of wages for any craft, classification or type of worker for which a no rate has not been set previously determined.

(2) A request for a special project job classification and commensurate rate of wages does not relieve a contractor from the obligation to classify and pay workers in accordance with annually established standard prevailing wage rates pending the establishment of a special project rate.

(3) A request for a special project job classification and rate of wage shall include:

(a) identification of the project by name, number or description and location,

(b) the name and address of the public contracting agency and the successful public contractor if a contract for work on the project has been awarded,

(c) the name, address and signature of the requesting party, ~~or the name and address of the requesting party~~ and the name, address and signature of ~~the~~ a requesting party's representative,

(d) each proposed job classification and rate of wages requested,

(e) a brief description of the project and the character of the work to be performed,

(f) a detailed description of the job requirements, work to be performed and skills involved in each proposed job classification,

(g) an explanation as to why none of the classifications established for the standard prevailing rate of wages is applicable,

(h) any written items of information or documents the requesting party desires to be considered,

(i) the names and addresses of all parties entitled to notice and a signed and dated certificate showing that a copy of the request was mailed to each.

(4) A request for a special project job classification and rate of wages must establish:

(a) that the project is of such an unusual character that its performance requires unique skills not traditionally performed by any craft classification or type of worker for which there has been established a standard prevailing rate of wages,

(b) that there exists a classification of workers who commonly perform work involving such unique skills at the proposed rate of wages. (AUTH: Sec. 18-2-431, MCA; IMP, Sec. 18-2-402, MCA)

24.16.9005 OBLIGATIONS OF PUBLIC CONTRACTING AGENCIES

(1) A public contracting agency will include in the bid specifications and contracts for any public works (projects not described in 20.16.9003(5) supra) contract the following:

(a) An unequivocal agreement by the contractor to give preference to employment of bona fide Montana residents in compliance with 18-2-403(1) MCA. For any state construction

project except where specifically prohibited by federal law requires otherwise the contract shall include the following statement: "It is agreed that the contractor shall give preference in hiring of bona fide Montana residents and that at least fifty percent (50%) of the work under the contract will be performed by such Montana resident, and furthermore, the contractor guarantees that all subcontractors performing work under the contract will comply with this provision." the bid specifications and the contract shall provide that at least 50% of the workers (including workers employed by subcontractors) will be bona fide Montana residents in compliance with 18-2-421(2), MCA. In the case of a particular contractor such percentage of Montana residents shall be modified to comply with any written directive by the commissioner specifying a different percentage.

(b) An unequivocal agreement by the contractor that a worker (including workers employed by a subcontractor) performing labor on the project will be paid the applicable standard prevailing rate of wages as determined by the commissioner pursuant to 24.16.9003 and 24.16.9004, supra. The contract shall set forth the actual rate of wages including fringe benefits for health and welfare and pension contributions and travel allowance to be paid for each craft, classification or type of worker needed to complete the project. The rates set forth shall not be less than the standard prevailing rate of wages.

(c) A listing of standard prevailing wage rates determined by the commissioner applicable at the project sites and language in the contractor's agreement incorporating the same by reference or otherwise.

(d) The contract provisions must clearly show require that the contractor agree that it and its subcontractors will be bound to pay wages at the rates set forth, determined by the commissioner, and to give required preferences.

(2) If a contract for public work is to be performed in more than one county where a different standard prevailing rate of wages is established for a particular craft, classification or type of worker, the highest rate is the rate to be included in the bid specifications and contract provision.

(3) Whenever a public works project, where the public contractor is required to be licensed pursuant to Section 37-71-201, et seq., MCA, is accepted by a public contracting agency, the agency shall promptly send to the department a notice of acceptance and the completion date of the project. This notice is required in all such instances, including those where the project cost is less than \$50,000. (See Section 18-2-421, MCA). (AUTH: Sec. 18-2-409 and 18-2-431 MCA; IMP, Sec. 18-2-403, 18-2-409, 18-2-421 and 18-2-422 MCA)

24.16.9006 OBLIGATIONS OF PUBLIC CONTRACTORS AND SUBCONTRACTORS (1) All public contractors and subcontractors shall give preference in hiring to bona fide Montana residents in the performance of contracts for public works.

(a) In the performance of a contract for a state project a public contractor shall ~~Such contractors must~~ ensure that at least fifty percent (50%) of all workers performing labor ~~performed~~ under the contract for public works ~~is performed~~ are bona fide Montana residents.

(b) For good cause as provided in 18-2-421(e), MCA, a contractor may in writing request that the commissioner modify percentage residency requirements on a particular ~~public-works state~~ project. The commissioner may modify or waive residency requirements ~~by-written-agreement~~ under the provision of the statute and shall by written directive notify the contracting agency of any such modification or waiver. ~~with-a-contractor-that-the-contractor-will-hire-bona-fide-Montana-residents-at-standard-prevailing-rate-of-wages-to-perform-a-like-amount-of-work-on-another-project-as-would-have-been-required-had-the-commissioner-not-agreed-to-modify-or-waive-compliance-on-the-particular-project.~~

(2) All public contractors and its subcontractors shall classify each worker who performs labor on a public works project according to the applicable standard prevailing rate of wages for such craft, classification or type of worker established by the commissioner, and shall pay each such worker a rate of wages not less than the standard prevailing rate.

(3) A public contractor or subcontractor shall require its subcontractors to comply with the law for contractor's bonds for wages and benefits prescribed by Sections 39-3-701, et seq., MCA unless excepted under Section 39-3-704, MCA. A contractor is jointly responsible for its subcontractor's failure to comply with classification and wage payment provisions of state law and department rules, including penalties assessed thereon.

(4) Any Public contractors ~~or~~ and subcontractors shall ~~generally~~ keep clear and legible records for each employee who performs labor on a public works project ~~that show showing:~~

(a) the place where the employee was contacted for hiring,

(b) ~~the state of permanent residence claimed by the employee,~~ whether or not the employee is a bona fide Montana resident,

(c) the craft, classification or type of work performed by the employee in conformity with the applicable standard prevailing rate of wages,

(d) the date, the time worked, on an hourly basis, and the identification of the project for each day the employee performed work on a public works project,

(e) the hourly rate of wages, including fringe benefits for health, welfare, pension contributions, travel allowance and other terms by which the employee was compensated for such work. (AUTH: Sec. 18-2-409 and 18-2-431 MCA; IMP, Sec. 18-2-403 and 18-2-409 MCA)

3. Formal hearings were held in Billings, Great Falls, Missoula and Helena. An informal session was held in Wolf Point.

(a) Parties representing local government, particularly school districts in rural communities and less populated counties voiced concern that wage rates determined for building construction were often at variance with rates prevailing in the community. Small projects such as school repairs are commonly let to local craftsmen under statutory exemptions to competitive bidding. It is not practical to annually predetermine a standard prevailing rate of wages for such a highly localized labor market. Wage rates in such communities vary from community to community and fluctuate during any given year.

The commissioner has, in the past, recognized this condition in attempting to predetermine wage rates for residential construction. Public construction of residences is generally confined to teacher housing in remote areas where local rates prevail. Subsection (5) is added to Rule 24.16.9003 to allow local prevailing wage rates to be paid under these two circumstances.

(b) Organized labor expressed concerns that a dollar threshold as appears in ARM 24.16.9003(5)(b) would allow splitting a project into several smaller projects to avoid bid advertising or to discourage competition. Existing statutes prohibit such "bid splitting" by local government units and school districts. (7-5-2305, 7-5-4305 and 20-9-205, MCA). Specific provisions here to prohibit the same conduct are not necessary.

(c) The Montana Chamber of Commerce felt that the commissioner's discretion in determining standard prevailing wage rates is too broad. It urged the use of a formula such as an average or a 30% provision similar to federal Davis-Bacon determinations. In order to devise a formula with any reliability in general application, a statistical survey is needed. The department has investigated the feasibility of a survey approach and has concluded that it does not have sufficient resources.

(d) Unclear language raised concerns not intended by the drafters of these rules. Changes are incorporated to clarify language that caused these areas of concerns.

(4) The authority for adopting these rules is contained in 2-4-201, 18-2-403 and 18-2-431, MCA. These rules implement, generally, 18-2-401, et seq., MCA.

Commissioner of Labor & Industry

By David E. Wanzenried
DAVID E. WANZENRIED
Commissioner

Certified to the Secretary of State this 18th day of November, 1985.

VOLUME NO. 41

OPINION NO. 33

ATTORNEYS GENERAL - Effect of declaratory judgment on a previously issued Attorney General's Opinion;
COUNTY COMMISSIONERS - Lack of authority to provide additional compensation to county clerk and recorder who is an election administrator;
COUNTY OFFICERS AND EMPLOYEES - Lack of authority for county clerk and recorder to receive additional compensation for acting as election administrator;
MONTANA CODE ANNOTATED - Sections 2-15-501(7), 27-8-301;
OPINIONS OF THE ATTORNEY GENERAL - 35 Op. Att'y Gen. No. 68 (1974); 38 Op. Att'y Gen. No. 112 (1980); 39 Op. Att'y Gen. No. 7 (1981).

- HELD: 1. A board of county commissioners may not provide additional compensation to a county clerk and recorder who is an election administrator in addition to the clerk's statutory salary.
2. A declaratory judgment by a district court does not supersede a previous Attorney General's Opinion where the district court does not explicitly overrule the prior opinion.

8 November 1985

Rae V. Kalbfleisch
Toole County Attorney
Toole County Courthouse
Shelby MT 59474

Dear Mr. Kalbfleisch:

You have requested my opinion on the following questions:

1. Is it permissible for the elected clerk and recorder to receive additional compensation for services as an election administrator?

Montana Administrative Register

22-11/29/85

2. Does a declaratory judgment by a district court supersede a previous Attorney General's Opinion?

Section 2-15-501(7), MCA, requires the Attorney General to issue opinions:

[T]o the legislature or either house thereof, to any state officer, board, or commission, to any county attorney, to the city attorney of any city or town, and to the board of county commissioners of any county of the state when required upon any question of law relating to their respective offices.

The purpose of an Attorney General's Opinion is to assist an official or government body in understanding its rights and obligations under the law. Although Attorney General's Opinions are declaratory of law, the Attorney General is an executive and not a judicial officer. Opinions serve as an executive construction of state law given for the benefit of the executive branch agencies seeking guidance. See 35 Op. Att'y Gen. No. 68 at 164 (1974).

The Opinions of the Attorney General do not have the effect of judicial rulings. Where a question of law is before the court for determination, the Supreme Court has held that an opinion is persuasive and will be upheld by the court if not erroneous and the Legislature has not enacted any statute declaring otherwise. See State ex rel. Barr v. District Court, 108 Mont. 433, 436, 91 P.2d 399, 400 (1930); State v. Schye, 130 Mont. 537, 541, 305 P.2d 350, 353 (1957).

Your question relates to a previous Attorney General's Opinion, which concerned whether an elected county clerk could receive additional compensation for services rendered as an election administrator. I concluded that since public officials could only claim compensation for services rendered where the compensation is provided by law, the county clerk did not have a right to additional compensation. See 39 Op. Att'y Gen. No. 7 at 27 (1981).

In a 1984 declaratory judgment of the Fifth Judicial District, however, the court--without joining the Attorney General or directly addressing his opinion--ruled the opposite. A county clerk was allowed

compensation paid to her by the county commission for services rendered as election administrator. Does the declaratory judgment supersede the 1981 opinion?

Section 27-8-301, MCA, pertaining to declaratory judgments, states:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration

A previous Attorney General's Opinion held that by the terms of section 27-8-301, MCA, an Attorney General is not bound by a declaratory judgment entered in a cause to which he was not a party. 38 Op. Att'y Gen. No. 112 at 399 (1980).

This opinion concerned whether particular expenditures required of municipal governments by statute may be financed by property taxes levied in addition to the 65-mill all purpose levy. My conclusions were based largely upon the reasoning of prior Attorney General's Opinions even though those opinions conflicted with a district court decision.

Several factors were considered in reaching my decision. One was that the district court did not explicitly overrule the prior opinions, even though the court's analysis was inconsistent with their content. I also questioned the precedential value of district court judgments. Trial court opinions and judgments are not reported in Montana. As these decisions are unavailable for persons doing research on the question decided by the court, they cannot be taken as declaratory of the law except as applied to the parties before the court. Therefore, district court judgments cannot serve as precedent. The opinion also held that a district court judgment in an action to which the Attorney General is not a party is not binding on the Attorney General in the performance of his statutory duty to render advisory opinions. 38 Op. Att'y Gen. No. 112 at 399 (1980).

Section 2-15-501(7), MCA, provides in part:

If an opinion issued by the attorney general conflicts with an opinion issued by a city attorney, county attorney, or an attorney

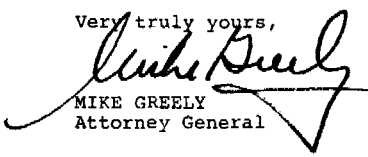
employed or retained by any state officer, board, commission, or department, the attorney general's opinion shall be controlling unless overruled by a state district court or the supreme court. [Emphasis added.]

The opinion in the instant issue was not expressly overruled by the declaratory judgment. Although the parties to the issue are bound by the judgment, it is questionable that this judgment can serve as binding precedent for all judicial districts. As chief legal officer and legal advisor, the Attorney General need not be bound by district court declaratory judgments in actions to which he was not a named party and which do not explicitly overrule a previous opinion. Although the district court opinion is entitled to weight, the Attorney General may reach a contrary result in his interpretation. The previous opinion regarding compensation of county clerks, 39 Op. Att'y Gen. No. 7 at 27 (1981), remains valid.

THEREFORE, IT IS MY OPINION:

1. A board of county commissioners may not provide additional compensation to a county clerk and recorder who is an election administrator in addition to the clerk's statutory salary.
2. A declaratory judgment by a district court does not supersede a previous Attorney General's Opinion where the district court does not explicitly overrule the prior opinion.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 41

OPINION NO. 34

ATTORNEYS - Authority of county commissioners to employ private attorney;
ATTORNEYS - Authority of county official to retain defense counsel;
ATTORNEYS GENERAL - Supervisory authority over county attorney;
COUNTIES - Obligation to pay defense-related expenses of county official;
COUNTY ATTORNEYS - Consent for employment of private attorney;
COUNTY COMMISSIONERS - Authority to employ private attorney;
COUNTY OFFICERS AND EMPLOYEES - Authority to retain defense counsel;
MONTANA CODE ANNOTATED - Sections 2-9-101, 2-9-305, 2-15-501(5), 7-4-2707, 7-4-2708, 7-4-2711(1), 7-5-2101, 7-5-2104, 7-6-2323, 37-61-403;
OPINIONS OF THE ATTORNEY GENERAL - 1 Op. Att'y Gen. at 190 (1905), 37 Op. Att'y Gen. No. 63 (1977), 37 Op. Att'y Gen. No. 171 (1978).

- HELD: 1. A county attorney may not unreasonably withhold his consent to the employment of another attorney by the board of county commissioners to perform legal services in connection with the civil business of the county. The decision of a county attorney to withhold his consent is subject to the supervisory authority of the Attorney General.
2. An elected county officer is not required to obtain the consent of the county attorney or the county commissioners in order to retain counsel in defense of a suit brought by the county attorney pursuant to section 7-6-2323, MCA. The county must reimburse the officer for legal fees incurred in the defense of the action unless an exclusion, as provided in section 2-9-305(6), MCA, applies.

8 November 1985

Ed A. Miller, Chairman
Big Horn County Board of Commissioners
Drawer H
Hardin MT 59034

Montana Administrative Register

22-11/29/85

Dear Mr. Miller:

I have received your letters of September 17 and 18, 1985, requesting my opinion on two issues of concern to the board. I have also received correspondence regarding the same matters from Commissioner Jim Ruegamer and County Attorney Clarence Belue.

Your first inquiry concerns section 7-4-2708, MCA, which provides:

In any county, the county commissioners may, upon consent of the county attorney, employ any other attorney licensed in Montana to perform any legal service in connection with the civil business of the county.

As I understand the background for the inquiry, Big Horn County is a defendant in four lawsuits pending in state and federal court. The county attorney is presently representing the county in these suits following the board's decision to terminate the services of a private attorney who had been employed by the board upon the recommendation and with the consent of the county attorney. Although the board wishes to hire another private attorney, the county attorney has withdrawn his consent to the employment of other counsel and has indicated that he will continue to represent the county in a private capacity in the four lawsuits.

Section 7-4-2708, MCA, together with section 7-4-2707, MCA, was enacted by the Montana Legislature in 1979 to provide for the rendition of county legal services by persons other than the county attorney. At least with regard to first-class counties, the 1979 statutes require the consent of the county attorney for the employment of outside counsel to perform legal services for the county, but do not expressly provide for resolution of disagreements between the commissioners and the county attorney regarding the necessity for employing outside counsel.

Section 7-4-2711(1), MCA, provides that the county attorney is the legal adviser of the board of county commissioners and must defend all suits brought against his county. He may not accept a fee in addition to his salary as county attorney for the defense of such lawsuits. See, e.g., 37 Op. Att'y Gen. No. 63 (1977).

It is not only the duty, but also the right and privilege of the county attorney to represent the county in matters of law in which the county is interested. See 27 C.J.S. District and Prosecuting Attorneys § 12(1).

Section 7-5-2104, MCA, provides that the board of county commissioners has jurisdiction and power to direct and control the prosecution and defense of all suits to which the county is a party. This grant of authority is consistent with the responsibility of the county commissioners, set forth in section 7-5-2101, MCA, to represent the county and have the care of the county property and the management of the business and concerns of the county. Such statutory authority has been held to clearly embrace the power to designate and employ special counsel to represent the county's interests, even where the county attorney has a duty imposed by statute to provide legal representation for the county. See Reed v. Gormley, 91 P. 1093 (Wash. 1907).

The consent required by section 7-4-2708, MCA, serves at least two purposes: (1) It provides notice to the county attorney in those situations where the county commissioners have not consulted the county attorney regarding outside counsel or the county attorney has not himself suggested the commissioners employ outside counsel, and (2) it allows the county attorney to review the need for employing outside counsel to perform legal services which might otherwise be performed by the county attorney without additional expense to the county.

Generally, the county attorney and the board of county commissioners stand in the same position as that of attorney and client with regard to the civil legal business of the county; where control of litigation is placed with the board, the county attorney should act under its direction. See 27 C.J.S. District and Prosecuting Attorneys § 12(5). This may include withdrawing and consenting to the employment of special counsel. There are numerous reasons why the board may wish to employ special counsel. The county attorney's absence, illness, refusal to act, differences on public policy, personal conflicts, or pressure of official business may effectively leave the county without necessary counsel, even in a grave emergency, or the litigation may involve conflicts between departments or

officers of the county. The board should not be precluded from employing special counsel as reasonably required under such circumstances. See 56 Am. Jur. 2d Municipal Corporations §§ 220, 221; 1 Op. Att'y Gen. at 190 (1905).

Although section 7-4-2708, MCA, requires consent of the county attorney for the employment of special counsel, the statutes and authorities discussed above lead me to conclude that such consent may not be unreasonably withheld where the board has compelling reasons for its decision. Except in the most unusual circumstances, the county attorney should defer to the board's decision to employ special counsel. If the county attorney disagrees with the board and withholds his consent, the board may request that the Attorney General review this conclusion and exercise supervisory power, if appropriate, over the county attorney, pursuant to section 2-15-501(5), MCA, by directing the county attorney to consent to the employment of special counsel.

It is my opinion that the board of county commissioners may select and employ special counsel to defend the county in lawsuits. The county attorney may not unreasonably withhold his consent to the employment of any other attorney for that purpose. If the board and the county attorney disagree on either the need for special counsel or which attorney should be employed, the board may request the Attorney General to exercise his supervisory authority over the county attorney. Special counsel may assist the county attorney in the case or may be substituted for the county attorney, pursuant to section 37-61-403, MCA.

Your second inquiry concerns a claim submitted by a private attorney for services rendered to the county clerk and recorder and two county commissioners. From the correspondence it is not clear whether the services were rendered in connection with the defense of a civil action brought by the county attorney in the name of the county against the county officers, or whether the claim concerns the attempted filing of a criminal action and subsequent appeal to the Montana Supreme Court. However, you limit your question to the civil action and ask whether these elected officials have the right under section 2-9-305, MCA, to be reimbursed for legal fees incurred for their defense if the county attorney and

the county commissioners have not given specific consent to the officials to retain private counsel.

Section 2-9-305, MCA, provides for the immunization, defense, and indemnification of public officers and employees civilly sued for their actions taken within the course and scope of their employment. This statute makes no exception for suits brought by the governmental entity employer against its own officers.

An action seeking to recover funds from county commissioners and the county clerk and recorder, brought by the county attorney pursuant to section 7-6-2323, MCA, is clearly a noncriminal action brought against employees of the county for actionable conduct committed while apparently acting within the course and scope of their offices or employment. Thus, the county is required by law to defend the action on behalf of the employees and indemnify the employees unless one of four specified exceptions applies. § 2-9-101(2), (3), (5), MCA; § 2-9-305(2), MCA. The exceptions or exclusions are set forth in subsection (6) of section 2-9-305, MCA, as follows:

In a noncriminal action in which a governmental entity employee is a party defendant, the employee may not be defended or indemnified by the employer for any money judgments or legal expenses, including attorney fees, to which the employee may be subject as a result of the suit if a judicial determination is made that:

(a) the conduct upon which the claim is based constitutes oppression, fraud, or malice, or for any other reason does not arise out of the course and scope of the employee's employment;

(b) the conduct of the employee constitutes a criminal offense as defined in Title 45, chapters 4 through 7;

(c) the employee compromised or settled the claim without the consent of the government entity employer; or

(d) the employee failed or refused to cooperate reasonably in the defense of the case.

Pursuant to section 2-9-305(3), MCA, an elected county officer having no supervisor would normally be required to give notice of the action to the county attorney, who is the legal officer of the county. However, since the action was brought by the county attorney in the name of the county, I conclude that no such notice would be necessary in this instance, nor would the county, as a named plaintiff, be able to provide a direct defense. Subsection (3) then allows the county officer to retain other counsel and requires the county to pay all expenses relating to the retained defense unless one of the subsection (6) exclusions applies. Subsection (4) of section 2-9-305, MCA, again makes it clear that the county must indemnify a county officer for attorney fees incurred by the officer in such a noncriminal action unless the conduct falls within the subsection (6) exclusions.

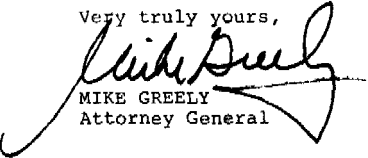
Section 2-9-305, MCA, does not require the defendant county officer to obtain consent from the commissioners and the county attorney in order to retain other counsel where the county refuses or is unable to provide a direct defense to the action. The provisions of section 7-4-2708, MCA, do not apply where the suit is brought against a county official individually and his retained counsel is not representing the county. See, e.g., 37 Op. Att'y Gen. No. 171 (1978).

It is my opinion that no such consent is required under section 2-9-305, MCA, and the commissioners and the clerk and recorder should be reimbursed by the county for legal fees incurred in defense of an action brought under section 7-6-2323, MCA, unless it is determined that an exclusion provided in section 2-9-305(6), MCA, applies. If there has not been a judicial determination concerning the subsection (6) exclusions, the county may proceed under subsection (7) to determine whether the exclusions apply. In the event of a dispute, this subsection allows the county to clarify its obligation to the county officials by commencing a declaratory judgment action or other legal action.

THEREFORE, IT IS MY OPINION:

1. A county attorney may not unreasonably withhold his consent to the employment of another attorney by the board of county commissioners to perform legal services in connection with the civil business of the county. The decision of a county attorney to withhold his consent is subject to the supervisory authority of the Attorney General.
2. An elected county officer is not required to obtain the consent of the county attorney or the county commissioners in order to retain counsel in defense of a suit brought by the county attorney pursuant to section 7-6-2323, MCA. The county must reimburse the officer for legal fees incurred in the defense of the action unless an exclusion, as provided in section 2-9-305(6), MCA, applies.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 41

OPINION NO. 35

CONSTITUTIONS - Right to privacy regarding merit pay awarded pursuant to plan devised by school district trustees;
EDUCATION - Merit pay of school district administrators;
EMPLOYEES, PUBLIC - Right to privacy regarding merit pay of school district administrators;
PRIVACY - Constitutional right to privacy regarding merit pay of school district administrators;
PUBLIC FUNDS - Merit pay of school district administrators awarded pursuant to plan, appropriated from school district general fund;
SCHOOL BOARDS - Right to privacy regarding board of trustees' plan allowing for merit pay;
SCHOOL DISTRICTS - Right to privacy regarding merit pay awarded pursuant to plan devised by school district trustees;
MONTANA CODE ANNOTATED - Section 20-3-324(8);
MONTANA CONSTITUTION - Article II, section 10;
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 109 (1980).

HELD: The administrators of School District No. 7 do not have a constitutionally-protected right to privacy regarding the amount of merit pay awarded to them pursuant to the district's Leadership Evaluation and Compensation Plan. Therefore, the amounts should be disclosed to the public.

13 November 1985

Mike Salvagni
Gallatin County Attorney
Law and Justice Center
615 South 16th Avenue
Bozeman MT 59715

Dear Mr. Salvagni:

You requested my opinion on the following question:

22-11/29/85

Montana Administrative Register

Is the Board of Trustees of School District No. 7 required to disclose the amount of merit pay awarded to an administrator of the District under its Leadership Evaluation and Compensation Plan when the amount of merit pay is based upon a performance evaluation of the administrator?

The "administrators" include principals, assistant principals, directors, supervisors, and the assistant superintendent. "Merit pay" is awarded in addition to the administrators' regular salary pursuant to the Leadership Evaluation and Compensation Plan adopted by the school trustees.

The school district trustees have the power to adopt and administer the annual budget of a school district. § 20-3-324(8), MCA. It is pursuant to this power that the trustees developed the Leadership Evaluation and Compensation Plan, which allows for merit pay following evaluation of the administrators.

Article II, section 10 of the Montana Constitution states:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

As to this privacy right, the Montana Supreme Court has stated that it applies a two-part test to determine whether a person has a constitutionally-protected privacy interest. First, a person must have had a subjective or actual expectation of privacy regarding the subject. Second, society must be willing to recognize that expectation as reasonable. Missoulain v. Board of Regents, 41 St. Rptr. 110, 116, 675 P.2d 962, 967 (1984).

The amount of merit pay awarded in this situation is directly related to the evaluation score of an administrator; the amount may vary with each administrator. Because the amount is directly affected by the outcome of a performance evaluation, the administrator may have an expectation that the amount of merit pay would not be disclosed.

However, such an expectation may not be reasonable. Reasonableness must be determined according to all relevant circumstances, including the nature of the information sought. Missouliau, 41 St. Rptr. at 117, 675 P.2d at 968. In the Missouliau case, the court found a reasonable expectation of privacy where the privacy interest involved was in job performance evaluations of university presidents. The evaluations contained information obtained from university staff and employees, the university presidents, and Board of Regents members regarding performance of a president and his administration. The evaluations, which were composed of written reports and interviews, included statements about sensitive, personal matters. Evidence supported the contentions that the reports and interviews were conducted with an expectation of confidentiality that was crucial to the evaluation process.

In Montana Human Rights Division v. City of Billings, 199 Mont. 434, 649 P.2d 1283 (1982), the Montana Supreme Court found a reasonable expectation of privacy in personnel records which included various types of personal information. The Court stated:

It may well be unreasonable for an employee to expect that this information will never be divulged to prospective employers. It does not necessarily follow that, therefore, this information is unprotected by the right of privacy under all other circumstances, even where an employee can reasonably expect it will not be divulged, such as in an investigation or during a public hearing in which the employee is only remotely involved. The right of privacy turns on the reasonableness of the expectation, which may vary, even regarding the same information and the same recipient of that information. [Emphasis in original.]

199 Mont. at 443, 649 P.2d at 1288. In the situation at hand, the amount of merit pay awarded would be disclosed, not the particulars of the evaluation of the administrator. Whereas the latter would involve personal matters which would give rise to a greater and more reasonable expectation of privacy, the former, in

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However, such an expectation may not be reasonable. Reasonableness must be determined according to all relevant circumstances, including the nature of the information sought. Missouliau, 41 St. Rptr. at 117, 675 P.2d at 968. In the Missouliau case, the court found a reasonable expectation of privacy where the privacy interest involved was in job performance evaluations of university presidents. The evaluations contained information obtained from university staff and employees, the university presidents, and Board of Regents members regarding performance of a president and his administration. The evaluations, which were composed of written reports and interviews, included statements about sensitive, personal matters. Evidence supported the contentions that the reports and interviews were conducted with an expectation of confidentiality that was crucial to the evaluation process.

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It may well be unreasonable for an employee to expect that this information will never be divulged to prospective employers. It does not necessarily follow that, therefore, this information is unprotected by the right of privacy under all other circumstances, even where an employee can reasonably expect it will not be divulged, such as in an investigation or during a public hearing in which the employee is only remotely involved. The right of privacy turns on the reasonableness of the expectation, which may vary, even regarding the same information and the same recipient of that information. [Emphasis in original.]

199 Mont. at 443, 649 P.2d at 1288. In the situation at hand, the amount of merit pay awarded would be disclosed, not the particulars of the evaluation of the administrator. Whereas the latter would involve personal matters which would give rise to a greater and more reasonable expectation of privacy, the former, in

many ways, resembles the basic salary of a public employee.

The merits of disclosure of a state employee's title, dates and duration of employment, and salary were discussed in 38 Op. Att'y Gen. No. 109 at 375 (1980). I concluded that such matters should be publicly disclosed, stating at 379:

In this case, the slight demand of individual privacy does not outweigh the great merit of allowing the public to know who its employees are, what their jobs are, and how much they are being paid. Disclosing such information increases public confidence in its government, and consequently increases government's ability to serve the public.

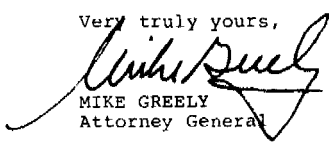
Similarly here, the merit pay is essentially money paid by the public. As with the base salaries of the administrators, the total sum of money available for the Leadership Evaluation and Compensation Plan is appropriated as part of the school budget. Thus, the Plan is funded by public monies.

It would be unreasonable for the administrators to expect that the amount of merit pay, derived from public monies, would be more private than their base salaries. Such information does not include personal or sensitive matters regarding the administrators. Because an expectation of privacy regarding the amount of merit pay awarded according to the Plan would be unreasonable, there is no constitutionally-protected right to privacy in this case. With this conclusion, I need not reach the issue of whether the privacy right involved outweighs the public's right to know the actions of the school district.

THEREFORE, IT IS MY OPINION:

The administrators of School District No. 7 do not have a constitutionally-protected right to privacy regarding the amount of merit pay awarded to them pursuant to the district's Leadership Evaluation and Compensation Plan. Therefore, the amounts should be disclosed to the public.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 41

OPINION NO. 36

GAME AND FISH - Use of surface waters for trapping and snowmobiling;
TRESPASS - Use of surface waters for trapping and snowmobiling;
WATER AND WATERWAYS - Use of surface waters for trapping and snowmobiling;
MONTANA CODE ANNOTATED - Sections 23-2-601 to 23-2-644, 45-6-201 to 45-6-203, 87-2-101(4), 87-2-601 to 87-2-604, 87-3-126;
SESSION LAWS OF 1985 - Chapter 556, sections 1 and 2 (House Bill 265), chapter 599, section 1 (House Bill 911).

- HELD: 1. Landowner permission is required before snowmobiling on the frozen surfaces of state waters between the ordinary high-water marks.
2. The "Stream Access Bill," 1985 Mont. Laws, ch. 556, does not apply to the trapping of fur-bearing animals. Rather, the state's criminal trespass statutes apply, making the right to trap fur-bearing animals between ordinary high-water marks dependent upon whether the trapper has license, invitation, or privilege to enter or remain upon the land and whether a license to trap has been secured.

15 November 1985

James W. Flynn, Director
Department of Fish, Wildlife,
and Parks
1420 East Sixth Avenue
Helena MT 59620

Dear Mr. Flynn:

You have requested my opinion on the following two questions:

1. Is landowner permission required for snowmobiling on the frozen surfaces of

22-11/29/85

Montana Administrative Register

state waters between the ordinary high-water marks?

2. Is landowner permission required for the trapping of fur-bearing animals between the ordinary high-water marks of state waters?

Your inquiry arises from the passage of House Bill 265 during the 1985 Legislative Session. House Bill 265 (1985 Mont. Laws, ch. 556), popularly known as the Stream Access Bill, addressed the rights of parties to make recreational use of the state's surface waters. Surface waters, defined as bodies of water, their beds, and their banks up to the ordinary high-water marks, are divided into two classes of water, which include all bodies of water with the exception of lakes. For purposes of this opinion, the distinctions between Class I and Class II waters are unimportant.

Section 2(1) of chapter 556 permits all surface waters that are capable of recreational use to be so used by the public without regard to ownership of the underlying land, with certain enumerated exceptions where landowner permission is necessary before recreational use of the waters may be made. Section 2(2)(a) of chapter 556 requires permission of landowners for "the operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water." This exception is pertinent to your question concerning snowmobiling on frozen surface waters. The language of section 2(2)(a) of chapter 556 which requires landowner permission for the use of "motorized vehicles not primarily designed for operation upon the water" clearly applies to snowmobiles. If landowner permission is granted, other statutes that regulate the ownership and operation of snowmobiles would apply. See §§ 23-2-601 to 644, MCA.

With respect to your question concerning the trapping of fur-bearing animals on state waters, chapter 556 does not apply. Chapter 556 deals with laws relating to "recreational use" of state waters. "Recreational use" is defined in section 1(10).

"Recreational use" means with respect to surface waters: fishing, hunting, swimming, floating in small craft or other flotation

devices, boating in motorized craft unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses. [Emphasis added.]

Chapter 556 was not intended to address the commercial use of state waters, but rather the use of those waters in a manner that primarily involves water-related pleasure activities. Certain of those activities are specifically mentioned in the above-quoted definition of "recreational use;" however, other pleasure activities that are water-related are also included in the definition. The trapping of fur-bearing animals is not specifically listed as a "recreational use" of the state's waters in section 1(10) of chapter 556. Nor can it be considered as fitting within the meaning of the phrase "other water-related pleasure activities." Fur-bearing animals include marten or sable, otter, muskrat, fisher, mink, bobcat, lynx, wolverine, northern swift fox, and beaver. § 87-2-101(4), MCA. The trapping of such animals is considered a commercial activity, subject to certain licensing requirements. Because the trapping of fur-bearing animals is not considered a recreational activity, chapter 556 is inapplicable in determining the necessity of landowner permission when trapping on state waters.

Those statutes which do apply to the trapping of fur-bearing animals include the criminal trespass statutes, §§ 45-6-201 to 203, MCA, as amended by 1985 Mont. Laws, ch. 599. The criminal trespass statutes make it a crime to enter premises (including real estate) without license, invitation, or privilege.

Privilege to enter or remain upon land is extended either by the explicit permission of the landowner or other authorized person or by the failure of the landowner or other authorized person to post notice denying entry onto private land. Such privilege may be revoked at any time by personal communication of notice by the landowner or other authorized person to the entering person.

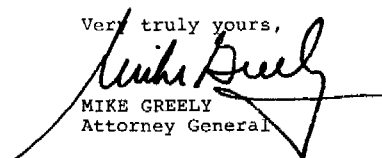
§ 45-6-201, MCA, as amended by 1985 Mont. Laws, ch. 599, § 1. In addition to compliance with the trespass laws,

the trapper of fur-bearing animals must also, of course, secure a license to trap under sections 87-2-601 to 604, MCA. Other restrictions on trapping are found in Title 87, including a prohibition against the use of boats. § 87-3-126, MCA.

THEREFORE, IT IS MY OPINION:

1. Landowner permission is required before snowmobiling on the frozen surfaces of state waters between the ordinary high-water marks.
2. The "Stream Access Bill," 1985 Mont. Laws, ch. 556, does not apply to the trapping of fur-bearing animals. Rather, the state's criminal trespass statutes apply, making the right to trap fur-bearing animals between ordinary high-water marks dependent upon whether the trapper has license, invitation, or privilege to enter or remain upon the land and whether a license to trap has been secured.

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 the 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 statutes 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 list MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 1985. This table includes those rules adopted during the period October 1, 1985 through December 31, 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 September 30, 1985, this table and the table of contents of this issue of the MAR.

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