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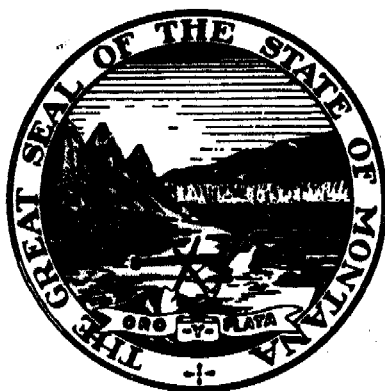
DEC 12 1985

OF MONTANA

**MONTANA
ADMINISTRATIVE
REGISTER**

**DOES NOT
CIRCULATE**

**1985 ISSUE NO. 23
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PAGES 1900-1940**



MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 23

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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

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BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE adoption)	NOTICE OF PUBLIC HEARING on the
of Rules relating to the pro-)	Proposed Adoption and Amend-
curement of used equipment;)	ments of Rules relating to
procurement from sheltered)	Procurement Procedures.
workshops and work activity)	
centers, the amendment of)	
Rules 2.5.301 Delegation of)	
Purchasing Authority; 2.5.502)	
Bid and Performance Security;)	
2.5.601 Competitive Sealed)	
Bids and 2.5.603 Small Purch-)	
ases of Supplies and Services.)	
)	

TO: All Interested Persons:

1. On January 7, 1986, at 1:00 p.m. a public hearing will be held in room 160 of the Mitchell Building, Capitol Complex, Helena, Montana, to consider the adoption of rules relating to procurement of used equipment; procurement from sheltered workshops and work activity centers; and amendments of rules 2.5.301 Delegation of Purchasing Authority; 2.5.502 Bid and Performance Security; 2.5.601 Competitive Sealed Bids and 2.5.603 Small Purchases of Supplies and Services.

2. The proposed rules provide as follows:

RULE I PROCUREMENT FROM SHELTERED WORKSHOPS OR WORK ACTIVITY CENTERS (1) state agencies may purchase products and services from sheltered workshops as defined in Section 18-5-101, MCA. Such purchases are exempt from competitive bidding laws and rules and may be made directly.

(2) The Department will maintain a list of certified sheltered workshops or work activity centers, as defined in 18-5-101 MCA, located in the state. The list will include the products and services provided by each. The list will be available to user agencies and will be updated annually in January.

(3) Sheltered workshops and work activity centers will submit to the department by June 30 and December 31 of each year an updated listing of products and services offered.

AUTH: Sec. 18-5-102, MCA; IMP: Sec. 18-5-102 and 18-5-103, MCA.

RULE II PROCUREMENT OF USED EQUIPMENT (1) Purchase of used equipment is allowable if in the best interest of the state.

(2) Unless justified as sole source or exigency, the award of the contract will be made by identifying the acceptable used equipment specifications as minimum requirements and proceeding with the competitive bidding or proposal process.

(3) The determination that purchase of used equipment is in

the best interest of the state must be in writing. Criteria to consider in making this determination include:

- (a) consideration of the type, use and life expectancy of new versus used equipment;
- (b) comparing the purchase price of new and used equipment;
- (c) comparing the price and general condition of used equipment among several vendors;
- (d) consideration of the freight charges and FOB point;
- (e) investigation of manufacturer or brand and availability of warranty, maintenance, and parts;
- (f) clarification of payment terms.

AUTH: Sec. 18-4-221, MCA; IMP: Sec. 18-4-221, MCA.

2.5.301 DELEGATION OF PURCHASING AUTHORITY (1) - (3)
remains the same.

(4) Delegation is not necessary for the following purchases: Salaries; fees for professional services, travel and per diem; telegrams and other message services; insurance including industrial accident; boiler, safety and scale inspections; retirement and social security payments; freight; licenses; dues to associations; legal ads; public utilities (water, natural gas, electricity); postage and U.S. Post Office services; subscriptions; copyrighted publications and text books; and any other commodities exempted by law.

AUTH: Sec. 18-4-221, MCA; IMP: Sec. 18-4-221 and 18-4-222, MCA.

2.5.502 BID AND CONTRACT PERFORMANCE SECURITY (1) Bid Security. ~~Reasons for requiring bid security for supply contracts or service contracts include:~~

- ~~----- (a) --- Type of commodity;~~
- ~~----- (b) --- Past state experience; and~~
- ~~----- (c) --- Potential damages if bidder reneges.~~ The state may, at its discretion, require bid and/or contract performance security on procurement of services and supplies.

(2) ~~Performance security.~~ ~~Factors to consider in determining whether to require performance security for supply contracts or service contracts include:~~

- ~~----- (a) --- Type of commodity;~~
- ~~----- (b) --- Past state experience;~~
- ~~----- (c) --- Labor required to perform the contract;~~
- ~~----- (d) --- Materials required to perform the contract;~~
- ~~----- (e) --- Amount and number of subcontracts;~~
- ~~----- (f) --- Damages chargeable to the state if the contract defaults.~~ The state shall require bid and contract security for service contracts exceeding \$10,000, except that security is discretionary for sole source contracts defined in 18-4-306 MCA.

(3) Bid and contract performance security requirements must be stated in the Invitation for Bids or the Request for Proposals.

(4) Types of security:

(a) The preferred types of security are bonds as described in 18-4-312(2) (a) and cash as described in 18-4-312 (2) (c) and (d), MCA.

(b) If certificates of deposit or money market certificates are determined to be acceptable ~~in order to increase competition,~~

they shall be issued in the name of the vendor and the state of Montana from ~~a properly insured financial institution, any bank or savings and loan association licensed to do business in Montana.~~

(c) ~~If irrevocable letters of credit are determined to be acceptable in order to increase competition, they shall be issued from a properly insured financial institution any bank or savings and loan association licensed to do business in Montana on a form reviewed and approved by the Department. Irrevocable letters of credit may not be accepted as security for contracts in excess of \$100,000.~~

(5) ~~If bid security is required, the amount of the security shall be no less than 10% of the total bid price. Factors to consider in requiring bid security and in determining the amount of the security include:~~

- ~~(a) type of commodity;~~
- ~~(b) past state experience;~~
- ~~(c) potential damage if bidder defaults;~~
- ~~(d) estimated dollar amount of the total bid price.~~

~~(6) If contract performance security is required, the amount of the security shall be no less than 25% of the total contract price. Factors to consider in requiring contract performance security and in determining the amount of the security include:~~

- ~~(a) type of commodity;~~
- ~~(b) past state experience;~~
- ~~(c) labor required to perform contract;~~
- ~~(d) materials required to perform contract;~~
- ~~(e) amount and number of subcontracts;~~
- ~~(f) damages chargeable to the state if the contractor defaults;~~

~~(g) estimated dollar amount of total contract.~~

AUTH: Sec. 18-4-221, MCA; IMP: Sec. 18-1-201 and 18-4-312, MCA.

2.5.601 COMPETITIVE SEALED BIDS (1) - (7) remains the same.

~~(8) The department may require state agencies to perform any tests or to provide technical expertise to determine product or service acceptability on bids received.~~

~~(9) Following determination of product acceptability, if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the state in accordance with the evaluation criteria set forth in the Invitation for Bids and the preference provisions described in ARM 2.5.403. The Procurement Officer reserves the right to combine bid items to provide for the most overall cost effective purchase. Only objectively measurable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder. Examples of such criteria include, but are not limited to, transportation cost, and ownership or life cycle cost formulas. Evaluation factors need not be precise predictors of actual future costs, but to the extent possible such evaluation factors shall:~~

~~(a) be reasonable estimates based upon information the state has available concerning future use; and~~

~~(b) treat all bids equitably.~~

~~(9) - (10) (c) remains the same.~~

AUTH: Sec. 18-4-221, MCA; IMP: 18-4-303, MCA.

2.5.603 SMALL PURCHASES OF SUPPLIES AND SERVICES (1) - (4)
remains the same.

(5) For small purchases of supplies or services over \$500 and under \$2,000, the Procurement Officer shall solicit no less than three (3) businesses to submit written quotations, and shall record the quotations and place them in the procurement file. The Procurement Officer shall award a contract to the business offering the lowest acceptable quotation. The Procurement Officer reserves the right to combine bid items and provide for the most overall cost-effective purchase. The names of the businesses submitting quotations and the date and amount of each quotation shall be recorded and maintained as a public record.

(6) remains the same.

(7) The department may require state agencies to perform any tests or to provide technical expertise to determine product or service acceptability on bids received.

~~(7)~~ (8) For small purchases of supplies and services of \$300 and under, the Procurement Officer may choose a purchase technique, including cash purchase, that best meets the needs of the agency.

AUTH: Sec. 18-4-221, MCA; IMP: Sec. 18-4-305, MCA.

3. The department is proposing the following rules because:

(a) Rule I. The 1985 Legislature made changes to the law on purchases through Sheltered Workshops. Rules are needed to outline the department, sheltered workshop, and work activity center responsibilities;

(b) Rule II. The department receives inquiries from agencies on what procedures to follow when purchasing used equipment. The rule describes the procedures.

(c) Rule 2.5.301. The department receives inquiries from agencies whether certain commodities should be competitively bid. The amendment to this rule clarifies for agencies the commodities that may be purchased without delegated purchasing authority.

(d) Rule 2.5.502. The 1985 Legislature made changes to the law on bid and contract performance security. The amendment to this rule incorporates the law changes and further describes procedures to follow when requiring the securities.

(e) Rules 2.5.601 and 2.5.603. The department on occasion needs technical expertise from agencies to determine product acceptability on bids received. The amendment notifies agencies and the public of the assistance needed. In certain instances the cost of issuing a separate purchase order to the supplier of a low bid item is greater than the difference between the low bid and the next higher bid. The following illustrates such a case:

Bids received from:	Supplier A	Supplier B
Item 1	\$484.00 (low bid)	\$523.00
Item 2	873.00 (low bid)	941.00
Item 3	152.00	150.00 (low bid)

In Item 3, Supplier B presented the low bid for a \$2.00 savings.

The cost for issuing a separate purchase order ranges from \$50.00 to \$100.00 for staff time. The state can realize a greater savings by issuing one purchase order to Supplier A for all items, than issuing a separate purchase order to Supplier B. This amendment allows the Procurement Officer to use his or her discretion to combine bid items in these cases.

4. Interested parties 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:

Mike Muszkiewicz, Administrator
Department of Administration
Purchasing Division
Mitchell Building, Room 165
Helena, Montana 59620

no later than January 15, 1986.

5. Luther Glenn, Assistant Administrator, Purchasing Division, Room 165, Mitchell Building, Helena, Montana has been designated to preside over and conduct the hearing.

By: Ellen Weaver
Director, Department of
Administration

Certified to the Secretary of State December 2, 1985.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF CHIROPRACTORS

In the matter of the proposed amendment of 8.12.601 concerning applications, education requirements and a proposed new rule concerning hair analysis)	NOTICE OF PROPOSED AMENDMENT OF 8.12.601 CONCERNING APPLICATIONS, EDUCATION REQUIREMENTS AND A PROPOSED NEW RULE CONCERNING HAIR ANALYSIS
--	---	---

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On January 13, 1986, the Board of Chiropractors proposes to amend and adopt the above-stated rules.
2. The proposed amendment of 8.12.601 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-357, Administrative Rules of Montana)

"8.12.601 APPLICATIONS, EDUCATION REQUIREMENTS

(1) The admission to examination for licensure shall be based upon proof that the applicant has completed 2 years of college in addition to graduation from an approved chiropractic college that has status with the Council on Chiropractic Education (CCE). As part of either the two years of college or the education program at the chiropractic college, each applicant must have had 120 classroom hours of instruction in physiotherapy. Official transcripts from all colleges shall accompany the application. In addition, a certified copy of the National Board scores, Parts I & II including physiotherapy, shall be supplied to the board prior to examination.

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

Auth: 37-12-201, MCA Imp: 37-12-302, MCA

3. The reason for this change is that during the past year out of 44 examination applicants, 28 applicants failed the examination and all failed in the area of written and practical physiotherapy and of the 12 who passed, 6 were retakes who had previously failed physiotherapy. The board feels that chiropractic colleges are not adequately providing educational classes on physiotherapy and physiotherapy is required for examination in Montana. This rule will require applicants to have adequate classroom hours for examination.

4. The proposed new rule will read as follows:

"1. HAIR ANALYSIS Section 37-12-104, MCA, provides that 'licensed chiropractors may diagnose, palpate, and treat the human body by the application of manipulation, manual, mechanical and dietetic methods, including chiropractic physiotherapy, the use of supportive appliances, analytical instruments, and diagnostic x-ray in accordance with guidelines promulgated or approved by state or federal health

regulatory agencies.' It is this board's interpretation that the conduct allowed by the statute does not include hair analysis, and that hair analysis is not an acceptable chiropractic procedure, except for testing for heavy metal toxicity. Those licensees who represent hair analysis as being chiropractic services may be misleading the public."

Auth: 37-12-201, MCA Imp: 37-12-101, MCA

5. This rule is proposed as an interpretive rule as hair analysis is only taught in one approved chiropractic college; therefore it does not meet the requirements of 37-12-101 (2) in the definition of chiropractic and is for consumer protection.

6. Interested persons may submit their data, views or arguments concerning the proposed amendment and adoption in writing to the Board of Chiropractors, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than January 10, 1986.

7. If a person who is directly affected by the proposed amendment and 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 Chiropractors, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than January 10, 1986.

8. If the board receives requests for a public hearing on the proposed amendment and adoption from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendment and 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 28 based on the 276 licensees in Montana.

BOARD OF CHIROPRACTORS
W. PAT PARDIS, D.C.
PRESIDENT

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, December 2, 1985.

-1907-

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

In the matter of the proposed) NOTICE OF PROPOSED AMENDMENT
amendment of 8.58.419 con-) OF 8.58.419 CONCERNING DIS-
cerning discrimination) CRIMINATION

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On January 13, 1986, the Board of Realty Regulation proposes to amend the above stated rule.

2. The proposed amendment will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-1610 through 8-1612, Administrative Rules of Montana)

"8.58.419 SUSPENSION OR REVOCATION - VIOLATION OF RULES - UNWORTHINESS OR INCOMPETENCY (4) (a) through (4) (i) will remain the same.

(j) Refusing, because of race, color, national origin or ethnic group, to show, sell, lease, or rent any real estate to prospective renters, lessees, or purchasers."

Auth: 37-51-203, MCA Imp: 37-51-203, MCA

3. The amendment is being proposed because the Board of Realty Regulation believes that discrimination on the basis of race, creed, or color is impermissible and that it (the Board) has an affirmative duty to prevent this type of behavior. Disciplinary statutes do not address this issue.

4. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Realty Regulation, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than January 11, 1986.

5. If a person who is directly affected by the proposed amendment 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 January 11, 1986.

6. If the board receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendment, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having 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

23-12/12/85

MAR Notice No. 8-58-22

-1908-

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, December 2, 1985.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMEND-)	NOTICE OF PUBLIC HEARING on
MENT of Rules 42.22.1212,)	the Proposed Amendment of
42.22.1215, and 42.22.1217)	Rules 42.22.1212, 42.22.1215,
relating to oil and gas net)	and 42.22.1217 relating to
proceeds deductions.)	oil and gas net proceeds
		deductions.

TO: All Interested Persons:

1. On January 3, 1986, at 9:00 a.m., a public hearing will be held in the SRS Auditorium, 111 Sanders, Helena, Montana, to consider the amendment of rules 42.22.1212, 42.22.1215, and 42.22.1217 relating to oil and gas net proceeds deductions.
2. The rules proposed to be amended can be found on pages 42-2255 and 42-2256 of the Administrative Rules of Montana.
3. The rules as proposed to be amended provide as follows:

42.22.1212 EXPENSES RELATED TO MACHINERY (1) and (2) remain the same.

(a) Vehicle acquisition and operating costs, including insurance, are deductible to the extent the costs are incurred for vehicle use directly related to the operation and development of the well. Acquisition costs include either the annual lease cost or the purchase price. No deduction will be allowed for finance charges associated with the operation or acquisition of a vehicle. The deductible amount will be computed using a ratio of miles traveled directly related to the operation and development of the well to total miles traveled. The operator must maintain mileage records to substantiate this deduction.

(b) The pro rata portion of the vehicle purchase price will be deductible only in the year of acquisition. It will be assumed for computational purposes that the vehicle was in service for the entire acquisition year. Annual lease costs will be deductible in the production year that payment is made. The deduction for vehicle acquisition and operating costs is effective for production years beginning on or after January 1, 1986.

(3) and (4) remain the same.

AUTH: 15-23-108 MCA, and Ch. 642, L. 1985; IMP: 15-23-603 MCA, and Ch. 642, L. 1985.

42.22.1215 DEDUCTIONS FOR DRILLING COSTS AND CAPITAL EXPENDITURES (1), (2), (3), and (4) remain the same.

(5) The amortization period for deduction of these capital expenditures shall begin, with the year of the actual expenditure and not the year when the lease or unit went into production with respect to natural gas production, on January 1 of the year production from a nonexempt gas well is first placed into a

natural gas distribution system; and, with respect to oil production, on January 1 of the year the pumping unit is installed. The amortization periods described above are effective for production years beginning on or after January 1, 1986. Prior to that time, amortization periods begin when the nonqualified natural gas or crude oil well is completed.
AUTH: 15-23-108 MCA, and Ch.642, L. 1985; IMP: 15-23-604 MCA, and Ch. 642, L. 1985.

42.22.1217 ADMINISTRATIVE AND OTHER OPERATIONAL COSTS (1)
Remains the same.

(2) All monies money expended for fire insurance, liability and casualty insurance directly attributable to the operation and development of the well, workmen's compensation insurance, performance or indemnity bonds required by the laws or rules of this state, and for payment by operators to welfare and retirement funds when required by wage contracts between operators and employees will be allowed as a deduction for net proceeds calculations. Deductions for liability and casualty insurance, and performance or indemnity bonds are effective for production years beginning on or after January 1, 1986.

(3), (4), and (5) remain the same.
AUTH: 15-23-108 MCA, and Ch. 642, L. 1985; IMP: 15-23-603 MCA, and Ch. 642, L. 1985.

4. The Department proposes to amend rules 42.22.1212, 42.22.1215, and 42.22.1217 because Chapter 642, Laws 1985, amending §§ 15-23-603 and 15-23-604, MCA, specifically provided for additional deductions in computing the oil and gas net proceeds. Those deductions are: vehicle expense, liability and casualty insurance, and performance and indemnity bonds. This bill also changed the manner in which capital expenditures and drilling costs may be deducted. The proposed rule changes would bring the rules into conformity with the statutes and provide clarity as to their computation.

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

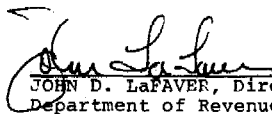
Dawn Sliva
Department of Revenue
Legal Division
Mitchell Building
Helena, Montana 59620
no later than January 10, 1986.

6. Jim McClean, Agency Legal Services, Department of Justice, has been designated to preside over and conduct the hearing.

7. The authority of the Department to make the proposed amendments is based on § 15-23-108, MCA, and Ch. 642, L. 1985.

-1911-

The rules implement §§ 15-23-603, 15-23-604, MCA, and Ch. 642, L. 1985.


JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 12/02/85

23-12/12/85

MAR Notice No. 42-2-312

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

In the matter of the amendments)	NOTICE OF AMENDMENTS CON-
of 8.22.302 concerning board)	CERNING 8.22.302 BOARD OF
of stewards, 8.22.1052 con-)	STEWARDS, 8.22.1502 DEFINI-
cerning definitions of conduct)	TION OF CONDUCT DETRIMENTAL
detrimental to racing)	TO RACING

TO: All Interested Persons:

1. On October 18, 1985, the Board of Horse Racing published a notice of amendments of the above-stated rules at pages 1455 through 1458, 1985 Montana Administrative Register, issue number 19.

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

3. No comments or testimony were received.

BOARD OF HORSE RACING
HAROLD GERKE, CHAIRMAN

BY: Keith L. Colbo
KEITH L. COLBO, DIRECTOR

Certified to the Secretary of State, December 2, 1985.

BEFORE THE DEPARTMENT OF INSTITUTIONS
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT OF
Rule 20.3.413 Certification for) ARM 20.3.413 CERTIFI-
chemical dependency personnel) CATION FOR CHEMICAL
) DEPENDENCY PERSONNEL

TO: All Interested Persons


1. On Thursday, August 29, 1985, the Department of Institutions gave notice of proposed adoption of amendment to ARM 20.3.413, certification for chemical dependency personnel, on page 1192 of the Montana Administrative Register, issue No. 16.

2. A public hearing was conducted by the Department of Institutions on the proposed rules on September 27, 1985. Robert Anderson, Administrator of the Alcohol and Drug Abuse Division, appeared on behalf of the Department. David J. Campbell, of the Kimrock Foundation of Billings, Montana, presented a memorandum and further testified in support of the changes.

3. The principal reason for the amendment of this rule is to clear up outdated language and to more accurately delineate who may do counseling in alcohol programs. No comments were received that urged the non-adoption of these rules.

4. Rule 20.3.413 was inadvertently omitted from the adoption notice published November 14, 1985 in The Montana Administrative Register, Issue No. 21.

5. Based on the foregoing pursuant to the rulemaking authority of 53-24-105 MCA, the Department hereby adopts Rule 20.3.413 as proposed.


CARROLL SOUTH, Director
Department of Institutions

CERTIFIED TO THE SECRETARY OF STATE December 2, 1985.

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
BEFORE THE BOARD OF WATER WELL CONTRACTORS

In the matter of the amend-)	NOTICE OF AMENDMENTS OF 36.21.
ments of 36.21.402 concerning))	402 LICENSURE RESTRICTED TO
licensure nontransferable,)	NATURAL PERSONS--NONTRANSFER-
36.21.409 concerning super-)	ABLE, 36.21.409 SUPERVISION,
vision, 36.21.410 concerning))	36.21.410 EXAMINATION, 36.21.
examinations, 36.21.413 con-)	413 RENEWALS, 36.21.415 FEE
cerning renewals, 36.21.415))	SCHEDULE, REPEAL OF 36.21.401
concerning fees; repeal of))	BOARD MEETINGS, AND ADOPTION
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licenses.)	OF CONTRACTOR'S LICENSE, 36.21.
))	406 CONTENTS OF DRILLER'S
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))	RESPONSIBLE CONTRACTOR,
))	36.21.408 DRILLER COMPLETION OF
))	EXAMINATION, 36.21.411 BOND
))	REQUIREMENTS, 36.21.412
))	APPRENTICES

1. On October 17, 1985, the Board of Water Well Contractors published a notice of proposed amendments, repeal, and adoptions of the above-stated rules at pages 1496 through 1503, Montana Administrative Registrar, issue number 19.

2. Two letters of comment were received. One from Larry Jennings questioned whether an individual could be a "hired hand" and not an apprentice under proposed rule VII. A letter has been sent to Mr. Jennings explaining that those individuals whose duties are not directly related to the actual drilling of the wells are not considered apprentices. Mr. Jennings also questioned the increased fees with relationship to inspectors and investigation of complaints. The ability to utilize the Department of Natural Resources and Conservation field offices for inspection and investigation was also explained by letter to Mr. Jennings, along with the fact that the fees are set to adequately cover program area costs.

Mr. William Lake also wrote requesting a hearing. Mr. Lake expressed concerns over construction standards and penalties for non-licensed persons drilling water wells, which he wanted to address at a hearing. These items were not addressed in the proposed notice and Mr. Lake was advised that he could attend a Board meeting to discuss the concerns with the Board. He stated, in his letter, that he was, for the most part, in favor of the proposed rules.

The Board office received several phone calls asking for an explanation on whether a contractor also had to carry a driller's license. These people were assured that if they had a contractor's license and bond, they did not need to have a separate driller's license.

No other comments or testimony were received.

3. The Board has amended, repealed and adopted the rules as proposed with the following exception: Rule VII contains a typographical error in subsection (5) and should read as follows: (new matter underlined, deleted matter interlined)

"36.21.412 APPRENTICES (1)...

(5) The Board may, upon application and request, approve equivalent experience under a ~~non-listed~~ non-licensed water well contractor or driller, if the experience was in a state other than Montana and if the Board is satisfied that the experience was the equivalent of working under a licensed water well contractor in Montana. The Board may approve other experience as equivalent as it finds appropriate.

(6)..."

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

BY:

Wesley Lindsay

WESLEY LINDSAY, CHAIRMAN
BOARD OF WATER WELL CONTRACTORS

Certified to the Secretary of State, December 2, 1985.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION)	NOTICE OF THE ADOPTION of New
of New Rule I (42.15.309))	Rule I (42.15.309) relating
relating to social security)	to social security benefits
benefits taxation.)	taxation.

TO: All Interested Persons:

1. On September 26, 1985, the Department published notice of the proposed adoption of Rule I (42.15.309) relating to social security benefits taxation at pages 1378 and 1379 of the 1985 Montana Administrative Register, issue no. 18.

2. The Department has adopted the rule with the following changes:

42.15.309 MONTANA MODIFIED ADJUSTED GROSS INCOME (1), (2), (3), (4), and (5) remain the same.

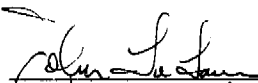
(6) A married person filing separately on the same form must claim \$16,000, as a base amount one-half of the base amount as allowed by section 86 of the internal revenue code.

(7) Remains the same.

AUTH: 15-30-305 MCA, and Ch. 682, L. 1985; IMP: 15-30-111 MCA, and Ch. 682, L. 1985.

3. The above change to rule I (42.15.309) was made by the Department to clarify the source of the \$16,000 figure used in subsection (6). No comments or testimony were received.

4. The authority of the Department to make the proposed adoption is based on § 15-30-305, MCA, and Chapter 682, L. 1985, and the rule implements § 15-30-111, MCA, and Chapter 682, L. 1985.



JOHN D. LAFAVER, Director
Department of Revenue

Certified to Secretary of State 12/02/85

VOLUME NO. 41

OPINION NO. 37

CITIES AND TOWNS - Elections conducted on partisan or nonpartisan basis;
LOCAL GOVERNMENT STUDY COMMISSIONS - Effect of election conducted on alternative form of government;
MONTANA CODE ANNOTATED - Sections 2-16-501, 7-3-113, 7-3-121 to 7-3-161, 7-3-141(1)(b), 7-3-171 to 7-3-193, 7-3-185(1)(b), 7-3-201 to 7-3-224, 7-3-219(1);
MONTANA CONSTITUTION - Article XI, sections 3(1), 9(1);
REVISED CODES OF MONTANA, 1947 - Sections 16-5115.1, 47A-3-203, 47A-3-203(h)(i).

- HELD: 1. Malta's local elections must be conducted on a partisan basis in the future, unless the voters adopt a different plan of government.
2. Those local public officers who were elected on a nonpartisan basis after May 2, 1977, served as de facto officers and their official acts should be regarded as legal. Local officeholders who were elected on November 5, 1985, may exercise their duties in the same manner.

2 December 1985

Willis M. McKeon
Phillips County Attorney
Phillips County Courthouse
Malta MT 59538

Dear Mr. McKeon:

You have requested an opinion on several questions which are related to the basic issue of whether local elections in the city of Malta should be conducted on a partisan or a nonpartisan basis.

Your inquiry arises from research carried out by the existing Malta Local Government Study Commission. The Commission has submitted a series of questions to the Phillips County Clerk and Recorder, who serves as the local election administrator. In order to understand

the exact nature of these questions, some background is in order.

Until the mid-1970s, local governments developed through many years of growth and statutory change. There was no single local government code as such. Existing statutes were confusing, contradictory, scattered, and repetitive. As a result, pressing local problems were unresolved or postponed. Schuman v. Study Commission of Yellowstone County, 176 Mont. 313, 317, 578 P.2d 291, 294 (1978). In 1972, the new state constitution required that the Legislature provide for the adoption of statutory forms of government and for a local government review process. Sections 3(1) and 9(1) of Article XI of the 1972 Montana Constitution state:

Section 3. Forms of government. (1) The legislature shall provide methods for governing local government units and procedures for incorporating, classifying, merging, consolidating, and dissolving such units, and altering their boundaries. The legislature shall provide such optional or alternative forms of government that each unit or combination of units may adopt, amend, or abandon an optional or alternative form by a majority of those voting on the question.

....

Section 9. Voter review of local government. (1) ~~The legislature shall~~, within four years of the ratification of this constitution, provide procedures requiring each local government unit or combination of units to review its structure and submit one alternative form of government to the qualified electors at the next general or special election. [Emphasis added.]

In 1975, the Legislature implemented the above-quoted sections of the new constitution by enacting various local government statutes which defined existing governmental forms and provided for several alternative forms. Of particular interest for the City of Malta, which had a mayor-council form of government, was the enactment of section 16-5115.1(1), R.C.M. 1947 (currently codified as section 7-3-113, MCA). Section

16-5115.1(1), R.C.M. 1947, provided that if a local government, organized under the general statutes authorizing the mayor-council form of government, did not adopt a new form of government, then it was governed by certain statutes after May 2, 1977, including one requiring partisan elections. § 47A-3-203(h)(i), R.C.M. 1947, currently codified as § 7-3-219(1), MCA. The Legislature's power to define those forms of government that existed where alternative forms were not adopted was upheld in Schuman, supra, 578 P.2d at 295.

As mandated by Article XI, section 9(1) of the 1972 Montana Constitution, and implemented by the local government legislation passed in 1975, a Malta Local Government Study Commission was formed in 1974. Its duties included reviewing the form of government that was already in place and submitting to the voters at the next election a choice between the existing form and an alternative. The Study Commission sought advice from local organizations and government officials, held public hearings, and surveyed citizen attitudes over a two-year period. It is clear from the Commission's final report that it had determined that the form of government best suited to the people of Malta was a mayor-council form of government, with elections conducted on a nonpartisan basis. Nonpartisan elections had been conducted in the past in Malta; however, the newly-enacted section 16-5115.1(1), R.C.M. 1947, required that those cities which kept the mayor-council form of government, without adopting one of the new alternative forms of government, must conduct partisan, rather than nonpartisan elections. Of the several alternative forms of government provided by the Legislature, which are currently set forth in Title 7, chapter 3, parts 2 to 7, MCA, one of them authorized a mayor-council structure with nonpartisan elections as one of its features. §§ 7-3-201 to 224, MCA. This was the alternative form of government which the Malta Study Commission recommended to the voters in 1976.

Before the November election of 1976, the Malta Local Government Study Commission published its final report in the local newspaper, as it was required by law to do. Copies of the report were made available to the public three months before the election. The report explained that in order for Malta to continue conducting its local elections on a nonpartisan basis, voters must approve the recommended alternative to the existing form of

government. While both options included the mayor-council form of government, the type of elections, i.e., partisan versus nonpartisan, was the distinguishing feature. The following excerpts are from the 1976 final report of the Malta Local Government Study Commission.

In this final report we obey the mandate of the 1972 constitution and the state legislature in presenting one alternative form of government. Because the overwhelming majority of those interviewed, those who attended our meetings, and those who responded to our surveys favored retaining the present form of government with no changes except changes which can be made within the structure of the present form, we submit an alternative form which contains no drastic change but still provides for a simplification which constitutes enough of a change to qualify as an alternative form according to the 1972 constitution and state law.

....

SUMMARY OF RECOMMENDATIONS

The Malta Local Government Study Commission thoroughly studied Malta's present form of city government, and examined the alternative forms of government available under state law. We present the following as the most satisfactory alternative form of city government.

1. The City of Malta shall adopt, effective May 2, 1977, the Mayor-Council form of government, with general government powers. It will differ from the existing form only in that its elections shall be non-partisan.

2. The question for the adoption of this alternative form or the retention of the present form shall be submitted to the voters of the City of Malta on November 2, 1976, in the following form:

OFFICIAL BALLOT

BALLOT ON ALTERNATIVE FORM OF LOCAL
GOVERNMENT FOR THE CITY OF MALTA

VOTE FOR ONE

☐ For adoption of the Council-Mayor form of government, with general government powers, with elections conducted on a non-partisan basis, as proposed in the report of the Local Government Study Commission.

☐ For the existing form of City Government.

....

The Study Commission's hearings and interviews with the public have shown that they do not want any substantial change in the form of city government. In their study of the present form, the Study Commission noted that the present form does not rule out partisan elections. If one or more candidates for city office filed on a party ticket, the city would have to conduct a primary election, followed by a general election. The Study Commission feels that city councils of small cities should not be controlled by party politics or divided along party lines. Therefore, they propose as the alternative form that City of Malta elections shall be non-partisan. This is the only difference between the present form and the alternative form. Both are Mayor-Council forms with general Government powers. [Emphasis added.]

The final report went on to provide sample certificates, one for the establishment of the "existing" plan of government and one for establishment of the "proposed" form. In the sample certificate for the "existing" plan, the Study Commission referred to section 47A-3-203(h)(i), R.C.M. 1947, which is quoted as requiring partisan elections. By contrast, the sample

certificate for the "proposed" plan cites the requirement for nonpartisan elections.

The above-quoted portions of the final report are not the only efforts made by the 1976 Study Commission to explain the difference between the existing form of government and the proposed alternative. Two charts that were attached to the final report contain further pertinent information for the voter. One chart contains columns showing the characteristics of the two different forms of government. For the category called "Elections," the column for "Present Form" of government reads "partisan;" the column for the "Proposed Form" of government reads "non-partisan." In the "Comment" column the following statement appears:

This is the only change in the proposed form. Under present form, if a candidate filed on a party basis, city would have to hold a primary election.

The second chart is an organizational chart showing that the city electorate elects the city council, with a notation that under the "present form" there would be partisan elections and under the "proposed form" there would be nonpartisan elections.

With that explanation offered to the voters by the Malta Local Government Study Commission, the proposed alternative form of government was voted on in November 1976. The final vote in the 1976 election was:

--305 votes cast for the alternative (Council-mayor form of government ... with elections conducted on a non-partisan basis, as proposed in the report of the Local Government Study Commission);

--650 votes cast for the existing form of government.

Following the 1976 election, the chairman of the Study Commission filed with the proper authorities a "Certificate Establishing Ratified Plan of Government for Malta, Montana," indicating that the ratified government would be organized under section 47A-3-203, R.C.M. 1947, including subsection 3(h)(i), which required partisan elections. However, the City of Malta

continued to conduct its local elections on a nonpartisan basis, and apparently the practice was not seriously questioned until the currently-existing Local Government Study Commission began its research.

This rather lengthy recitation of the results of the 1976 local government review in Malta is meant to explain the origins of the following questions which you have posed:

1. Are the local elections of the City of Malta to be conducted on a partisan or a nonpartisan basis?
2. If the elections are and were to be conducted on a partisan basis from and after May 2, 1977, how is the validity of the elections conducted on a nonpartisan basis prior to 1985 affected?
3. If the elections prior to 1985 are invalid, what effect does this have on the status of the currently elected city officials who have not completed their terms in office and what effect does this have on the validity of the laws and regulations which the elected city officials have enacted during their terms?
4. Currently, a nonpartisan election for city government is set for November 5, 1985. If the Malta elections are to be conducted on a partisan basis, which steps would be taken to assure the validity of this 1985 election?

Although it is easy to understand how an uninformed voter could be misled into believing that a vote for the "existing" form of government was a vote for not only the old form of government, but also all of its features, the voters were advised otherwise. The final report of the Malta Local Government Study Commission informed voters of the implications of their votes. It explained that in order to continue with nonpartisan elections the alternative, which was recommended by the Commission, should be adopted.

This is not a case where electors were deprived of a right to vote or where there was any debasement or dilution of their votes. See Burger v. Judge, 364 F. Supp. 504, 511 (D. Mont. 1973). There is no suggestion that the final report of the Malta Study Commission was intended to misrepresent any facts or mislead the voters. To the contrary, the final report of the Study Commission clearly advised the voters of the difference between a vote for the "existing" form of government and a vote for the Commission's proposed alternative. In Kohler v. Tugwell, 292 F. Supp. 978 (E.D. La. 1969), plaintiffs complained that the ballot's description of a proposed constitutional amendment misled voters because it was inartfully worded. The court agreed that the ballot language was confusing, but upheld the election.

It is apparent that the text is so turgid that it would be difficult to say that any ballot designation could describe it accurately. ... They [voters] must come to the polls prepared in advance to vote on the amendments if they are to vote with any semblance of understanding. ... The procedure followed by Louisiana does not deprive the plaintiffs of Due Process for it is sufficient that Louisiana's voters were informed by the ballot of the subject of the amendment, were given a fair opportunity by publication to consider its full text, and were not deceived by the ballot's words.

292 F. Supp. at 980-81.

I conclude that because the Malta voters in 1976 were advised by publication of the implication of their votes on a form of government, the results of the election are binding. Thus, when the voters adopted the "existing" form of government, partisan elections became a feature of Malta's mayor-council form of government, as of May 2, 1977, by operation of section 16-5115.1(1), R.C.M. 1947.

Should the voters of Malta desire that local elections legitimately be conducted on a nonpartisan basis, they may still opt for the plan of government provided for in sections 7-3-201 to 224, MCA. That form of government allows voters to adopt a mayor-council structure with either partisan or nonpartisan elections. See

§ 7-3-219, MCA. The procedures for recommending such a change are set forth in sections 7-3-121 to 161, MCA (petition for alteration), and sections 7-3-171 to 193, MCA (recommendation of study commission). The specific authority to propose a new plan of government by petition is found in section 7-3-141(1)(b), MCA. A study commission's authority is found in section 7-3-185(1)(b), MCA.

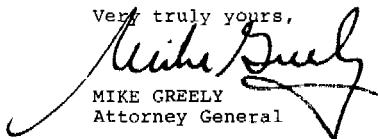
Your second and third questions deal with the validity of those local elections held in Malta since May 2, 1977, which have been conducted on a nonpartisan basis, and the legality of actions taken by local officers who were elected during that time. Where there has been an irregularity in the conduct of an election due to an honest misapprehension of the law, courts have generally agreed that the elected officers are "de facto" officers, who may perform duties under color of right. 63A Am. Jur. 2d Public Officers and Employees §§ 578-79; 28 Am. Jur. 2d Elections § 226. The circumstances surrounding Malta's local elections do not suggest bad faith on the part of election officials. Therefore, it is my opinion that those officers who were elected to local office after May 2, 1977, served as de facto public officials and their official acts should be regarded as legal. The affairs of society cannot be carried on in any other way. See State ex rel. Flynn v. Ellis, 110 Mont. 43, 50, 98 P.2d 879, 882-83 (1940); State ex rel. Buckner v. Mayor of Butte, 41 Mont. 377, 386-87, 109 P.2d 710, 712-13 (1910); 3 McQuillin Municipal Corporations §§ 12.106-07 (3d ed. 1982).

Your last question concerns the recently-held election of November 5, 1985, which was conducted on a nonpartisan basis. As has already been discussed, those officials who were elected at this past election may exercise their duties as de facto officers. The statutory procedure for filling vacancies does not apply, since no vacancies can be said to exist under section 2-16-501, MCA. See Conboy v. State, 42 St. Rptr. 120, 124, 693 P.2d 547, 550 (1985). Thus, unless vacancies should occur, as defined in section 2-16-501, MCA, there is no need to address this matter, and the incumbent de facto officeholders may serve throughout the remainder of their terms. However, the next local election in Malta should be conducted on a partisan basis unless an alternative has been adopted by the voters.

THEREFORE, IT IS MY OPINION:

1. Malta's local elections must be conducted on a partisan basis in the future, unless the voters adopt a different plan of government.
2. Those local public officers who were elected on a nonpartisan basis after May 2, 1977, served as de facto officers and their official acts should be regarded as legal. Local officeholders who were elected on November 5, 1985, may exercise their duties in the same manner.

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.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1985 Montana Administrative Register.

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