OF MONTANA

MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 10

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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.

Page Number

TABLE OF CONTENTS

NOTICE SECTION

BEFORE THE STATE TAX APPEALS BOARD
OF THE STATE OF MONTANA

In the matter of Proposed Repeal and Amendment of Various Tax Appeal Board Rules	) NOTICE OF PROPOSED REPEAL OF RULES 2.51.301 ORGANIZATION, MEETINGS, AND DUTIES GENERALLY; 2.51.302 APPLICATION FOR HEARING; 2.51.303 NOTICE OF HEARING AND HEARING ON APPLICATION; 2.51.304 RECORD OF HEARING; 2.51.305 EVIDENCE; 2.51.306 EX PARTE CONSULTATIONS PROHIBITED; 2.51.308 APPEALS; 2.51.401 APPEALS-NOTICES; 2.51.402 ORDER OF THE BOARD; AND AMENDMENT OF RULE 2.51.307 ORDERS OF THE BOARD.) NO PUBLIC HEARING CONTEMPLATED.

TO: All Interested Persons.

1. On July 18, 1986, the State Tax Appeals Board proposes to repeal and amend the above noticed rules regarding the operation of and public participation in the county and state tax appeals process.

2. The rules proposed to be repealed may be found on pages 2-3485 through 2-3553 of volume 1 title 2 of the Administrative Rules of Montana. 2.51.307 Orders of The Board, found on page 2-3488, is proposed to be amended by deleting subsections (1) and (2). Subsection (3) would be renumbered subsection (1).

2.51.307 ORDERS OF THE BOARD ~~(1) The final action of a county tax appeal board upon applications shall be entered in the record by order on forms prescribed by the state tax appeal board. The orders shall specify the changes to be made in the assessment roll.~~

~~(2) A signed copy of a board's order shall be sent by certified mail to the applicant and to the property assessment division of the department of revenue and to the county clerk within 3 days following the signing of the order.~~

~~(3)~~ (1) The decision of the county tax appeal board shall be final and binding on all interested parties for the tax year in question unless reversed or modified by the state tax appeal board review. If not reviewed by the state tax appeal board, the decision of the county tax appeal board shall also be final and binding on all interested parties for all subsequent tax years unless there is a change in the property itself or circumstances surrounding the property which affect its value.

AUTH: 15-2-104, MCA IMP: 15-2-201, MCA

3. The rationale for the repeal of these rules is based on the fact that procedural duties and limits of the board are prescribed by current statutes. The present rules are either redundant, contrary to law or unnecessary. It is the board's position that any form of protest of tax is sufficient certification for review. A formal application creates unnecessary administrative expense, paperwork and may create an unintended bar to review by the board.

4. Interested parties may submit their data, views or arguments concerning the proposed change in writing to Mr. Robert S. Raundal, Chairman, State Tax Appeals Board, 1209 Eighth Avenue, Helena, MT 59601, no later than June 26, 1986.

5. If a person who is directly affected by the proposed rule wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Mr. Robert S. Raundal, at the above address, no later than June 26, 1986.

6. If the Board receives requests for a public hearing on the proposed repeal and amendment from either 10 percent or 25, whichever is less of the persons who are directly affected by the proposed changes; the administrative code committee of the legislature; a governmental subdivision or agency; an association having not less than 25 members who will be directly affected, a notice of hearing will be published in the Montana Adminstrative Register. The percent of those persons directly affected has been determined to be more than 25.

STATE TAX APPEALS BOARD

By Robert S. Raundal
Robert S. Raundal
Chairman

Certified to the Secretary of State May 19, 1986.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of rules relating to the administration of a sick leave fund for state employees	))))	NOTICE OF PUBLIC HEARING ON THE ADOPTION OF RULES RELATING TO THE ADMINISTRATION OF A SICK LEAVE FUND FOR STATE EMPLOYEES

TO: Interested Persons.

1. On June 19, 1986, at 12:15 p.m. in Room 136, Mitchell Building, Helena, Montana, a public hearing will be held to consider the adoption of rules relating to the administration of a sick leave fund for state employees.

2. The proposed rules provide as follows:

RULE I SHORT TITLE (1) This policy may be cited as the sick leave fund policy.

(Auth. 2-18-618, MCA, Imp. 2-18-618, MCA)

RULE II POLICY AND OBJECTIVES (1) It is the policy of the state of Montana to allow the sharing of accrued sick leave between employees and the pooling of sick leave, consistent with these rules. Shared and pooled sick leave may then be available to a qualifying employee who suffers an extensive illness or accident.

(2) Nothing in this policy guarantees that an agency shall approve leave of absence and nothing in this policy guarantees direct grants or grants of sick leave from the sick leave fund.

(3) It is the objective of this policy to establish the structure of the sick leave fund, to establish eligibility requirements, and to establish procedures to administer both the sick leave fund and direct grants.

(4) No funds shall be attached to any hours of sick leave which are donated to the sick leave fund, are received as grants from the sick leave fund, or are donated or received as direct grants. The agency employing the recipient of a grant from the sick leave fund or a direct grant of sick leave shall pay all costs of the use of that sick leave.

(Auth. 2-18-618, MCA; Imp. 2-18-618, MCA)

RULE III DEFINITIONS As used in this sub-chapter, the following definitions apply:

(1) "Agency" means all executive branch departments, those agencies allocated to the state board of education under 2-15-1511, MCA, all attached to boards, commissions and their staffs, the Montana university system and units of that system under the board of regents, the legislative branch and the judicial branch.

(2) "Contribution" means the number of hours of accrued personal sick leave which an employee must donate to the sick leave fund to become or to remain a participant in the fund.

(3) "Direct grant" means the extension to an employee, who may or may not be a participating employee, of up to 80 hours of sick leave in a 12-month period which is donated by other state employees, who may or may not be participating employees, for the specific use of the employee.

(4) "Employee" means an employee of the state of Montana, who is in an allocated FTE or who is on the faculty of the Montana university system and who is receiving sick leave.

(5) "Extensive illness or accident" means an illness, injury, disability, or quarantine which incapacitates the participating employee for 10 or more consecutive working days.

(6) "Grant" means the extension to a participating employee of sick leave from the sick leave fund.

(7) "Maximum allowable benefit" means no more than 80 hours of sick leave in any continuous 12-month period received as either grants from the sick leave fund or as direct grants.

(8) "Participating employee" means an employee of the state of Montana assigned to a position which has been designated as permanent or seasonal who has joined the sick leave fund by making the initial contribution of the number of hours required by these rules and who has contributed any hours subsequently requested by the department of administration.

(9) "Sick leave advisory council" means the nine-member council provided for in 2-15-216, MCA, to advise the department of administration on the sick leave fund.

(10) "Sick leave fund" means a pool established to accumulate and disburse voluntarily and irrevocably contributed accrued personal sick leave from state employees for the purpose of providing sick leave to participating employees.

(11) "Sick leave voucher" means the form used to transmit sick leave credits as a direct grant from an employee to another employee, to the sick leave fund, or from the sick leave fund to a participating employee.

(Auth. 2-18-618, MCA; Imp. 2-18-618, MCA)

RULE IV PROHIBITED USES OF SICK LEAVE FUND AND DIRECT GRANTS (1) No sick leave accrued prior to July 1, 1971, may be contributed to the sick leave fund or provided as direct grants.

(2) An employee shall not receive direct grants of sick leave or a grant from the sick leave fund:

(a) if the employee is eligible for workers' compensation benefits;

(b) if the employee is no longer employed by the state;

(c) while the employee is on long-term leave of absence without pay for a reason other than extensive illness or accident or during the one-year preference period following a reduction-in-work force.

(d) to provide care or attendance to an immediate family member.

(Auth. 2-18-618, MCA; Imp. 2-18-618, MCA)

RULE V STRUCTURE OF SICK LEAVE FUND (1) The sick leave fund created in 2-18-618, MCA, for state of Montana employees shall be administered by the department of administration. There shall be one sick leave fund with the following exception: The Montana university system under the board of regents may establish and administer a sick leave fund plan for employees of the university system consistent with these rules.

(2) Where the university system elects to establish and administer a sick leave fund plan, the university system may adopt procedures in addition to those provided in these rules. Such procedures shall not be less specific, inconsistent, or in conflict with these rules.

(3) The sick leave advisory council shall meet at least semiannually to review the operation of the sick leave fund and to make recommendations to the director of the department of administration regarding the fund.

(Auth. 2-18-618, MCA; Imp. 2-18-618, MCA)

RULE VI ADMINISTRATION OF SICK LEAVE FUND (1) No grants from the sick leave fund shall be made unless the fund has a fund balance of 400 hours of sick leave.

(2) Sick leave credits shall be contributed to the sick leave fund using a sick leave voucher. The sick leave voucher and any other forms necessary to administer the sick leave fund shall be prescribed by the department of administration.

(3) Where an employee makes an initial contribution to the sick leave fund, the sick leave voucher shall be transmitted from the employing agency to the department of administration.

(4) To request a grant of sick leave from the sick leave fund, the participating employee shall obtain a voucher from the employing agency.

(5) The employing agency shall certify that:

(a) the employee meets all eligibility requirements to receive a grant from the sick leave fund in Rule IX;

(b) the agency head or designee has approved the receipt of sick leave; and

(c) the supervisor has approved the leave of absence.

(6) The agency shall transmit the voucher to the department of administration. The department of administration shall certify that the requested sick leave credits are available from the sick leave fund and shall return the voucher to the employing agency. The employing agency shall credit the sick leave credits to the employee's account.

(Auth. 2-18-618, MCA; Imp. 2-18-618, MCA)

RULE VII MEMBERSHIP IN SICK LEAVE FUND (1) A full-time or part-time employee in a position - designated as permanent or seasonal - of the executive, legislative or judicial branches of state government or of the Montana university system may become a participating employee in the sick leave fund.

(2) To enroll in the sick leave fund, an employee must:

(a) have completed the 90-day qualifying period to take sick leave, provided for in 2-18-618(1), MCA;

(b) have a minimum balance of 40 hours of sick leave credited to the employee's account. The minimum balance for a part-time employee shall be prorated;

(c) contribute at least 8 hours hours of accrued sick leave to the sick leave fund. The initial contribution for part-time employees shall be prorated.

(3) An employee may contribute a combined total of no more than 40 hours of sick leave either to the sick leave fund or as direct grants in a 12-month period. The 12-month period is calculated from the first day the employee contributes to the fund or makes a direct grant. An employee may exceed the 40-hour limit in order to make an additional contribution requested by the department of administration to maintain a minimum balance in the fund. At the time of termination, there is no limit on the amount of sick leave an employee may contribute to the fund.

(4) An employee meeting the requirements in (2)(a-c) may enroll in the sick leave fund at any time.

(5) All contributions to the sick leave fund shall be voluntary and irrevocable.

(6) Participation in the fund constitutes the employee's agreement to abide by all rules related to the sick leave fund promulgated by the department of administration.

(7) An employee remains a member of the sick leave fund unless or until the employee:

(a) fails to authorize an additional contribution;

(b) terminates employment with state government; or

(c) resigns in writing from the fund at any time.

(Auth. 2-18-618, MCA; Imp. 2-18-618, MCA)

RULE VIII CONTRIBUTIONS (1) The initial contribution required from a full-time employee to become a member of the sick leave fund shall be 8 hours of accrued personal sick leave. The contribution from a part-time employee shall be prorated.

(2) To maintain a minimum balance in the sick leave fund, it may become necessary for the department of administration to request additional contributions of 8 hours of sick leave from participating employees. The additional contribution for a part-time employee shall be prorated.

(3) Participating employees shall authorize the additional contribution within 45 days, except as provided in paragraph (5). If an employee fails to authorize the additional contribution, the employee's membership in the sick leave fund shall be terminated.

(4) The employee shall be eligible to rejoin the fund at a later time. An employee who rejoins the sick leave fund shall meet all initial membership requirements provided in Rule VII, and must wait 90 days from the date the employee rejoins the fund to be eligible to receive a grant from the fund.

(5) A participating employee who is in the process of exhausting or who has exhausted all sick and annual leave and compensatory time as the result of an extensive illness or accident at the time a request for additional contributions is made shall not be required to make the contribution. An exception must be approved by the agency head or designee and submitted to the department of administration within 45 days.

(Auth. 2-18-618, MCA; Imp. 2-18-618, MCA)

RULE IX ELIGIBILITY TO RECEIVE GRANTS FROM THE SICK LEAVE FUND (1) A participating employee who meets the eligibility requirements of paragraph (6) of this rule may receive no more than a maximum of 80 hours of sick leave in any continuous 12-month period in grants from the sick leave fund. Leave approved for a part-time employee shall be prorated. The maximum allowable benefit in any 12-month period from either grants from the fund or direct grants is 80 hours.

(2) The 12-month period is calculated from the first day the employee takes sick leave which is a grant from the sick leave fund or a direct grant.

(3) No employee is eligible to receive a grant of sick leave from the sick leave fund without the approval of the agency head or designee.

(4) Participation in the sick leave fund or meeting the eligibility requirements of paragraph (6) of this rule does not guarantee that receipt of sick leave shall be approved in any specific case by the agency head.

(5) When approving leave of absence, a supervisor may approve a combination of paid sick leave and leave of absence without pay in a workweek, for example, 20 hours of paid sick leave and 20 hours of leave of absence without pay.

(6) To be eligible to receive a grant from the sick leave fund, an employee must:

(a) have met the 90-day qualifying period to take sick leave provided for in 2-18-618(1), MCA;

(b) suffer an extensive illness or accident which results in absence from work of no less than 10 consecutive working days;

(c) exhaust all personally accrued sick leave, annual leave and compensatory time;

(d) take 5 days of leave of absence without pay following exhaustion of all accrued leave and compensatory time;

(e) receive approval from the supervisor for leave of absence;

(f) receive approval from the agency head or designee to receive a grant or direct grant of sick leave;

(g) provide to the employing agency a physician's certification of extensive illness or accident, in accordance with ARM 2.21.137, in the sick leave policy; and

(h) have been a member of the sick leave fund for 90 days.

(7) If an employee is incapacitated and unable to apply for leave of absence and a grant from the sick leave fund, another person may do so for the employee.

(8) Denial of leave of absence or denial of sick leave grants may not be appealed to the sick leave advisory council.

(9) Participation in the sick leave fund does not prohibit an agency from terminating an employee for, as provided in 39-2-504, MCA, "continued incapacity to perform."

(Auth. 2-18-618, MCA; Imp. 2-18-618, MCA)

RULE X ADMINISTRATION OF A DIRECT GRANT (1) Employees do not have to be participating members in the sick leave fund in order to give or receive direct grants.

(2) Direct grants shall be made using a sick leave voucher. The agency shall certify that the granting employee has met the eligibility requirements to make a direct grant in Rule XI. The granting employees sick leave balance shall be debited by the appropriate number of hours.

(3) A sick leave voucher shall be transmitted directly from the granting employee's agency to the recipient's agency.

(4) If the recipient of a direct grant has exceeded the maximum allowable benefit, or if the recipient's agency does not agree to accept the sick leave credits, the voucher shall be returned to the granting employee's agency and the sick leave shall be recredited to the granting employee's balance.

(5) A copy of the sick leave voucher shall be transmitted to the department of administration for record keeping purposes.

(Auth. 2-18-618, MCA; Imp. 2-18-618, MCA)

RULE XI ELIGIBILITY TO MAKE DIRECT GRANT (1) To be eligible to make a direct grant of sick leave, an employee shall have completed the 90-day qualifying period to take sick leave, provided for in 2-18-618(1), MCA, and shall have a minimum balance of 40 hours of accrued sick leave credited to the employee's account. The minimum balance for a part-time employee shall be prorated.

(2) An employee may directly grant a maximum of 40 hours of accrued personal sick leave in any continuous 12-month period to another employee or employees. An employee may contribute no more than a combined total of 40 hours of sick leave to either the sick leave fund or as direct grants in any 12-month period. The 12-month period is calculated from the first day an employee makes a direct grant or contribution to the sick leave fund. If the employee's leave balance falls below 40 hours, the employee will not be eligible to make a direct grant. The employee may not reduce the leave balance below 40 hours by making direct grants.

(3) An employee may make a direct grant of sick leave to an employee of any state agency.

(Auth. 2-18-618, MCA; Imp. 2-18-618, MCA)

RULE XII ELIGIBILITY TO RECEIVE DIRECT GRANTS (1) An employee may receive no more than a maximum of 80 hours of sick leave in any consecutive 12-month period in direct grants. Leave granted to a part-time employee shall be prorated. The maximum

allowable benefit in any 12-month period from either direct grants or grants from the fund is 80 hours.

(2) The 12-month period is calculated from the first day the employee takes sick leave which is a direct grant or a grant from the sick leave fund.

(3) The employee shall meet all applicable eligibility requirements in Rule IX(6).

(4) No employee is eligible to receive direct grants of sick leave without the approval of the agency head or designee.

(5) A supervisor may approve a combination of paid sick leave and leave of absence without pay in a workweek, as provided in Rule IX(5).

(6) If an employee is incapacitated and unable to apply for leave of absence and direct grants, another person may do so, as provided in Rule IX(7).

(7) Denial of leave of absence or direct grants may not be appealed to the sick leave fund advisory council.

(Auth. 2-18-618, MCA; Imp. 2-18-618, MCA)

3. These rules are proposed for adoption to comply with 2-18-618(8), MCA, which directs the department of administration to adopt rules for the administration of a sick leave fund.

4. With passage of HB 550, the 1985 Legislature provided for the creation of a sick leave fund for state employees. The Legislature also created a nine-member advisory council to be consulted by the Department of Administration in the adoption of these rules. The Council represents executive branch departments, offices of other elected officials, the legislative branch, judicial branch, and the university system. In making its recommendations, issues the Council considered include requirements of the statute, the statement of intent attached to HB 550, and current practices on leave administration. The proposed rules published here are based on the Council's recommendations to the department and have been reviewed by the Council.

5. Interested parties may submit their data, views or arguments concerning the proposed adoption of rules in writing to:

Laurie Ekanger, Administrator
State Personnel Division
Department of Administration
Room 130, Mitchell Building
Helena, Montana 59620

no later than June 28, 1986.

6. Gale Kuglin, Personnel Policy Coordinator, State Personnel Division, Department of Administration, Mitchell Building, Helena, Montana 59620, has been designated to preside over and conduct the hearing.

7. The authority of the agency to make the proposed adoption is based on 2-18-618, MCA, and the rule implement 2-18-618, MCA.

Ellen Feaver, Director
Department of Administration

Certified to the Secretary of State May 19, 1986.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the adoption of rules concerning commodity dealers and public warehousemen and repealing certain rules	)	NOTICE OF PUBLIC HEARING PERTAINING TO THE ADOPTION OF NEW RULES CONCERNING COMMODITY DEALERS AND PUBLIC WAREHOUSEMEN AND THE REPEAL OF RULES 4.12.1001 THROUGH 4.12.1010, AND 4.12.1015 THROUGH 4.12.1016

TO: All Interested Persons.

1. On June 26, 1986 at 10:00 a.m. in room 225 Agriculture/Livestock Building, Sixth and Roberts, Helena, Montana, a public hearing will be held to consider the adoption of the proposed new rules concerning commodity dealers and public warehousemen.

2. The proposed rules provide as follows:

RULE I TERM OF LICENSES - EXPIRATION (1) A public warehouse license period shall be for the term of July 1, through June 30, or part thereof. A public warehouse license shall expire July 1 of each year.

(2) A commodity dealer license period shall be for the term of July 1, through June 30, or part thereof. A commodity dealer license shall expire July 1 of each year.

AUTH: 80-4-403, MCA IMP: 80-4-404, MCA

RULE II REPORTS TO THE DEPARTMENT (1) A public warehouseman and/or commodity dealer monthly report is required to be completed in full and filed with the Department of Agriculture on a monthly basis. The report is due within thirty (30) days of the end of the reporting month. Reports must be submitted even if no business has been conducted. These reports shall include the following information:

(a) all stored commodities in which warehouse receipts have been issued, including those held by CCC, producers, etc.

(b) all commodities stored in each public warehouse in Montana including cash grain.

(c) all commodities for which warehouse receipts have been issued that are being stored in facilities outside of Montana.

(d) all commodities purchased in the reporting period except those contracted for future delivery.

(e) all commodities contracted for on deferred payment contract in which payment has not been made.

(2) A special report may be filed with the Department of Agriculture in lieu of a commodity report. Special reports can include but are not limited to: feedlot, poultry, dairy, swine, and dry edible bean operations. The special report is required to be completed in full and filed with the Department of Agriculture on a monthly basis. The report is due within thirty (30) days of the end of the reporting month. Reports must be submitted even if no business has been conducted. The report shall include the names of producers, elevators or other dealers from whom purchases were made. The report shall include all information that is covered by commodity dealers under this act.

(3) A grain movement monthly report shall be filed with the department by all public warehouseman/commodity dealers licensed who ship grain. The report is due within thirty (30) days of the end of the reporting month. Reports must be submitted even if no shipments have been made.

(a) Grain businesses having more than one business location shall submit separate reports for each business location.

(b) Grain businesses providing the department with internally generated computer reports shall comply with all requirements of this rule.

(c) The report shall include, but not be limited to:

(i) the amount of cwt/bu of agricultural commodities shipped.

(ii) the number of units (rail covered hoppers - rail boxcar - trucks) shipped.

(iii) the type of grain (winter wheat, spring wheat, durum, barley, oats, etc.) shipped.

(iv) the destination of shipment.

(4) A Montana wheat/barley assessment report shall be filed by the first purchaser, mortgagee, or pledgor, with the department, on forms prescribed by the department, within twenty (20) days after the end of the month in which he purchases a grower's wheat or barley. The information provided by the licensed commodity dealer to the department shall comply with the requirements in section 80-11-207 MCA.

(5) An alfalfa seed assessment report shall be filed with the department by the first handler. The report shall be on forms prescribed by the department and filed within twenty (20) days after the close of business for the month for which the report is being filed.

AUTH: 80-4-403, MCA IMP: 80-4-207, MCA
80-4-311, MCA
80-4-407, MCA

RULE III FINANCIAL STATEMENTS - FILING DATE (1) The financial statement accompanying an applicant's original application shall show a statement closing date that is within six (6) months of the date of application. Thereafter, the licensee applying for renewal shall submit an annual statement not later than ninety (90) days after the close of his business year.

(2) If the financial statement indicates non-compliance with the financial requirement provisions of the grain act or the licensee fails to submit an acceptable financial statement within ninety (90) days of the end of his fiscal year end, then the department may immediately suspend his license pursuant to the Administrative Procedures Act.

AUTH: 80-4-403, MCA IMP: 80-4-421, MCA
80-4-502, MCA
80-4-601, MCA

RULE IV BOND CONDITIONS - CANCELLATION (1) A surety bond, or bond equivalent may be in bond increments rounded up to the nearest $2,000.00.

(2) The surety bond shall be on a form prescribed by the department.

(3) Such surety bond shall name the State of Montana as obligee for the benefit of all parties.

(4) A surety bond required by section 80-4-504 MCA, and 80-4-601 MCA, shall be effective on the date of commencement, shall not be affected by the expiration of the license period, and shall continue in full force and effect until cancelled. The continuous nature of a surety bond, however, shall in no event be construed to allow the liability of the surety under a surety bond to accumulate for each successive license period during which the surety bond is in force, but shall be limited in the aggregate to the amount stated on the bond or as changed, from time to time, by appropriate endorsement or rider.

(5) The principal or the surety on a bond may cancel a bond by written notice of intent to cancel, by registered or certified mail, with return receipt, to the other party and to the department. Such written notice shall be received at least sixty (60) days prior to the cancellation date specified on the notice.

(6) Not later than forty-five (45) days after a notice of intent to cancel as described in (5) of this section is received by a public warehouseman, the licensee shall file with the director a new bond or bond equivalent which must become effective and be in full force and effect on and after the date upon which his existing bond is to be cancelled.

AUTH: 80-4-403, MCA IMP: 80-4-425, MCA
80-4-504, MCA
80-4-505, MCA
80-4-601, MCA
80-4-604, MCA

RULE V CERTIFICATES OF DEPOSIT OR OTHER BOND EQUIVALENTS (1) Rules promulgated hereunder that apply to surety bonds shall also apply to certificates of deposit (CD) and other bond equivalents.

(2) A CD may be liquidated for disbursement for the same reasons and in the same manner that surety bond proceeds may be requested for disbursement.

(3) A CD or other bond equivalent shall be on a form approved by the department.

(4) A CD issued by a bank or savings and loan association that is a member in good standing with the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation, respectively may be submitted to the department in lieu of a surety bond for a public warehouseman or a commodity dealer as required by sections 80-4-504 MCA, and 80-4-601 MCA. The CD must be in an amount equal to the otherwise required surety bond.

(5) A CD may be automatically renewable, or for a single maturity. If it is for a single maturity, the CD must be for a term of one (1) year or less.

(6) A CD submitted in lieu of a surety bond shall be held by the department.

(7) All CDs shall be made payable or properly assigned to the department as follows: "Pay to the order of the director of the Montana Department of Agriculture". If a CD is assigned to the department, written consent of the assignment must be received from the financial institution issuing the certificate.

(8) All interest earned on the CD is to be credited or paid directly to the purchaser of the CD. If interest is paid to the department, it shall be endorsed to the purchaser of the CD. These conditions are valid only if no claim has been made against the CD. In event of a claim the interest earned may become a part of the dispersable proceeds of the CD.

(9) If a licensee under this act desires to terminate a license and requests the return of a CD, the licensee filing the CD must return the license and make written request by registered or certified mail with return receipt for the return of the CD. Upon receipt of the written request and the submission of the license, the director shall hold the CD for a period of ninety (90) days before it is returned. If at the end of the ninety (90) days no claim against the CD has been made, the CD shall be returned, unless the director is of the opinion that claims against the CD may exist. Under these conditions, the director may hold the CD until it is determined that no claims against the CD exist.

(10) If a license issued under this act is revoked, the CD shall be held by the director for a period of one hundred and twenty (120) days or until the director is satisfied that no claims against the CD exist.

(11) If a licensee under this act desires to remain licensed and requests the return of a CD on file with the director, the licensee shall file with the director a replacement CD, bond, or bond equivalent in an amount required by the director in accordance with section 80-4-504 MCA, and 80-4-601 MCA. The replacement CD, bond, or bond equivalent must be received, become effective and be in full force and effect on or before the date that the licensee's existing CD is to be returned. The director shall not return the CD until a replacement CD, bond or bond equivalent has been received.

(12) If a reduction in the amount of a CD is permitted by the department, such reduction shall be made by submitting a new

CD in the smaller amount approved by the department. The date the CD is to be effective, shall be set by the department and any new liability accrued under the prior CD will transfer to the new CD or its equivalent. The department will release the original CD upon receipt of the reduced CD or its equivalent providing all actions are approved by the department.

(13) In addition to CDs the director may accept irrevocable letters of credit which he deems to be acceptable. All of the provisions that apply to CDs shall apply to these bond equivalents.

AUTH: 80-4-403, MCA IMP: 80-4-425, MCA
80-4-504, MCA
80-4-505, MCA
80-4-538, MCA
80-4-601, MCA
80-4-604, MCA

RULE VI AGRICULTURAL SEED WAREHOUSE RECEIPTS - WRITTEN TERMS (1) The public agricultural seed warehousemen shall each day, issue a warehouse receipt for each lot of agricultural seed of one kind received. Agricultural seed of one kind received from one owner during any one day may be construed to be a single lot. If seed is received solely for cleaning and not to be held longer than twenty-four (24) hours; the warehouseman is not required to issue a warehouse receipt. If seed is received for storage or cleaning and storage, a warehouse receipt shall be issed.

(2) Public agricultural warehouse storage rules and statutes shall apply to all other aspects of agricultural seed warehousing.

AUTH: 80-4-403, MCA IMP: 80-4-527, MCA

RULE VII LOSS OF RECEIPTS - CONDITIONS OF REISSUE (1) Where a negotiable receipt has been lost or destroyed, the director may, upon proof of such loss or destruction, require the warehouseman and the holder of the original receipt, to sign an affidavit. The affidavit shall state that the receipt has been lost or destroyed and cannot be produced for cancellation, that delivery or payment in full for the commodity represented by the receipt or the reissue of such receipt has been made to the holder, and that the warehouseman has not negotiated the receipt for value. The affidavit or reissued receipt shall state any encumbrance against the grain represented by the original receipt.

AUTH: 80-4-403, MCA IMP: 80-4-533, MCA

RULE VIII DATE OF TERMINATION OF STORAGE CONTRACTS EVIDENCED BY WAREHOUSE RECEIPTS (1) All storage contracts on agricultural commodities in store in public warehouses, as evidence by a public warehouse receipt, shall terminate on the last day of the license period that being June 30th of each year.

(2) The public warehouseman shall notify by registered or certified mail all public warehouse receipt holders of the provisions of section 80-4-536 MCA, thirty (30) days prior to the end of storage period.

AUTH: 80-4-403, MCA IMP: 80-4-535, MCA
80-4-536, MCA

RULE IX WAREHOUSE SHORTAGE - REMEDIES (1) Within forty-eight (48) hours of taking possession of a public warehouse, the Department of Agriculture shall give written notice of its action to the surety company on the bond or to the financial institution of the warehouseman on a CD or its equivalent.

(2) Upon taking possession of a public warehouse, the Department of Agriculture shall allow one hundred and twenty (120) days for the holder of public warehouse receipts or scale weigh tickets to provide to the department such tickets as evidence of deposit. Failure to file a claim within the one hundred and twenty (120) days provided shall defeat the claim with respect to the surety bond or its equivalent.

(3) The director may make demand upon the bond or its equivalent at anytime he finds valid claims may exist against it. The department shall make full or pro rata payment on such claims within one hundred and eighty (180) days from the date of verification of all claims and receipt of liquidated bond or bond equivalent proceeds.

AUTH: 80-4-403, MCA IMP: 80-4-425, MCA
80-4-538, MCA

RULE X SEED BUYER CONTRACTS - RESPONSIBILITIES (1) Persons applying for a commodity dealer's license which includes seed shall:

(a) Use a contract form which clearly states the terms of purchase and basis for payment.

(b) Submit a sample copy of the contract and subsequent revisions to the department.

(c) Determine the percentage of pure seed before transporting seed out of state.

AUTH: 80-4-403, MCA IMP: 80-4-422, MCA

(2) The department proposes to repeal ARM 4.12.1001 APPOINTMENT OF STORAGE SPACE; 4.12.1002 WAREHOUSE RECEIPTS TO BE ISSUED; 4.12.1003 WRITTEN TERMS, GRAIN WAREHOUSE RECEIPTS; 4.12.1004 GRAIN WAREHOUSE RECEIPT FORM; 4.12.1005 RECEIPTS ISSUED; 4.12.1006 LEGAL PUBLIC WAREHOUSE RECEIPTS; 4.12.1007 SHIPMENTS OF STORED GRAIN TO POINT OUTSIDE THE STATE OF MONTANA; 4.12.1008 LICENSING OF GRAIN MERCHANDISING - FEES - EXEMPTIONS; 4.12.1009 BOND FILED - BOND FEE SCHEDULE; 4.12.1010 CHARGES OF PUBLIC WAREHOUSMEN FOR HANDLING CLEANING; found on pages 4-401 through 4-407 of the Administrative Rules of Montana, and 4.12.1015 SURETY BOND FOR BEAN WAREHOUSING; 4.12.1016 STORAGE

CHARGES FOR DRY BEAN WAREHOUSEMEN; found on page 4-409 through 4-410. The authority section for repealing these rules is 80-4-403 MCA.

3. The department finds it necessary to implement these rules so as to specify the requirements for obtaining and retaining licenses under the grain act. These rules set forth the deadlines, forms and procedures for applying for commodity dealer and public warehouseman licenses. These rules are necessary for the administration of the act. The rules relating to bonding or bond equivalents are necessary to insure that the proper security is posted in order to protect persons doing business with the licensees. The department also believes it necessary to specify the procedures of collection on the bond or bond equivalents in order to insure smooth administration of such proceedings.

The department is repealing the above-mentioned rules because recent legislation has made the rules repetitive, or inaccurate and incongruous with the present statutes.

4. Interested persons may present their data, views, or arguments concerning the proposed rule either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Oran Roy Bjornson, Montana Department of Agriculture, Agriculture/Livestock Building, Sixth and Roberts, Helena, Montana 59620, no later than July 1, 1986.

5. Garth Jacobson, of the Department of Agriculture has been designated to preside over and conduct the hearing.

Keith Kelly
Department of Agriculture

Certified to the Secretary of State 5/19/86

BEFORE THE STATE AUDITOR
AND COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

In the matter of the adoption of rules pertaining to the Montana Insurance Assistance Plan	))))	NOTICE OF PUBLIC HEARING

TO: All Interested Persons

1. On July 1, 1986 at 9:00 a.m. a public hearing will be held in Room 270 of the Mitchell Building at Helena, Montana to consider the adoption of rules pertaining to the Montana Insurance Assistance Plan.

2. The text of the proposed rules is as follows:

RULE I DEFINITIONS As used in [Rules I through VIII], the following definitions apply:

(1) "Applicant" means a person who completes and signs a written application for assistance through the plan.

(2) "Cancel" means to terminate an insurance policy before the expiration of the period of time for which the policy was issued.

(3) "Commissioner" means the commissioner of insurance of the state of Montana.

(4) "Insurer" means any person authorized to transact insurance in this state.

(5) "Line" means a specific type of insurance coverage within commercial liability insurance such as political subdivision insurance, family day-care insurance, day-care center insurance, or liquor liability insurance.

(6) "Plan" means the Montana Insurance Assistance Plan.

(7) "Policy" means the written contract of or written agreement for or effecting insurance, by whatever name called, and includes all clauses, riders, endorsements, and papers attached thereto and part thereof.

(8) "Premium" is the consideration for insurance, by whatever name called, and includes any assessment or membership, policy, survey, inspection, service, or similar fee or charge in consideration for an insurance contract.

(9) "Rejected risk" means a risk which an insurer will not insure.

(10) "Renewal" means any agreement whereby an insurer and insured agree to an extension or continuation of an existing insurance policy.

(11) "Risk" means a person or thing insured.

(12) "Surplus line agent" means an individual, firm, or corporation who meets the requirements of 33-2-305, MCA, and who has the rights provided in 33-2-306, MCA.

AUTH: Sec. 16, Ch. 11, Sp. L. March, 1986 IMP: Sec. 16, Ch. 11, Sp. L. March, 1986

RULE II AGENT COMMISSION The insurer that insures an applicant's risk shall pay the applicant's agent the commission it normally pays for the type of risk insured.

AUTH: Sec. 16, Ch. 11, Sp. L. March, 1986 IMP: Sec. 16, Ch. 11, Sp. L. March, 1986

RULE III APPLICATIONS AND APPLICATION FEES (1) Application forms are available to property and casualty insurance agents, licensed in this state, through the advisory committee.

(2) Each application must be executed by an agent, licensed in this state, and submitted to the commissioner.

(3) Each completed application must be accompanied by a non-refundable application fee made payable to the plan and paid by the applicant.

(4) The application fees are as follows:

(a) liability insurance for political subdivisions, as defined in 2-9-101(5), MCA, $300;

(b) liability insurance for family day-care homes, as defined in 53-4-501(2)(h), MCA, $25;

(c) liability insurance for day-care centers, as defined in 53-4-501(2)(c), MCA, $100; and

(d) liability insurance for liquor liability, $50.

AUTH: Sec. 8, Ch. 11, Sp. L. March, 1986; Sec. 16, Ch. 11, Sp. L. March, 1986 IMP: Sec. 8, Ch. 11, Sp. L. March, 1986

RULE IV FISCAL ARRANGEMENT (1) The advisory committee shall designate a committee member as fiscal agent for the plan. The fiscal agent is authorized to receive and hold funds submitted to the plan and to disburse them upon authorization of one other committee member. The funds may be used for the necessary expenses of the committees, including printing, postage, mailing, telephone, and such other expenses incurred by the plan as the advisory committee deems appropriate for payment.

(2) The fiscal agent shall maintain books and records of all receipts and disbursements and shall submit a quarterly financial statement to the advisory committee of the plan. The commissioner or any advisory committee member shall have access to said books and records during normal business hours.

(3) The fiscal agent shall maintain a bank account under the name of the "Montana Insurance Assistance Plan". All checks drawn upon the account of the plan shall bear the signatures of the fiscal agent or such other person duly authorized by the advisory committee.

AUTH: Sec. 16, Ch. 11, Sp. L. March, 1986 IMP: Sec. 10, Ch. 11, Sp. L. March, 1986

RULE V UNAVAILABILITY An applicant is unable to procure insurance through ordinary methods, if his application for insurance has been rejected by a minimum of two insurers and

one surplus line agent. The applicant shall submit, to the commissioner, written documentation by an insurance agent licensed in this state of the applicant's inability to procure insurance.

AUTH: Sec. 16, Ch. 11, Sp. L. March, 1986 IMP: Sec. 8(1)(c), Ch. 11, Sp. L. March, 1986

RULE VI ELIGIBLE APPLICANTS An applicant who receives notice of cancellation or nonrenewal of an existing insurance policy does not currently have insurance.

AUTH: Sec. 16, Ch. 11, Sp. L. March, 1986 IMP: Sec. 10(1), Ch. 11, Sp. L. March, 1986

RULE VII LINES OF INSURANCE The underwriting committee shall submit applications to insurers participating in the plan for only those lines of insurance which the insurer is authorized to transact in this state.

AUTH: Sec. 16, Ch. 11, Sp. L. March, 1986 IMP: Sec. 12(3), Ch. 11, Sp. L. March, 1986

RULE VIII EFFECTIVE DATE OF POLICY The policy is effective when the insured accepts the insurer's quotation and pays the premium.

AUTH: Sec. 16, Ch. 11, Sp. L. March, 1986 IMP: Sec. 13, Ch. 11, Sp. L. March, 1986

RULE IX SEVERABILITY If any provision of these rules or the application thereof to any person or circumstance is for any reason held to be invalid, the remainder of the rule and its application to other persons or circumstances shall not be affected thereby.

AUTH: Sec. 16, Ch. 11, Sp. L. March, 1986 IMP: Sec. 1 through 16, Ch. 11, Sp. L. March, 1986

3. Commercial liability insurance is currently unavailable for many risks resident, located, or to be performed in Montana. During its March, 1986 Special Session, the Forty-Ninth Legislature enacted the Montana Insurance Assistance Plan (plan), a temporary, voluntary plan to assist insurance consumers in this state in obtaining needed commercial liability insurance when no quotation is available from regular sources of insurance. The commissioner is proposing these rules to implement the plan.

4. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to John Bebee, State Auditor's Office, Mitchell Building, P. O. Box 4009, Helena, Montana 59604 no later than June 26, 1986.

5. John Bebee has been designated to preside over and conduct the hearing.

6. The authority of the agency to adopt the proposed rules is provided in sections 8 and 16, chapter 11, Special Laws, March 1986, and the rules implement sections 1 through 16, chapter 11, Special Laws, March, 1986.

Andrea "Andy" Bennett
State Auditor and
Commissioner of Insurance

Certified to the Secretary of State this 14th day of May, 1986.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE MILK CONTROL BUREAU

In the matter of the amendment of ARM 8.79.101 (1)(n) regarding purchase and resale	NOTICE OF PROPOSED AMENDMENT OF ARM 8.79.101 (1)(n) TRANSACTIONS INVOLVING PURCHASE AND RESALE OF MILK WITHIN THE STATE No Public Hearing Contemplated DOCKET #75-86

TO: All Interested Persons:

1. On July 17, 1986, the Department of Commerce proposes to amend Rule 8.79.101 (1)(n) at the request of Clover Leaf Dairy so the Bureau's rules conform to Board action permitting grocery warehouses to purchase milk at warehouse prices and to resell that product at other wholesale prices effective July 18, 1986.

2. Rule 8.79.101 (1)(n) as amended will read as follows: (full text of rule is located at pages 8-2302 through 8-2310 Administrative Rules of Montana) (new matter underlined, deleted matter interlined).

"8.79.101 TRANSACTIONS INVOLVING THE PURCHASE AND RESALE OF MILK WITHIN THE STATE - RULE DEFINITIONS

(1) . . .

(m) . . .

(n) "Store" means any supermarket, grocery, soda fountain, dairy store, confectionery, or similar mercantile establishment, whether rural or urban, which sells milk over the counter or on the premises to customers at retail.~~, and, unless otherwise distinguished herein, chain stores, supermarkets, and wholesale food purchasing organizations.~~

(o) . . ."

3. The purpose for the Clover Leaf Dairy request to amend Rule 8.79.101 (1)(n) is to permit grocery warehouses to purchase milk at other than the regular wholesale price and sell at other than retail prices. The amendment is consistent with Board action establishing warehouse prices and permitting warehouses to resell that product at other than retail prices.

4. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Milk Control Bureau, 1520 East Sixth Avenue, Helena, Montana, 59620, no later than June 26, 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 written comments he has to the Milk Control Bureau, 1520 East Sixth Avenue, Helena, Montana, 59620, no later than June 26, 1986.

6. If the Department receives requests for a public hearing on the proposed amendments from either ten percent (10%) or twenty five (25), whichever is less of the 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 twenty five (25) members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent (10%) of those persons directly affected has been determined to be eleven (11) based on ten (10) licensed Montana distributors, seventy five (75) jobbers and twenty one (21) out-of-state distributors licensed to do business in Montana.

7. The authority of the Department to amend the proposed rules is based on Section 81-23-104, MCA, and implements Section 81-23-103, MCA.

KEITH COLBO, Director
Montana Department of Commerce

BY: William E. Ross
William E Ross, Chief
Milk Control Bureau

Certified to the Secretary of State May 19, 1986.

BEFORE THE MONTANA FISH AND GAME COMMISSION

In the matter of a new rule relating to the transplant of nuisance animals and the introduction of peregrine falcons.	))))	NOTICE OF A PUBLIC HEARING ON THE PROPOSED ADOPTION OF A NEW RULE RELATING TO THE INTRODUCTION OF PEREGRINE FALCONS

TO: All interested persons

1. On June 25, 1986, at 7:00 p.m., a public hearing will be held in the Commission Room, Department of Fish, Wildlife and Parks headquarters, 1420 East Sixth Avenue, Helena, Montana 59620, to consider the adoption of a new rule authorizing the trapping and transplant of nuisance animals and the introduction of peregrine falcons into the state in accordance with the requirements of Title 87, Chapter 5, Part 7, MCA.

2. The proposed rule does not replace or modify any section currently found in the administrative rules of Montana. The proposed new rules provide as follows:

RULE I DEFINITIONS For purposes of this rule the following definitions apply:

(1) "Nuisance animal" means any game or nongame wildlife which has caused significant damage to real or personal property or represents a threat of injury to persons.

(2) "Hacking" means the reintroduction of peregrine falcons into their former range by any process to allow natural physical conditioning of eyasses or young birds of prey taken from the nest before they can fly or hatched in captivity. It may, for example, involve the use of a box or other structure suspended on a cliff face and through the top of which food and water are lowered to keep the falcons from associating people with food, until the young birds learn to fly and hunt on their own. It is the process of taking the captive birds or nestlings and facilitating their transition to a wild state using such methods as hacking, direct, and cross fostering.

AUTH: 87-5-704, 87-5-711 IMP: 87-5-704, 87-5-711

RULE II INTERPRETIVE RULE The Commission interprets the definition of "natural habitat" to mean that the restrictions posed by 87-5-711, et seq. apply only to those habitats in which the species proposed for location do not currently exist.

AUTH: 87-5-704, 87-5-711 IMP: 87-5-704, 87-5-711

RULE III AUTHORIZATION FOR THE TRAPPING AND TRANSPLANT OF NUISANCE ANIMALS (1) The Department may trap and transplant nuisance animals in response to complaints about damage caused by such animals.

(2) Pursuant to Section 87-5-711, the Commisson finds that, based upon long experience with trapping and transplant of nuisance animals, trapping and transplanting has significant public benefits insofar as it mitigates damage to agricultural production and to other persons or real property.

(3) The department, in transplanting nuisance animals shall transplant the animals in areas remote from circumstances which attracted the animal to become a nuisance animal and in areas with sufficient natural forage to discourage the animal from moving into inhabited areas where it will be prone to further depredations.

(4) The department's experience with and studies of trapping and transplant of nuisance animals constitutes the scientific investigation required by 87-5-711, MCA.

AUTH: 87-5-704, 87-5-711 IMP: 87-5-704, 87-5-711

RULE IV REINTRODUCTION OF PEREGRINE FALCON (1) The Commission finds that the peregrine falcon, an endangered species, has been the subject of a re-introduction program for the past six years in Montana as part of an ongoing effort to recover the peregrine falcon from its status as an endangered species. The Commission further finds that six years of experience with the hacking of peregrine falcons within the state of Montana and the experience of other states with the hacking of peregrine falcons, and the analysis of those programs constitutes sufficient scientific investigation under 87-5-711 to warrant continuation of the peregrine falcon re-introduction program at existing hacking sites and at identified historic or potential eyries throughout Montana.

(2) The Commission finds that the introduction of peregrine falcons into its historic range in Montana poses no threat of harm to native wildlife or plants and that introduction of the peregrine falcon into its historic range has a significant public benefit of contributing to the recovery of an endangered species.

(3) Based upon the findings in subsection (1) of this rule, the department may continue its peregrine re-introduction program at existing re-introduction sites and may extend hacking program into identified historic or potential eyries.

AUTH: 87-5-704,87-5-711 IMP: Sec. 87-5-704, 87-5-711

3. The proposed new rule implements Title 87, Chapter 5, Part 7, MCA, passed and approved as Chapter 624, Laws of 1985, which regulate the importation, introduction and transplantation of wildlife in the state. The rule is needed in order to allow the department to carry on necessary trapping and transplanting of nuisance animals and to allow the Department to continue to carry on its obligations in the Endangered Species Act to assist in the recovery of the peregrine falcon.

4. 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 Stan Bradshaw, Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, MT 59620, no later that June 30, 1986.

5. Stan Bradshaw has been designated to preside over and conduct the hearing.

6. The authority of the Commission to adopt the proposed rule is based on Section 87-5-704 and 87-5-711, MCA.

Spencer S. Hegstad
Chairman
Montana Fish and
Game Commission

Certified to Secretary of State May 19, 1986.

BEFORE THE MONTANA FISH AND GAME COMMISSION

In the matter of a proposed rule prohibiting shooting on a portion of the Clark Fork and Bitterroot Rivers near Missoula.	NOTICE OF A PUBLIC HEARING ON PROPOSED ADOPTION OF A RULE PROHIBITING SHOOTING ON A PORTION OF THE CLARK FORK AND BITTERROOT RIVERS NEAR MISSOULA

TO: All interested persons

1. On July 1, 1986, at 7:00 o'clock p.m., a public hearing will be held at the Fish, Wildlife and Parks Headquarters, 3201 Spurgin, Missoula, Montana to consider the adoption of Rule I.

2. The proposed rule does not replace or modify any section currently found in the administrative rules of Montana.

3. The proposed rule provides as follows:

RULE I HUNTING AND SHOOTING CLOSURES (1) Shooting a firearm and hunting by any other means is prohibited on the following lands in Missoula County:

Beginning at the intersection of the west right-of-way of Reserve Street and the north right-of-way of Old U.S. Highway 93 a point located approximately 1500 feet north from the southeast corner of Section 31 Township 13 North Range 19 West P.M.,M., thence southwesterly 2 miles more or less along the north right-of-way of said Old U.S. Highway 93 and U.S. Highway 93 to the east right-of-way of Blue Mountain Road; thence northwesterly along said right-of-way and the easterly right-of-way of Big Flat Road 4.5 miles more or less to the north section line of Section 28 Township 13 North Range 20 West; thence easterly 600 feet more or less along said section line and the north line of Section 27 Township 13 North Range 20 West to the middle of the Clark Fork River; thence southeasterly and easterly 1 mile more or less along the middle of said river to the confluence of the Bitterroot River and the southerly main channel of the Clark Fork River, a point near the east one quarter corner of said Section 27; thence northerly along the middle of said southerly channel 1/2 mile more or less to the intersection with the west line of Section 23 Township 13 North Range 20 West; thence north 700 feet more or less to the south one sixteenth corner common to Sections 22 and 23 Township 13 North Range 20 West; thence east 1 mile more or less along the south one sixteenth line of said Section 23 to the west right-of-way of Clements Road; thence south 3/4 of a mile more or less along said right-of-way to the north right-of-way of Mount Avenue; thence west 1/2 mile more or less to the west right-of-way of Humble Road; thence south 3/4 mile along said west right-of-way to the north one sixteenth line of Section 35 Township 13 North

Range 20 West; thence east 2.1 miles more or less along said north one sixteenth line and the north one sixteenth line of Section 36 Township 13 North Range 20 West and Section 31 Township 13 North Range 19 West to the northwest right-of-way of Fort Road; thence northeasterly 1100 feet more or less along said right-of-way to the north right-of-way of Dearborn Avenue; thence east 1000 feet more or less along the north right-of-way of Dearborn Avenue to the west right-of-way of Reserve Street; thence south 3100 feet more or less to the northwest right-of-way of Old U.S. Highway 93 and the point of beginning.

AUTH: Sec. 87-1-303, MCA IMP: Sec. 87-1-303, MCA

4. The Commission is proposing this rule because of requests by landowners adjacent to the rivers within the described area have raised concerns about the safety of hunting or shooting in that reach.

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 Stan Bradshaw, Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620, no later than July 8, 1986.

6. Stan Bradshaw has been designated to preside over and conduct the hearing.

7. The authority of the Agency to make the proposed rule is based on Section 87-1-303 MCA, and the rule implements 87-1-303, MCA.

Richard L. Johnson
Deputy Director
Montana Department of
Fish, Wildlife and Parks

Certified to Secretary of State May 19, 1986.

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

In the matter of the amendment of rules 16.44.104 , 16.44.105, 16.44.106, 16.44.109, 16.44.110, 16.44.111, 16.44.116, 16.44.202, 16.44.301, 16.44.302, 16.44.303, 16.44.304, 16.44.305, 16.44.306, 16.44.307, 16.44.330, 16.44.333, 16.44.404, 16.44.415, 16.44.416, 16.44.417, 16.44.425, 16.44.609, and 16.44.702, and the adoption of new rules I - VIII, regarding an update of state regulations to bring them into conformance with the federal hazardous waste program	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENTS TO RULES AND ADOPTION OF NEW RULES (Hazardous Waste Management)

TO: All Interested Persons

1. On June 19, 1986 at 9:30 a.m., a public hearing will be held in Room C209 of the Cogswell Building, Helena, Montana, to consider the amendment of rules and the adoption of new rules, as listed in the above caption, regarding hazardous waste management facility permits, definitions, classification of wastes, identification and listing of wastes, standards applicable to generators of hazardous waste, standards for permitted facilities, and regulation of certain hazardous waste recycling activities.

2. The rules as proposed to be amended and the new rules provide as follows (the new rules are located among the rules to be amended, inserted where they would occur; matter to be stricken is interlined, new material in rules to be amended is underlined):

16.44.104 PERMITTING REQUIREMENTS: EXISTING AND NEW HWM FACILITIES (1) Same as existing rule.

(2) At any time after adoption of final facility standards, the owner and operator of an existing HWM facility may be required to submit Part B of the permit application. Any owner or operator shall be allowed at least six months from the date of request to submit Part B of the application. Any owner or operator of an existing HWM facility may voluntarily submit Part B of the application any time after adoption of final facility standards. Notwithstanding the above, any owner or operator of an existing HWM facility must submit a Part B permit application in accordance with the dates specified in ARM 16.44.105(3). Any owner or operator of a land disposal facility in existence on the effective date of statutory or regulatory amendments under RCRA defined in ARM

16.44.202 that render the facility subject to the requirement to have a permit must submit a Part B application in accordance with the dates specified in ARM 16.44.105(3).

(3)-(8) Same as existing rule.

AUTHORIZING: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.105 TEMPORARY PERMITS (INTERIM STATUS) (1) Any person who owns and or operates an existing HWM facility or a facility in existence on the effective date of statutory amendments under RCRA defined in ARM 16.44.202 or regulatory amendments that render the facility subject to the requirement to have a hazardous waste management permit and who has complied with the provisions of ARM 16.44.601 et seq. shall be deemed to have been issued a temporary permit (interim status) in accordance with this subchapter.

(2) If the department has reason to believe upon examination of a Part A application that it fails to meet the requirements of ARM 16.44.119, it shall notify the owner or operator in writing of the apparent deficiency. Such notice shall specify the grounds for the department's belief that the application is deficient. The owner or operator shall have 30 days from receipt to respond to such a notification and to explain or cure the alleged deficiency in his Part A application. If, after such notification and opportunity for response, the department determines that the application is deficient it may take appropriate enforcement action.

(3) Section (1) of this rule shall not apply to any facility which has been previously denied an HWM permit or if authority to operate the facility under the Act or RCRA referred to in ARM 16.44.102 has been previously terminated.

~~(2)~~ (4) During interim status, owners or operators shall comply with the interim status standards of Title 16, chapter 44, subchapter 6.

~~(3)~~ (5) Interim status terminates when:

(a) When ~~F~~final administrative disposition of a permit application is made; or

(b) When ~~I~~interim status is terminated by the department. Interim status may be terminated for any of the following reasons:

(i)-(iv) Same as existing rule.

(c) For owners or operators of each land disposal facility which is in existence on the effective date of statutory or regulatory amendments under RCRA that render the facility subject to the requirement to have a HWM permit and which is granted interim status, twelve months after the date on which the facility first becomes subject to such permit requirement unless the owner or operator of such facility:

(i) submits a Part B application for an HWM permit for

such facility before the date twelve months after the date on which the facility first becomes subject to such permit requirement; and

(ii) certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

(d) For owners or operators of each incinerator facility on November 8, 1989, unless the owner or operator of the facility submits a Part B application for an HWM permit for an incinerator facility by November 8, 1986.

(e) For owners or operators of any facility (other than a land disposal or an incinerator facility) on November 8, 1992, unless the owner or operator of the facility submits a Part B application for an HWM permit for the facility by November 8, 1988.

AUTHORIZING: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.106 APPLICATION FOR PERMIT

(1)-(2) Same as existing rule.

(3) The department shall not issue a permit before receiving a complete application for a permit except for permits by rule, ARM 16.44.121 or emergency permits, ARM 16.44.122. An application for a permit is complete when the department receives an application form and any supplemental information which are complete to its satisfaction. An application for a permit is complete notwithstanding the failure of the owner or operator to submit the exposure information described in section (7) of this rule. The completeness of any application for a permit shall be judged independently of the status of any other permit application or permit for the same facility or activity. An application is complete when the department receives either a complete application or the information listed in a notice of deficiency.

(4)-(6) Same as existing rule.

(7) After August 1, 1986, any Part B permit application submitted by an owner or operator of a facility that stores, treats, or disposes of hazardous waste in a surface impoundment or a landfill must be accompanied by information, reasonably ascertainable by the owner or operator, on the potential for the public to be exposed to hazardous wastes or hazardous constituents through releases related to the unit. At a minimum, such information must address:

(a) reasonably foreseeable potential releases from both normal operations and accidents at the unit, including releases associated with transportation to or from the unit;

(b) the potential pathways of human exposure to hazardous wastes or constituents resulting from the releases described under subsection (a); and

(c) the potential magnitude and nature of the human exposure resulting from such releases.

AUTHORIZING: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.109 CONDITIONS OF PERMITS

(1)-(9) Same as existing rule.

(10) The permittee must comply with the following requirements concerning monitoring and records~~,~~:

(a) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

(b) The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, the certification required by 40 CFR 264.73(b)(9), and records of all data used to complete the application for the permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the department at any time. The permittee shall maintain records of all groundwater quality and groundwater surface elevations, for the active life of the facility, and for the post-closure care period as well.

(c) Same as existing rule.

(11)-(18) Same as existing rule.

(19) A ~~biennial~~ An annual report must be submitted covering facility activities ~~during odd numbered calendar years~~, as specified in ~~40 CFR section 264.75~~ NEW RULE II.

(20)-(21) Same as existing rule.

(22) The department hereby adopts and incorporates herein by reference 40 CFR sections 264.72, 264.73(b)(9), ~~264.75~~, and 264.76. 40 CFR sections 264.72, 264.73(b)(9), ~~264.75~~, and 264.76 are federal agency rules setting forth requirements for owners and operators of HWM facilities concerning respectively, manifest discrepancies, operating records, ~~biennial reports~~ and unmanifested waste reports.

(23) Copies of 40 CFR sections 264.72, 264.73(b)(9), ~~264.75~~ and 264.76 may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620.

AUTHORIZING: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.110 ESTABLISHING PERMIT CONDITIONS

(1) Same as existing rule.

(2) Each HWM permit shall include permit conditions necessary to achieve compliance with the Act and applicable rules including each of the applicable requirements specified in 40 CFR Parts 264 and ~~267~~ 266. In satisfying this provi-

sion, the department may incorporate applicable requirements of 40 CFR Parts 264 and ~~267~~ 266 directly into the permit or establish other permit conditions that are based on these parts.

(3)-(5) Same as existing rule.

(6) The department hereby adopts and incorporates by reference 40 CFR Parts 264 and ~~267~~ 266. 40 CFR Parts 264 and ~~267~~ 266 are federal agency rules setting forth requirements, for owners and operators of HWM facilities, concerning respectively, standards for operation and maintenance of facilities and ~~interim standards for new hazardous waste land disposal facilities~~ standards for specific hazardous wastes such as recyclable wastes and specific types of facilities.

(7) Copies of 40 CFR Parts 264 and ~~267~~ 266 or any portion thereof may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620.

AUTHORIZING: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

NEW RULE I RESEARCH, DEVELOPMENT, AND DEMONSTRATION PERMITS (1) The department may issue a research, development, and demonstration permit for any hazardous waste treatment facility which proposes to utilize an innovative and experimental hazardous waste treatment technology or process for which permit standards for such experimental activity have not been promulgated under 40 CFR Part 264 or 266. Any such permit shall include such terms and conditions as will assure protection of human health and the environment. Such permits:

(a) shall provide for the construction of such facilities as necessary, and for operation of the facility for not longer than one year unless renewed as provided in section (4) of this rule;

(b) shall provide for the receipt and treatment by the facility of only those types and quantities of hazardous wastes which the department deems necessary for purposes of determining the efficacy and performance capabilities of the technology or process and the effects of such technology or process on human health and the environment; and

(c) shall include such requirements as the department deems necessary to protect human health and the environment (including, but not limited to, requirements regarding monitoring, operation, financial responsibility, closure, and remedial action), and such requirements as the department deems necessary regarding testing and providing of information to the department with respect to the operation of the facility.

(2) For the purpose of expediting review and issuance of permits under this rule, the department may, consistent with

the protection of human health and the environment, modify or waive permit application and permit issuance requirements in subchapters 1 and 9 of this chapter, except that there may be no modification or waiver of regulations regarding financial responsibility (including insurance) or of procedures regarding public participation.

(3) The department may order an immediate termination of all operations at the facility at any time it determines that termination is necessary to protect human health and the environment.

(4) Any permit issued under this rule may be renewed not more than three times. Each such renewal shall be for a period of not more than one year.

(5) The department hereby adopts and incorporates herein by reference 40 CFR Part 266, which pertains to standards for the management of specific hazardous wastes such as recyclable materials. Copies of 40 CFR Part 266 may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620.

AUTHORIZING: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.111 DURATION OF PERMITS

(1)-(3) Same as existing rule.

(4) Each permit for a land disposal facility shall be reviewed by the department five years after the date of permit issuance or reissuance and shall be modified as necessary, as provided in ARM 16.44.116.

AUTHORIZING: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.116 MODIFICATION OR REVOCATION AND REISSUANCE

(1) Same as existing rule.

(2)(a)-(e) Same as existing rule.

(f) Notwithstanding any other provision in this rule, when a permit for a land disposal facility is reviewed by the department under ARM 16.44.111(4), the department shall modify the permit as necessary to assure that the facility continues to comply with the currently applicable requirements of this chapter.

(3)-(5) Same as existing rule.

AUTHORIZING: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.202 DEFINITIONS In this chapter, the following terms shall have the meanings or interpretations shown below:

(1)-(5) Same as existing rule.

(6) "Board" means the board of health and environmental sciences provided for in section 2-15-2104, MCA.

(7) "Boiler" means an enclosed device using controlled flame combustion and having the following characteristics:

(a)(i) The unit must have physical capabilities for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gasses; and

(ii) The unit's combustion chamber and primary energy recovery section(s) must be of integral design. To be of integral design, the combustion chamber and the primary energy recovery section(s) (such as waterwalls and superheaters) must be physically formed into one manufactured or assembled unit. A unit in which the combustion chamber and the primary energy recovery section(s) are joined only by ducts or connections carrying flue gas is not integrally designed; however, secondary energy recovery equipment (such as economizers or air preheaters) need not be physically formed into the same unit as the combustion chamber and the primary energy recovery section. The following units are not precluded from being boilers solely because they are not of integral design: process heaters (units that transfer energy directly to a process stream), and fluidized bed combustion units; and

(iii) While in operation, the unit must maintain a thermal energy recovery efficiency of at least 60 percent, calculated in terms of the recovered energy compared with the thermal value of the fuel; and

(iv) The unit must export and utilize at least 75 percent of the recovered energy, calculated on an annual basis. In this calculation, no credit shall be given for recovered heat used internally in the same unit. (Examples of internal use are the preheating of fuel or combustion air, and the driving of induced or forced draft fans or feedwater pumps); or

(b) The unit is one which the department has determined, on a case-by-case basis, to be a boiler, after considering the standards in NEW RULE III.

(7)-(14) Same as existing rule, but will be renumbered (8)-(15).

~~(15)~~(16)(a) "Designated facility" means a hazardous waste treatment, storage, or disposal facility which has received an EPA permit or interim status, a permit from the department pursuant to subchapters 1 or 6 of this chapter, or a permit from another state authorized by EPA or that is regulated under ARM 16.44.305(3)(f) or Subpart F of 40 CFR Part 266, and that has been designated on the manifest by the generator as required by ARM 16.44.405.

(b) The department hereby adopts and incorporates by reference herein 40 CFR Part 266, which is a federal agency rule pertaining to standards for the management of specific hazardous wastes such as recyclable materials and specific types of hazardous waste management facilities. A copy of 40

CFR Part 266 may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

(16)-(22) Same as existing rule, but to be renumbered (17)-(23).

(24) "EPA Administrator" means the head of the EPA, appointed by the President with the consent of the U. S. Senate.

(23)-(34) Same as existing rule, but will be renumbered (27)-(36).

~~(35)~~ (37) "Hazardous constituents" means constituents identified in ARM 16.44.352(4) that are reasonably expected to be in or derived from a hazardous waste; for the purposes of subpart M (land treatment) of 40 CFR Part 264 incorporated by reference into ARM 16.44.702, hazardous constituents are limited to those constituents reasonably expected to be in or derived from waste placed in or on the treatment zone of a land treatment unit; for the purposes of subpart F (ground water protection) of 40 CFR Part 264 incorporated by reference into ARM 16.44.702, hazardous constituents are limited to those waste constituents detected in ground water in the uppermost aquifer underlying a regulated unit.

~~(36)~~ (38)(a) "Hazardous waste" means a waste or combination of wastes that, because of its quantity, concentration, or physical, chemical, or infectious characteristics, may:

(i) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or

(ii) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of or otherwise managed.

(b) hazardous wastes do not include those substances governed by Title 82, chapter 4, part 2, MCA.

(37)-(40) Same as existing rule, but will be renumbered (39)-(42).

~~(41)~~ (43) "Incinerator" means an enclosed device using controlled flame combustion, ~~the primary purpose of which is to thermally break down hazardous waste. Examples of incinerators are rotary kiln, fluidized bed, and liquid injection incinerators.~~ that neither meets the criteria for classification as a boiler nor is listed as an industrial furnace.

(42)-(43) Same as existing rule, but will be renumbered (44)-(45).

(46) "Industrial furnace" means any of the following enclosed devices that are integral components of manufacturing processes and that use controlled flame devices to accomplish recovery of materials or energy:

(a) cement kilns;

(b) lime kilns;
(c) aggregate kilns;
(d) phosphate kilns;
(e) coke ovens;
(f) blast furnaces;
(g) smelting, melting and refining furnaces (including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machine, roasters, and foundry furnaces);
(h) titanium dioxide chloride process oxidation reactors;
(i) methane reforming furnaces;
(j) pulping liquor recovery furnaces;
(k) combustion devices used in the recovery of sulfur values from spent sulfuric acid; and
(l) such other devices as the department may, in a subsequent rulemaking procedure, add to this list on the basis of one or more of the following factors:
(i) the design and use of the device primarily to accomplish recovery of material products;
(ii) the use of the device to burn or reduce raw materials to make a material product;
(iii) the use of the device to burn or reduce secondary materials as effective substitutes for raw materials, in processes using raw materials as principal feedstocks;
(iv) the use of the device to burn or reduce secondary materials as ingredients in an industrial process to make a material product;
(v) the use of the device in common industrial practice to produce a material product; and
(vi) other factors, as appropriate.
(44)-(103) Same as existing rule, but will be renumbered (46)-(105).
AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-403, 75-10-405, 75-10-406, MCA

16.44.301 POLICY (1) The definition of waste contained in this subchapter applies only to wastes that also are hazardous as defined in this chapter. For example, it does not apply to materials (such as non-hazardous scrap, paper, textiles, or rubber) that are not otherwise hazardous wastes and that are recycled.
(2) This subchapter identifies only some of the materials which are hazardous wastes under the Act and this chapter. A material which is not a hazardous waste identified in this subchapter is still a hazardous waste for purposes of the Act if, during an inspection under section 75-10-410, MCA, the department has reason to believe that the material may be a hazardous waste within the meaning of section 75-10-403, MCA or meets the statutory elements of section 75-10-415, MCA.

(3) In application to ARM 16.44.302 and 16.44.306 the following definitions apply:

(a) A "spent material" is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing;

(b) "sludge" has the same meaning used in subchapter 2;

(c) A "by-product" is a material that is not one of the primary products of a production process and is not solely or separately produced by the production process. Examples are process residues such as slags or distillation column bottoms. The term does not include a co-product that is produced for the general public's use and is ordinarily used in the form it is produced by the process.

(d) A material is "reclaimed" if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents.

(e) A material is "used or reused" if it is either:

(i) employed as an ingredient (including use as an intermediate) in an industrial process to make a product (for example, distillation bottoms from one process used as feedstock in another process); however, a material will not satisfy this condition if distinct components of the material are recovered as separate end products (as when metals are recovered from metal-containing secondary materials); or

(ii) employed in a particular function or application as an effective substitute for a commercial product (for example, spent pickle liquor used as phosphorous precipitant and sludge conditioner in wastewater treatment).

(f) "scrap metal" is bits and pieces of metal parts (e.g., bars, turnings, rods, sheets, wire) or metal pieces that may be combined together with bolts or soldering (e.g., radiators, scrap automobiles, railroad box cars), which when worn or superfluous can be recycled.

(g) A material is "recycled" if it is used, reused, or reclaimed.

(h) A material is "accumulated speculatively" if it is accumulated before being recycled. A material is not accumulated speculatively, however, if the person accumulating it can show that the material is potentially recyclable and has a feasible means of being recycled and that during the calendar year the amount of material that is recycled, or transferred to a different site for recycling, equals at least 75 percent by weight or volume of the amount of that material accumulated at the beginning of the period. In calculating the percentage of turnover, the 75 percent requirement is to be applied to each material of the same type (e.g., slags from a single smelting process) that is recycled in the same way (i.e., from which the same material is recovered or that is used in the

same way). Materials accumulating in units that would be exempt from regulation under ARM 16.44.304(1)(h) are not to be included in making the calculation. (Materials that are already defined as wastes also are not to be included in making the calculation). Materials are no longer in this category once they are removed from accumulation for recycling, however.

AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-403, 75-10-404, MCA

16.44.302 DEFINITION OF WASTE ~~A waste is any garbage, refuse, sludge or any other waste material which is not excluded under ARM 16.44.304. An "other waste material" is any solid, liquid, semi-solid or contained gaseous material, resulting from industrial, commercial, mining or agricultural operations, or from community activities which:~~

~~(1) is discarded or is being accumulated, stored or physically, chemically or biologically treated prior to being discarded;~~

~~(2) has served its original intended use and sometimes is discarded; or~~

~~(3) is a manufacturing or mining byproduct and sometimes is discarded.~~

~~(a) A material is "discarded" if it is not used, reused, reclaimed or recycled and is abandoned by being:~~

~~(i) disposed of as defined in section 75-10-403(3), MCA;~~

~~(ii) burned or incinerated, except where the material is being burned as a fuel for the purposes of recovering usable energy; or~~

~~(iii) physically, chemically or biologically treated, other than burned or incinerated, in lieu of or prior to being disposed of.~~

~~(b) A "manufacturing or mining byproduct" is a material that is not one of the primary products of a particular manufacturing or mining operation, is a secondary and incidental product of the particular operation, and would not be solely and separately manufactured or mined by the particular manufacturing or mining operation. The term does not include an intermediate manufacturing or mining product which results from one of the steps in a manufacturing or mining process and is typically processed through the next step of the process within a short time.~~

(1)(a) A waste is any discarded material that is not excluded by ARM 16.44.304(1)(b), (c), (d), (f), (g), (h), or (i) or that is not reclassified upon application to the department pursuant to NEW RULE VI.

(b) A discarded material is any material which is:

(i) abandoned, as explained in section (2) of this rule; or

(ii) recycled, as explained in section (3) of this rule; or

(iii) considered otherwise waste-derived, as explained in section (4) of this rule.

(2) Materials are wastes if they are abandoned by being:

(a) disposed of;

(b) burned or incinerated; or

(c) accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

(3) Materials are wastes if they are recycled or accumulated, stored, or treated before recycling as specified below:

(a) used in a manner constituting disposal;

(i) materials noted with a "*" in column 1 of table 1 are wastes when they are:

(A) applied to or placed on the land in a manner that constitutes disposal; or

(B) used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a waste).

(ii) commercial chemical products listed in ARM 16.44.333 are not wastes if they are applied to the land and that is their ordinary manner of use.

(b) burned for energy recovery;

(i) materials noted with a "*" in column 2 of table 1 are wastes when they are:

(A) burned to recover energy; or

(B) used to produce a fuel or are otherwise contained in fuels (in which cases the fuel remains a waste).

(ii) commercial chemical products listed in ARM 16.44.333 are not wastes if they are fuels;

(c) reclaimed; materials noted with a "*" in column 3 of table 1 are wastes when reclaimed; or

(d) accumulated speculatively; materials noted with a "*" in column 4 of table 1 are wastes when accumulated speculatively.

Table 1

	Use constituting disposal ARM 16.44.302(3)(a) (1)	Energy recovery/ fuel ARM 16.44.302(3)(b) (2)	Reclamation ARM 16.44.302(3)(c) (3)	Speculative accumulation ARM 16.44.302(3)(d) (4)
Spent Materials	(*)	(*)	(*)	(*)
Sludges (listed in ARM 16.44.331 or 16.44.332)	(*)	(*)	(*)	(*)
Sludges exhibiting a characteristic of hazardous waste	(*)	(*)	.....	(*)
By-products (listed in ARM 16.44.331 or 16.44.332)	(*)	(*)	(*)	(*)
By-products exhibiting a characteristic of hazardous waste	(*)	(*)	.....	(*)
Commercial chemical products listed in ARM 16.44.333	(*)	(*)	.....	.....
Scrap metal	(*)	(*)	(*)	(*)

Note — The terms "spent materials," "sludges," "by-products," and "scrap metal" are defined in ARM 16.44.301.

(4) The following materials are otherwise waste-derived when they are recycled in any manner:

(a) hazardous waste nos. F020, F021 (unless used as an ingredient to make a product at the site of generation), F022, F023, F026, and F028 listed in ARM 16.44.331.

(b) wastes added to this list by the department such as:

(i)(A) the materials ordinarily disposed of, burned, or incinerated; or

(B) the materials which contain toxic constituents listed in ARM 16.44.352(4) and that are not ordinarily found in raw materials or products for which the materials substitute (or are found in raw materials or products in smaller concentrations) and which are not used or reused during the recycling process; and

(ii) the material which may pose a substantial hazard to human health and the environment when recycled.

(5)(a) Materials are not wastes when they can be shown to be recycled by being:

(i) used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed;

(ii) used or reused as effective substitutes for commercial products; or

(iii) returned to the original process from which they are generated, without first being reclaimed. The material must be returned as a substitute for raw material feedstock, and the process must use raw materials as principal feedstocks.

(b) The following materials are wastes, even if the recycling involves use, reuse, or return to the original process (described in subsections (5)(a)(i) through (iii) of this rule:

(i) materials used in a manner constituting disposal, or used to produce products that are applied to the land;

(ii) materials burned for energy recovery, used to produce a fuel, or contained in fuels;

(iii) materials accumulated speculatively; or

(iv) materials listed in section (4)(a) of this rule.

(6) Respondents in actions to enforce regulations implementing this chapter who raise a claim that a certain material is not a waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must

show that they have the necessary equipment to do so.
AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-403, 75-10-405, MCA

16.44.303 DEFINITION OF HAZARDOUS WASTE (1) A waste, as defined in ARM 16.44.302, is a hazardous waste if:

(a) it is not excluded from regulation as a hazardous waste under ARM 16.44.304(1)(a) and (c), and 16.44.304(2)(a)-(g); and

(b) it meets any of the following criteria:

(i)-(iii) Same as existing rule.

(iv) it is a mixture of solid any waste and one or more hazardous wastes identified in ARM 16.44.330 through 16.44.333; however, the following mixture of solid wastes and hazardous wastes listed in ARM 16.44.330 through 16.44.333 are not hazardous wastes (except by applicaton of subsection (1)(b)(i) or (ii) of this rule) if the generator can demonstrate that the mixture consists of wastewater the surface water discharge of which is permitted pursuant to Title 75, chapter 5, MCA, and rules implementing that chapter and:

(A)-(E) Same as existing rule.

(2) Same as existing rule.

(3)(a) Unless and until it meets the criteria of ARM 16.44.303(4), a hazardous waste will remain a hazardous waste. Except as otherwise provided in subsection (3)(b) of this rule, Any any waste generated from the treatment, storage or disposal of a hazardous waste, including any sludge, spill residue, ash, emission control dust or leachate, but not including precipitation run-off, is a hazardous waste. (However, materials that are reclaimed from wastes and that are used beneficially are not wastes and hence are not hazardous wastes under this provision unless the reclaimed material is burned for energy recovery or used in a manner constituting disposal.)

(b) The following wastes are not hazardous even though they are generated from the treatment, storage, or disposal of a hazardous waste, unless they exhibit one or more of the characteristics of hazardous waste: waste pickle liquor sludge generated by lime stabilization of spent pickle liquor from the iron and steel industry.

(4) Same as existing rule.
AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-403, 75-10-405, MCA

16.44.304 EXCLUSIONS (1) The following are not subject to regulation under this chapter:

(a)-(h) Same as existing rule.

(i) pulping liquor (i.e., black liquor) that is reclaimed in a pulping liquor recovery furnace and then reused

in the pulping process, unless it is accumulated speculatively as defined in ARM 16.44.301(3); and

(j) spent sulfuric acid used to produce virgin sulfuric acid, unless it is accumulated speculatively as defined in ARM 16.44.301(3).

(2) The following are not subject to regulation under this chapter but may be subject to regulation under the provisions of ARM title 16, chapter 14:

(a) household waste, including household waste that has been collected, transported, stored, treated, disposed of, recovered such as refuse-derived fuel, or reused. "Household waste" means any waste material, including garbage, trash and sanitary wastes in septic tanks, derived from households including single and multiple residences, hotels and motels, bunkhouses, ranger stations, crew quarters, campgrounds, picnic grounds and day-use recreation areas. A resource recovery facility managing municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this chapter, if such facility:

(i) receives and burns only:

(A) household waste (from single and multiple dwellings, hotels, motels, and other residential sources); and

(B) solid waste from commercial or industrial sources that does not contain hazardous waste; and

(ii) such facility does not accept hazardous wastes and the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

(b)-(f) Same as existing rule.

(g)(i) wastes which fail the test for the characteristic of EP toxicity because chromium is present or are listed in ARM 16.44.330 through 16.44.333 due to the presence of chromium, which do not fail the test for the characteristic of EP toxicity for any other constituent or are not listed due to the presence of any other constituent, and which do not fail the test for any other characteristic if it is shown by a waste generator or by waste generators that:

(A) the chromium in the waste is exclusively (or nearly exclusively) trivalent chromium;

(B) the waste is generated from an industrial process which uses trivalent chromium exclusively (or nearly exclusively) and the process does not generate hexavalent chromium; and

(C) the waste is typically and frequently managed in non-oxidizing ~~environment~~ environments.

(ii) Specific wastes which meet the standard in (i)(A), (B) and (C) (so long as they do not fail the test for the

characteristic of EP toxicity, and do not fail the test for any other characteristic) are:

(A) Same as existing rule.

(B) Chrome (blue) shavings generated by the following subcategories of the leather tanning and finishing industry: hair pulp/chrome tan/retan/wet finish; hair save/chrome tan/retan/wet finish; no beamhouse; through-the-blue; and shearling.

(C)-(H) Same as existing rule.

(3) Same as existing rule.

AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-403, MCA

16.44.305 SPECIAL REQUIREMENTS FOR HAZARDOUS WASTE GENERATED BY SMALL QUANTITY GENERATORS

(1)-(2) Same as existing rule.

(3) Hazardous waste that is ~~beneficially used or re-used or legitimately recycled or reclaimed and that is excluded from regulation by ARM 16.44.306(1) is not included in the quantity determinations of this rule, and is not subject to any requirements of this rule. Hazardous waste that is subject to the special requirements of ARM 16.44.306(2) is included in the quantity determinations of this rule and is subject to the requirements of this rule.~~ recycled and that is excluded from regulation under ARM 16.44.306(1)(b)(iii) and (v), 16.44.306(1)(c), or 40 CFR Part 266, is not included in the quantity determinations of this rule and is not subject to any requirements of this rule. Hazardous waste that is subject to the requirements of ARM 16.44.306(2) and (3) and subparts C, D, and F, of 40 CFR Part 266 is included in the quantity determination of this rule and is subject to the requirements of this rule.

(4) Same as existing rule.

(5) If a small quantity generator generates acutely hazardous waste in a calendar month in quantities greater than set forth below, all quantities of that acutely hazardous waste are subject to regulation under this chapter:

(a) a total of one kilogram of acute hazardous wastes listed in ARM 16.44.331, 16.44.332, or 16.44.333(5) ~~commercial chemical products and manufacturing chemical intermediates having the generic names listed in ARM 16.44.333(5), and off-specification commercial chemical products and manufacturing chemical intermediates which, if they met specifications, would have the generic names listed in ARM 16.44.333(5)~~; or

(b) a total of 100 kilograms of any residue or contaminated soil, water waste, or other debris resulting from the dishcarge, into or on any land or water, of any acute hazardous wastes listed in ARM 16.44.331, 16.44.332, or commercial

chemical product listed in ARM 16.44.333(5). ~~commercial chemical products or manufacturing chemical intermediates having the generic names listed in ARM 16.44.333(5) or any residue or contaminated soil, water or any other debris resulting from the discharge, into or on any land or water, of any off-specification commercial chemical products or manufacturing chemical intermediates which, if they met specifications, would have the generic names listed in ARM 16.44.333(5).~~

(6)-(9) Same as existing rule.

(10) The department hereby adopts and incorporates by reference herein subparts C, D, and F of 40 CFR Part 266 which pertains to the handling of recycled materials. A copy of subparts C, D, and F of 40 CFR Part 266 or any portion thereof may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620.

AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.306 ~~SPECIAL REQUIREMENTS FOR HAZARDOUS WASTE WHICH IS USED, REUSED, RECYCLED OR RECLAIMED~~ ~~(1) Except as otherwise provided in subsection (2) of this rule, a hazardous waste which meets any of the following criteria is not subject to regulation under sub-chapters 4, 5, 6 or 7 of this chapter until such time as the department adopts rules to the contrary.~~

~~(a) it is being beneficially used or reused or legitimately recycled or reclaimed.~~

~~(b) it is being accumulated, stored, or physically, chemically or biologically treated prior to beneficial use or reuse or legitimate recycling or reclamation.~~

~~(c) it is one of the following materials being used, reused, recycled or reclaimed in the specified manner.~~

~~(i) Spent pickle liquor which is reused in wastewater treatment at a facility holding a surface water discharge permit issued pursuant to Title 75, Chapter 5, MCA, and rules implementing that chapter, or which is being accumulated, stored, or physically, chemically or biologically treated before such reuse.~~

~~(2) Except for these wastes listed in subsection (1)(c) of this rule, a hazardous waste which is a sludge, or which is listed in ARM 16.44.331 or 16.44.332, or which contains one or more hazardous wastes listed in ARM 16.44.331 or 16.44.332, and which is transported or stored prior to being used, reused, recycled or reclaimed is subject to the requirements of sub-chapters 4, 5, 6, and 7 of this chapter except ARM 16.44.609, and to Subparts B, C, D, E, F, G, I, J, K, and L of Part 265, Title 40, CFR, with respect to such transportation or storage.~~

~~(3) The department hereby adopts and incorporates herein by reference 40 CFR Part 265, Subparts B, G, D, E, F, G, I, J, K, and L, Subparts B, G, D, E, F, G, H, I, J, K, and L of 40 CFR Part 265 are federal agency rules. These subparts contain, respectively, general facility standards (B), requirements for preparedness and prevention (C), requirements for contingency plan and emergency procedures (D), manifest system requirements, recordkeeping and reporting requirements (E), requirements for ground water monitoring (F), closure and post-closure requirements (G), use and management of containers (I), requirements for tanks (J), requirements for surface impoundments (K), and requirements for waste piles (L). A copy of Subparts B, G, D, E, F, G, H, I, J, K, and L of 40 CFR Part 265, or any portion thereof, may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.~~

REQUIREMENTS FOR RECYCLABLE MATERIALS (1)(a) Hazardous wastes that are recycled are subject to the requirements for generators, transporters, and storage facilities of sections (2) and (3) of this rule, except for the materials listed in subsections (1)(b) and (1)(c) of this rule. Hazardous wastes that are recycled will be known as "recyclable materials".

(b) The following recyclable materials are not subject to the requirements of this rule but are regulated under subparts C through G of 40 CFR Part 266 and all applicable provisions in subchapters 1, 8, and 9 of this chapter:

(i) recyclable materials used in a manner constituting disposal (subpart C, 40 CFR Part 266);

(ii) hazardous wastes burned for energy recovery in boilers and industrial furnaces that are not regulated under subpart O of 40 CFR Part 264 or subpart O of 40 CFR Part 265 (subpart D, 40 CFR Part 266);

(iii) [reserved for used oil];

(iv) recyclable materials from which precious metals are reclaimed (subpart F, 40 CFR Part 266);

(v) spent lead-acid batteries that are being reclaimed (subpart G, 40 CFR Part 266);

(c) The following recyclable materials are not subject to regulation under this chapter:

(i) industrial ethyl alcohol that is reclaimed;

(ii) used batteries (or used battery cells) returned to a battery manufacturer for regeneration;

(iii) used oil that exhibits one or more of the characteristics of hazardous waste; or

(iv) scrap metal.

(v) fuels produced from the refining of oil-bearing hazardous wastes along with normal process streams at a petroleum refining facility if such wastes result from normal petroleum refining, production, and transportation practices;

(vi) oil reclaimed from hazardous waste resulting from normal petroleum refining, production, and transportation practices, which oil is to be refined along with normal process streams at a petroleum refining facility; or

(vii) coke from iron and steel industry that contains hazardous waste from the iron and steel production process.

(2) Generators and transporters of recyclable materials are subject to the applicable requirements of subchapters 4 and 5 of this chapter, except as provided in section (1) of this rule.

(3)(a) Owners or operators of facilities that store recyclable materials before they are recycled are regulated under all applicable provisions of Subparts A through L of 40 CFR Parts 264 and 265 and subchapters 1, 8, and 9 of this chapter, except as provided in section (1) of this rule. (The recycling process itself is exempt from regulation.)

(b) Owners or operators of facilities that recycle recyclable materials without storing them before they are recycled are subject to the notification requirements of section 3010 of RCRA, as amended, 40 CFR 265.71 and 265.75 (dealing with the use of the manifest and manifest discrepancies), except as provided in section (1) of this rule.

(4) The department hereby adopts and incorporates by reference subpart O of 40 CFR Part 264, subpart O of 40 CFR Part 265, 40 CFR 265.71, 265.75, and subparts C through G of 40 CFR Part 266. These federal agency rules refer, respectively, to: standards for owners and operators of hazardous waste treatment, storage, and disposal facilities, specifically pertaining to incinerators (40 CFR Part 264, subpart O); interim status standards for owners and operators of hazardous waste treatment, storage, and disposal facilities, specifically pertaining to incinerators (40 CFR Part 265, subpart O); use of a manifest system for interim status facility owners and operators (40 CFR 265.71), requirements pertaining to a biennial report (40 CFR 265.75), and recyclable materials (40 CFR Part 266). The department hereby adopts and incorporates by reference herein section 3010 of RCRA (Resource Recovery and Conservation Act of 1976, as amended), 42 U.S.C. 3010. A copy of these provisions or any portion thereof may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620.

AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.307 RESIDUES OF HAZARDOUS WASTE IN EMPTY CONTAINERS

(1)-(2) Same as existing rule.

(3) A container or an inner liner removed from a container that has held any hazardous waste, or hazardous

material identified in ARM 16.44.333, except a waste or material that is a compressed gas or that is identified ~~in~~ as acutely hazardous in ARM 16.44.331, 16.44.332 or 16.44.333(5), is empty if:

(a)-(c) Same as existing rule.

(4) Same as existing rule.

(5) A container or an inner liner removed from a container that has held a an acute hazardous waste listed in ARM 16.44.331 or 16.44.332 or an acute hazardous material identified in ARM 16.44.333(5), other than a compressed gas, is empty if:

(a)-(c) Same as existing rule.

AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.330 LISTS OF HAZARDOUS WASTES -- GENERAL

(1)-(3) Same as existing rule.

(4) The following hazardous wastes listed in ARM 16.44.331 are subject to the exclusion limits for acutely hazardous wastes established in ARM 16.44.305: EPA hazardous wastes nos. F020, F021, F022, F023, F026, and F027.

AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.333 DISCARDED COMMERCIAL CHEMICAL PRODUCTS, OFF-SPECIFICATION SPECIES, CONTAINER RESIDUES, AND SPILL RESIDUES THEREOF (1) The following materials or items are hazardous wastes if and when they are discarded or intended to be discarded, when they are burned for purposes of energy recovery in lieu of their original intended use, when they are used to produce fuels in lieu of their original intended use, when they are applied to the land in lieu of their original intended use, or when they are contained in products that are applied to the land in lieu of their original intended use:

(a) Any commercial chemical product, or manufacturing chemical intermediate having the generic name listed in subsections (1)(e) or (f) of this rule.

(b) Any off-specification commercial chemical product or manufacturing chemical intermediate which, if it met specifications, would have the generic name listed in subsections (1)(e) or (f) of this rule.

(c) ~~Any residue remaining in a container that has held~~ Any container or inner liner removed from a container that has been used to hold any commercial chemical product or manufacturing chemical intermediate having the generic name listed in subsections (5) or (6) of this rule, or any container or inner liner removed from a container that has been used to hold any off-specification chemical product and manufacturing chemical intermediate which, if it met specifications, would

have the generic name listed in subsections (5) or (6) of this rule, unless the container is empty as defined in ARM 16.44.307.

(d) Any residue or contaminated soil, water or other debris resulting from the discharge, into or on any land or water, of any commercial chemical product or manufacturing chemical intermediate having the generic name listed in sub section (5) or (6) of this rule, or any residue or contaminated soil, water or other debris resulting from the discharge, into or on any land or water, of any off-specification chemical product and manufacturing chemical intermediate which, if it met specifications, would have the generic name listed in subsection (5) or (6) of this rule.

(5)-(6) Same as existing rule, but to be renumbered as subsections (e) and (f) of section (1).

AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.404 MAINTENANCE OF REGISTRATION AND REGISTRATION FEES (1) Same as existing rule.

(2) The following categories of persons shall not be required to maintain registration as generators nor to pay the annual registration fee:

(a) small quantity generators who are subject to the special provisions of ARM 16.44.305;

(b) persons ~~who beneficially use or reuse or legitimately recycle or reclaim their hazardous wastes in accordance------with the provisions of~~ whose only hazardous wastes are recyclable materials defined in ARM 16.44.306(1)(c);

(c) persons whose wastes are excluded from regulation as hazardous wastes under ARM 16.44.304;

(d) farmers who generate hazardous wastes and who dispose of all such wastes on their own farm property in accordance with ARM 16.44.430.

(3)-(7) Same as existing rule.

(8) No person shown as the legal owner of multiple individual generation sites shall ~~in any case~~ be assessed total generator registration fees exceeding $5,000.

AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.415 ACCUMULATION TIME

(1)-(3) Same as existing rule.

(4)(a) A generator may accumulate as much as 55 gallons of hazardous waste or one quart of acutely hazardous waste listed in ARM 16.44.331, 16.44.332 or 16.44.333(5) in containers at or near any point of generation where wastes initially accumulate, which is under the control of the operator of the process generating the waste, without a permit or

interim status and without complying with section (1) of this rule provided he:

(i) complies with 40 CFR 265.171, 265.172, and 265.173(a); and

(ii) marks his containers either with the words "Hazardous Waste" or with other words that identify the contents of the containers.

(b) A generator who accumulates either hazardous waste or acutely hazardous waste in excess of the amounts listed in subsection (4)(a) of this rule at or near any point of generation must, with respect to that amount of excess waste, comply within three days with section (1) of this rule or other applicable provisions of this subchapter. During the three-day period the generator must continue to comply with subsections (4)(a)(i) and (ii) of this rule. The generator must mark the container holding the excess accumulation of hazardous waste with the date the excess amount began accumulating.

(c) The department hereby adopts and incorporates by reference herein 40 CFR 265.171 pertaining to condition of containers, 40 CFR 265.172 pertaining to compatibility of waste with containers, and 40 CFR 265.173(a) pertaining to closure of containers during storage. A copy of 40 CFR 265.171, 265.172, and 265.173(a) or any portion thereof may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana, 59620.

AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.416 RECORDKEEPING

(1) Same as existing rule.

(2) A generator must keep a copy of each ~~biennial~~ annual report and exception report for a period of at least 3 years from the due date of the report (March 1).

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

AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.417 ~~BIENNIAL~~ ANNUAL REPORTING (1) A generator who ships his hazardous waste off-site must submit ~~biennial~~ annual reports to the department, on forms obtained from the department, no later than March 1 of each ~~even numbered~~ year. The ~~biennial~~ annual report must cover generator activities during the previous calendar year and must include the following information:

(a) the EPA identification number, name, and address of the generator;

(b) the calendar year covered by the report;

(c) the EPA identification number, name, and address for

each off-site treatment, storage, or disposal facility to which waste was shipped during the year; for exported shipments, the report must give the name and address of the foreign facility;

(d) the name and EPA identification number of each transporter used during the reporting year;

(e) a description, EPA hazardous waste number, DOT hazard class, and quantity of each hazardous waste shipped off-site. This information must be listed by EPA identification number of each off-site facility to which waste was shipped;

(f) a description of the efforts undertaken during the year to reduce the volume and toxicity of waste generated;

(g) a description of the changes in volume and toxicity of waste actually achieved during the year in comparison to previous years, to the extent such information is available for years prior to 1984; and

~~(f)~~(h) the certification signed by the generator or his authorized representative.

(2) Any generator who treats, stores, or disposes of hazardous waste on-site must submit ~~a biennial~~ an annual report covering those wastes in accordance with the provisions of subchapters 1, 6, and 7 of this chapter.

AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.425 INTERNATIONAL SHIPMENTS

(1)-(3) Same as existing rule.

(4) Any person exporting hazardous waste identified or listed under this chapter shall file with the EPA Administrator no later than March 1 of each year, a report summarizing the types, quantities, frequency, and ultimate destination of all such hazardous waste exported during the previous calendar year.

~~(4)~~ (5) When importing hazardous waste, a person must meet all requirements of ARM 16.44.405(1) for the manifest except that:

(a) in place of the generator's name, address and EPA identification number, the name and address of the foreign generator and the importer's name, address and EPA identification number must be used; and

(b) in place of the generator's signature on the certification statement, the U.S. importer or his agent must sign and date the certification and obtain the signature of the initial transporter.

AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING:75-10-405, MCA

NEW RULE II ANNUAL REPORT (1) The owner or operator of an interim status hazardous waste management facility must

prepare and submit an annual report to the department by March 1 of each year. The annual report must be submitted on forms obtained from the department. The report must cover facility activities during the previous calendar year and must include the following information:

(a) the EPA identification number, name, and address of the facility;

(b) the calendar year covered by the report;

(c) for off-site facilities, the EPA identification number of each hazardous waste generator from which the facility received a hazardous waste during the year; for imported shipments, the report must give the name and address of the foreign generator;

(d) a description and the quantity of each hazardous waste the facility received during the year. For off-site facilities, this information must be listed by EPA identification number of each generator;

(e) the method of treatment, storage, or disposal for each hazardous waste;

(f) monitoring data under 40 CFR 265.94(a)(2)(ii) and (iii), and (b)(2), (which has been incorporated by reference in ARM 16.44.609) where required;

(g) the most recent closure cost estimate under ARM 16.44.804 and, for disposal facilities, the most recent post-closure cost estimate under ARM 16.44.805; and

(h) the certification signed by the owner or operator of the facility or his authorized representative.

AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.609 STANDARDS FOR EXISTING FACILITIES WITH TEMPORARY PERMITS (INTERIM STATUS) (1) A person who receives a temporary permit under 16.44.605 must comply with the standards and requirements in 40 CFR Part 265, subparts B through and including Q.

(2) The department hereby adopts and incorporates herein by reference 40 CFR Part 265, subparts B through and including Q, and excluding subpart H and 40 CFR 265.75. The equivalent of subpart H is set forth in subchapter 8 of this chapter. The equivalent of 40 CFR 265.75 is set forth in NEW RULE II. Subparts B through Q of 40 CFR Part 265 are federal agency rules setting forth general facility standards (B); requirements for preparedness and prevention (C); requirements for contingency plan and emergency procedures (D); manifest system, recordkeeping and reporting requirements (E); groundwater monitoring requirements (F); closure and post-closure requirements (G); requirements for use and management of containers (I) and requirements for tanks (J), surface impoundments (K), waste piles (L), land treatment (M), landfills (N), incinera-

tors (O), thermal treatment (P), and chemical, physical and biological treatment (Q). A copy of 40 CFR Part 265, subparts B through and including Q, excluding subpart H, or any portion thereof, may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620.
AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.702 STANDARDS AND REQUIREMENTS FOR PERMITTED FACILITIES (1) Except as provided in ARM 16.44.124, any person who owns or operates a HWM facility must comply with the standards in 40 CFR Part 264, subparts B through and including O, excluding subpart H. Subpart H of 40 CFR Part 264 (financial assurance) is set forth in full in subchapter 8 of this chapter.

(2) The department hereby adopts and incorporates herein by reference 40 CFR Part 264, Subparts B through and including O, excluding Subpart H and 40 CFR 264.75. The equivalent of subpart H is set forth ~~in full~~ in subchapter 8 of this chapter. The equivalent of 40 CFR 264.75 is set forth in NEW RULE II. Subparts B through O, excluding subpart H, are federal agency rules setting forth, respectively, general facility standards (B); requirements for preparedness and prevention (C); requirements for contingency plan and emergency procedures (D); manifest system, recordkeeping and reporting requirements (E); groundwater monitoring requirements (F); closure and post-closure requirements (G); requirements for use and management of containers (I); and requirements for tanks (J); surface impoundments (K); waste piles (L); land treatment (M); landfills (N); and incinerators (O). A copy of 40 CFR Part 264, subparts B through and including O, excluding subpart H, or any portion thereof, may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620.
AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

NEW RULE III RECLASSIFICATION TO A MATERIAL OTHER THAN A WASTE (1) In accordance with the standards and criteria in NEW RULE IV and the procedures in NEW RULE VI, the department may determine on a case-by-case basis that the following materials are not wastes:

(a) materials that are accumulated speculatively (as defined in ARM 16.44.301) without sufficient amounts being recycled;

(b) materials that are reclaimed, as defined in ARM 16.44.301, and then reused within the original primary production process in which they were generated; or

(c) materials that have been reclaimed but must be reclaimed further before the materials are completely recovered for their original uses.

AUTHORIZING: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

NEW RULE IV STANDARDS AND CRITERIA FOR RECLASSIFICATION TO A MATERIAL OTHER THAN A WASTE (1) The department may grant requests for a reclassification from classification as a waste those materials that are accumulated speculatively without sufficient amounts being recycled if the applicant demonstrates that sufficient amounts of the material will be recycled or transferred for recycling in the following year. If a request for reclassification is granted, it is valid only for the following year, but can be renewed, on an annual basis, by filing a new application. The department's decision will be based on the following standards and criteria:

(a) the manner in which the material is expected to be recycled, when the material is expected to be recycled, and whether this expected disposition is likely to occur (for example, because of past practice, market factors, the nature of the material, or contractual arrangements for recycling);

(b) the reason that the applicant has accumulated the material for one or more years without recycling 75 percent of the volume accumulated at the beginning of the year;

(c) the quantity of material already accumulated and the quantity expected to be generated and accumulated before the material is recycled;

(d) the extent to which the material is handled to minimize loss; or

(e) other relevant factors.

(2) The department may grant requests for reclassification from classification as a waste those materials that are reclaimed and then reused as feedstock within the original primary production process in which the materials were generated if the reclamation operation is an essential part of the production process. This determination will be based on the following criteria:

(a) how economically viable the production process would be if it were to use virgin materials, rather than reclaimed materials;

(b) the prevalence of the practice on an industry-wide basis;

(c) the extent to which the material is handled before reclamation to minimize loss;

(d) the time periods between generating the material and its reclamation, and between reclamation and return to the original primary production process;

(e) the location of the reclamation operation in relation to the production process;

(f) whether the reclaimed material is used for the purpose for which it was originally produced when it is returned to the original process, and whether it is returned to the process in substantially its original form;

(g) whether the person who generates the material also reclaims it; or

(h) other relevant factors.

(3) The department may grant requests for reclassification from classification as a waste those materials that have been reclaimed but must be reclaimed further before recovery is completed if, after initial reclamation, the resulting material is commodity-like (even though it is not yet a commercial product, and has to be reclaimed further). This determination will be based on the following factors:

(a) the degree of processing the material has undergone and the degree of further processing that is required;

(b) the value of the material after it has been reclaimed;

(c) the degree to which the reclaimed material is like an analogous raw material;

(d) the extent to which an end market for the reclaimed material is guaranteed;

(e) the extent to which the reclaimed material is handled to minimize loss; or

(f) other relevant factors.

AUTHORIZING: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

NEW RULE V RECLASSIFICATION AS A BOILER (1) In accordance with the standards and criteria in ARM 16.44.202 (definition of "boiler"), and the procedures in NEW RULE IV, the department may determine on a case-by-case basis that certain enclosed devices using controlled flame combustion are boilers, even though they do not otherwise meet the definition of boiler contained in ARM 16.44.202, after considering the following criteria:

(a) the extent to which the unit has provisions for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gases;

(b) the extent to which the combustion chamber and energy recovery equipment are of integral design;

(c) the efficiency of energy recovery, calculated in terms of the recovered energy compared with the thermal value of the fuel;

(d) the extent to which exported energy is utilized;

(e) the extent to which the device is in common and customery use as a "boiler" functioning primarily to produce steam, heated fluids, or heated gases; or

(f) other factors, as appropriate.

AUTHORIZING: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

NEW RULE VI PROCEDURES FOR RECLASSIFICATION (1) The department will use the following procedures in evaluating applications for reclassification from classification as a waste or applications to classify particular enclosed flame combustion devices as boilers (as described in NEW RULE V):

(a) The application must address the relevant criteria contained in NEW RULES IV and V.

(b) The department will evaluate the application and issue a draft notice provisionally granting or denying the application. A notification of this provisional decision with notice of the opportunity to comment to the department within 30 days of the notification shall be provided by the applicant to a newspaper of general circulation within the area to be affected by a decision to reclassify. A radio broadcast, in the locality where the recycler is located, about the provisional notification and opportunity to comment shall also be made by the applicant. The department will accept comment on the provisional decision for 30 days, and may also hold a public hearing upon request or at its discretion. The department will issue a final decision on the application after receipt of comments and after the hearing (if any).

AUTHORIZING: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

NEW RULE VII ADDITIONAL REGULATION OF CERTAIN HAZARDOUS WASTE RECYCLING ACTIVITIES ON A CASE-BY-CASE BASIS (1) The department may decide on a case-by-case basis that persons accumulating or storing the recyclable materials described in ARM 16.44.306(1)(b)(iv) should be regulated under ARM 16.44.306(2) and (3). The basis for this decision is that the materials are being accumulated or stored in a manner that jeopardizes human health and the environment because the materials or their toxic constituents have not been adequately contained, or because the materials being accumulated or stored together are incompatible as further explained in 40 CFR Part 265, appendix V. In making this decision, the department will consider the following factors:

(a) the types of materials accumulated or stored and the amounts accumulated or stored;

(b) the method of accumulation or storage;

(c) the length of time the materials have been accumulated or stored before being reclaimed;

(d) whether any contaminants are being released into the environment, or are likely to be so released; or

(e) other relevant factors.

(2) The procedures for this decision are set forth in NEW RULE IX.

(3) The department hereby adopts and incorporates herein by reference 40 CFR Part 265, appendix V, which sets forth

examples of incompatible wastes. A copy of 40 CFR Part 265, appendix V, may be obtained from the Solid Waste Management Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620.
AUTHORIZING: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

NEW RULE VIII PROCEDURES FOR CASE-BY-CASE REGULATION OF HAZARDOUS WASTE RECYCLING ACTIVITIES (1) The department will use the following procedures when determining whether to regulate hazardous waste recycling activities described in ARM 16.44.306(1)(b)(iv) under the provisions of ARM 16.44.306(2) and (3):

(a) If a generator is accumulating the waste, the department will issue a notice setting forth the factual basis for the decision and stating that the person must comply with the applicable requirements of subchapter 4. The notice will become final within 30 days, unless the person served requests a public hearing to challenge the decision. Upon receiving such a request, the department will hold a public hearing. The department will provide notice of the hearing to the public in the newspapers of general circulation serving the affected areas and will allow public participation at the hearing. The department will issue a final order after the hearing stating whether or not compliance with subchapter 4 is required. The order becomes effective 30 days after issuance of the decision unless the department specifies a later date or unless review by the board is requested. The order may be appealed to the board by any interested and affected person who participated in the public hearing. Final agency action occurs when a final order is issued by the board.

(b) If the person is accumulating the recyclable material at a storage facility, the department shall send out notice to the person which states that the person must obtain a permit in accordance with all applicable provisions of subchapters 1 and 9. The owner or operator of the facility must apply for a permit within no less than 60 days and no more than six months of notice, as specified in the notice. If the owner or operator of the facility wishes to challenge the department's decision, he may do so in his permit application, in a public hearing held on the draft permit, or in comments filed on the draft permit or on the notice of intent to deny the permit. The fact sheet accompanying the permit will specify the reasons for the department's determination. The question of whether the department's decision was proper will remain open for consideration during the public comment period discussed under ARM 16.44.906 and in any subsequent hearing.
AUTHORIZING: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

4. The department is proposing these amendments to the rules and the new rules in order to effect changes in the state regulatory program consistent with federal regulatory changes.

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 Robert L. Solomon, Cogswell Building, Capitol Complex, Helena, Montana 59620, no later than June 26, 1986.

6. Robert L. Solomon, Cogswell Building, Capitol Complex, Helena, Montana, has been designated to preside over and conduct the hearing.

JOHN J. DRYNAN, M.D., Director,
Department of Health and
Environmental Sciences

Certified to the Secretary of State May 19, 1986.

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

In the matter of the proposed amendments of 36.16.101 through 36.16.114, and 36.16.116 concerning water reservations; proposed repeal of 36.16.115 concerning applications in the Yellowstone River Basin; and proposed adoption of new rules concerning applications in the Missouri River Basin and reservation changes and transfers.	NOTICE OF PUBLIC HEARING OF PROPOSED AMENDMENTS OF 36.16.101 THROUGH 36.16.114, 36.16.116; PROPOSED REPEAL OF 36.16.115 APPLICATIONS IN THE YELLOWSTONE RIVER BASIN; AND PROPOSED ADOPTION OF NEW RULES REGARDING RESERVATIONS IN THE MISSOURI RIVER BASIN AND RESERVATION CHANGES AND TRANSFERS

TO: ALL INTERESTED PERSONS

1. On Thursday, July 10, 1986, at 1:15 p.m., in the conference room of the Department of Natural Resources and Conservation, 1520 East Sixth Avenue, Helena, Montana, a public hearing will be held to consider the above-stated rules.

2. The proposed amendments will read as follows: (new matter underlined, deleted matter interlined) (Each amended rule is followed by a justification.)

"36.16.101 POLICY AND PURPOSE OF RULES (1) As provided by section 85-2-101, MCA: "It is the policy of this state ... to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation to the natural aquatic ecosystems." While it is the policy of this state to recognize and confirm all existing rights to the beneficial use of any waters, Montana must be responsive to the need for establishing options for future diversionary uses of Montana's water resource and for maintaining stream flows for the protection of existing water rights, aquatic life, and water quality ~~and for establishing options for future consumptive and non-consumptive uses of Montana's water resources.~~

(2) The water reservation process, as presented in ~~To aid in the implementation of this policy,~~ section 85-2-316, MCA, is a means whereby this policy can be implemented. This law provides for the establishment of reservations of water by governmental entities ~~and~~ for beneficial uses that are necessary and shown to be in the public interest. ~~section 85-2-605, MCA, provides that the department of natural resources and conservation shall as rapidly as possible assist those governmental entities in applying for reservations within the Yellowstone River Basin.~~

(3) The ~~policy and~~ purpose of these rules is ~~to encourage application for and the establishment of reservations of water which meet the criteria expressed in the Act and~~ to provide guidelines and procedures ~~in the establishment of~~ for the preparation and processing of correct and complete water ~~such~~ reservations applications and for the adoption and implementation of board orders reserving waters."

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

3. The board is proposing the amendment to further clarify the intent and utility of the rules. The reference which encourages applications in the Yellowstone Basin has been deleted because the formal basin-wide Yellowstone reservation process was finalized by a 1978 board order.

4. For the purpose of brevity, ARM 36.16.102 has been amended by rearrangement of current definitions and addition of others in alphabetical order. Definitions intended for deletion appear at the end of the rule.

"36.16.102 DEFINITIONS Unless the context requires otherwise, in these rules:

(1) "Act" means the Montana Water Use Act, Title 85, chapter 2, parts 1-4, MCA.

(2) "Applicant" means the state or any political subdivision or agency thereof or the United States or any agency thereof that is eligible to reserve water pursuant to 85-2-316 and 85-2-331, MCA.

(3) "Beneficial use" means a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses; ~~provided, however, that a use of water for slurry to export coal from Montana is not a beneficial use. Slurry is a mixture of water and insoluable matter.~~ For the purpose of these rules, the term beneficial use includes the maintenance of a minimum flow, level, or quality of water.

(~~5~~4) "Board" means the board of natural resources and conservation provided for in 2-15-3302, MCA.

(~~4~~5) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(6) "Direct benefits" mean all benefits derived from applying reserved water to the use for which it is granted.

(7) "Direct costs" mean all costs to the reservant resulting from applying reserved water to beneficial use for the purpose granted.

(8) "Diversionary use" means a water use occurring out-of-stream or requiring development of a project before water can be applied to beneficial use. This includes stockwater use and development of projects that will augment an instream use.

(9) "Economic feasibility" means that indirect and direct project benefits exceed indirect and direct project costs.

(10) "Financial feasibility" means that finances for a water reservation project can be secured and that project costs will be recovered from project income through revenues generated over the project life, or through available subsidies, or from a combination thereof.

(11) "Firm yield" means the volume of water, including reasonable carry-over storage, that will be available from a storage facility during a specified critical dry period to meet water needs under a predetermined demand schedule. Reasonable carry-over storage is determined on a case-by-case basis by considering such factors as type of beneficial use, relation of amount of the carry-over storage to project size, the impacts of water shortage on project operation, and other demands on the water resource.

(12) "Indirect benefits" mean the benefits of applying reserved water to beneficial use that accrue to other uses or to parties other than the reservant.

(13) "Indirect costs" mean the costs of applying reserved water to beneficial use that accrue to other uses or to parties other than the reservant.

(14) "Instream use" means a water use that requires water to remain within a stream channel and does not require the development of a project in order to apply water to a beneficial use.

(15) "Irrigable lands" means lands with the soil, topographic, and water supply conditions needed to sustain irrigated agriculture on an economically feasible basis under foreseeable economic conditions.

(16) "Management plan" means a detailed plan accompanying a reservation application that contains information on proposed project design and operation. Management plans for instream uses must contain a schedule for estimating and monitoring unquantified flows and for reporting findings to the board.

(17) "Net benefits" mean indirect and direct benefits less indirect and direct costs.

(18) "Period of use" means the time period, expressed in months, during which reserved water will be used in a calendar year.

(~~9~~19) "Permit" means the permit to appropriate water issued by the department under sections 85-2-301 ~~through 85-2-303, MCA, and sections 85-2-306 through 85-2-314,~~ MCA, et seq.

(20) "Project" means any water storage or diversion facility or a combination thereof, including dams, water spreading systems, diversion canals, laterals, waste and drainage canals, dikes, wells, pumping units, mains, pipelines, power generators, and waterworks systems needed for application of reserved water to beneficial use.

(21) "Rate" means a volume of water measured during a specified time interval, expressed in cubic feet per second (cfs) or gallons per minute (gpm).

(22) "Reservant" means an applicant that has been granted a reservation of water pursuant to 85-2-316 and 85-2-331, MCA.

(823) "Reservation ~~of water~~" means a ~~reservation of~~ water appropriation for existing or future beneficial uses approved by the board pursuant to sections 85-2-316 and 85-2-~~605~~ 331, MCA, and these rules.

(24) "Reservation term" means the period of years ordered by the board during which a reservation must be applied to beneficial use.

(25) "Volume" means a quantity of water expressed in acre-feet per year.

(~~2~~26) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

~~(6) "Storage facility" is any facility that regulates the flow of water for use at a more beneficial time.~~"

~~(7) "Diversion facility" is any facility that is used to divert and transport water from a source water in order that it be put to beneficial use.~~"

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

5. The board is proposing the amendment to conform the definitions to previous statutory amendments, provide further clarity and depth to the requirements outlined in the rules, and to delete definitions which no longer apply or are addressed as part of other definitions. Special note should be given to definitions for beneficial use, instream use, diversionary use, and direct and indirect costs and benefits which are used extensively throughout these rules.

"36.16.103 FORMS The necessary forms for the administration of these rules are available from the ~~w~~Water ~~r~~Resources ~~d~~Division of the department, 1520 East Sixth Avenue ~~32 South Ewing,~~ Helena, Montana 5960~~1~~20. ~~These~~ forms hereinafter listed must ~~are hereby adopted and shall~~ be used in the administration of these rules ~~as herein provided~~:

(1) Form No. 610, Application for Reservation of Water.

(2) Form No. 623, Notice of Beneficial Use of Reserved Waters.

~~(3) Form No. 624, Notice of Progress.~~

~~(4) Form No. 625, Order Reserving Waters~~"

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

6. The board is proposing the amendment to indicate the change of address of the department. Provisions regarding forms 624 and 625 have been deleted as the forms are either obsolete or nonexistent.

"36.16.104 APPLICATIONS--GENERAL ~~ASSISTANCE BY DEPARTMENT.~~

(1) ~~An~~ Each application for reservation of water shall be ~~made on~~ accompanied by Form 610, available from the department, and shall be submitted to the board through the ~~W~~Water ~~R~~Resources ~~D~~Division of the department, ~~32 South Ewing~~ 1520 East Sixth Avenue, Helena, Montana 5960~~1~~20. ~~and shall be accompanied by the information, plan, and fee required by the act and these rules~~ A fee of $100 shall be submitted with the application.

(2) The applicant shall submit the original and four (4) copies of an application at the time of filing with the board. Oversized maps and design plans need only accompany the original.

(3) The application must be typed, printed, or otherwise legibly reproduced on 8½" x 11" paper, or as otherwise approved in writing by the department.

(4) The application must be submitted in a looseleaf format to facilitate the addition of updated material, except for oversized material such as maps and overlays which must be presented as attachments.

(5) The text must be consecutively numbered.

(6) An application must contain a list of sources of information, including field investigations and professional consultations, used in preparing the application.

(7) The application must be organized as follows:

(a) table of contents;

(b) introduction, as required in ARM 36.16.105(1);

(c) a description of the purpose, as required in ARM 36.16.105(2);

(d) an analysis of need, as required in [Rule I.];

(e) an analysis of the amount of water requested, as required in [Rule II.];

(f) information to support that the reservation is in the public interest, as required in [Rule III.]

(g) a management plan, as required in ARM 36.16.106; and

(h) a bibliography, appendices, and attachments.

(~~2~~8) The department shall return a deficient or incomplete application to the applicant for correction or completion as required in ARM 36.16.107(2). An application will not be ~~processed by the department and~~ considered and acted upon by the board until the filing fee has been submitted and the application is found to be correct, ~~it is~~ complete, and in compliance with the act and these rules.

(~~3~~9) ~~The~~ An applicant may request the department to provide assistance ~~it~~ in ~~completing~~ preparing ~~the~~ a reservation application. The department will provide such assistance within its budgeting and staffing limitations ~~free of charge~~."

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

7. The board is proposing the amendment to further guide applicants regarding application format. This will assure that applications are uniform in content, and also serve to streamline the department's determination of whether applications are correct and complete. Clarification is also made of the terms upon which the board may begin to review and eventually act upon

the application. Prior to board review, the department may guide applicants in compiling information for application preparation. The reference to this service being free of charge was deleted because it is superfluous in the context of the sentence.

8. To improve organization of the rules, ARM 36.16.105 has been amended to become four separate rules. Subsections (2), (3), and (4) of 36.16.105 have been deleted in their entirety and three new rules have been developed from the concepts in the deleted matter. The amended rule and the three new rules read as follows: (Full text of the current rule is located at pages 36-338 and 36-339, Administrative Rules of Montana.)

"36.16.105 APPLICATION CONTENT - INTRODUCTION AND PURPOSE ~~An application for reservation of water shall contain information to show the following:~~

(1) The introduction shall identify the applicant(s) including a showing of the applicant's authority to reserve water; a general discussion and map of sufficient detail to identify where the requested reservation will be applied to use; and a brief description of the purpose of the reservation, the amount requested, and any proposed projects.

(~~1~~2) ~~t~~The purpose section of the ~~reservation:~~ application shall describe ~~T~~the beneficial use or uses to which the ~~reserved~~ water granted pursuant to the reservation will be applied, ~~shall be indicated~~ and identify the beneficiaries of the reservation."

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

"I. APPLICATION CONTENT - ANALYSIS OF NEED (1) The application shall present an analysis of why the reservation is needed. The analysis shall include the following, where appropriate:

(a) a description of potential competing water uses that could consume, degrade, or otherwise affect the water available for the proposed reservation; or

(b) where information regarding the effect of potential competing water uses on a proposed reservation is not available, a description of the water resource uses associated with the reservation that warrant protection; or

(c) where the applicant is otherwise eligible to obtain a water right permit, an explanation of constraints to project construction that restrict the applicant from perfecting a permit for the proposed reservation purpose. These constraints may include the inability to finance a project in the near-term, lack of increased demand for water until some time in the future, or the need for additional project planning before water can be applied to beneficial use."

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

"II. APPLICATION CONTENT - DETERMINATION OF AMOUNT (1) The amount of water for which the reservation is being sought must be expressed in terms of volume, rate, and period of use. An application shall contain an explanation of the methods and assumptions used to calculate the amount of water to be

reserved. Where an applicant is already served by existing projects the total amount requested shall take into account the cost-effectiveness of increasing water use efficiencies at the existing projects.

(a) The amount of water for municipal uses must be determined by:

(i) calculating the projected peak and average per capita water use rate for the proposed local service area;

(ii) forecasting the population to the year when all reserved water must be applied to beneficial use;

(iii) calculating the annual and peak daily amount needed on the basis of (i) and (ii); and

(iv) comparing results of (iii) with the current municipal use to determine additional water required under the reservation.

(b) The amount of water for future full-service and supplemental irrigation uses must be determined on the basis of monthly crop irrigation requirements, conveyance and on-farm delivery system efficiencies, and the number of irrigable acres. Irrigable lands shall include those lands as defined in ARM 36.16.102 for which landowners have expressed an interest in developing new or supplemental irrigation. Interest must be determined from a survey of all potential irrigators in the area that would be affected by the proposed reservation, as provided in ARM 36.16.106. Lands for which no response or a negative response to the survey was received may be included in an application only if an explanation of why these lands should be included is presented in the application.

(c) The amount of water for future industrial uses must be determined on the basis of estimated water requirements for the proposed industrial process as reflected by the preliminary design plans required in ARM 36.16.106;

(d) The amount of water for hydroelectric generation uses must be determined on the basis of preliminary estimates of head (feet), generating capacity (megawatts), and generating facility design as required in ARM 36.16.106.

(e) The amount of water for other diversionary uses must be calculated using a state-of-the-art methodology approved by the department for determining water requirements.

(f) The amount of water for instream uses such as water quality, recreation, and fish and wildlife, must be determined using methodologies that estimate the amount of water needed to maintain instream benefits at a desired level. A justification for selecting the methodology used must be presented, including a literature review on the chosen methodology. Where such a methodology indicates that a range of flows in a specified river reach would sustain the desired instream benefits, the applicant shall present the factors considered in selecting the requested flow.

(2) An analysis must be made to estimate the physical availability of flows or aquifer yields requested in ARM 36.16.105B(1). The department may, upon written request, assist in the design of this analysis subject to available budget and personnel.

(a) For gaged streams, physical water availability on a monthly basis must be demonstrated, using available water resources data. Statistical information on streamflows must include monthly means and 20, 50, and 80th percentile exceedence frequency flows. The applicant must consult with the department to assure that the period of record selected is consistent with the period chosen by any competing applicants. Consideration shall be given to the need for adjusting flows to a prescribed level of development.

(b) For drainages in which gaging records are not available, monthly flows must be calculated, unless otherwise waived by the department, using a state-of-the-art flow estimation technique approved by the department.

(c) For applications involving the use of ground water, estimates of aquifer supplies must be based on information collected from the aquifer(s) involved. Where available, descriptions and maps of pertinent hydrogeologic information, including but not limited to aquifer extent, stratigraphic relationships, and aquifer transmissions capability shall be presented. Where this information is not available, a study plan must be presented in the application showing steps that will be taken to develop the information."

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

"III. APPLICATION CONTENT - PUBLIC INTEREST (1) In making a showing that the reservation is in the public interest, the application shall contain information to support that the proposed reservation is in the public interest, including:

(a) An analysis of the direct benefits and costs associated with applying reserved water to the proposed beneficial use.

(b) A discussion of the indirect benefits and costs associated with applying water to beneficial use that considers the following:

(i) effects on future economic activity;

(ii) effects on the environment;

(iii) effects on public health and safety; and

(iv) the economic opportunity costs that the requested flow may have to parties other than the reservant.

(c) A discussion of the effects of not granting the reservation.

(d) Where the reservation would require withdrawal and transport for use outside the state, a discussion of:

(i) whether the reserved water could otherwise be transported to alleviate water shortages within Montana;

(ii) the demand on the available water supply in the state where the water will be applied to use; and

(iii) the effect of the proposed out-of-state water use on the welfare of Montana citizens."

Auth: 85-1-201, MCA. Auth Extension: Sec. 22, Chapter 573, L. 1985. Imp: 85-2-316, MCA.

9. The board is proposing the amendment and new rules to assure that reservation applications contain the appropriate and adequate information needed by the board in making informed decisions on reservation applications. The board wants to assure that applications contain adequate and standardized information, making comparison of the proposals and board decision-making possible without gathering additional data. To accomplish this objective, the amended and proposed rules set out detailed application requirements that define the four statutory application components: purpose, need, amount, and public interest.

Most of the new language is non-substantive in nature, serving rather to further clarify and define the requirements of the current rule. Exceptions include subsection (1)(a) of proposed Rule I which requires applicants to provide indications of why water may not be available for future use if it is not reserved, and subsection (1)(b) which allows instream use applicants to describe the public values of instream protection that substantiate need. Subsection 2 of proposed rule II requires the applicant to present an estimate of the physical availability of water to assure that the applicant is not spending time and funds on projects and instream flow plans for which water is not physically available. The board, in its hearings and subsequent decisions on reservation applications, will address the matter of legal water availability. Subsection (1)(d) of Rule III is a new requirement dealing with the public interest determination for reservations proposing to withdraw water for out-of-state use. This requirement was added as a result of H.B. 680, which was passed during Montana's 79th legislative session to address a variety of water marketing and out-of-state water use issues.

"36.16.106 APPLICATION CONTENT - MANAGEMENT ~~COMPLETION~~ PLANS (1) ~~As required by section 85-2-316(4): "If the purpose of the reservation requires construction of a storage or diversion facility, the applicant shall establish to the satisfaction of the board that there will be progress toward completion of the facility and accomplishment of the purpose with reasonable diligence in accordance with an established plan." Therefore, if the application involves the beneficial use of water requiring storage or diversion facilities,~~ a A management plan shall accompany ~~the~~ all applications.

~~(2) The plan shall meet the following minimum standards:~~

~~(a)~~ Plans for ~~the construction of the diversion, conveyance,~~ and ~~application facilities~~ diversionary uses shall ~~be prepared to a level of detail necessary~~ contain the technical information needed to adequately define ~~their~~ project size, and function, and costs. ~~The intent of this criteria is to demonstrate that the applicant is not speculating on the use of reserved water, but rather has reasonable and established plans for the construction of a water resource project or projects.~~ The plan ~~shall~~ must be ~~prepared and documented to the highest~~

~~degree of detail possible,~~ and accompanied by maps or drawings showing the project locations, ~~place of water use,~~ including point(s) ~~or points~~ of diversions, main delivery systems, place(s) of water use, shown to the nearest ¼ ¼ ¼ section, township, and range, and other relevant information. All project plans shall demonstrate a consideration of water conservation measures. ~~The department shall determine if each application has been sufficiently defined to preclude speculation.~~

(a) Plans for storage facilities shall include prefeasibility studies demonstrating firm yield of the proposed reservoir. If the reservoir is planned to supply the demand on a non-firm basis, information shall be included to demonstrate how often the demand is successfully met. Consideration of Montana dam safety regulations and dam safety requirements of potential federal or state funding entities shall also be demonstrated in the storage facility plans.

(b) ~~The economic feasibility of the project or projects shall be discussed. The project should be a financially feasible undertaking. The applicant should furnish documentation that will support the economic feasibility of the project. Since it is difficult to forecast future prices, returns, technologies, etc., with precision, each project will be evaluated on a case-by-case basis rather than on an arbitrary 1:1 benefit-cost criteria. Further, each project will be considered on its merits as a viable development project and as a worthwhile investment undertaking.~~ The management plan shall include an analysis of the financial feasibility of the project(s). The ability to finance project costs, through bond sales, commercial loans, project revenues or other means, must be addressed. If the project is not financially feasible using these means, the application shall contain a discussion of how financial feasibility might be achieved. Among the factors to be considered are the availability of funding, or changes in interest rates, commodity prices, and production and installation costs.

(c) ~~For the following beneficial uses: (i)~~ For applications involving irrigation, ~~to demonstrate the suitability of lands to sustain irrigation, a land classification map shall be submitted showing the location of the actual lands proposed to be irrigated. The classification shall show soil capabilities and be based on factors such as soil types, salinity, slope, and drainage characteristics.~~ the proposed water distribution systems, drainage systems, places of use, and types of irrigation systems shall be delineated on 7.5 minute U.S. Geological Survey topographic maps, if available. If not available, other maps with a scale acceptable to the department may be used. This base map shall be accompanied by the following overlays:

(i) a transparent overlay to the same scale as the base map that delineates the location of soil mapping units in the proposed project areas. This overlay must be based on soil classifications acceptable to the department and must be

accompanied by a narrative describing general soil characteristics affecting irrigability. The overlay must be of sufficient detail to delineate the predominant soil series and factors limiting irrigation in each project area. If an area has not been mapped for soils, the applicant may use best available information as approved by the department;

(ii) a transparent overlay to the same scale as the base map that delineates the location of irrigable lands in the project areas. A narrative describing the criteria used for selecting irrigable lands shall accompany this overlay. Soil suitability for irrigation must be based on standards acceptable to the department; and

(iii) a transparent overlay showing the ownership of land to be affected by the reservation as identified in ARM 36.16.106(7). A table that lists ownership locations may be substituted for this requirement.

(~~iid~~) ~~domestic and~~ mMunicipal applicants~~, population projects based on state or local trends~~ must submit preliminary engineering feasibility plans ~~shall be submitted to demonstrate future water needs~~ that define the service area, project design, water system capacity, and location. The plan must include preliminary plans or designs for metering the system.

(~~de~~) If ~~the purpose of~~ applying the reservation to beneficial use requires ~~individual~~ private investments, ~~the applicant where possible shall show that the appropriate persons are willing to make those investments.~~ a survey shall be conducted of potential users to show their support of the reservation.

(~~ef~~) ~~Proof of~~ Capability of proceeding with reasonable diligence must ~~shall~~ be documented by ~~including~~ presenting a detailed schedule of ~~planning~~ activities needed to apply reserved water to beneficial use including ~~and development efforts to be initiated and completed, along with~~ target dates or years ~~that~~ when financing will be available, facilities ~~will~~ be built, and the water applied to beneficially used.

~~(f) Applications for reservations of water to be used any number of years in the future will be accepted and processed, provided that the plan indicates a bona fide intent and ability to use the water reserved as projected. However, applications for the reservation of water for more than 10 years in the future will be closely scrutinized.~~

(g) The applicant shall demonstrate its plans and ability to ~~own or~~ administer the process of applying reserved ~~control the water project or the~~ water to beneficial use ~~reservation~~. This shall include a set of administrative procedures which outline how the applicant proposes to notify the individual users of the reservation regarding steps needed to apply the reserved water to beneficial use, and to report to the board regarding use of the reserved water including its allocation during water shortages. ~~The organizational entity or persons that will plan, initiate, and construct the project or projects shall be indicated. Anticipated sources of funding for the proposed development shall also be indicated.~~

(2) A management plan shall accompany all instream use applications and shall include:

(a) a list of stream gaging stations in the basin area affected by a requested reservation and the period of record for each;

(b) an identification of stream reaches where historic streamflow records are available;

(c) an analysis of the costs and feasibility of purchasing and installing needed gaging stations or, if needed gaging stations are not planned for installation, a description of how flows in ungaged reaches will be estimated, as determined after consultation with the department and after consideration of items described in [Rule II (1)(e).] and [Rule II (2).]; and

(d) a description of how instream flow studies will be reported to the board and monitored over time."

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

10. The board is proposing the amendment to better clarify components of the management plan that must accompany each application. Substantive changes to the rule were added to include the following:

- The proposed subsection (1)(a) requires a firm yield analysis as well as a demonstrated consideration of dam safety requirements for all proposed storage reservoirs. This has been proposed to assure that dam design reflects water availability constraints and state dam safety regulations being developed as a result of recent legislation (See Title 85, Chapter 15, MCA). These are both analyses that can be conducted at the prefeasibility stage of planning and are needed to assess the economic feasibility of water storage projects proposed in a reservation application.

- Subsection (1)(b) regarding financial and economic feasibility analyses was replaced with specific requirements for proving financial feasibility. Economic feasibility requirements were moved to a different rule (the proposed Rule III).

- Subsection (1)(c) has been expanded to require information that clarifies mapping requirements, soils criteria, irrigation project design, and land ownership. The addition of these clarifications will serve to standardize the applications. In cases where soils information is not available, the department will accept best available information where the cost of completing a soil survey may render application preparation costs prohibitive.

- Subsection (1)(d) has been amended to further clarify municipal application requirements. Like the previous subsection this has been done to standardize application content and facilitate an assessment of speculative intent.

- Subsection (1)(e) has been amended to further require a survey of potential users of the reservation to assure that the potential users are interested in the reservation.

- Subsection (f) has been deleted as its message is reflected in the requirements of new Rule IV.

- Deleted matter in (1)(g) has been relocated in subsections (1)(b) and (1)(e).

- New subsection (2) requires a management plan from instream applicants. Because an instream reservation may not require project construction, the board now proposes to require information in the application regarding the measurement of flows to be protected by an instream reservation. In the past, this information was required after the reservation was granted, in the Board Order. The board now proposes to require a portion of this information earlier, at the application phase, in order to fully ascertain the extent of study and time needed to set up flow monitoring programs and to measure unquantified flows.

11. Rule 36.16.107 is amended in its entirety. Deleted subsections have been incorporated into two new rules that follow the amended rule.

"36.16.107 PROCESSING ~~AND ACTION ON~~ APPLICATIONS AND MONITORING RESERVATIONS -- DEPARTMENT RESPONSIBILITIES

(1) The department will, upon request, assist the applicant by responding to questions regarding the interpretation and requirements of these rules. The department may review draft applications prior to final submittal. The department shall provide access to and assistance in the interpretation of water rights records, water availability information, or other needed data maintained by the department.

(2) The department shall determine if an application is correct and complete within 60 days after an application has been submitted along with the required application fee. To be determined as correct and complete, a water reservation application shall meet all requirements of ARM 36.16.105, [Rule I.], [Rule II.], [Rule III.], and ARM 36.16.106. The applicant must be notified in writing of any deficiencies. Unless otherwise provided in ARM 36.16.117, an application returned to an applicant as not correct or complete must be resubmitted to the department within 60 days of its return to the applicant or it will be terminated, unless the applicant requests and receives written approval from the department for an extension of time.

(~~1~~3) As provided by section 85-2-316(~~2~~3), MCA, an correct and complete application for reservation of water will be processed in accordance with 85-2-307 through 309, MCA. ~~as is an application for a permit to appropriate water.~~ Public notice of the application and a public hearing on objections to the application, if any, are required.

~~(2) The board will make the final decision on whether to approve the application. The board may, in its discretion, approve the application as requested, approve the application subject to terms and conditions it considers appropriate including requiring periodic submission of Form 624, Notice of Progress, or deny the application.~~

~~(3) Fulfillment of all requirements in the act and these rules for an application for a reservation of water does not mean that the board will automatically approve the request.~~

(4) After an application has been found correct and complete the department shall prepare an environmental impact statement, if required, in accordance with 75-2-101 et. seq., MCA.

(5) The department may evaluate applications and perform analyses necessary to make recommendations to the board for findings pursuant to [Rule V.] and for any other analysis requested by the board.

(6) The department may evaluate annual reports submitted by reservants regarding progress in applying reserved water to beneficial use. The department shall prepare a report to the board regarding any needed action.

(7) The department shall review all change and transfer proceedings required in ARM 36.16.118 and recommend to the board any action needed on changes or transfers."

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

"IV. ACTION ON APPLICATIONS AND MONITORING RESERVATIONS--BOARD RESPONSIBILITIES (1) The board may approve, deny, or condition the requested reservation subject to such terms it considers appropriate. The board may approve the reservation for an amount less, but not for more, water than requested in an application.

(2) If an order reserving water is issued by the board with conditions, the board shall allow the applicant a prescribed period of time to revise its reservation proposal in response to board conditions.

(3) When several applications are being considered concurrently, the board shall establish the priority of granted reservations by the chronological order in which the reservations are adopted. Such priorities will be established only after consideration of positive as well as detrimental effects on applicants of establishing such priorities.

(4) The board shall periodically, but at least once every 10 years, review reservations pursuant to 85-2-316 (10), MCA. It shall include as part of the review a determination of whether the steps presented in the reservant's management plan, and conditions in the board order are being fulfilled. Where the objectives of the reservation are not being met, the board may extend the term of, revoke or modify the reservation after the reservant has been granted an opportunity to be heard by the board.

(5) The board shall act on change or transfer requests, in accordance with [Rule VII.]."

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

"V. ACTION ON APPLICATIONS--BOARD DECISION CRITERIA

(1) For the board to adopt an order reserving water, it must find that:

(a) the applicant is qualified to reserve water, pursuant to 85-2-316, MCA; and

(b) the purpose of the reservation is a beneficial use as defined in ARM 36.16.102.

(2) For the board to adopt an order reserving water, it must establish that the reservation is needed, as required in 85-2-316(4)(a)ii, MCA, by finding that:

(a) there is a reasonable likelihood that future instate or out-of-state competing water uses would consume, degrade, or otherwise affect the water available for the purpose of the reservation. Such a determination shall be based on a department forecast that identifies the potential impact of competing uses on the purpose of the reservation; or

(b) where information regarding the effect of future water uses on a proposed reservation is not available, the applicant has demonstrated the importance of reserving water for the requested purpose; or

(c) where the applicant could otherwise seek a water right permit, there are constraints that would restrict the applicant from perfecting a water permit for the intended purpose of the reservation.

(3) For the board to adopt an order reserving water, it must determine the amount needed to fulfill the purpose of the reservation, as required in 85-2-316(4)(a)(iii), MCA, on the basis of a finding:

(a) that the methodologies and assumptions used by the applicant to determine the requested amount are reasonable, accurate, and suitable.

(b) that water use efficiencies associated with diversionary uses are reasonable, and that there are no cost effective measures that could be taken within the reservation term to increase the use efficiency and lessen the amount of water required for the purpose of the reservation.

(4) For the board to adopt an order reserving water, it must establish, in its judgement and discretion, that the reservation is in the public interest, as required in 85-2-316(4)(a)(iv), MCA, by finding that:

(a) the expected benefits of applying the reserved water to beneficial use are reasonably likely to exceed the costs where:

(i) benefits include all direct and indirect benefits to the applicant or the state of Montana, where any non-market benefits are quantified and valued to the extent reasonably possible;

(ii) costs include all direct and indirect costs to the applicant or the state of Montana, where any non-market costs are quantified and valued to the extent reasonably possible;

(iii) benefits and costs that may not be reasonably quantified are not of a magnitude that would be likely to reverse the finding in (a).

(b) the net benefits associated with granting a reservation exceed the net benefits of not granting the reservation;

(c) there are no reasonable alternatives to the proposed reservation that have greater net benefits;

(d) a failure to reserve the water will or is likely to result in an irretrievable loss of a natural resource or an irretrievable loss of a resource development opportunity; and

(e) there are no significant adverse impacts to public health, welfare and safety.

(5) Where the purpose of the reservation requires the withdrawal and transport of water for use outside the state, the board must find by clear and convincing evidence, as required by 85-2-316(4)(b), MCA, that:

(a) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

(b) the proposed out-of-state use of water is not detrimental to the citizens of Montana.

(6) For the board to adopt an order reserving water, it must find that the applicant has shown its capability to exercise reasonable diligence toward feasibly financing projects and applying the reserved water to beneficial use, or toward measuring, quantifying, protecting, and reporting instream uses in accordance with an established management plan as required in ARM 36.16.106.

(7) For the board to adopt an order reserving water, it must find that the reservation, as the board proposes to condition it, will not adversely affect existing water rights, including other reservations."

Auth: 85-1-201, MCA. Auth Extension: Sec. 22, Chapter 573, L. 1985. Imp: 85-2-316 and 331, MCA.

12. The board is proposing the amendment and new rules to better define department and board responsibilities and to provide detailed guidelines that must be followed by the board in making its decision to reserve water. Most amendments are non-substantive, serving rather to further clarify and define the requirements of the current rule. Substantive changes include:

- ARM 36.16.107(2), which sets a 60-day time limit on department application review and the same limit on submittal of application revisions by the applicant as required by the department. These reasonable time constraints will assure that the application review and revision process occurs in a timely fashion.

- Former ARM 36.16.107(2) and (3) have been deleted and relocated in new Rule IV. Proposed subsection (3) of new rule IV clarifies the board's ability to assign relative priorities to reservations. Relative priorities may still be assigned within that 1985 priority date, however. Subsection (4) of the new rule was previously contained in the repealed ARM 36.16.109.

- New Rule V outlines all decision criteria to be followed by the board when acting on reservations. All decision criteria are based on information provided in applications as well as on information generated during environmental impact statement preparation. Subsections (1), (2), (3), (4) and (5) are clarifications of direct statutory requirements. The decision criteria stated in subsection (6) was developed to assure that all reservations are likely to be developed (diversionary) or monitored (instream) with due diligence. Subsection (7) clarifies that the board may not grant a reservation that will adversely affect prior water users. In effect, this requirement assures that an analysis will be made of legal and physical water availability prior to granting the reservation.

"36.16.108 RECORDING ORDER RESERVING WATERS (1) An order of the board reserving waters must ~~shall~~ be ~~recorded by~~ filed with the department and recorded in the applicable county clerk's offices~~, and such recording shall be updated by the department as required~~. The department shall provide quarterly reports and an annual summary report on the use of the reserved water to the county clerk and recorder of the counties where the point(s) of diversion and place(s) of use are located."

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

13. The board is proposing the amendment to conform the reporting of beneficially used reserved water with statutory requirements regarding recording of water use under the permit system (see 85-2-312, MCA).

"36.16.110 WATER USE UNDER A RESERVATION--RESERVANT RESPONSIBILITIES ~~A reservation may be granted for existing or future beneficial uses.~~ (1) A ~~reservation holder~~ reservant may use water ~~pursuant to the reservation without a permit~~ in accordance with the board order granting the reservation and the administrative procedures developed in ARM 36.16.106(g) as approved or amended by the board. ~~A water reservation will not be changed to a permit, or vice versa, except by loss of priority date.~~ A ~~reservation holder~~ reservant holding a reservation for a diversionary use shall, upon applying water to beneficial use, ~~completion of any project facility~~ file Form No. 623, Notice of Beneficial Use of Reserved Waters, with the ~~water rights bureau of the~~ department.

(2) A reservant must file an annual report with the department that summarizes the progress made in complying with provisions of the board order reserving water.

(3) All applications made for changes to or transfers of a granted reservation must be submitted to the department in accordance with the procedures outlined in [Rule VII.]"

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

14. The amendment proposed by the board to this rule is non-substantive, although clarification is made regarding a reservant's requirements in requesting transfers and changes to its reservation.

"36.16.111 STATUS OF WATER RESERVATION (1) ~~Once a~~ A reservation ~~is granted, it~~ is subject to protection under the act and is an appropriative ~~a conditional~~ water right protected by law ~~as is a permit to appropriate water. A reservation holder is an "appropriator" under the act and as such has standing to file an objection to any application for a permit to appropriate reserved waters filed by any person. This allows the holder to appear at a hearing before the department to assert its entitlement to protection.~~"

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

15. The board is amending the rule to further clarify the status of a reservation. As defined in 85-2-102, MCA, a reservation is an appropriative right. As such, the reservant has standing as an objector in water rights proceedings. The deleted matter is superfluous in the context of the retained portion of the rule.

"36.16.112 INDIVIDUAL ~~PROJECTS~~ USERS (1) The act does not provide for the ~~water~~ reservations of water by individuals. A water reservation right must be held by the reservant ~~applicant~~ if approved by the board and may not be transferred in whole or in part to private individuals or entities. However, an applicant's request for a reservation is appropriate ~~could be proper~~ if it is ~~were to be~~ based on and on behalf of the needs of a number of individual users~~, provided that the distribution system and other facilities for the use of the water under the reservation are owned or controlled by the applicant~~."

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

16. The board is proposing the amendment in order to delete reference to the need for an applicant to own or control a project.

"36.16.113 ENVIRONMENTAL IMPACT STATEMENT (EIS)

(1) The necessity for an EIS must be evaluated ~~on a case by case basis~~ for each reservation application ~~request and is governed~~ as required by the Montana Environmental Policy Act ~~(MEPA)~~, the Montana Water Use Act, and board and department ~~regulations and guidelines~~ rules.

(2) ~~However, if several applications for reservations of water are received or are expected to be received within a short time period,~~ a A cumulative programmatic EIS may be prepared if several applications are received or expected to be filed for water in a common drainage basin ~~the total size of the cumulative requests indicate an EIS is necessary~~.

(3) ~~The~~ An EIS, if required, shall be prepared by the department or its designee ~~prior to~~ sufficiently in advance of board action on the reservation application to allow for full public review and comment. ~~(4) The department shall compile the EIS~~ , ~~i~~If necessary, ~~and it~~ the department may require the applicant to submit ~~such~~ information ~~as is necessary~~ needed ~~to enable it~~ to assess ~~compile~~ the impacts of the proposed reservation ~~EIS~~."

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

17. The board is proposing the amendment to clarify the statutory requirement and the current rule. Changes are non-substantive.

"36.16.114 FEES AND COSTS (1) As required by ARM 36.12.1034, a $100 fee ~~shall~~ must be paid to the department when filing an application for reservation of water. In addition to the $100 fee and Aas required by section 85-2-316, MCA, the department's costs of giving notice, holding the hearing,

conducting investigations, and making records~~,~~ incurred in acting upon the application to reserve water, except the cost of salaries of the department's personnel, ~~shall~~ must be paid by the applicant~~.~~, unless waived by the department upon a showing of good cause. The applicant is also required to pay fees needed for EIS preparation as prescribed in 85-2-124, MCA. If an application is for an instream use, the department shall determine a fee be paid to the department after consultation with the applicant. ~~The department shall bill the applicant for those charges.~~"

Auth: 85-2-201, MCA. Imp: 85-2-316, MCA.

18. The board is proposing the amendment to further clarify statutory requirements and the current rule. Changes are non-substantive.

"36.16.116 APPLICABILITY (1) These rules apply to all Missouri Basin reservation applications and to all applications filed with the department after May 1, 1986. ~~are applicable to applications for reservations of water pending on the effective date of these rules as well as others submitted thereafter. Any applications pending on the effective date of these rules shall be amended to conform to the requirements of these rules.~~"

Auth: 85-1-201, MCA. Imp: 85-2-316 and 331, MCA.

19. In proposing the amendment the board recognizes there are several public entities who are preparing applications in accordance with the current rules. Accordingly, there is a need to clarify which parties must conform to these proposed rules. As stated, the amendment allows applicants applying to the department prior to May 1, 1986 to conform to the current rules, thus avoiding the expenditure of additional funds and time by applicants who have been preparing applications which conform to the current rules. On the other hand, all applications submitted for reservation of water in the Missouri Basin prior to May 1, 1986 for which no action has yet been taken by the board, must conform to the revised rules. Any required changes to these applications to make them conform to the revised rules are primarily procedural in nature and do not substantially impair any rights of the applicants. Compliance with the revised rules by all Missouri River applicants serves the important public purpose of assuring that all applications are standardized for fair comparison by the board when it issues its 1991 order for reservation of waters in the Missouri Basin. In view of this circumstance, the department will assist those applicants in revising their submitted drafts so as to assure conformance with these proposed rules.

20. The board is proposing to repeal ARM 36.16.109 and 36.16.115 in their entirety. (Full text of the current rules are located on pages 36-341 and 36-343, Administrative Rules of Montana.)

21. The board proposes to repeal ARM 36.16.109 because it has been incorporated into proposed Rule IV. The board proposes to repeal ARM 36.16.115 because the Yellowstone reservation process was finalized in a 1978 board order.

22. The proposed adoptions for new rules are as follows (in addition to those proposed in earlier sections of this notice):

"VI. APPLICATIONS IN MISSOURI RIVER BASIN (1) Applicants seeking a water reservation in the Missouri River basin shall submit correct and complete applications prior to July 1, 1989. The board shall make a final determination on all applications before December 31, 1991. The priority date of Missouri reservation applications submitted prior to July 1, 1989 and granted prior to December 31, 1991 is July 1, 1985. Applications for water reservations in the Missouri basin will be accepted after the July 1, 1989 deadline, but the priority date shall be the date of the board order granting the reservation."

Auth. 85-1-201, MCA. Auth Extension: Sec. 22, Chapter 573, L. 1985. Imp: 85-2-331, MCA.

"VII. CHANGES AND TRANSFERS (1) Points of diversion and places of storage and use not indicated in the original public notice of the reservation may be included in the reservation at a later date if approved by the board.

(2) A water reservation may be transferred to a new owner without loss of priority if the transferee is qualified to reserve water pursuant to 85-2-316(1), MCA, and if the transfer is approved by the board.

(3) All decisions regarding changes and transfers shall reflect the decision criteria listed in [Rule VI."

Auth: 85-1-201, MCA. Imp: 85-2-316, MCA.

23. The board is proposing Rule VI to reflect new statutory requirements resulting from the passage of House Bill 680 during the 79th Montana legislative session. The board is proposing new Rule VII to formalize a change and transfer process that has been developed as a result of changes in and transfers of certain Yellowstone reservations.

24. Interested parties may present their data, views and arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Natural Resources and Conservation, 1520 East Sixth Avenue, Helena, Montana, 59620, no later than July 18, 1986.

25. G. Steven Brown, Helena, Montana, will preside over and conduct the hearing.

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

BY: _____
GORDON G. HOLTE, CHAIRMAN
BOARD OF NATURAL RESOURCES
AND CONSERVATION

Certified to the Secretary of State, May 19, 1986.

10-5/29/86 MAR Notice No. 36-16-2

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION) of New Rules I, II, III, and) IV relating to the seven day) credit limit of cigarette and) tobacco products.)	NOTICE OF THE PROPOSED ADOPTION of New Rules I, II, III, and IV relating to the seven day credit limit of cigarette and tobacco products.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On June 30, 1986, the Department of Revenue proposes to adopt new Rules I, II, III, and IV relating to the seven day credit limit of cigarette and tobacco products.

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

RULE I GENERAL POLICY (1) Under 16-10-305, any extension or acceptance of credit for more than seven business days is a violation by the wholesaler and the retailer. Where there is a mutual violation of law and/or these rules, the punishment given to the wholesaler and retailer will be equal. Where the retailer agrees to pay within seven days but fails to do so, no violation of the law will be considered to have occurred unless such violations become a pattern and practice of the retailer, or the agreement is a sham.

AUTH: 16-10-104 MCA; IMP: 16-10-305 MCA.

RULE II COMPLAINTS AND INVESTIGATIONS (1) All complaints for violation of 16-10-305 and/or these rules must be received in writing. No anonymous or oral complaints will be considered by the department.

(2) The department will not consider small or trifling complaints or complaints where the cost of the investigation will exceed the amount of the extended credit.

(3) Upon receipt of a complaint, an investigation will be conducted of the wholesaler's and retailer's entire records for the applicable period. If the department finds sufficient cause and believes prosecution of the alleged violation will aid in collection of cigarette and tobacco products taxes, the department will proceed pursuant to 16-10-403.

AUTH: 16-10-104 MCA; IMP: 16-10-305 MCA.

RULE III RECORDS (1) Cigarette and tobacco product wholesalers shall keep and maintain records at their place of business of all cigarette or tobacco products furnished or sold to retailers. These records must contain the following information:

(a) name and address of each retailer;

(b) date the cigarette or tobacco products were sold;

(c) date the cigarette or tobacco products were delivered;

(d) item or items sold or furnished;
(e) retailer cost per item; and
(f) date the wholesaler received payment.

(2) Commercial records or invoices may be used if they contain the information listed in subsection(1)(a) through (f).

(3) The records or invoices shall be maintained for three years.

AUTH: 16-10-104 MCA; IMP: 16-10-305 MCA.

RULE IV DATE OF MAILING AS DATE OF PAYMENT (1) The date of payment shall be considered to be the date of mailing the payment. The date of mailing shall be determined by reference to ARM 42.3.111.

AUTH: 16-10-104 MCA; IMP: 16-10-305 MCA.

3. The Department proposes to adopt Rules I through IV relating to the seven day credit limitation on sales of cigarette and tobacco products to enforce the provisions of 16-10-305, MCA, and to ensure the timely payment of taxes on cigarette and other tobacco products. Rules I and II are designed to minimize trivial complaints and to emphasize that any violation involves two parties who are equally to blame under the law. Rule III lists the specific records that must be maintained by the wholesaler in order for the Department to enforce 16-10-305, MCA. Rule IV defines the date of payment for the Department's enforcement of 16-10-305, MCA.

4. Interested parties may submit their data, views, or arguments either orally or in writing to:

Irene LaBare
Department of Revenue
Legal Division
Mitchell Building
Helena, Montana 59620

no later than June 26, 1986.

5. If a person who is directly affected by the proposed adoptions wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Irene LaBare at the above address no later than June 26, 1986.

6. If the agency receives requests for a public hearing on the proposed adoptions from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoptions; from the Administrative Code Committee of the Legislature; from a governmental subdivision, or agency; or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25.

7. The authority of the Department to make the proposed adoptions is based on § 16-10-104, MCA, and § 3, Ch. 139, Laws 1985, and the rules implement § 16-10-305, MCA.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 05/19/86

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF OCCUPATIONAL THERAPISTS

In the matter of the adoption of new rules concerning licensing, procedure, discipline for occupational therapists	))))	NOTICE OF ADOPTION OF NEW RULES FOR PROCEDURE, LICENSING AND DISCIPLINE OF OCCUPATIONAL THERAPISTS

TO: All Interested Persons:

1. On March 27, 1986, the Board of Occupational Therapists published a notice of public hearing to consider the adoption of new rules I (8.35.101), II and III (8.35.201 and 8.35.202) and IV through XVI (8.35.401 through 8.35.413) at page 412, 1986 Montana Administrative Register, issue number 6. The public hearing was held at 10:00 a.m. on April 21, 1986, in the conference room of the Department of Commerce at 1424 9th Avenue, Helena, Montana.

2. The board has adopted the rules as proposed with the following changes recommended by the Legislative Code Committee.

3. They would like the Implementing section in rule VI (8.35.403) Applications for Licensure changed from 37-24-307, MCA to 37-24-302, MCA.

4. The Code Committee would like the following change made in rule VIII (8.35.405) Examinations, subsection (1) and would like the Authority section changed from 37-24-202, 202, MCA to 37-24-201, 202, MCA.

"VIII (8.35.405) EXAMINATIONS (1) For the purposes of section 37-24-304(2), MCA, the board adopts as its examination the examinations in existence on May 30, 1986 offered through the American Occupational Therapists Association.

(2) through (6) will remain as proposed."

Auth: 37-24-201, 202, MCA Imp: 37-24-304, MCA

5. They would also like the following change made to rule IX (8.35.406) Pass/Fail Criteria:

"IX. PASS-FAIL CRITERIA (1) The board will utilize the pass/fail criteria in existence on May 30, 1986 of the American Occupational Therapists Association."

Auth: 37-24-201, 202, MCA Imp: 37-24-304, MCA

6. The Committee would like the following change made to rule XIII (8.35.410) Reciprocity as follows:

"XIII (8.35.410) RECIPROCITY A person licensed under the laws of another state that has licensure requirements at least as stringent as the requirements of Chapter 24, Title 37, MCA, or ~~the person~~ who meets the requirements for certification as an Occupational Therapist registered (OTR) or

a certified Occupational Therapist Assistant (COTA) established by the American Occupational Therapists Association may apply for licensure using the same application and procedures as an in-state licensee."

Auth: 37-24-201, 202, MCA Imp: 37-24-305, MCA

7. The Board concurred with the recommendations of the Code Committee and the changes have been made.

8. No other comments or testimony were received.

BOARD OF OCCUPATIONAL THERAPISTS
DEBRA AMMONDSON, CHAIRMAN

BY: _____
ROBERT J. WOOD, COUNSEL

Certified to the Secretary of State, May 19, 1986.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PHARMACY

In the matter of the amendments of 8.40.403 concerning examination and 8.40.1003 concerning approved programs	NOTICE OF AMENDMENTS OF 8.40.403 EXAMINATION FOR LICENSURE AS A REGISTERED PHARMACIST and 8.40.1003 APPROVED PROGRAMS

TO: All Interested Persons:

1. On March 13, 1986, the Board of Pharmacy published a notice of amendments of the above-stated rules at page 305, 1986 Montana Administrative Register, issue number 5.

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

3. No comments or testimony were received.

BOARD OF PHARMACY
D. WAYNE BOLLINGER, R.PH.
PRESIDENT

BY: _____
ROBERT J. WOOD, COUNSEL

Certified to the Secretary of State, May 19, 1986.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PRIVATE SECURITY PATROLMEN
AND INVESTIGATORS

In the matter of the amendments of 8.50.423 concerning definitions, 8.50.424 concerning temporary employment, 8.50.427 concerning experience requirements, 8.50.431 concerning insurance requirements, 8.50.437 concerning fees, and proposed adoption of new rules I (8.50.438) and II (8.50.439) concerning probationary investigators and assessments	NOTICE OF AMENDMENTS AND ADOPTIONS OF NEW RULES FOR PRIVATE SECURITY PATROLMEN AND INVESTIGATORS

TO: All Interested Persons:

1. On March 27, 1986, the Board of Private Security Patrolmen and Investigators published a notice of public hearing to consider the amendments and adoption of the above-stated rules at page 419, 1986 Montana Administrative Register, issue number 6.

2. Both the Legislative Code Committee and the Legislative Council suggested Authority Extension Sec.10, Chapter 647, Laws of 1985 be added to each amendment and each new rule.

3. The Code Committee also suggested the Implementing sections under 8.50.423 Definitions should be changed to Sec. 37-60-101, 105, 202, 409, MCA.

4. The Board concurred with these suggestions and the changes have been made.

5. The Board amended and adopted the rules as proposed with the following changes:

"8.50.423 DEFINITIONS (7) will be adopted as proposed. (8) will be deleted."

Auth: 37-60-202, MCA Imp: 37-60-101, 105, 202, 409, MCA

"8.50.424 TEMPORARY EMPLOYMENT WITHOUT REGISTRATION OR IDENTIFICATION CARD (1) - (3) and (5) - (8) remain the same.

(4) Any person hired by a licensee under the provisions of 37-60-308 shall be issued a temporary license by the board. Within 5 days of hiring such person, the licensee must provide the employee's name and address to the board, and the licensee must submit a quarterly report to the board detailing the cumulative number of days or hours the temporary employee has been employed."

Auth: 37-60-202, MCA Imp: 37-60-302, MCA

"8.50.431 INSURANCE REQUIREMENTS (1) All licensees regulated by Title 37, Chapter 60, MCA, ~~except private investigators,~~ shall file with the board, a certificate of insurance evidencing a comprehensive general liability coverage for both licensees and employees for bodily injury, and property damage; the broad form comprehensive general liability endorsement which includes the following: personal injury and property damage with endorsement for assault and battery and personal injury, including false arrest, false imprisonment, wrongful entry, mental anguish, defamation and discrimination.

(2) was adopted as proposed."

Auth: 37-60-202, MCA Imp: 37-60-202(8), MCA

"I. (8.50.438) PROBATIONARY PRIVATE INVESTIGATOR Any person who does not meet the requirements for age, employment experience and written examination, as required by 37-60-303(2) and (3), may be sponsored by a licensed private investigator to apply for a probationary registration or I.D. card. In addition to the information listed in an application for licensure, the sponsor shall detail the age, experience or examination qualifications which are lacking and explain how training and experience and direct supervision will be provided during the probationary period, and how long the probationary period is expected to last. A probationary private investigator shall operate only under the authority and permission of the sponsor listed on his probationary registration or I.D. card. The probationary period shall last until the statutory requirements have been met or the probationary card has been terminated by the board."

Auth: 37-60-202, MCA Imp: 37-60-202(13), MCA

6. Rules 8.50.427, 8.50.428, 8.50.437 and new rule II (8.50.439) were adopted exactly as proposed.

7. No other comments or testimony were received.

BOARD OF PRIVATE SECURITY
PATROLMEN AND INVESTIGATORS
CLAYTON BAIN, CHAIRMAN

BY: _____
ROBERT M. WOOD, COUNSEL

Certified to the Secretary of State, May 19, 1986.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF VETERINARY MEDICINE

In the matter of the amendments of 8.64.501 concerning applications and 8.64.503 concerning examinations, and the adoption of new rule under sub-chapter 4 concerning disciplinary actions	)))))	NOTICE OF AMENDMENTS OF 8.64.501 APPLICATION REQUIREMENTS AND 8.64.503 EXAMINATION FOR LICENSURE AND ADOPTION OF NEW RULE I (8.64.405) DISCIPLINARY ACTIONS

TO: All Interested Persons:

1. On March 13, 1986, the Board of Veterinary Medicine published a notice of amendments and adoption of the above-stated rules at page 316, 1986 Montana Administrative Register, issue number 5.

2. The board has amended and adopted the rules as proposed with the following changes suggested by the Legislative Council.

3. In 8.64.501(2), the sentence should read ". . . Interstate Reporting Service or its equivalent." Also in (3)(b) the address for the American Veterinary Medical Association, E.C.F.V.B., should be 930 North Meacham Road instead of 903 North Meacham Road.

4. In 8.64.503 (3) the last sentence should read ". . .or must retake the National Board Examination and/or Clinical Competency Test if the five year allowance period has expired. The word "examination" has been deleted.

5. The Legislative Council also noted that the reasons of necessity for new rule I (8.64.405) were insufficient and suggested the following reasons be included for the adoption of this rule: "This rule is necessary because the Board wishes to be able to impose a variety of sanctions depending on the circumstances of the offense. A formal definition of those sanctions and circumstances is necessary to ensure due process."

3. No other comments or testimony were received.

BOARD OF VETERINARY MEDICINE
WILLIAM D. MCFARLAND, D.V.M.
PRESIDENT

BY: ROBERT J. WOOD, COUNSEL

Certified to the Secretary of State, May 19, 1986.

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

In the matter of a new rule relating to fish plants by the department or commercial hatcheries.	))))	NOTICE OF ADOPTION OF A NEW RULE RELATING TO FISH PLANTS, 12.7.701

To: All interested persons:

1. On March 27, 1986, the Montana Department of Fish, Wildlife and Parks (Department) and the Montana Fish and Game Commission (Commission) published a proposed rule that would authorize certain fish plants by the Department or fish plants by commercial hatcheries as approved by the Department. This notice was published at pages 429-431 of the 1986 Montana Administrative Register, Issue No. 6. The public hearing was rescheduled in a notice published on April 10, 1986 at page 497 of the 1986 Montana Administrative Register, Issue No. 7. On May 15, 1986, a public hearing was held before the Montana Fish and Game Commission in Helena, Montana.

2. The Commission has adopted the rule as proposed with the following changes:

12.7.701 AUTHORIZATION FOR DEPARTMENT AND COMMERCIAL FISH PLANTING (1) The fish species on the following list and those listed in 87-5-714, MCA, may be introduced or transplanted by the department. This includes plants made by the U.S. Fish and Wildlife Service fish hatcheries at the department's request, commercial hatchery stocking of licensed private and commercial ponds when approved by the department, and commercial hatchery stocking of waters on private lands when approved by the department. List of fish species approved:

Common Name	Scientific Name
White sturgeon	Acipenser transmontanus
Pallid sturgeon	Scaphirhynchus albus
Shovelnose sturgeon	Scaphirhynchus platorynchus
Paddlefish	Polyodon spathula
Goldeye	Hiodon alosoides
Mountain whitefish	Prosopium williamsoni
Pygmy whitefish	Prosopium coulteri
Coho salmon	Oncorhynchus kisutch
Westslope cutthroat trout	Salmo clarki lewisi
Yellowstone cutthroat trout	Salmo clarki bouvieri
Atlantic salmon	Salmo salar
Bull trout	Salvelinus confluentus
Splake	Salvelinus fontinalis-Salvelinus namaycush hybrid
Arctic grayling	Thymallus arcticus

Pearl dace	Semotilus margarita
Creek chub	Semotilus atromaculatus
Northern redbelly dace	Phoxinus eos
Finescale dace	Phoxinus neogaeus
Flathead chub	Hybopsis gracilis
Sturgeon chub	Hybopsis gelida
Sicklefin chub	Hybopsis meeki
Lake chub	Couesius plumbeus
Emerald shiner	Notropis atherinoides
Sand shiner	Notropis stramineus
Brassy minnow	Hybognathus hankinsoni
Plains minnow	Hybognathus placitus
Western silvery minnow	Hybognathus argyritis
Fathead minnow	Pimephales promelas
Longnose dace	Rhinichthys cataractae
Redside shiner	Richardsonius balteatus
Smallmouth buffalo	Ictiobus bubalus
Bigmouth buffalo	Ictiobus cyprinellus
Channel catfish	Ictalurus punctatus
Stonecat	Noturus flavus
Burbot	Lota lota
Plains killifish	Fundulus zebrinus
Mosquitofish	Gambusia affinis
Brook stickleback	Culaea inconstans
Sauger	Stizostedion canadense
Iowa darter	Etheostoma exile
Mottled sculpin	Cottus bairdi
Slimy sculpin	Cottus cognatus
Torrent sculpin	Cottus rhotheus
Shorthead sculpin	Cottus confusus
Spoonhead sculpin	Cottus ricei
Walleye-sauger hybrid	Stizostedion vitreum x Stizostedion canadense

(2) The commission concurs, in accordance with its authority under section 87-5-711, MCA, that the department's experiences with and studies of prior fish plantings and the requirements of the commission's rules on fish planting (ARM 12.7.601 and 12.7.602) constitute a scientific investigation required by section 87-5-714, MCA, and the plan required by Section 87-5-713, MCA, for those species listed in Section 87-5-714, MCA, or listed in subsection (1) of this rule.

AUTH: Section 87-5-704 and 87-5-714 IMP: Section 87-5-704, 87-5-711, 87-5-713 and 87-5-714, MCA.

3. The Department presented testimony at the public hearing in favor of the adoption of the proposed rule by the Commission. Written comments were also received. The following is a summary of those comments and the Department's responses:

Comment: The United States Fish and Wildlife Service (Service) requested that the Walleye - Sauger hybrid (Stizostedion vitreum x Stizostedion canadense) be added to the list of fish species. The Department agreed with the request in its oral testimony. The reasons for the request are that the Department and Service have had considerable experience with both parental species, that the Sauger is native to eastern Montana, that the walleye-sauger hybrid is sterile and will not reproduce, and that the hybrid has been used extensively in South Dakota by both the Service and the state and it has also been used in Ohio and Michigan.

Response: The Commission agrees and has added the walleye-sauger hybrid to the list in the rule.

Comment: The Department stated in oral testimony that the scientific name for bull trout was incorrectly given and should be Salvelinus confluentus. The Department also notes that the scientific name for the western silvery minnow was incorrectly given and should be changed to Hybognathus argyritis.

Response: The Commission has corrected the scientific name for bull trout and the western silvery minnow.

Three other persons commented favorable upon the rule and either asked questions about the Department's fish planting program or made suggestions concerning the present fish planting program.

No other comments or testimony were received.

Spencer S. Hegstad, Chairman
Montana Fish and Game Commission

Certified to Secretary of State May 19, 1986.

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

In the matter of the amendment of rules pertaining to public use regulations on department lands and waters.	)))	NOTICE OF THE AMENDMENT OF ARM 12.8.202, 12.8.204, 12.8.208, 12.8.210 and 12.8.212

TO: All interested persons

1. On March 27, 1986, the Montana Department of Fish, Wildlife and Parks (Department) and the Montana Fish and Game Commission (Commission) published proposed amendments to ARM 12.8.202, 12.8.204, 12.8.208, 12.8.210 and 12.8.212 relating to public use regulations on Department lands and waters. The notice was published at pages 425-428 of the 1986 Montana Administrative Register, Issue No. 6.

2. No comments or testimony were received nor were any requests for a public hearing received.

The Department and Commission have adopted the rules as proposed.

Ronald G. Marcoux
Associate Director
Department of Fish,
Wildlife and Parks

Certified to the Secretary of State May 19, 1986.

BEFORE THE DEPARTMENT OF STATE
LANDS OF THE STATE OF MONTANA

In the matter of the adoption of rules for consultation by the Department of State Lands with the State Historic Preservation Office under the Antiquities Act.	)))))	NOTICE OF ADOPTION OF RULES FOR DSL'S CONSULTATION WITH SHPO

To: All Interested Persons

1. On November 29, 1985, the Department of State Lands published notice of a proposed adoption of rules concerning consultation with the State Historic Preservation Officer at page 1849 of The Montana Administrative Register, 1985 Issue No. 22.

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

26.2.801 (RULE I) POLICY STATEMENT The purpose of this subchapter is to implement Title 22, Chapter ~~4~~ 3, 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.

26.2.802 (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) "Effect" means a change in the integrity of location, design, materials, workmanship, feeling or association of an antiquity that contributes to its significance. The term includes isolation from or alteration of the surrounding environment, neglect of the property resulting in its deterioration or destruction, transfer or sale without adequate conditions or restrictions regarding preservation, maintenance or use, and destruction or alteration, either partial or total. For heritage properties only, the term includes introduction of visual, audible or atmospheric elements that are out of character with the property or alter its setting.

~~(3)~~ (4) "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)~~ (5) "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 approved activity ~~would result in substantial physical change below or on the surface of the earth, including buildings, structures or sites~~ will or might have an effect on antiquities or the department decision to proceed with an action that will or might have an effect on antiquities. "Department action" does not include decisions regarding a state mineral estate where the surface estate is not in state ownership.

(6) "Known antiquities" means antiquities on record with SHPO, the department, or the Montana statewide archeology files.

~~(5)~~ (7) "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)~~ (8) "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.

(9) "SHPO" means the historic preservation office provided for in 2-15-1512, MCA.

(10) "Significant," as used in subsection (7) above, means the quality in American history, architecture, archeology, or culture that is present in districts, sites, structures, or objects of state and local importance that possess integrity of location, design, setting, materials, workmanship, feeling, and association and:

(a) that are associated with events that have made a significant contribution to the broad patterns of our history;

(b) that are associated with the lives of persons significant in our past;

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.

26.2.803 (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~~ physical characteristics of the proposed action area, including slope, vegetation, availability of game, and proximity of water, if known~~;~~, and a topographic map, if available;

(e) known ~~or possible~~ antiquities and districts, sites, structures, and objects that the department determines may be antiquities on the affected state lands; ~~and~~

(f) the effect on known antiquities and districts, sites, structures, and objects listed pursuant to (e) above; and

~~(f)~~ (g) 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~~,~~ or feature, the department shall also provide the following to SHPO:

(a) photographs of the ~~building or~~ structures or feature; and

(b) information, including dates, on construction, construction materials and their origin, dimensions, previous use, ~~and~~ alterations, integrity of setting, and physical integrity of the structure, if available.

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

(a) determine whether the state lands to be affected by the department action have been ~~professionally~~ adequately surveyed ~~in a systematic manner~~ and an adequate record of antiquities and other sites, structures, and objects prepared;

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

(c) determine the relative value of any districts, sites, structures, and objects identified under (1)(e) above; and

~~(c)~~ (d) 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, including data retrieval, recordation, or interpretation;

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

(iv) abandonment of the proposed project; ~~and~~ or

(v) data retrieval and recordation of the antiquity if the effect is unavoidable.

~~(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 delivery of 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.

26.2.804 (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)~~ (g) 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~~ antiquities 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 and the level of identification and protection of the antiquities that will be required. The department may not proceed with the proposed action until five working days after written notice to SHPO. The department shall afford or require for the antiquities the highest degree of identification and protection feasible within the constraints of time, personnel, budget, and its trust responsibilities.

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

(a) the department's determination is to implement all SHPO's recommendations, if any, 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 and the level of identification and protection of antiquities that will be required. The department shall afford or require for the antiquities the highest degree of identification and protection feasible within the constraints of time, personnel, budget, and its trust responsibilities. The department may not proceed with the proposed action until five working days after delivery of written notice to SHPO. If ~~it~~ the department within those five working days receives written notice from SHPO that SHPO continues to disagree with the department's decision, the department shall consult with SHPO in person or by telephone. The department shall document the substance ~~of this~~ of SHPO's comments and the department's response and may then proceed with ~~the~~ mitigation measures and ~~proposed~~ the action.

26.2.805 (RULE V) ~~PROFESSIONAL CULTURAL RESOURCE~~ POST-SURVEY CONSULTATION (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~~ receipt of the final survey report. An

analysis of site value must be included in the survey report. 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; and comments on the plan of avoidance, mitigation, or documentation.

~~(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, or documentation within ~~10~~ 15 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, if any, the department shall notify SHPO of its determination in writing, implement the recommendations, 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 and the level of identification and protection of antiquities that will be required. The department shall afford or require for the antiquities the highest degree of identification and protection feasible within the constraints of time, personnel, budget, and its trust responsibilities. The department may not proceed with the proposed action until five working days after delivery of written notice to SHPO. If ~~it~~ the department receives written notice from SHPO that SHPO continues to disagree with the department's decision, the department shall consult with SHPO in person or by telephone. The department shall document the substance of SHPO's comments and the department's response and may then proceed with mitigation and the action.

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

26.2.807 (RULE ~~VII~~ VI) DISCOVERY OF ANTIQUITIES AFTER COMMENCEMENT OF PROJECT (1) As is required in part by 22-3-435, ~~Any~~ a person who discovers antiquities on state lands administered by the department or who finds that an operation licensed or otherwise entitled by the ~~state~~ department may damage antiquities on state lands administered by the department shall immediately cease any activity that may affect the antiquities, 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 possible antiquities to immediately halt and not resume until the consultation process is completed;

(b) conduct a preliminary evaluation to determine whether ~~antiquities are present~~ the properties identified are antiquities and, if so, appropriate protection or mitigation measures; and

(c) notify SHPO of the discovery and ~~make a~~ request ~~for an assessment of whether antiquities are present~~ concurrence with preliminary evaluations and any mitigation measures proposed.

(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.

26.2.808 (RULE ~~VIII~~ VII) DEPOSIT OF MATERIALS RELATED TO ANTIQUITIES SITES The department shall deposit with SHPO all inventory reports produced during site or ~~building~~ structure identification and evaluation, and other pertinent ~~materials~~ documents generated during mitigation, unless otherwise agreed by SHPO. These materials include maps, architectural plans, photographs, and inventory site forms~~, and cultural materials that may be processed and labeled for archival and museum storage by SHPO~~. The department shall, when possible, provide for the deposition of cultural and paleontological materials through curation agreements with the Montana historical society, the Montana university system, or another college, university, or museum.

26.2.810 (RULE ~~IX~~ VIII) ANTIQUITIES PERMIT REQUIREMENT As provided in 22-3-432, ~~No~~ no person may excavate, remove, or restore any antiquities on state land administered by the department 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.~~

26.2.812 (RULE ~~X~~ IX) 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.

26.2.813 (RULE ~~XI~~ X) EMERGENCY ACTION The department may take or permit action substantially altering antiquities on state lands that it administers without consultation with the SHPO in an emergency situation. The department shall provide whatever protection and recordation is possible, given the exigencies of the situation. Within ~~30~~ five days or as soon thereafter as possible following initiation of the action, the department shall notify SHPO of the need for and the results of the action.

3. The Department received written comments from The State Historic Preservation Officer (SHPO), the Montana Archeological Association (MAA), Historical Research Associates (HRA), the Western Area Power Association (WAPA), Montana Power Company (MPC), Ethnoscience (Ethno), Region 1 of the U.S. Forest Service (U.S.F.S.), Barb Springer Beck (Beck), and the staff of The Administrative Code Committee (Legislative Council). At the public hearing on the rules held on December 30, 1985 in Helena, the Department received testimony from MPC and the Montana Mining Association (MMA). Finally, the Department consulted with SHPO at all significant stages in development of the rules. A summary of the comments received and the Department's responses are as follows (citations in the comments refer to the numbering system contained in the rules as initially proposed):

(1) COMMENT: DSL should adopt these procedures for its mine permitting function as well as its administration functions. (USFS)

RESPONSE: The Montana Antiquities Act, which authorizes the Department to adopt these rules, applies only to state lands. It does not authorize the Department to adopt similar procedures in administration of the mine land reclamation act on private or federal lands.

(2) COMMENT: The proposed rules omit the requirement for determination of site significance. Without this determination, DSL would be required to consider all sites. (USFS, Beck)

RESPONSE: The proposed rules require the Department to protect "antiquities", which include "heritage properties" and "paleontological remains." The definition of these latter terms incorporate the concept of significance by providing that heritage properties have significance and that paleontological remains are rare and critical to scientific research.

(3) COMMENT: For many transmission line projects, WAPA is required to consult with SHPO. The rules should provide that DSL/SHPO consultation is not required in that situation. (WAPA)

RESPONSE: Rule IX provides that DSL and SHPO may, by a Memorandum of Understanding, adopt alternative procedures on a project type basis. This provides an adequate procedure to avoid dual antiquities requirements for WAPA.

(4) COMMENT: The rules should identify the responsibilities of an applicant for an easement across state lands. When must an applicant supply the information necessary for identification of antiquities and mitigation? When the state or a lessee requests electrical services, who is responsible for this information? This includes provision of gas or electrical services to state lessees. (MPC)

RESPONSE: The proposed rules provide procedures for DSL/SHPO consultation. They do not regulate applicants for easements and other land use authorizations. The department's surface management rules regulate those applicants. The department is currently drafting proposed amendments to its surface management rules. Your concern will be addressed in these amendments.

(5) COMMENT: Antiquities sites are vulnerable to looting. The Department should establish procedures to maintain confidentiality of all site location information. (MPC)

RESPONSE: DSL agrees that location of certain sites should remain confidential. However, a confidentiality provision may violate the public's right to know granted by Section 9, Article II of the Montana Constitution. The Department is, therefore, not proposing a confidentiality rule.

(6) COMMENT: The time for SHPO's response to consultation request is unreasonably short, given SHPO's workload and responsibilities to other agencies. A twenty-day response time should be adopted. (Beck)

RESPONSE: The timeframes in the proposed rules are established to allow DSL to respond to land use authorization requests in a timely fashion. SHPO has not requested that these timeframes be lengthened. The Department has provided for extension for large or complex consultation request.

(7) COMMENT: The references throughout the rules to "buildings or structures" should be reduced to "structures" because all buildings are structures. (Beck)

RESPONSE: The redundant language has been eliminated. Also, "building" has been replaced with "structure."

(8) COMMENT: In Rules III, IV, and V, SHPO is given the opportunity to respond to DSL consultation requests and DSL's response to SHPO's requests. Due to the short time allowed for SHPO comments, these rules should be amended to begin the response period upon delivery of DSL's communication. Currently the rules could be interpreted to commence the response period upon mailing. (SHPO)

RESPONSE: The suggested language has been added.

RULE I

(1) COMMENT: The last line of Rule I provides a loophole through which much activity could occur without mitigation, preservation, or protection. The words "when feasible" should be deleted. (HRA)

RESPONSE: Section 22-3-424(1) provides that the antiquities rules shall provide for the identification and preservation of antiquities to avoid, "whenever feasible," actions that substantially alter antiquities on lands owned by the state. Elimination of the language objected to is not in accordance with legislative intent and further would impede the Department in fulfilling its school trust responsibilities.

(2) COMMENT: The rule incorrectly cites "Chapter 1" of Title 22, instead of Chapter 3. (Legislative Council)

RESPONSE: The citation has been corrected.

RULE II

(1) COMMENT: The proposed rules purport to apply to all "state lands". They should be limited to apply only to lands administered by DSL. (Legislative Council, MMA)

RESPONSE: Rules III through VI apply to each "department action" as that term is defined in Rule II(4). That definition includes only those actions for which an easement lease or other certificate from the Department is necessary for conducting activities on state lands. Therefore, these rules are generally limited to lands administered by the Department. Language limiting the scope of Rules VII, IX and XI has been added.

(2) COMMENT: The acronym "SHPO" should be defined. (Legislative Council)

RESPONSE: A definition has been added.

(3) COMMENT: The term "significant" used in Rule II(5) should be defined. National Register eligibility criteria could be used. (Ethnoscience, MAA)

RESPONSE: A definition closely paralleling the National Register criteria has been added.

(4) COMMENT: In Rule II(4), the term "substantial physical change" should be clarified (MPC). The review of all surface activities, as required in federal regulations, is better than leaving it to the judgment of DSL. (HRA)

RESPONSE: A review of all activities resulting in physical change would require unnecessary consultations. The definition has been changed to include any physical change that will or could affect antiquities.

(5) COMMENT: The term "heritage property" should be replaced by "cultural resource" to be consistent with widely accepted terminology within historical and archeological

professions. Rule V and subsequent rules use the accepted terminology. (HRA)

RESPONSE: The Montana Antiquities Act requires protection of both heritage property and paleontological remains. The term "antiquities" is preferred to "cultural resources" because the latter term does not include paleontological remains. The references to "cultural resources" in Rule V and subsequent rules have been amended.

(6) COMMENT: A definition of the term "survey" should be added. (MPC)

RESPONSE: There are different levels of professional surveys. Which level is appropriate depends upon the situation. If SHPO is of the opinion that a certain level of survey is appropriate, it may include a recommendation in its consultation response.

(7) COMMENT: A definition of the term "known antiquities" should be added. (MPC)

RESPONSE: The definition proposed by the commentor has been added.

(8) COMMENT: The definition of "heritage property" should include a reference to evaluation against National Register criteria and may wish to add a 50-year limit. (Beck)

RESPONSE: Significance criteria based on the federal rules has been added. See response to Comment (3). The Department does not wish to add a 50-year limit because it is possible that sites or objects less than 50 years in age may be significant.

(9) COMMENT: The definition of "department action" should include DSL initiated actions. (SHPO)

RESPONSE: The requested change has been made.

RULE III

(1) COMMENT: The steps in Rule III do not seem to relate to the usual cultural compliance steps as clearly as they could. (USFS)

RESPONSE: These rules are based upon the state rather than the federal statute and are tailored to DSL administration of its trust land.

(2) COMMENT: We question whether ten working days is adequate for SHPO to respond and suggest 15 working days be substituted. (MAA, HRA)

RESPONSE: The timeframe allows DSL to respond to applications for land use authorization in a timely manner. SHPO has not requested additional time. The rules do provide for extensions in time for large or complex consultation requests.

(3) COMMENT: In Rule III(1)(e), the term "possible antiquities" is a vague term that requires further explanation. Also, DSL should determine the relative value of known antiquities. (MPC)

RESPONSE: The rule has been amended by eliminating the term. At this stage, DSL will usually have no opinion as to relative value. Relative value will be determined at the time of survey.

(4) COMMENT: In Rule III(1)(f), the proposal for mitigation measures should be preceded by a report as to what effect the proposed action will have on antiquities. Criteria of effect need to be identified. (MPC, Beck)

RESPONSE: DSL will not always have the information on effects available at this stage. However, language requiring the effect to be included, if adequate information is available, has been added preceding the proposed mitigation action. Criteria for determining effect have also been added in Rule II.

(5) COMMENT: The term "cultural resources" is used without definition and should be replaced with "antiquities". (MPC)

RESPONSE: The change has been made.

(6) COMMENT: In Rule III(3)(c), an option for accepting the effect as unavoidable and criteria for protecting known antiquities should be added. (MPC)

RESPONSE: Language indicating that an effect may be unavoidable has been added. Criteria for protecting known antiquities have not been added because protection measures must be taken on a case-by-case basis considering the circumstances and DSL's trust responsibilities.

(7) COMMENT: In Rule III(3)(b), the word "state" should be inserted for "lands" to indicate that the rules apply only to state lands. (MPC)

RESPONSE: Some projects involve both state and private or federal lands. For this reason, the requested language has been added to (3)(a) and (3)(b).

(8) COMMENT: In Rule III(3)(c)(ii), the term "protective stipulations" is a vague term that should be expanded to include data retrieval, recordation or interpretation. (MPC)

RESPONSE: The recommended language has been incorporated into the rule.

(9) COMMENT: The Rule III(3)(d) determination of relative value should precede the Rule III(3)(c) determination on proposed mitigation. SHPO's function should be to review the DSL's relative value determination. Also, the term "both sites or buildings" should be replaced with "heritage properties". (MPC)

RESPONSE: Rule III has been amended to require DSL to make a relative value determination for known antiquities in its request for initial consultation. DSL feels it is appropriate to request SHPO concur in the Department's relative value determination on previously identified antiquities. The term "antiquities" has been substituted for "sites or buildings." "Antiquities" covers both heritage property and

paleontological remains. Subparagraph (d) has been placed ahead of subparagraph (c) and the subparagraphs have been re-lettered.

(10) COMMENT: In subsection (1), the term "surface or subsurface impacting" should be inserted before "department action" so that DSL is not obligated to report every type of action. (Beck)

RESPONSE: The suggested language is already incorporated in the definition of "department action" contained in Rule II.

(11) COMMENT: The legal description required in Rule III(1)(b) should be expanded to include portions of a project located on private land. (Beck)

RESPONSE: The Montana Antiquities Act does not authorize the Department to request information for private lands.

(12) COMMENT: In order to give SHPO adequate information, Rule III(1)(d) should be expanded to include more physical characteristics of the proposed action area, such as availability of game and proximity to water. (Beck)

RESPONSE: The suggested additions have been incorporated and a requirement for submission of a topographic map, which would provide some of this information, has also been added.

(13) COMMENT: Rule III(2)(a) should be expanded by replacing both "building or structure" with "photographs of the structures or features." (Beck)

RESPONSE: The suggested language has been inserted.

(14) COMMENT: Rule III(2)(b) does not require sufficient information. Also included should be "dimensions, construction material, origin of construction materials, integrity of setting, and physical integrity of the structure." (Beck)

RESPONSE: The suggested language has been added.

(15) COMMENT: DSL should add to paragraph two a subparagraph "c" that reads: "a preliminary assessment of affected sites for eligibility to the National Register." (Beck)

RESPONSE: At the initial consultation phase, DSL almost never has information adequate to determine eligibility. That information is generated with the on-site inspection and is considered in the post-survey consultation process.

(16) COMMENT: In subsection (3), the existing subparagraph (a) should be replaced with "determine whether information provided by the Department is sufficient and of professional quality." (Beck)

RESPONSE: Language substantially similar to the suggested language has been substituted.

(17) COMMENT: In subparagraph (3)(b) the term "systematic" is redundant and should be omitted. (Beck)

RESPONSE: It has been omitted.

(18) COMMENT: Paragraph (3)(c) is inappropriate because eligibility has not been determined. (Beck)
RESPONSE: See response to Comment (9).

(19) COMMENT: Subparagraph (3)(d) should be clarified to indicate what "sites or buildings" are intended. (Legislative Council)
RESPONSE: Clarifying language has been added.

(20) COMMENT: In (3)(a) and (c), DSL has used the term "antiquities." A broader term should be used in (3)(a) because SHPO's determination should not be limited to antiquities. In (3)(c), a broader term should be used because it is the relative value determination that identifies antiquities. (SHPO)
RESPONSE: The requested changes have been made.

RULE IV

(1) COMMENT: Paragraphs (1)(b) and 2(b) should be amended to require that DSL's reasons for rejection of SHPO's recommendations may be based only on professionally defensible grounds. DSL should not be able to reject SHPO's recommendations on the basis of lack of time or money. (Ethnoscience) DSL's reasons should be confined to active consideration of cultural resource values. Although DSL is free to choose its own courses of action, DSL should provide whatever protection or mitigation it can, considering the constraints of time and money. These might take the form of identifying varying levels of impact and concentrating on high level impacts or conditions on easements or leases allowing DSL to perform an inventory at a later time. (SHPO)
RESPONSE: Time and monetary constraints cannot be avoided. In certain instances DSL's trust responsibilities will unavoidably conflict with protection of antiquities. Language requiring DSL to document that its proposed course of action affords the highest feasible level of restraints identification and protection given the restraints of time, money, workload, and trust responsibilities has been added.

(2) COMMENT: Paragraph (1)(b) should be modified to provide that further negotiations between SHPO and DSL may occur at the request of either in an attempt to resolve the disagreement. (MAA, SHPO) An additional 10 days in requirement for documentation of the consultation during that 10-day period should be added. (MAA)
RESPONSE: Sufficient opportunity for consultation has been provided in Rules III and IV. The purpose of the five-day waiting period is to allow SHPO to evaluate the DSL's reasons and allow SHPO additional input. Language specifically stating that SHPO may give additional input has been added. Also, language adding that DSL shall amend its rationale if it changes its response to SHPO's recommendations has been added. However, the Department is of the opinion that five days is adequate for this process and that additional time would interfere with the DSL's orderly and timely administration of state lands. SHPO has not requested additional time.

(3) COMMENT: The term "cultural resources" in Rule IV should be replaced by "antiquities." (MPC)
RESPONSE: The substitution has been made.

(4) COMMENT: DSL should clarify what is entailed in a cultural resource survey so that the contractors can submit acceptable work. (Beck)
RESPONSE: The professional cultural resource survey (now "professional antiquities survey") entails different levels of survey depending upon the circumstances. Part of the function of a cultural resource professional is to determine the scope of the survey required. A definition broad enough to include all categories of survey that might be required would be too broad to be useful.

RULE V

(1) COMMENT: In subsection (1) DSL should be required to provide SHPO with analysis of site impact and value to which it can respond. (SHPO) The last sentence in subsection (1) delegates more responsibility to SHPO than it needs to. DSL should recommend to SHPO which properties are antiquities and seek its concurrence with the recommendation. (MAA)
RESPONSE: The recommended language has been added.

(2) COMMENT: Rules V and VI should be combined. It would be simpler for DSL to seek SHPO comments on survey adequacies, site values, project effects, and proposals for avoidance or mitigation at the same time. (SHPO)
RESPONSE: The rules have been combined and a 15-day review period adopted.

(3) COMMENT: In subsection (1), the requirement that the Department file all documents with SHPO "immediately upon completion of the survey" is unreasonable. DSL should omit the quoted phrase, omit "immediately", or substitute for the quoted phrase "immediately on receipt of the final survey report." (MAA, MPC, Beck)
RESPONSE: The language quoted above has been substituted.

RULE VI

(1) COMMENT: With regard to paragraph (3)(b) DSL should incorporate language similar to that recommended in Comment (1) to Rule V. (SHPO, Ethnoscience)
RESPONSE: Language similar to that inserted in response to the above-referenced comment has been inserted in (3)(b).

(2) COMMENT: For reasons cited in Comment (1) on Rule IV, the language suggested for Rule IV(2)(b) should be added to Paragraph (3)(b) of Rule VI. (SHPO)
RESPONSE: The proposed language has been added.

(3) COMMENT: Rules V(1) and VI(1) should be combined and a 15-day response period established. (MAA, SHPO)
RESPONSE: Accepted. See response to Comment (2) on Rule V.

(4) COMMENT: Proposed mitigation measures as well as assessment of effect required in subsection (1) should actually be included as part of survey report submitted under Rule V(1). (MAA)

RESPONSE: This language has been added in the process of combining Rules V and VI and responding to comments on Rule V.

(5) COMMENT: In Paragraph 3(a), the Department should be required to notify SHPO, then implement the recommendation, then document that the Department has done so, and then proceed with the action. (Beck, MPC))

RESPONSE: The order of wording has been changed in accordance with the comment.

(6) COMMENT: In Paragraph (3)(b), provision should be made for further negotiation in an attempt to reach a solution acceptable to both agencies. (MAA, Beck)

RESPONSE: In combining Rules V and VI and responding to similar comments on Rule V, the DSL has incorporated language suggested in this comment.

(7) COMMENT: The term "cultural resources" should be replaced with "antiquities." (MPC)

RESPONSE: The substitution has been made.

(8) COMMENT: Criteria of effect need to be developed. (MPC)

RESPONSE: These criteria have been adopted. See response to Comment (4) to Rule III.

RULE VII

(1) COMMENT: Subsection (1) is a restatement of 22-3-435, MCA. The statutory source of the pertinent language should be indicated as required by 2-4-305(2). (Legislative Council)

RESPONSE: The statutory source has been added.

(2) COMMENT: Use of the phrase "shall take all reasonable steps to preserve the antiquities" is too weak. Also, a person who discovers antiquities will not be in a position to preserve them. (Beck, SHPO)

RESPONSE: The quoted language is merely a restatement of 22-4-235. However the rule has been amended to add that a person who discovers antiquities must immediately cease the activity and notify the Department and SHPO.

(3) COMMENT: In Paragraph 2(a) the word "possible" should be inserted before "antiquities." (MAA)

RESPONSE: The word "possible" has been added.

(4) COMMENT: In Paragraph 2(b) the present language should be replaced with "conduct a preliminary evaluation to determine if the properties identified are antiquities, and to recommend mitigation measures if appropriate." (MAA)

RESPONSE: Substitution of substantially similar language has been made.

(5) COMMENT: In paragraph (2)(c) the wording should be changed to "request concurrence with preliminary evaluations and any mitigation measures proposed." (MAA, Beck)
RESPONSE: The proposed language has been substituted for the pertinent existing language.

(6) COMMENT: The phrase "reasonable steps to preserve" is a vague term that requires further explanation and the person who discovers antiquities should be required to protect the antiquities by means of avoidance mitigation, data retrieval, or interpretation when feasible. (MPC)
RESPONSE: The objectionable language is statutory. However, DSL has added language requiring immediate cessation of operations. See response to Comment (2) above.

(7) COMMENT: This section is conjectural and ambiguous. Because even the possibility of finding antiquities can halt the project, this clouds any development in uncertainty and makes it unlikely that anyone would invest in such an insecure venture. Present reclamation laws are adequate and no expansion is necessary. (MMA)
RESPONSE: Present reclamation laws do not provide for preservation of antiquities to the extent required by the Montana Antiquities Act. In a situation in which an ongoing operation would be required to shut down, the Department would take immediate action to avoid a prolonged interruption. Given the requirements for a survey before initial disturbance, the situations in which this rule comes into play should be few. Given the directives of the Montana Antiquities Act, the interests of protecting antiquities outweighs the small possibility that an operation would be hindered.

RULE VIII

(1) COMMENT: This rule should be reworded to permit decisions regarding deposition of materials with the Montana Historical Society to be accomplished on the basis of curation agreements developed with the Historical Society. (SHPO)
RESPONSE: The rule has been amended accordingly.

RULE IX

(1) COMMENT: Rule IX is in part a restatement of 22-3-432, MCA. The statutory source of the pertinent language should be indicated as required by 2-4-305(2). (Legislative Council)
RESPONSE: The statutory source has been indicated.

(2) COMMENT: The rule must be clarified as to what types of testing are allowed without a permit. (Beck, MAA, SHPO) Section 22-3-432 does not appear to contemplate any excavation, removal, or restoration of any antiquity without a permit. The provision that allows such activity should be eliminated or

rewritten to be consistent with the statute. (Legislative Council)

RESPONSE: Because the statute does not appear to allow any exceptions, the second sentence has been eliminated.

(3) COMMENT: SHPO is not a licensing agency. Any permits necessary are already taken care of under existing reclamation laws. (MMA)

RESPONSE: Section 22-3-432 provides that no person may excavate, remove or restore any antiquities on state lands unless he has secured an antiquities permit from SHPO.

RULE X

No comments received

RULE XI

(1) COMMENT: The rule should contain some indication as to what constitutes an emergency action. Notification to SHPO should occur immediately, or at most, within 5 days. In addition, some steps should be taken to record or protect antiquities even though SHPO might not be involved. Perhaps the Montana Archeological Society or Montana Archeological Association could be involved on a voluntary basis. (HRA)

RESPONSE: A definition of emergency is contained in Rule II(3). The time for notice has been cut to five days "or as soon thereafter as possible" to allow for those situations in which notice within five days is not possible. A requirement for a recordation or protection "when possible" has been added.

4. The authority for the proposed rules is 22-3-424(1), MCA. The rules implement 22-3-421, 22-3-424, 22-3-432 and 22-3-435.

Dennis Hemmer, Commissioner

Certified to the Secretary of State May 19, 1986.

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

In the matter of the amendment of Rule 46.12.575 and adoption of rules pertaining to family planning services	)))))	NOTICE OF THE AMENDMENT OF RULE 46.12.575 AND ADOPTION OF RULES (I) 46.12.576 AND (II) 46.12.577 PERTAINING TO FAMILY PLANNING SERVICES

TO: All Interested Persons

1. On March 27, 1986, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.575 and the adoption of rules pertaining to family planning services at page 449 of the 1986 Montana Administrative Register, issue number 6.

2. The Department has amended the following rule as proposed with the following changes:

46.12.575 FAMILY PLANNING SERVICES (1) Family planning services are available without limitation and may include prescribed drugs, ~~the~~ THE services ~~of~~ OF ~~provided by~~ a ~~doctor~~ PHYSICIAN, ~~prescribed drugs and a family planning agency.~~ or services provided by local delegate agencies of the family planning program of the department of health and environmental sciences. These services are:

Subsections (1)(a) through (1)(c) remain as proposed.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101 and 53-6-141 MCA

3. The Department has adopted the following rules as proposed with the following changes:

46.12.576 FAMILY PLANNING SERVICES, REQUIREMENTS These requirements are in addition to those contained in ARM 46.12.301 through 46.12.308.

(1) Contraceptive clinic services ~~must be performed by a physician,~~ are the services of a physician or the services of the local delegate agencies of the family planning program of the department of health and environmental sciences.

Subsections (2) through (4) remain as proposed.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101 and 53-6-141 MCA

46.12.577 FAMILY PLANNING SERVICES, REIMBURSEMENT

Subsections (1) through (3) remain as proposed.

(4) Contraceptive supplies

Progestasert IUD -	~~$14.70~~ 31.00
Diaphragm -	$ 8.00

Contraceptive foam, jelly, creme -	$ 4.50
Condoms, 1 dozen -	$ 4.00
Oral contraceptives, 1 cycle, pills -	$ 4.00
Contraceptive sponge -	$ 1.00

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101 and 53-6-141 MCA

4. The Department has thoroughly considered all commentary received:

COMMENT: Several parties commented that they were opposed to the proposed change in ARM 46.12.575 regarding "services provided by a doctor". They noted that this proposed language would restrict the delivery of family planning services to services provided only by a physician and would not allow for reimbursement of family planning services provided by nurse practitioners or nurse midwives. Under the language in the current rule, which reads "the services of a doctor", nurse practitioners or nurse midwives may be delegated by the physician to perform those services.

RESPONSE: The department agrees. The wording of this phrase has been changed to read, "the services of a physician." The change in the wording did not intend to restrict these services only to physicians, nor did it intend to change the practice behavior of physicians being allowed to delegate to nurse practitioners and other licensed professionals who are operating under the supervision and protocols of a physician.

COMMENT: Several parties commented that they were opposed to the statement in Rule I that "Contraceptive clinic services must be performed by a physician." This proposed requirement would limit family planning services to only those services performed by a physician.

RESPONSE: The department agrees. The wording of this phrase has been changed. This changed wording is consistent with the phrasing in ARM 46.12.575 and is not intended to change or restrict services provided by licensed individuals operating within the scope of their licensure.

COMMENT: "The reimbursement rate for the Progestasert IUD is listed as $14.70. The current cost is $38.30 to family planning programs. I would like to see that raised to that cost amount. The cost increase has come about since the other IUDs were pulled off the market."

RESPONSE: The department has contacted the manufacturer (ALZA Corporation) about the price of Progestasert IUDs. The lowest price quoted for this device was $31.00 in quantities of 36. The reimbursement rate in the rule for Progestasert will be changed to reflect this $31.00 price as the lowest quoted amount.

We appreciate the various comments from individuals, agencies, and associations to clarify the specific wording in this rule.

Dave Lewis

Director, Social and Rehabilitation Services

Certified to the Secretary of State May 16, 1986.

VOLUME NO. 41 OPINION NO. 62

CONSERVATION DISTRICTS - Application of Streambed Act permit process to irrigator altering streambed to divert water;
NATURAL RESOURCES - Application of Streambed Act to irrigator altering streambed to divert water;
SOIL AND WATER CONSERVATION - Application of Streambed Act permit process to irrigator altering streambed to divert water;
WATER AND WATERWAYS - Application of Streambed Act permit process to irrigator altering streambed to divert water;
ADMINISTRATIVE RULES OF MONTANA - Sections 36.2.404 to 36.2.406;
MONTANA CODE ANNOTATED - Sections 75-7-102, 75-7-103, 75-7-113, 75-7-117, 75-7-122, 75-7-123;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 15 (1977), 39 Op. Att'y Gen. No. 2 (1981), 40 Op. Att'y Gen. No. 71 (1984).

HELD: In accordance with the Natural Streambed and Land Preservation Act of 1975, an irrigator must apply for a 310 permit before altering a stream channel to divert water.

19 May 1986

Ted L. Mizner
Powell County Attorney
Powell County Courthouse
Deer Lodge MT 59722

Dear Mr. Mizner:

You have requested my opinion on the following question:

> Does the Natural Streambed and Land Preservation Act of 1975 require an irrigator to apply for a 310 permit before machinery is used to maintain or improve an earthen diversion dam?

This question evolved from earlier questions presented to you by the Deer Lodge Valley Conservation District.

Their concerns stem from the expressed need to enter stream channels during periods of low water to capture flowing water for diversion through their headgates and into their ditches.

The Natural Streambed and Land Preservation Act of 1975, §§ 75-7-101 to 124, MCA (hereinafter Streambed Act), was enacted to protect and preserve rivers and adjacent lands and to minimize soil erosion and sedimentation. The Streambed Act established a permit process whereby individuals who intend to physically alter a stream or its bed and banks must present notice to the supervisors of the local conservation district. The supervisors review the proposed project and issue what is known as a "310 permit" for approved projects; Senate Bill 310 was the legislative source of the Streambed Act.

While the Streambed Act with its 310 permit process has been in effect for over a decade, there have been no reported judicial decisions construing its parameters. This situation exists despite the apparent controversy the Streambed Act evoked among ranching and irrigating interests during its consideration by the Legislature. As reflected in the minutes of the Senate and House committees on natural resources, ranchers and farmers objected in 1975 to a permit process that would regulate irrigators attempting to get water into their headgates during periods of low water. These concerns persist today, as your opinion request indicates.

The general statutory scheme of the Streambed Act has been addressed in prior opinions of the Attorney General. See 40 Op. Att'y Gen. No. 71 (1984); 39 Op. Att'y Gen. No. 2 at 9 (1981); 37 Op. Att'y Gen. No. 15 at 56 (1977). The keystone of the Streambed Act is its policy section, § 75-7-102, MCA:

> Policy. It is the policy of the state of Montana that its natural rivers and streams and the lands and property immediately adjacent to them within the state are to be protected and preserved to be available in their natural or existing state and to prohibit unauthorized projects and in so doing to keep soil erosion and sedimentation to a minimum, except as may be necessary and appropriate after due consideration of all factors involved. Further, it is the policy

> of this state to recognize the needs of irrigation and agricultural use of the rivers and streams of the state of Montana and to protect the use of water for any useful or beneficial purpose as guaranteed by The Constitution of the State of Montana.

The second sentence of this policy paragraph which recognizes the "needs of irrigation" was added to Senate Bill 310 by an amendment shortly after the bill was referred to the Senate Committee on Natural Resources and Fish and Game. Senate Journal, 44th Sess., 586 (1975). This policy section is pivotal to the application of the permit process because a "project" for purposes of invoking the 310 review is defined with reference to that section:

> "Project" means a physical alteration or modification of a stream in the state of Montana which results in a change in the state of the stream in contravention of 75-7-102.

§ 75-7-103(5), MCA.

The Legislature delegated rulemaking authority to the Board of Natural Resources and Conservation. § 75-7-117, MCA. The resulting rules appear at sections 36.2.401 to 406, ARM. Of importance to your inquiry is section 36.2.405, ARM, which details what actions constitute a project:

> 36.2.405 PROJECTS (1) Projects shall include the following within a project area:
>
> (a) channel changes;
> (b) new diversions;
> (c) riprap and other streambank protection projects;
> (d) jetties;
> (e) new dams and reservoirs;
> (f) commercial, industrial, and residential development.
>
> (2) A district may add to this list of projects in its adopted rules setting standards and guidelines for projects.

Section 36.2.405, ARM, is qualified by section 36.2.406, ARM, which specifically exempts certain irrigation-related actions from the 310 permit application process:

> 36.2.406 EXCLUSIONS (1) The following shall not be projects, and thus no notice of proposed project may be required for:
>
> (a) A water user or his agent to clean, maintain, or repair any diversion facility, canal, ditch, or lateral or to remove any obstruction from a stream channel which is interfering with the delivery of water under a valid existing water right or water use permit so long as the action does not alter the existing stream channel; and
>
> (b) Removal of debris from a channel, provided that all material removed will be disposed of at some point outside the channel where it cannot again re-enter the channel and provided further that such removal does not constitute a project as listed in ARM 36.2.405.

Construing these two administrative rules together I find that an irrigator with a valid water right can work on an existing diversion facility or remove debris that is obstructing water delivery without applying for a 310 permit provided that (1) the action does not alter the existing stream channel and (2) removed debris is placed permanently outside the channel where it does not constitute a section 36.2.405, ARM, project such as a new diversion, riprap, jetty, or dam.

Therefore, without further analysis, I conclude that the Streambed Act and its promulgated rules require irrigators to apply for a 310 permit before machinery is used to maintain an earthen diversion dam. Unquestionably, machinery, particularly a tractor, bulldozer, or other blade-equipped vehicle, when used for maintenance will alter a stream channel to some extent.

Arguably certain types of work on a diversion structure would have only minimal effect on a stream channel and would therefore be outside the scope of alterations that invoke the 310 permit process. However, the Streambed

Act as enacted does not contain an exemption for minor alterations. All alterations, however slight, are subject to the permit process. The Legislature in 1975 considered statutory alternatives that would have created an express exclusion for minor alterations, but rejected these proposals. For example, the definition of "project" in Senate Bill 310 was temporarily amended during the session to exclude "minor alterations necessary for the use and protection of adjacent lands." Senate Journal, 44th Sess., 586 (1975). At the same time, section 11 of the bill (presently codified as § 75-7-117, MCA) was amended to direct the supervisors to promulgate "exclusions for minor alterations of streams such as installation of culverts, bridges, machinery crossings, snagging and other similar minor alterations and modifications within their districts." Id. at 587. Furthermore, during deliberations before the House Committee on Natural Resources, it was proposed that "irrigation headgates and diversions" be considered an exclusion as a minor alteration for purposes of rulemaking. See Explanation of Amendments to Senate Bill No. 310, Hearings on Senate Bill 310 before the House Committee on Natural Resources, 44th Sess. (1975) (statement of Conrad Fredricks, Sweet Grass County Preservation Association). All of the above proposals were ultimately rejected by the Legislature. The bill as enacted did not differentiate between major and minor alterations.

For the guidance of the Deer Lodge Valley Conservation District, I will briefly address other types of diversion projects. Where a diversion structure is something other than an earthen dam, such that neither streambed material nor heavy equipment is used in maintenance, then it may be possible to maintain such a structure without altering the stream channel. In those situations, an irrigator would not be required to apply for a 310 permit. Such activities are within the exclusions to the permit process contemplated by section 36.2.406(1), ARM.

Low water conditions during summer months may require an irrigator to channel existing stream flows toward a diversion intake. Since any such channelization would of necessity alter the stream channel, 310 review is invoked. The review process is critical during such periods of water shortage as increased sedimentation

could have a profound effect on the preservation of the fish and aquatic habitat.

Emergency actions to protect growing crops are anticipated by the Streambed Act. Section 75-7-113(1), MCA, states:

> The provisions of this part do not apply to those actions which are necessary to safeguard life or property, including growing crops, during periods of emergency. The person responsible for a project under this section shall notify the supervisors in writing within 15 days of the action taken as a result of an emergency.

Further subsections of the Streambed Act provide for review of the emergency project including a determination of whether a more permanent solution exists to the problem. Of importance to your inquiry is that, during a period of emergency, a permitless and immediate response may be made and the irrigator or landowner will be protected from the sanctions of the Streambed Act including its declaration of public nuisance. See §§ 75-7-122, 75-7-123, MCA.

My opinion that all planned alterations of a stream channel are subject to 310 review should not be unduly burdensome to the responsible irrigator. Under the Streambed Act an individual is not forever barred from altering a stream channel to facilitate a diversion. While the individual must submit a planned project to 310 review, that process does not prohibit all alterations. The promulgated rules require, inter alia, that proposed projects be "justified" and that the amount of stream channel alteration be "minimized." § 36.2.404, ARM. Furthermore, irrigators have been bound by common law prohibitions on stream alterations that preceded statutory permit systems such as our 310 process:

> It is the established rule ... that the ordinary or natural course of water cannot lawfully be changed for the benefit of one person or class of persons to the injury of another. Accordingly, one who changes the course of a stream must do so in such manner as not to injure, or unduly interfere with the

> rights of, the adjoining proprietor, either above, below, or on the opposite side of the stream.

78 Am. Jur. 2d Waters § 11 (1975). See also Ward v. Kidd, 392 P.2d 183 (Idaho 1964) (dam constructed by upstream owner with caterpillar tractor during period of low water constituted private nuisance which downstream owner, a prior appropriator, had right to abate); Weeks v. McKay, 382 P.2d 788 (Idaho 1963) (maintenance of a dam during a dry year that interfered with the natural flow of the water properly enjoined). While the cited authority and decisions are not controlling in Montana they do illustrate common law principles that preceded our Streambed Act. See Faucett v. Dewey Lumber Co., 82 Mont. 250, 266 P. 646 (1928) (statutory definition of nuisance that includes unlawful obstruction or use of water is but a crystallization of common law long recognized by the courts); Chessman v. Hale, 31 Mont. 577, 79 P. 254 (1905) (the use of water by an upstream appropriator in Grizzly Gulch such that it infringes upon the rights and fouls the water of a downstream appropriator in Last Chance Gulch constitutes a nuisance, both at common law and under section 4550, Civ. C. 1895).

THEREFORE, IT IS MY OPINION:

> In accordance with the Natural Streambed and Land Preservation Act of 1975, an irrigator must apply for a 310 permit before altering a stream channel to divert water.

Very truly yours,

MIKE GREELY
Attorney General

BEFORE THE DEPARTMENT OF STATE LANDS
OF THE STATE OF MONTANA

In the matter of the petition for a declaratory ruling that certain lands near the Tongue River in Rosebud County, Montana may not be mined for coal.	))))))	DECLARATORY RULING

INTRODUCTION

On August 5, 1985, the Department of State Lands received from Messrs. Jay T. Nance, Marcus L. Nance, and Dr. and Mrs. Arthur F. Hayes, Sr., a petition for a declaratory ruling regarding 3,829.50 acres of fee coal, hereinafter referred to as "petition area," owned by those persons. The petition requests a declaratory ruling that: (1) the petition area is on an alluvial valley floor that is irrigated or naturally subirrigated; (2) mining of the petition area would interrupt, discontinue or preclude farming on the alluvial valley floor; and (3) the farming that would be interrupted, discontinued or precluded would not be of such small acreage as to be of negligible impact on the farms' agricultural production. If the land in question meets the criteria listed above, then under 82-4-227(3)(b), MCA, the Department could not allow coal mining to occur on those lands. Based on evidence contained in the petition for declaratory ruling and upon the Department's independent investigation, the Department makes the following Findings of Fact, Conclusions of Law and Declaratory Ruling.

FINDINGS OF FACT

1. That this declaratory ruling pertains to the land denominated the "petition area," divided into northern and southern portions, and described as follows:

NORTHERN PORTION

Rosebud County
Township 4 South, Range 43 East

Section 23:	Lot 2 (18.66), SE1/4SE1/4.
Section 24:	All of S1/2 lying south and east of the Tongue River except the SE1/4SE1/4 (26.92).
Section 25:	W1/2NW1/4.
Section 26:	NE1/4, N1/2SE1/4, SW1/4SE1/4, E1/2W1/2, SW1/4NW1/4.
Section 27:	Lot 1(22.03).
Section 33:	Lot 1(35.26).
Section 34:	S1/2NE1/4, W1/2SE1/4, SW1/4.
Section 35:	Lot 2(16.83), SW1/4NW1/4.

Township 5 South, Range 43 East

Section 3: Lot 3(39.22), 4 (39.76).
Section 9: W1/2NE1/4, NW1/4SE1/4, NE1/4SW1/4.
Section 17: NE1/4NW1/4, N1/2NE1/4, SW1/4NE1/4.

SOUTHERN PORTION

Township 5 South, Range 42 East
Section 22: SE1/4SE1/4.
Section 25: Lot 5(53.14), E1/2E1/2.
Section 27: Lot 1(38.44), SE1/4NE1/4.
Section 35: Lot 3(40.10), 4(29.98), 6(53.30), 7(40.76), 8(40.54), NE1/4.

Township 6 South, Range 42 East
Section 1: SE1/4NE1/4, E1/2SE1/4, SW1/4, SE1/4.
Section 12: E1/2E1/2, W1/2SE1/4, SW1/4NE1/4, SE1/4SW1/4.
Section 13: NE1/4NE1/4.

Township 6 South, Range 43 East
Section 6: Lot 2(41.17), 3(41.15), 4(34.97), 5(34.04), 6(34.06), 7(34.09), SE1/4NW1/4, E1/2SW1/4.
Section 7: Lot 1(34.11), 2(34.14), 3(34.16), 4(34.19), E1/2W1/2.
Section 18: Lot 1(34.22), 2(34.26), NW1/4NE1/4, NE1/4NW1/4.

Township 5 South, Range 42 East
Section 36: All (State Section)

2. That Jay T. Nance, Marcus L. Nance, and Dr. and Mrs. Arthur F. Hayes, Sr. jointly own the mineral estate, including the coal, in the petition area;

3. That the owners of the minerals in the petition area have petitioned the Department for this declaratory ruling;

4. That the Tongue River and certain tributaries to the Tongue flow through the petition area;

5. That the Tongue River and its tributaries as they flow through the petition area are surrounded by unconsolidated streamlaid deposits;

6. That Jay T. Nance and Marcus L. Nance, doing business as Nance Cattle Company, conduct a ranching operation that includes the northern portion of the petition area; that Dr. and Mrs. Arthur F. Hayes, Sr., doing business as Brown Cattle Company, conduct a ranching operation that includes the southern portion of the petition area;

7. That Nance Cattle Company maintains a minimum herd size of approximately 825 head during the winter, and that Brown Cattle Company maintains a minimum herd size of approximately 730 head during the winter;

8. That Nance Cattle Company uses approximately 900 tons of hay to feed its cattle during the winter, and that Brown Cattle Company uses approximately 1,260 tons of hay to feed its cattle during the winter;

9. That all of the above-referenced 900 tons of hay fed during the winter by Nance Cattle Company is grown on 300 irrigated acres in the northern portion of the petition area; and that all of the 1,260 tons of hay fed in the winter by Brown Cattle Company is grown on 614 irrigated acres in the southern portion of the petition area;

10. That water from the Tongue River and its tributaries is sufficient for flood irrigation of the above-referenced 914 acres of irrigated hay land;

11. That the above-referenced 914 acres of hay land is flood irrigated by diversion of water from the Tongue River and its tributaries;

12. That portions of the above-referenced 914 acres of hay land are subirrigated from water occurring naturally in the Tongue River alluvium and alluvium in streams tributary to the Tongue River.

CONCLUSIONS OF LAW

1. That the Tongue River as it flows through the petition area is contained within an alluvial valley floor, as that term is defined in 82-4-203(2), MCA;

2. That the irrigated hayfields comprising approximately 914 acres in total contained within the petition area are situated on an alluvial valley floor, as that term is defined in 82-4-203(2), MCA;

3. That the above-referenced hay fields are either flood irrigated or naturally subirrigated or both within the meaning of 82-4-227(3)(b)(i), MCA; and

4. That the above-referenced acreage is not undeveloped rangeland and is significant to agricultural production on both Nance Cattle Company operation and Brown Cattle Company operation within the meaning of 82-4-227(3)(b)(i), MCA.

DECLARATORY RULING

Having made the findings of fact and conclusions of law above written, the Department hereby makes, pursuant to 2-4-501, MCA, the following declaratory ruling:

(1) That, except as provided in (3) below, should the Department receive an application pursuant to 82-4-221 for a permit to conduct stripmining operations that would interrupt, discontinue or preclude farming on the 300 irrigated acres within the northern portion of the petition area on which Nance Cattle Company grows the hay for the wintering of its cattle, the Department would be required by 82-4-227(3)(a)(i) to deny the application or to delete from the permit those fields and any area upon which mining would interrupt, discontinue or preclude farming on a significant portion of those fields;

(2) That, except as provided in (3) below, should the Department receive an application pursuant to 82-4-221 for a permit to conduct strip mining operations that would interrupt, discontinue, or preclude farming on the 614 irrigated acres within the southern portion of the petition area upon which Brown Cattle Company grows the hay for

wintering its cattle, the Department would be required by 82-4-227(3)(a)(i) to deny the application or delete from the permit those fields and any area upon which mining would interrupt, discontinue, or preclude farming on a significant portion of those fields; and

(3) That, notwithstanding (1) and (2) above, the Department could allow mining that would preclude farming on a portion of those fields that is so small so as to be of negligible impact on the agricultural production of either Nance Cattle Company or Brown Cattle Company operation.

DATED this 19 day of May, 1986.

Dennis Hemmer, Commissioner
Department of State Lands

Certified to the Secretary of State on May 19, 1986.

BEFORE THE DEPARTMENT
OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

IN THE MATTER of Green Oil and Field Service's Petition for Declaratory Ruling interpreting the term "oil field supplies" as contained in PSC No. 1915 (Sub A).	)))))	DECLARATORY RULING

On October 22, 1985, the Montana Public Service Commission received a written request for a declaratory ruling from Green Oil and Field Services, Inc. a Montana corporation. Green Oil asked this Commission to answer the following question:

> Does the term "oil field supplies" as contained in PSC certificate No. 1915 (sub A) include the transportation of water and waste oil in bulk in tank vehicles?

The Commission determined that it would issue a declaratory ruling on this matter and notified interested parties on January 7, 1986. In that notice the Commission stated that it "does not intend to hold a hearing on this petition unless good cause is shown by motor carrier interest." The Commission made its decision in a scheduled public work session on March 26, 1986.

PSC No. 1915 (Sub A) was owned by James and Donna Pinkerton, d/b/a/ D-J Trucking. On December 20, 1985, this Commission approved the transfer of the certificate to Brian Tatman, who owns a vacuum truck suitable for the transportation of water and waste oil from oil fields. The certificate was reissued in Mr. Tatman's name on January 15, 1986. If the term "oil fields supplies" includes water and waste oil in bulk, Brian Tatman would be able to compete with Green Oil.

The issue raised by Green Oil and Field Services, Inc. hinges on the Commission's authority to define what commodities a certified carrier may haul. Section 69-12-201, MCA, gives the Commission the authority to regulate motor carriers in this state. To carry out its duty to regulate, the Commission issues certificates authorizing carriers to haul stated commodities in a designated area. This conforms with the regulatory process used by the Interstate Commerce Commission. This Commission, by ARM 38.3.204, has adopted the rules of the ICC.

Green Oil and Field Services maintains that because PSC certificate No. 1915 at one time had Sub A authorizing the transportation of oil field supplies and Sub B authorizing the transportation of water, the Commission cannot define oil field supplies to include water. This is incorrect. The Commission has never addressed the question of what items are included in the term "oil field supplies."

The ICC in T.E. Mercer 74 Motor Carrier Cases 459, 5 Federal Carrier Cases 482, ¶31,188 (1946) considered the question of the scope of authority of haulers of oil field supplies. The ICC did not consider whether water or waste oil in bulk is included in the term "oil field supplies" but the ICC recognized regulatory bodies' authority to define commodities and

to expand the scope of a certificate. In that case the ICC also stated:

> The shippers desire a complete single-line motor carrier service for the transportation of oilfield commodities to and from places in the involved territory.... We are of the view, that the restrictions of authority ... would not be practical or easily enforceable, that they would serve to confuse the shippers and carriers and that they would adversely affect the operation of the natural gas and petroleum industry, contrary to the public interest. id 540.

This Commission agrees with the ICC's analysis of the oil field industry and concludes that the term oil field supplies does include water and waste oil in bulk in tank vehicles. It would be impractical, if not impossible, for this Commission to exclude water and waste oil in bulk from the term oil field supplies. The Commission would not have the resources to enforce such a restriction nor does the Commission consider such a restriction of the term oil field supplies in the public interest.

APPROVED BY THE COMMISSION MAY 19, 1986.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

JOHN B. DRISCOLL, Commissioner

HOWARD L. ELLIS, Commissioner

TOM MONAHAN, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Trenna Scofield
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

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 March 31, 1986. This table includes those rules adopted during the period March 31, 1986 through June 30, 1986, and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 1986, 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 1986 Montana Administrative Register.

ADMINISTRATION, Department of, Title 2

(Teachers' Retirement Board)	
I	Procedure to Allow a Retired Member to Designate a Different Beneficiary and Select a Different Retirement Option, p. 1596, 1670, 1982
I-II	Written Requests Required for a Refund Below a Certain Amount Before Refund Will be Sent - Exceptions to Refund Rule, p. 1598, 1977
I-X	Minimum Standards for the Administration of a Probationary Period for State Employees, p. 1043, 1978
2.5.301	and other rules - Procurement of Used Equipment - Procurement from Sheltered Workshops and Work Activity Centers - Delegation of Purchasing Authority - Bid and Performance Security - Competitive Sealed Bids - Small Purchases of Supplies and Services, p. 1900, 242
2.21.133	Administration of Sick Leave, p. 1657, 103
2.21.216	Annual Vacation Leave, p. 1441, 101
2.21.6705	and other rules - Administration of the Employee Incentive Awards Program, p. 1660, 31
(Public Employees' Retirement Board)	
2.43.301	and other rules - Administration of Public Retirement Systems and the State Social Security Program, p. 702

(Workers' Compensation Judge)
2.52.343 and other rule - Attorney Fees - Petition for New Trial or Reconsideration of Attorney Fee Award, p. 302, 774

AGRICULTURE, Department of, Title 4

I-II Establishing Fertilizer Assessments and Reporting, p. 1448, 1855
I-III Designation of Noxious Weeds Pursuant to the County Weed Control Act, p. 88, 337
I-VIII Establishing 1080 Livestock Protection Collar Regulations, p. 396, 775
I-VIII Establishing Civil Penalties for Pesticide Act Violations, p. 618
I-XII Noxious Weed Trust Fund, p. 1, 651
4.10.101 and other rules - Pesticide Sale and Use, p. 589
4.10.1501 Definition of Terms in the Pesticide Act, p. 725
4.12.1205 and other rule - Importation of Alfalfa Leafcutting Bees, p. 6, 336
4.12.3503 and other rules - Permitting Purple Internal Discoloration in Nooksack Seed Potatoes for Blue or Red Tag Grades, p. 536
4.12.3503 and other rule - Grading of Certified Seed Potatoes, p. 8, 245

STATE AUDITOR, Title 6

I-III Montana Title Insurance Act, p. 12, 783
I-VI Joint Rulemaking with Human Rights Commission. Discrimination in Insurance and Retirement Plans, p. 1049, 194
I-VIII Voluntary Payroll Deductions - Automatic Deductions from Payroll Warrants Other than those Mandated by Law, p. 1941, 246
I-IX Emergency Rules Relating to Montana Insurance Assistance Plan, p. 655, 781
I-X Unfair Trade Practices on Cancellations, Non-renewals, or Premium Increases of Casualty or Property Insurance, p. 1450, 1983
6.6.2003 Unfair Trade Practices on Mid-term Cancellations of Casualty or Property Insurance, p. 10, 538
6.6.2003 Emergency Amendment Relating to Unfair Trade Practices on Cancellations of Casualty or Property Insurance, p. 32

COMMERCE, Department of, Title 8

(Board of Architects)
8.6.406 and other rules - Qualifications Required of Architects Licensed Outside Montana - Examination - Individual Seal - Disciplinary Actions, and Partnerships, p. 404, 789

(Board of Athletics)
8.8.2802 and other rule - Definitions - Prohibitions, p. 1945, 200
(Board of Chiropractors)
8.12.601 and other rule - Applications, Education Requirements - Hair Analysis, p. 1905, 201
8.12.601 Applications, Educational Requirements - Renewals - Continuing Education Requirements, p. 730
(Board of Cosmetologists)
8.14.401 and other rules - Expanding Existing Cosmetology Rules to Incorporate Manicuring Specifications Granted by the 1985 Legislature, p. 1807, 659
(Board of Dentistry)
I-X Dental Procedures Involving the Administration of Anesthetics - Training and Monitoring Requirements - Inspecting and Approving Dental Practice Facilities in Which Anesthetics are Administered, p. 1672, 1994
(Board of Denturity)
I-XVIII Licensing - Procedure - Unprofessional Conduct - Inspections - Disciplinary Issues - Complaint Procedures, p. 732
(Board of Hearing Aid Dispensers)
8.20.401 and other rules - Traineeship Requirement and Standards - Fees - Examination - Renewals - Address Change - Code of Ethics - Hearings - Disciplinary Actions - Fines - Purchaser Recision Rights - Continuing Education, p. 1822, 202, 250, 410
(Board of Horse Racing)
8.22.302 and other rules - Board of Stewards - Licenses Issued for Conducting Wagering on Horse Racing Meetings - Definition of Conduct Detrimental to Racing, p. 1455, 1912
8.22.502 Licenses Issued for Conducting Parimutual Wagering on Horse Racing Meetings, p. 90, 791
(Board of Landscape Architects)
8.24.405 Examinations, p. 1947
(Board of Medical Examiners)
8.28.904 and other rules - Implementation of an EMT Defibrillation Training and Certification Program for EMT - Basic Personnel, p. 626
(Board of Morticians)
I Disciplinary Actions, p. 740
(Board of Occupational Therapists)
I-XVI Procedures - Licensing and Discipline, p. 412
(Board of Pharmacy)
8.40.403 and other rule - Examination for Licensure - Approved Programs, p. 305
(Board of Physical Therapy Examiners)
8.42.402 Examinations, p. 418, 792
(Board of Private Security Patrolmen and Investigators)
8.50.423 and other rules - Definitions - Temporary Employment - Experience Requirements - Insurance

Requirements - Fees - Probationary Investigators - Assessments, p. 419

(Board of Realty Regulation)

I Continuing Education, p. 1832

8.58.401 Purpose of Board, p. 307, 661

8.58.419 Discrimination, p. 1907, 105

(Social Work Examiners and Professional Counselors)

I-IV Continuing Education Requirements, p. 309, 662

I-IV Licensure Requirements - Application Procedure - Fee Schedule - Ethical Standards, p. 312, 663

(Board of Veterinary Medicine)

8.64.501 and other rules - Applications - Examinations - Disciplinary Actions, p. 316

(Building Codes Bureau)

8.70.407 Electrical Inspection Fees, p. 1693, 109

(Milk Control Bureau)

8.79.301 Licensee Assessments, p. 152, 452

(Financial Division)

I Examination Fees for Consumer Loan Licensees, p. 494

8.80.301 Advertising by Consumer Loan Licensees, p. 321, 793

(Board of Milk Control)

I Emergency Rule - Limited Service Wholesale Allowance - Temporary Wholesale Prices, p. 251, 539

I Emergency Rule - Limited Service Minimum Jobber Price, p. 539

8.86.301 Class I Price Formula to Establish a Special Wholesale Price for Retail Grocery Stores, p. 495

(Economic and Community Development Division)

I Administration of the 1986 Federal Community Development Block Grant (CDBG) Program, p. 156, 664

8.94.3701 Incorporation by Reference of Rules for the Administration of the Federal Development Block Grant Program, p. 154, 542

(Montana Economic Development Board)

8.97.402 and other rule - Criteria for Determining Eligibility - Purchase of Guaranty of Debentures of Qualified Montana Capital Companies, p. 1077, 34

8.97.404 Permissible Investments and Deposits, p. 636

(Board of Housing)

Zero Notice of Public Hearing - Annual Policy Statement Report by the Montana Board of Housing with Respect to Housing, Development and Low Income Housing Assistance Which Such Board will Follow for Issuing Qualified Mortgage Bonds and Mortgage Credit Certificates, p. 1834

(Science and Technology Development Board)

I-XXXIX Operations of the Science and Technology Board, p. 1836, 110

EDUCATION, Title 10

(Board of Public Education)

I Minimum Scores on the National Teacher Examination Core Battery, p. 158

10.55.202 Board of Trustees, p. 161

10.55.302 Certificates, p. 162

10.55.402 Basic Instructional Program: High School, Junior High, Middle School and Grades 7 and 8 Budgeted at High School Rates, p. 159

10.55.406 and other rule - Guidance and Counseling: High School, Junior High School, Middle School and 7th and 8th Grades Funded at High School Rates - Guidance and Counseling: Elementary, p 1601

10.55.505 Safety, p. 163

10.57.101 Review of Policy, p. 647

10.57.403 Class 3 Administrative Certificate, p. 637

10.57.405 Class 5 Provisional Certificate, p. 639

10.57.501 School Psychologists, Social Workers, Nurses and Speech Therapists, p. 642

10.58.103 Visitations, p. 644

10.58.303 Professional Education, p. 645

(Montana State Library Commission)

I-III and other rule -State Coal Severance Tax Funding to Federations and Grant Programs, p. 324

FISH, WILDLIFE AND PARKS, Department of, Title 12

I Reporting and Tattooing of Bears, Wolves, Tigers, Mountain Lions and Coyotes Captured or Held in Captivity, p. 1465, 119

I Abandoning Teton - Spring Creek Bird Preserve, p. 424

I Fish Plants by the Department or Commercial Hatcheries, p. 429, 497

I-VI Migratory Game Bird Avicultural Permits, p. 1471, 116

I-IV Fish and Game Crimestoppers Program, p. 1474, 122

12.3.106 Hunting by Certain Disabled Persons from Parked Vehicles, p. 1468, 115

12.6.902 Use of Boats and Other Craft on Castle Rock Reservoir, p. 1298, 2003

12.8.202 and other rules - Public Use Regulations on Department Lands and Waters, p. 425

12.9.207 Seeley Lake Game Preserve, p. 1696, 668

HEALTH AND ENVIRONMENTAL SCIENCES, Department of, Title 16

I-II Certification of Wood Stoves or Other Combustion Devices for Tax Credit Purposes, p. 1477, 2004

I-III Notification Requirements for Owners and Operators of Underground Storage Tanks - Interim Prohibition for Installation, p. 326, 669

I-VII Health and Sanitation Standards for Youth Camps, p. 454, 889, 2007

I-XVII Standards and Criteria Relating to Health, Safety and Physical Well-being in Schools, p. 443, 882, 1479, 546

16.8.1404 and other rules - Air Quality - Limiting Visible Air Contaminants - Prohibiting Wood Stove Combustion of Certain Materials - Setting Standards for Stack Heights, p. 20, 91

16.10.207 and other rules - Regulation of Food Service Establishments, p. 501

16.18.201 and other rule - Water Treatment Operators Requirement to Earn Continuing Education Units, p. 498

16.28.201 and other rule - Communicable Diseases - AIDS, Who must Report a Communicable Disease - What Diseases are Reportable - Reporting Requirements, p. 1949, 254

16.32.501 and other rule - Reportable Tumors - Tumor Records Which Must be Kept by an Independent Laboratory, p. 1480, 1857

HIGHWAYS, Department of, Title 18

18.6.202 and other rules - Regulation of Outdoor Advertising, p. 1482, 339

INSTITUTIONS, Department of, Title 20

I-IV Standards for Chemical Dependency Educational Courses provided by State-Approved Treatment Programs, p. 1371, 2011

I-VI Voluntary Admissions to Montana State Hospital, p. 1960, 258

I-IX and other rules - Admission Policy for the Center for the Aged, p. 1965, 257

I-XII Certification of Mental Health Professional Persons, p. 1953, 260

20.3.202 and other rules - Certification and Evaluation of Alcohol Programs, p. 1192, 1768, 1913

JUSTICE, Department of, Title 23

I Safety Equipment Requirements for Trailers Used for Hauling and Spreading Fertilizer, p. 643, 1858

I Completion and Filing of Final Disposition Reports, p. 1698, 43

23.7.111 Uniform Fire Code, p. 164, 453
(Board of Crime Control)

23.14.407 and other rules - Requirements for the Advance Certificate - The Basic Course - The Intermediate Course - The Advance Course, p. 507

LABOR AND INDUSTRY, Department of, Title 24

I Minimum Wage Rates to be Paid on Public Contracts - Annual Adoption of Standard Prevailing Rate of Wages, p. 1846, 44

I-VI Wage Rates to Be Paid to Laborers on Public Works Projects and To Specific Obligations of Contractors and Agencies Entering Into Contracts for Public Works, p. 1306, 1859

(Workers' Compensation Division)

I Relative Value Fee Schedule for Medical, Chiropractic and Paramedical Services, p. 1970, 454

24.29.705 and other rule - Corporate Officer Coverage Under the Workers' Compensation Act, p. 1490, 49

24.29.3801 Attorney Fee Regulation and Submission of Attorney Fee Contracts, p. 27, 458

STATE LANDS, Department of, Title 26

I-XI Consultation of the Department of State Lands with the State Historic Preservation Office Under the Antiquities Act, p. 1849

LIVESTOCK, Department of, Title 32

32.3.212 Changing the Requirements for Import of Cattle from States Classified Brucellosis A, B, and C, p. 432, 794

32.3.213 Allowing Movement of Cats into State Under Health Certificate, p. 437, 795

32.3.407A Permanent Waiver in All Counties the Change of Ownership Brucellosis Test, p. 435, 796

32.8.202 Time from Processing that Fluid Milk may be Sold for Human Consumption, p. 1494, 50

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

(Board of Water Well Contractors)

I-VII Definitions - Disciplinary Action, p. 235, 671, 797

36.21.402 and other rules - Licensure Restricted to Natural Persons - Nontransferable - Supervision - Examination - Renewals - Fee Schedule - Board Meetings - Requirements for Contractors and Drillers Licenses, p. 1496, 1914

(Board of Oil & Gas Conservation)

36.22.1242 Increasing the Oil and Gas Privilege and License Tax, p. 742

PUBLIC SERVICE REGULATION, Department of, Title 38

I-XXXIX Telecommunications Act - Minimum Rate Case Filing Requirements for Telephone Utilities, p. 166, 799

(Commissioner of Political Practices)
44.10.321 and other rules - Contributions - Expenditures - Definitions - Reporting Requirements - Personal Financial Disclosure by Elected Officials, p. 1551, 128

SOCIAL AND REHABILITATION SERVICES, Department of, Title 46

I-IX Residential Alcohol and Drug Treatment for Indigent Juveniles, p. 585, 911, 1251
46.5.621 and other rules - Child and Youth Care Facilities, p. 511
46.5.902 and other rules - Day Care Facilities, p. 1726, 2041, 51
46.8.102 and other rules - Utilization of Aversive Training Procedures in Development of Disabilities Services, p. 1712, 345
46.8.701 and other rules - Certification of Developmental Disabilities Professional Persons - Service Program Funding, p. 752
46.10.318 AFDC Emergency Assistance to Needy Families with Dependent Children, p. 191, 559
46.12.102 and other rule - Billing, Reimbursement, Claims Processing and Payment for the Medicaid Program, p. 94, 359
46.12.204 and other rules - Co-payments for Licensed Clinical Social Workers' Services, p. 330, 677
46.12.575 Family Planning Services, p. 449
46.12.801 Prosthetic Devices, Durable Medical Equipment and Medical Supplies, p. 755
46.12.1201 and other rules - Reimbursement for Skilled Nursing and Intermediate Care Services, p. 439, 824
46.12.1202 and other rules - Adoption of Amendments to Federal Statutes, Agency Rules and Guidelines Incorporated by Reference in Rules Pertaining to Reimbursement for Skilled Nursing and Intermediate Care Services, p. 445
46.12.1205 Emergency Amendment - Payment Procedures for Skilled Nursing and Intermediate Care Services, p. 360
46.12.3002 and other rules - Eligibility Determinations for SSI - and AFDC - Medically Needy Assistance - Mandatory Social Security Number Requirements, p. 332, 678
46.12.3803 Medically Needy Income Standard for One Person, p. 1710, 2051
46.13.401 LIEAP Maximum Benefit Awards for Wood, p. 96, 362
46.13.401 Emergency Amendment of LIEAP Maximum Benefit Awards for Wood, p. 130
46.25.101 and other rules - Structured Job Search and Training Program - Workfare, p. 746