MONTANA ADMINISTRATIVE REGISTER

1986 ISSUE NO. 18
SEPTEMBER 25, 1986
PAGES 1523-1647

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 18

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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

TABLE OF CONTENTS

Page Number

NOTICE SECTION

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption) NOTICE OF THE PROPOSED ADOPTION
Rules I through IX relating) of Rules I through IX relating
to emergency telephone) to emergency telephone service.
service.) NO PUBLIC HEARING CONTEMPLATED.

TO: All Interested Persons:

1. On November 15, 1986, the Department proposes to adopt new rules I through IX relating to emergency telephone service.

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

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

RULE I PURPOSE (1) It is the policy and intent of the state of Montana to establish a statewide emergency telephone system which will provide access to all emergency public and private safety services from all telephones in the state through the use of the nationally recognized emergency telephone number 9-1-1. It is the purpose of these rules to provide an administrative framework for the accomplishment of this policy.

(2) These rules have been prepared by the department of administration with the concurrence of the department of administration's advisory council on 9-1-1.

(3) It is the intent of these rules to provide the greatest degree of flexibility for local jurisdictions, public safety agencies, and private safety agencies and citizens to plan, design, install, operate and maintain and improve local emergency telephone systems based upon the individual needs and requirements at the local level.

(4) It is the intent of these rules that all local emergency telephone systems provide at least minimum 9-1-1 service.

AUTH: 10-4-102 , MCA; IMP: 10-4-101 through 10-4-303, MCA.

RULE II DEFINITIONS (1) "Account" means the 9-1-1 emergency telecommunications account established in 10-4-301, MCA.

(2) "Central office boundary" is the smallest subdivision in a telephone system which is defined by the extent of central office physical telephone service coverage and/or electronic software defined coverage.

(3) "Department" means the department of administration provided for in Title 2, chapter 15, part 10, MCA.

(4) "Direct dispatch method" means a 9-1-1 service in which a public safety answering point, upon receipt of a telephone request for emergency services, provides for a decision as to the proper action to be taken and for dispatch of appropriate emergency service units.

(5) "Emergency" means any event that requires dispatch of a public or private safety agency.

(6) "Emergency services" means services provided by any public or private safety agency, including law enforcement, firefighting, ambulance or medical services, and civil defense services.

(7) "Exchange access services" means:

(a) telephone exchange access lines or channels that provide local access from the premises of a subscriber in this state to the local telecommunications network to effect the transfer of information; and

(b) unless a separate tariff rate is charged therefor, any facility or service provided in connection with the services described in subsection (7)(a).

(8) "Local government" means any city, county, or political subdivision of the state and its agencies.

(9) "Minimum 9-1-1 service" means a telephone service meeting the standards established in 10-4-102, MCA that automatically connects a person dialing the digits 9-1-1 to an established public safety answering point. "Minimum 9-1-1 services" includes equipment for connecting and outswitching 9-1-1 calls within a telephone central office, trunking facilities from the central office to a public safety answering point, and equipment, as appropriate, for transferring the call to another point, when appropriate.

(10) A "9-1-1 jurisdiction" means a group of public or private safety agencies who operate within or are affected by one or more common central office boundaries and who have agreed in writing to jointly plan a 9-1-1 emergency telephone system.

(11) "Private safety agency" means any entity, except a public safety agency, providing emergency fire, ambulance, or medical services.

(12) "Provider" means a public utility, cooperative telephone company, or any other entity that provides telephone exchange access services.

(13) "Public safety agency" means the state and any city, county, city-county consolidated government, municipal corporation, chartered organization, public district, or public authority located in whole or in part within this state that provides or has authority to provide emergency services.

(14) "Public safety answering point" means a communications facility operated on a 24-hour basis that first receives 9-1-1 calls from persons in a 9-1-1 service area and which may, as appropriate, directly dispatch public or private safety services or transfer or relay 9-1-1 calls to appropriate public safety agencies.

(15) "Relay method" means a 9-1-1 service in which a public safety answering point, upon receipt of a telephone request for emergency services, notes that pertinent information from the caller and relays such information to the appropriate public safety agency, other agencies, or other providers of emergency services for dispatch of an emergency unit.

(16) "Subscriber" means an end user who receives telephone exchange access services.

(17) "Transfer method" means a 9-1-1 service in which a public safety answering point, upon receipt of a telephone request for emergency services, directly transfers such a request to an appropriate public safety answering agency or other provider of emergency services.

AUTH: 10-4-102, MCA; IMP: 10-4-101, MCA.

RULE III DEPARTMENT OF ADMINISTRATION DUTIES AND POWERS (1) The department shall assist in the development of 9-1-1 systems in the state. The department shall:

(a) prescribe and publish preliminary and final planning forms with instructions to be filed by 9-1-1 jurisdictions with the department which will describe proposed 9-1-1 systems in a level of detail which will identify compliance with and variations from minimum 9-1-1 service. The department will amend the planning forms at its discretion in order to ensure the filing by 9-1-1 jurisdictions of all needed information;

(b) upon request of a 9-1-1 jurisdiction, assist in planning an emergency 9-1-1 telephone system. The level and amount of assistance provided shall be based upon the department's staffing and scheduling availability, based upon the department's determination. Requests for assistance are to be directed in writing to the Chief, Telecommunications Bureau, Information Services Division, department of administration, Capitol Station, Helena, MT 59620;

(c) establish criteria and procedures for evaluating plans to ensure 9-1-1 telephone systems will provide minimum 9-1-1 service;

(d) monitor the implementation of approved plans for compliance with the plan and the use of funding. The department may schedule on-site visits of planned or implemented 9-1-1 telephone systems for the purpose of determining compliance with approved plans and the use of funding, and may prescribe information to be filed by 9-1-1 jurisdictions with the department to verify compliance with approved plans and the use of funding;

(e) report biennially to the legislature the progress made in implementing a statewide emergency telephone system in a form prescribed by the department or requested by the legislature.

(2) The department shall establish an advisory council to participate in the development and implementation of the 9-1-1 program in the state. The council shall be established pursuant to 2-15-122, MCA. The council shall be appointed for a one year term and, at the end of one year, may be

reappointed in full, replaced in full or in part or terminated at the discretion of the director of the department.

AUTH: 10-4-102, MCA; IMP: 10-4-103, 10-4-104, MCA.

RULE IV EMERGENCY TELEPHONE SYSTEM REQUIREMENTS (1) Every public and private safety agency in this state may establish or participate in an emergency telephone system.

(2) An emergency telephone system must include:

(a) a 24-hour communications facility automatically accessible anywhere in the 9-1-1 jurisdiction's service area by dialing 9-1-1;

(b) direct dispatch of public and private safety services in the 9-1-1 jurisdiction or relay or transfer of 9-1-1 calls to an appropriate public or private safety agency; and

(c) a 24-hour communications facility equipped with at least two trunk-hunting local access circuits provided by the local telephone company's central office.

(3) The primary emergency telephone number within the state is 9-1-1, but a public safety answering point shall maintain both a separate seven-digit secondary emergency number for use by the telephone company operator and a separate seven-digit nonemergency number.

AUTH: 10-4-102, MCA; IMP: 10-4-103, 10-4-104, MCA.

RULE V PARTICIPATION BY PUBLIC AND PRIVATE SAFETY AGENCIES (1) 9-1-1 jurisdictions must include all legally constituted public and private safety agencies which operate within or are affected by one or more common central office boundaries.

(2) Public and private safety agencies wishing to jointly plan a 9-1-1 emergency telephone system must agree in writing in order to become a 9-1-1 jurisdiction. Such written agreement must be filed by the proposed 9-1-1 jurisdiction at the time of filing preliminary plans and final plans in a form prescribed by the department.

(3) Public or private safety agencies sharing common boundaries may enter into agreements which provide that an emergency unit dispatched by an emergency telephone system established in accordance with 10-4-103, MCA must render emergency services without regard to jurisdictional boundaries.

(4) A public safety agency with jurisdictional responsibilities must in all cases be notified by the public safety answering point of a request for service in the agency's jurisdiction.

AUTH: 10-4-102, MCA; IMP: 10-4-104, 10-4-113, MCA.

RULE VI SUBMISSION OF PRELIMINARY PLANS (1) A 9-1-1 jurisdiction may submit a preliminary plan, in a form prescribed by the department, for establishing an emergency telephone system in accordance with 10-4-103, MCA to:

(a) public and private safety agencies in the 9-1-1 jurisdiction;

(b) the department; and
(c) providers of telephone service in the 9-1-1 jurisdiction's service area.
(2) The department shall review the preliminary plan for compliance with 10-4-103, MCA and rules adopted pursuant to 10-4-102, MCA and report its approval or disapproval to the 9-1-1 jurisdiction within 90 days of receipt of the plan.
(3) A provider of telephone service in the 9-1-1 jurisdiction's service area shall, within 90 days of receipt of the plan, provide the 9-1-1 jurisdiction with a good faith estimate of the cost to the 9-1-1 jurisdiction for implementing the plan.
AUTH: 10-4-102, MCA; IMP: 10-4-111, MCA.

RULE VII SUBMISSION AND APPROVAL OF FINAL PLANS (1) A 9-1-1 jurisdiction shall submit a proposed final plan, in a form prescribed by the department, for establishing an emergency telephone system pursuant to 10-4-103, MCA within one year from receipt of the department's approval of its preliminary plan to:
(a) public and private safety agencies in the 9-1-1 jurisdiction;
(b) the department; and
(c) providers of telephone service in the 9-1-1 jurisdiction's service area.
(2) In addition to other matters required by 10-4-103, MCA, the final plan must include a description of all capital and recurring costs for the proposed emergency 9-1-1 telephone system.
(3) The department shall determine whether the final plan complies with 10-4-103, MCA and rules adopted pursuant to 10-4-102, MCA. Subject to 10-4-113, MCA, if the department determines that the plan complies, it shall approve the plan, or if the department determines that the plan does not comply, it shall disapprove the plan. The department shall inform the 9-1-1 jurisdiction of its decision within 180 days of receipt of the plan. In any statement approving a final plan, the department shall indicate a timetable in which the provider shall undertake necessary telephone system conversions. The timetable must be such that conversions may not be required unless sufficient funds to compensate the provider for its conversion costs are available within 1 year of the initial installation of the 9-1-1 system.
AUTH: 10-4-102, MCA; IMP: 10-4-112, MCA.

RULE VIII DISTRIBUTION OF EMERGENCY TELECOMMUNICATIONS ACCOUNT (1) The department shall make quarterly distribution of the emergency telecommunications account, established in the state special revenue fund in the state treasury, beginning on April 1, 1987. Distribution shall be made for the following:
(a) administrative costs incurred during the preceding calendar quarter by the department of revenue in carrying out its responsibilities. The amount paid may not exceed 1% of

the account on the date of distribution or actual expenses incurred, whichever is less. The department of revenue shall submit an itemized statement of actual expenses incurred during each calendar quarter to the department within 30 days following the end of each calendar quarter. If such a statement is not received by the department within 30 days following the end of the quarter the department shall not distribute any of the account to the department of revenue for that calendar quarter;

(b) administrative costs incurred during the preceding calendar quarter by the department in carrying out its responsibilities. The amount paid may not exceed 7% of the account on the date of distribution or actual expenses incurred, whichever is less. The department shall prepare an itemized statement of actual expenses incurred during each calendar quarter within 30 days following the end of each calendar quarter. If such a statement is not prepared by the department within 30 days following the end of the quarter the department shall not receive any of the account for that calendar quarter;

(c) Costs incurred during the preceeding calendar quarter by each provider of telephone service in the state for:

(i) collection of the fee imposed by 10-4-201, MCA;

(ii) modification of central office switching and trunking equipment for emergency telephone service only; and

(iii) conversion of pay station telephones required by 10-4-121, MCA.

(2) Payments under subsection (1)(c) shall be made only after application by the provider to the department in a form prescribed by the department, for costs incurred in subsection (1)(c). Applications for payments under subsection (1)(c) must be received by the department within 30 days following the end of each calendar quarter. If an application by a provider is not received by the department within 30 days following the end of the calendar quarter the department shall not distribute any of the account to that provider for that calendar quarter.

All applications received by the department relevant to subsection (1)(c) shall be reviewed in detail by the department for appropriateness of costs claimed by providers. Such detailed review may include, but is not limited to, review of an application by one provider in comparison to other similar applications by other providers, review of associated paid invoices, time records and contracts and on site reviews by the department and its employees and consultants of completed work supported in an application. Such detailed reviews may be made to verify costs for subsections (1)(c)(i), (1)(c)(ii) and (1)(c)(iii) individually or collectively. If the provider contests the review, payment may not be made until the amount owed to the provider is made certain by the department.

(3) All amounts under subsection (1) and (2) shall be paid within 60 days following the end of each calendar

quarter. Payments which are still under review at the expiration of the 60 days may be distributed from the next calendar quarterly receipts of the account if, within 60 days following the end of the next calendar quarter, the amount owed to the provider is made certain.

(4) After all amounts under subsection (1), (2) and (3) have been paid the department shall, within 10 days, distribute the balance of the account into separate accounts for the cities and counties utilizing the following information and in the following manner:

(a) the department shall obtain the most recent per capita census data for incorporated cities and counties in the state from the department of commerce, census and economic information center;

(b) the department shall compute the per capita percentage each county represents to the entire state population based upon the census data. Any county whose per capita percentage is less than 1% of the entire state population shall automatically have its percentage increased to equal 1%. Each county's percentage shall then be recomputed to adjust for the counties whose per capita percentage was originally less than 1%. The county per capita percentages shall total 100%;

(c) the department shall compute the quarterly allocation amount for each county based upon the percentages computed in subsection (4)(b) applied against the balance of the account;

(d) the department shall compute the per capita percentage each incorporated city represents to its county population based upon the census data obtained in (4)(a). The balance of each county's population shall be computed to be each county's per capita percentage for its remaining population. The total of each county's incorporated city per capita percentage(s) and its remaining per capita percentage shall equal 100%;

(e) the department shall compute the quarterly distribution amount for each incorporated city and each county based upon the percentages computed in subsection (4)(d) applied against each county's quarterly allocation amount computed in subsection (4)(c);

(f) the department shall compute the quarterly distribution amount for each 9-1-1 jurisdiction. This shall be based upon the per capita percentage that each 9-1-1 jurisdiction's service area is in relation to the incorporated city(s) and the remaining county(s) area served by each 9-1-1 jurisdiction.

(g) each incorporated city with 9-1-1 jurisdictions with an approved final plan shall receive the quarterly distribution amount for each 9-1-1 jurisdiction. Each county with 9-1-1 jurisdictions with an approved final plan shall receive the quarterly distribution amount for each 9-1-1 jurisdiction. Quarterly distributions for each city and county without approved final plans shall be distributed into separate accounts within the state treasury for each city and

county. Such amounts shall be retained in the separate accounts within the state treasury until a final plan is approved, at which time the accrued balance for a 9-1-1 jurisdiction, with interest, shall be distributed to the city or county with the next quarterly distribution;

(h) cities and counties shall distribute the amounts received under (4)(e) to 9-1-1 jurisdictions within their jurisdiction who have an approved final plan. The department shall provide a statement with each city and county distribution indicating which 9-1-1 jurisdictions in their jurisdiction have an approved final plan. A 9-1-1 jurisdiction with an approved final plan whose 9-1-1 service area includes more than one city or county is eligible to receive operating funds from each city or county involved. Cities and counties are to distribute monies to 9-1-1 jurisdictions with an approved final plan whose 9-1-1 service area includes multiple local jurisdictions on a per capita basis.

AUTH: 10-4-102, MCA; IMP: 10-4-121, 10-4-301, 10-4-302, MCA.

RULE IX LIMITATIONS ON USE OF FUNDS (1) Money received under Rule VIII, subsection (4)(g) and (h) may be used only to pay for installing, operating and improving an emergency telephone system using 9-1-1. Direct expert or consultant contracts necessary for directly planning, designing, developing and installing an emergency telephone system using 9-1-1 are considered bona fide expenses.

(2) If the department through its monitoring process determines that a 9-1-1 jurisdiction is not adhering to an approved final plan or is not using funds in the manner described in subsection (1), the department may, after notice and hearing, suspend payment to the 9-1-1 jurisdiction. The 9-1-1 jurisdiction is not eligible to receive funds until such time as the department determines that the 9-1-1 jurisdiction is complying with the approved final plan and fund limitations.

(3) Money not necessary for immediate use may be invested by the city or county. The income from the investments shall be used only for the purposes described in subsection (1).

AUTH: 10-4-102, MCA; IMP: 10-4-303, MCA.

4. Interested parties may submit their data, views or arguments concerning the proposed rule in writing to Anthony J. Herbert, Chief, Telecommunications Bureau, Department of Administration, Mitchell Building, Helena, MT 59620 no later than October 23, 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 a written request for a hearing and submit this rule along with any written

comments he has to Anthony J. Herbert, at the above address, no later than October 23, 1986.

6. If the Department receives requests for a public hearing on the proposed rules 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 Administrative Register. The percent of those persons directly affected has been determined to be more than 25.

Department of Administration

By _____
Ellen Feaver
Director, Department of Administration

Certified to the Secretary of State September 15, 1986.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF DENTURITRY

In the matter of the proposed amendments of 8.17.404 concerning examinations, 8.17.501 concerning fees and 8.17.702 concerning renewals	))))	NOTICE OF PROPOSED AMENDMENTS OF 8.17.404 EXAMINATION, 8.17.501 FEE SCHEDULE AND 8.17.702 RENEWAL-CONTINUING EDUCATION

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On October 27, 1986, the Board of Denturitry proposes to amend the above-stated rules.

2. The proposed amendment of 8.17.404 will read as follows: (new matter underlined, deleted matter interlined)

"8.17.404 EXAMINATION (1) through (5) will remain the same.

(6) Examinations will be held in Helena on the third Friday and Saturday of January of each year, in addition to the second Monday in July as provided in section 37-29-305(2), MCA."

Auth: 37-29-201, MCA Imp: 37-29-305, MCA

3. The board proposed the rule to set a permanent schedule and location for examination to eliminate requests for special examination and to eliminate having examinations in denturists offices. With holding the examination on weekends and during the summer, the board therefore can utilize the dental hygiene facilities at Carrol College.

4. The proposed amendment of 8.17.501 will read as follows: (new matter underlined, deleted matter interlined)

"8.17.501 FEE SCHEDULE (1) through (5) will remain the same.

(6)	In-state license renewal by December 1st of each year, which may be paid in 2 installments of $250 each on October 1st and December 1st of each year	$500.00
(a)	Renewal fee for inactive and out-of-state licensees must be paid by December 1st of each year"	$200.00

Auth: 37-29-201, 37-1-134, MCA Imp: 37-1-134, 37-29-304, MCA

5. The board proposed a lesser renewal fee for those persons not practicing in the state as there would not be complaints or a lot of activity provided to those licensees.

6. The proposed amendment of 8.17.702 will read as follows: (new matter underlined, deleted matter interlined)

"8.17.702 RENEWAL-CONTINUING EDUCATION (1) through (9) will remain the same.

(10) An inactive license may be issued to an individual who is not actively practicing in the state of Montana, but must be renewed by December 1st of each year by paying the fees prescribed in ARM 8.17.404."

Auth: 37-29-201, MCA Imp: 37-29-306, MCA

7. This rule was proposed to allow those persons not practicing in Montana an inactive status and the board would not be handling these licensees as often as in-state practitioners.

8. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Denturitry, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than October 23, 1986.

9. If a person who is directly affected by the proposed amendments, wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Board of Denturitry, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than October 23, 1986.

10. If the board receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 1 based on the 19 licensees in Montana.

BOARD OF DENTURITRY
BRENT KANDARIAN, PRESIDENT

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

Certified to the Secretary of State, September 15, 1986.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PHARMACY

In the matter of the proposed amendment of 8.40.1215 concerning dangerous drugs	))))	NOTICE OF PROPOSED AMENDMENT OF 8.40.1215 ADDITIONS, DELETIONS, & RESCHEDULING OF DANGEROUS DRUGS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On October 27, 1986, the Board of Pharmacy proposes to amend the above-stated rule.

2. The proposed amendment of 8.40.1215 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-1181 and 8-1182, Administrative Rules of Montana)

"8.40.1215 ADDITIONS, DELETIONS, & RESCHEDULING OF DANGEROUS DRUGS

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

(b). . .

(i) hallucinogenic substances listed in section 50-32-224 (5) Hallucinogenic substances. Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product.

(i) and (ii) will be renumbered (ii) and (iii).

(c) Schedule IV

(i) midazolam listed in section 50-32-229 (2)(r), depressants

(ii) quazepam listed in section 50-32-229 (2)(x), depressants

~~(c)~~ (d) Schedule V

(i) and (ii) will remain the same."

Auth: 50-32-103, MCA Imp: 50-32-103, 222, 224, 229, MCA

3. The reason for the proposed amendment of (5)(b)(i) is to reschedule synthetic dronabinol in sesame oil and encapsulated in soft gelatin capsules from Schedule I to Schedule II. Dronabinol is the synthetic equivalent of the isomer of delta-9-tetrahydrocannabinol (THC) which is the principal psychoactive substance in Cannabis sativa L., marijuana. This action is based on a finding that the U.S. Food and Drug Administration approved drug products which contained dronabinol fit the statutory criteria for inclusion in Schedule II of the Controlled Substance Act. 50-32-222 (7). This rule does not affect the Schedule I status of any other substance, mixture, or preparation which is currently included in 21 CFR 1308.11(d)(21) dated May 1, 1986. 50-32-222 (3)(q), MCA.

4. The reason for the proposed amendment of (5)(c) is that midazolam and quazepam, benzodaizepine substances have been placed in Schedule IV of the Controlled Substances Act

(CSA). Dated March 25, 1986. The Drug Enforcement Administration relied on the scientific and medical evaluations of the Acting Assistant Secretary of Health and based on his independent evaluations that midazolam and quazepam each are similar to other substances in Schedule IV to place these substances in Schedule IV.

5. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Pharmacy, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than October 23, 1986.

6. If a person who is directly affected by the proposed amendment wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Board of Pharmacy, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than October 23, 1986.

7. If the board receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendment, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 108 based on the 1088 licensees in Montana.

BOARD OF PHARMACY
ANTHONY J. FRANCISCO, R.Ph.
PRESIDENT

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

Certified to the Secretary of State, September 15, 1986.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PROFESSIONAL ENGINEERS
AND LAND SURVEYORS

In the matter of the proposed amendments of rules concerning applications, licensing, comity, disciplinary action, etc.	NOTICE OF PROPOSED AMENDMENTS OF 8.48.501, 8.48.502, 8.48.504, 8.48.507, 8.48.508, 8.48.601 THROUGH 8.48.604, 8.48.802, 8.48.901, 8.48.902, 8.48.1105, 8.48.1106, AND THE REPEAL OF 8.48.1107, AND THE ADOPTION OF NEW RULES CONCERNING DISCIPLINARY ACTION, EMERITUS STATUS AND APPLICATIONS BY PARTNERSHIPS AND CORPORATIONS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On October 27, 1986, the Board of Professional Engineers and Land Surveyors proposes to amend, repeal and adopt the above-stated rules.

2. The proposed amendment of 8.48.501 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-1301, Administrative Rules of Montana)

"8.48.501 APPROVAL OF SCHOOLS (1) Engineering schools or colleges approved by the board are those which require for entrance, graduation from an accredited high school or preparatory school (or equivalent by passing of advance standing examination), which offer a minimum of a 4 year course leading to a degree of bachelor of science in recognized branches of engineering, or engineering technology, or ~~its~~ their equivalent, and which are either approved by the ~~Engineers' Council for Professional Development~~ Accreditation Board for Engineering and Technology or equivalent curricula as approved by the board.

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

Auth: 37-67-202, MCA Imp: 37-67-306, MCA

3. The amendment is proposed so that the rule will harmonize with amendments to section 37-67-306, MCA.

4. The proposed amendment of 8.48.502 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-1301 and 8-1302, Administrative Rules of Montana)

"8.48.502 APPLICATIONS (1) through (3) will remain the same.

~~(4) Applications for registration as professional engineer and/or land surveyor from persons who are not~~

~~residents of Montana and who are not registered in their home state or country will not be approved by the board.~~

~~(5)~~(4) All non-resident applicants must be registered in their states of residence and original registration submitted, before their application can be considered."

Auth: 37-67-262, MCA Imp: 37-67-303, 313, MCA

5. This amendment is being proposed because the language is already covered by statute.

6. The proposed amendment of 8.48.504 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-1302 and 8-1303, Administrative Rules of Montana)

"8.48.504 APPLICATION REFERENCES (1) Upon receipt of an application, a copy of the board's uniform questionnaire and form letter shall be transmitted to 5 or more references. ~~Applicants will note that~~ 3 Three or more of the references shall be registered in the profession being applied for as professional engineers or professional land surveyors. No member of the board will be accepted as a reference. The Department shall provide the applicant with copies of the board's uniform reference letter and the applicant shall submit same to 5 references, with a stamped return envelope addressed to the board office.

(2) will remain the same."

Auth: 37-67-202, MCA Imp: 37-67-303, MCA

7. This amendment is being proposed to enhance the existing law. The board wants the applicant to provide this information to the board office instead of the department having to obtain it. This amendment will also facilitate compliance with statutory requirements.

8. The proposed amendment of 8.48.507 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-1304 and 8-1305, Administrative Rules of Montana)

"8.48.507 CLASSIFICATION OF EXPERIENCE (1)(a) through (d) will remain the same.

(e) Land survey experience consists of work done under the supervision of a registered professional land surveyor such as section breakdowns, retracing boundaries, establishing new boundaries, corner search and re-establishment, calculations, and preparations of certificates of surveys, deed searches, and corner recordation.~~, etc.~~

(f) Other survey experience is survey work which may or may not be done under the supervision of a registered professional land surveyor. It includes such work as construction layout of buildings and miscellaneous structures; surveys necessary to obtain data and location of highways,

roads, pipelines, canals, etc., construction staking for highways, roads, utilities, etc.

(f)(i) through (h) will remain the same.

(2) The board will not deem experience to be pre-professional work, pre-professional work (in charge), or pre-professional work (design), as those terms are defined in subsection (1) of this rule, unless during the period of time in question the applicant's work products were reviewed by a licensed professional engineer or professional land surveyor as appropriate.

~~(2)~~(3) The board, in passing on each of these requirements, as defined, will carefully weigh the evidence of experience submitted by the applicant and the replies received from his references."

Auth: 37-67-202, MCA Imp: 37-67-306, 309, MCA

9. The amendment is being proposed to clarify the quality of experience that the board will require under section 37-67-306 and 309, MCA.

10. The proposed amendment of 8.48.508 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-1305 and 8-1306, Administrative Rules of Montana)

"8.48.508 EXAMINATION PROCEDURES (1) After July 1, 1975, registration as a professional engineer and/or professional land surveyor in Montana requires in part, examinations. The examinations required are defined in section 37-67-311, MCA.

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

(4) A candidate failing to pass any examination may take that examination a second time at a subsequent examination period upon payment ~~of a fee established by the board.~~ of the re-examination fee specified by ARM 8.48.1105. However, if more than three examination periods have passed since the candidate's original failure, he or she must submit a new application and pay the appropriate application and test fee specified by ARM 8.48.1105 before he or she will be re-examined.

(5) and (6) will remain the same."

Auth: 37-67-202, MCA Imp: 37-67-311, MCA

11. The board is proposing this amendment to establish a cut-off period for record keeping purposes and to protect the public by requiring applicants to confirm their competency.

12. The proposed amendments of 8.48.601, 8.48.602 and 8.48.603 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rules is located at pages 8-1309 and 8-1310, Administrative Rules of Montana)

"8.48.601 ~~RECIPROCITY~~ COMITY FOR PROFESSIONAL ENGINEERS (1) through (3) will remain the same."
Auth: 37-67-202, MCA Imp: 37-67-312, MCA

"8.48.602 ENGINEER REGISTRATION BY ~~RECIPROCITY~~ COMITY WITHOUT EXAMINATION (1)(a) and (b) will remain the same."
Auth: 37-67-202, MCA Imp: 37-67-312, MCA

"8.48.603 ENGINEER REGISTRATION BY ~~RECIPROCITY~~ COMITY WITHOUT EDUCATION (1) will remain the same."
Auth: 37-67-202, MCA Imp: 37-67-312, MCA

13. The above amendments are being proposed so that the titles harmonize with statutory language.

14. The proposed amendment of 8.48.604 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-1310, Administrative Rules of Montana)

"8.48.604 ~~RECIPROCITY FOR REGISTERED LAND SURVEYORS~~ COMITY CONSIDERATION FOR PROFESSIONAL LAND SURVEYORS (1) The board may, upon application and payment of proper fees and passing a written examination, issue a certificate of registration as a professional land surveyor to any person who submits evidence that he holds a certificate of registration issued to him by proper authority of any state or territory or possession of the United States, ~~provided that the applicant's qualifications meet the requirements of the law and rules established by the board at the time he was originally licensed~~ based upon qualifications that were not less than those of this state at the time the applicant received his or her certificate in the other state, territory or possession."
Auth: 37-67-202, MCA Imp: 37-67-313, MCA

15. The board is proposing this amendment to harmonize this rule with the applicable statute relating to land surveyors.

16. The proposed amendment of 8.48.801 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-1317, Administrative Rules of Montana)

"8.48.801 GRANT AND ISSUE LICENSES (1) At the time an applicant is voted registration by the board, he will be assigned a registration number and issued a certificate of registration as a professional engineer and/or professional land surveyor as appropriate. These numbers will be issued consecutively in the order in which the applications are approved by the board. The applicant will be advised of his registration number in the notice sent him.

(2) will remain the same.

(3) Applicants approved for registration as professional engineers and professional land surveyors shall receive one certificate of registration authorizing the practice of professional engineering and professional land surveying."

Auth: 37-67-202, MCA Imp: 37-67-306, 309, MCA

17. This amendment is being proposed to harmonize the rule with the applicable statute relating to professional land surveyors.

18. The proposed amendment of 8.48.802 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-1317 and 8-1318, Administrative Rules of Montana)

"8.48.802 REGISTRANT SEAL (1) will remain the same.

(2) Seals for professional engineers and professional land surveyors will be furnished by the board, at a fee, upon request. Seals of two different sizes are authorized;

(a) and (b) will remain the same.

(c) The seal will bear the registrant's name, registration number, and the legend "Registered Professional Engineer", "Registered Professional Land Surveyor", or "Registered Professional Engineer and Registered Professional Land Surveyor.

(3) For stamping plans, specifications, and reports, registrants are authorized ~~to use a rubber stamp copy made of their official seal. The title page of all sets of plans and all documents filed with public authorities must bear the seal.~~ to use a facsimile made of their official seal. The title page of all sets of plans and all documents filed with public authorities must bear the seal."

Auth: 37-67-202, MCA Imp: 37-67-314, MCA

19. The board is proposing this amendment to harmonize rule language with statutory language and expand the permissive forms of copies of seals.

20. The proposed amendment of 8.48.901 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-1321, Administrative Rules of Montana)

"8.48.901 EXPIRATION OF REGISTRATION - RENEWAL (1) will remain the same.

(2) The department will notify every registered person by mailing a letter to the address in the roster or to a corrected address 30 to 60 days prior to the date of expiration of his certificate. The letter will include a form for a ~~verified statement by the registrant that he has maintained his professional competency during the preceding biennium. This statement must be signed and sworn to before a~~

~~notary public, and returned to the board before the registrant's registration will be renewed~~ statement by the registrant that he has maintained his professional competency during the preceding biennium. This statement must be signed, and returned to the board before the registrant's registration will be renewed."

Auth: 37-1-101(7), 37-67-202, MCA Imp: 37-67-315, MCA

21. The board is proposing this amendment to harmonize the rule with amendments to section 37-67-315 (2), MCA.

22. The proposed amendment of 8.48.902 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-1321, Administrative Rules of Montana)

"8.48.902 STATEMENT OF COMPETENCY (1) will remain the same.

(a) ~~The verified certification by the registrant that he has practiced engineering or land surveying for a minimum of 520 hours during each of the 2 years preceding renewal is accepted as evidence of maintained competency.~~ The statement by the registrant that he has practiced engineering or land surveying for a minimum of 520 hours during each of the 2 years preceding renewal is accepted as evidence of maintained competency.

(2) If the registrant has not continued in practice as in (1)(a) above, he must provide evidence to the board that he has completed a minimum combined time of 520 hours per year of practice, formal course work, home study, and/or group study. ~~Verified certification of the preceding will be accepted as evidence of maintained competency.~~ Statements that the preceding requirement has been met will be accepted as evidence of maintained competency.

(3) In determining whether an applicant for renewal has satisfied the requirements of this rule, the board will not allow credit for the practice of professional engineering or professional land surveying during a period in which the registrant's license was invalid."

Auth: 37-67-202, MCA Imp: 37-67-315, MCA

23. The board is proposing this amendment to harmonize the rule with the amendments made to section 37-67-315, MCA.

24. The proposed amendment of 8.48.1105 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-1331, Administrative Rules of Montana)

8.48.1105 FEE SCHEDULE (1) and (2) will remain the same.

(3) The biennial renewal fee for registration as a professional engineer or professional land surveyor shall be

$40.00. For professional engineers-surveyors (ES), it shall be $60.00. For partnership or corporation certificates of authorization it shall be $15.00.

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

(k) Partnership and corporation certificate of authorization (original)	$40.00
(l) Emeritus application	15.00"

Auth: 37-1-134, 37-67-202, MCA Imp: 37-67-303, 315, 320, 321, MCA

25. This amendment is being proposed to establish fees contemplated by sections 37-67-320 and 321, MCA.

26. The proposed amendment of 8.48.1106 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-1331 and 8-1332, Administrative Rules of Montana)

"8.48.1106 COMPLAINT PROCESS (1) through (3) will remain the same.

(4) The board will employ the following complaint procedure: When letters are received from an individual complaining about a registrant, the administrative assistant shall provide the registrant with a copy of the letter of complaint. The administrative assistant will send a complaint affidavit form to the individual making the complaint and place the letter of complaint in the registrant's file. If no formal affidavit is received within 6 months from the date of mailing of the affidavit form, the letter of complaint shall be removed from the registrant's file and destroyed."

Auth: 37-67-202, MCA Imp: 37-67-331, MCA

27. The board is proposing this amendment to implement section 37-67-331, MCA and bring complaint procedures into harmony with department rules.

28. The board is proposing to repeal 8.48.1107 which can be found on page 8-1332, Administrative Rules of Montana. The reason for this proposed repeal is that the rule is being incorporated into proposed new rule III entitled Disciplinary Action under subsections (3) and (4).

29. The proposed new rules will read as follows:

"I. APPLICATION FOR EMERITUS STATUS (1) A registrant who has terminated his practice of engineering or land surveying may apply for a certificate of emeritus status by submitting to the board a completed application therefore accompanied by the fee established by ARM 8.48.1105."

Auth: 37-67-202, MCA Imp: 37-67-321, MCA

"II. APPLICATION BY JOINT PARTNERSHIPS AND CORPORATIONS (1) Any entity practicing engineering as a partnership or corporation must complete an application for certification of

authorization to practice engineering or land surveying by a partnership or corporation.

(2) Each registrant has the responsibility to see that any partnership or corporation he is involved with is registered.

(3) Add list of partnerships and corporations on roster."

Auth: 37-67-202, MCA Imp: 37-67-320, MCA

"III. DISCIPLINARY ACTION (1) The board reserves the discretion to take appropriate disciplinary action provided for in 37-1-136, MCA, against a licensee violating any law or rules of the board, and to decide on a case by case basis the type and extent of disciplinary action it deems appropriate applying the following considerations:

(a) the seriousness of the infraction;

(b) the detriment to the health, safety and welfare of the people of Montana;

(c) past or pending disciplinary actions relating to the licensee.

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

(a) revocation of a license;

(b) suspension of its judgment of revocation on terms and conditions determined by the board;

(c) suspension of the right to practice for a period not exceeding 1 year;

(d) placing a licensee on probation;

(e) public or private reprimand or censure of a licensee; or

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

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

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

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

(4) Any person whose registration has been revoked may apply to the board for reinstatement after expiration of the minimum time period, if any, specified in the notice of revocation. In the application for reinstatement the applicant must state why he feels registration should be reinstated, specifically setting forth any changed conditions which would justify reinstatement. The applicant must include evidence that he meets the current requirements for registration. The board, upon receipt of said application for reinstatement and after ascertaining that all requirements of the notice of revocation have been met, may reissue a certificate of registration, provided the evidence submitted by the applicant is satisfactory to the members voting in

favor of reinstatement and provided five or more of the members of the board vote in favor of reinstatement."

Auth: 37-1-136, 37-67-202, MCA Imp: 37-1-136, 37-67-331, MCA

30. The reason for proposed new rule I is to implement provisions of section 19, Chapter 553, Laws of 1985.

31. The reason for proposed new rule II is to implement provisions of section 5, Chapter 553, Laws of 1985.

32. The reason for proposed new rule III is to implement section 37-1-136(1), MCA, giving the board more options and broader latitude in imposing disciplinary sanctions for improper conduct, and to clarify the procedure for applications for reinstatement.

33. Interested persons may submit their data, views or arguments concerning the proposed amendments, repeals, and adoptions in writing to the Board of Professional Engineers and Land Surveyors, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than October 23, 1986.

34. If a person who is directly affected by the proposed amendments, repeals, and adoptions wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Board of Professional Engineers and Land Surveyors, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than October 23, 1986.

35. If the board receives requests for a public hearing on the proposed amendments, repeals, and adoptions from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments, repeals, and adoptions, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 279 based on the 2792 licensees in Montana.

BOARD OF PROFESSIONAL ENGINEERS
AND LAND SURVEYORS
DICK GUENZI, CHAIRMAN

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

Certified to the Secretary of State, September 15, 1986.

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

In the matter of the proposed adoption of a new rule concerning continuing education	)))	NOTICE OF PROPOSED ADOPTION OF NEW RULE CONCERNING CONTINUING EDUCATION

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On October 27, 1986, the Board of Realty Regulation proposes to adopt a new rule concerning continuing education.

2. The proposed new rule will read as follows:

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

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

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

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

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

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

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

4. Interested persons may submit their data, views or arguments concerning the proposed adoption in writing to the Board of Realty Regulation, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than October 23, 1986.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Board of Realty Regulation, 1424 9th Avenue, Helena, Montana, 59620-0407, no later than October 23, 1986.

6. If the board receives requests for a public hearing on the proposed adoption from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed adoption, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be

directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 510 based on the 5100 licensees in Montana.

BOARD OF REALTY REGULATION
JOHN DUDIS, CHAIRMAN

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

Certified to the Secretary of State, September 15, 1986.

BEFORE THE DEPARTMENT OF STATE LANDS
OF THE STATE OF MONTANA

In the matter of the repeal of Rules 26.3.101 through 26.3.127 ARM and the adoption of rules on surface leasing of state land.	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED REPEAL OF RULES 26.3.101 THROUGH 26.3.127; THE ADOPTION OF RULES RELATING TO THE LEASING OF THE SURFACE OF STATE LANDS

TO: All Interested Persons:

1. On October 20, 1986, at 7:00 P.M. at the Sheriff's Office Conference Room in the Fergus County Complex (121 8th Ave. S.) Lewistown, Montana, and at 7:00 P.M. in the Commissioner's Office at the Beaverhead County Courthouse in Dillon, Montana; on October 21, 1986 at 7:00 P.M. at the Valley County Courthouse Community Room in Glasgow, Montana, at 7:00 P.M. at the Flathead County Courthouse (East Room #1) in Kalispell, Montana, and at 7:00 P.M. at the Gallatin County Courthouse, Community Room in Bozeman, Montana; on October 22, 1986 at 7:00 P.M. at the Sheriff's Office of the Custer County Courthouse in Miles City Montana, at 7:00 P.M. at the Civic Center Galaxy Room in Great Falls, Montana; and at 7:00 P.M. at the Missoula County Courthouse in Missoula, Montana; on October 23, 1986 at 7:00 P.M. at Room 403 of the Yellowstone County Courthouse in Billings, Montana, and at 7:00 P.M. at the Main Conference Room of the Montana Department of State Lands, 1625 Eleventh Avenue, Helena, Montana, public hearings will be held to consider the repeal of Rules 26.3.101 through 26.3.127, ARM and the adoption of rules governing surface management of state lands.

2. The rules proposed to be repealed are found on pages 26-95 through 26-115 of the Administrative Rules of Montana.

3. These rules are proposed to be repealed because the Department of State Lands and the Board of Land Commissioners are concurrently proposing to adopt newly written and reorganized rules governing surface management of state lands. Because of the extensive nature of the change from the currently existing rules and the proposed new rules, it was deemed to be appropriate to repeal the existing rules and adopt the new rules.

4. The proposed rules provide as follows:

RULE I - QUOTED MATERIAL Material enclosed in quotation marks, with the exception of terms defined in Rule II, is taken verbatim from the statutes or constitution of this state as cited following each quotation. AUTH: 77-1-209 MCA, IMP: 77-1-209 MCA.

RULE II - DEFINITIONS When used in this subchapter of the ARM, unless a different meaning clearly appears from the context:

(1) "Agricultural land" means land which is principally valuable for the production of crops;

(2) "Animal unit" means 1 cow, 1 horse, 5 sheep or 5 goats;

(3) "Animal-unit-month carrying capacity" (A.U.M.) means that amount of natural feed necessary for the complete subsistence of one animal unit for one month;

(4) "Best interests of the state" means those considerations that will produce the maximum return to the state with the least damage to the long-term productivity of the land;

(5) "Board" means the board of land commissioners of the state of Montana;

(6) "Cabinsite" means land occupied or to be occupied for a non-commercial use as a temporary or principal place of residence, for a single family, or equivalent of the same, and the supporting buildings, in the immediate vicinity;

(7) "Commissioner" means commissioner of state lands, chief administrative officer of the department of state lands;

(8) "Crop" means such products of the soil as are planted and harvested, including but not limited to cereals, vegetables and grass maturing for harvest or harvested, but not including grass used for pasturage;

(9) "Custom farming" means farming for another at a fixed fee. Such fixed fee may not be based on a crop share percentage.

(10) "Department" means department of state lands as provided in section 2-15-3201, MCA;

(11) "Grazing land" means land which is principally valuable for pasturage or the feeding of livestock on growing grass or herbage;

(12) "Land use license" or "license" means a contract by which the department conveys an interest in state lands for a specific term and fee, and for a use other than that for which the land is classified.

(13) "Lease" means a contract by which the board conveys state lands for a term of years for a specified rental, and for the use for which the land is classified.

(14) "Lessee" means the person or persons in whose name a surface lease appears on record in the offices of the department, whether such person or persons be the original lessee or a subsequent assignee. The term "lessee" also includes, where the context of the rule may indicate, any person who is the apparent successful bidder for a surface lease but with whom a formal surface lease has not been completed and finalized;

(15) "Licensee" means the person or persons in whose name a license appears on the record in the offices of the department, whether such person or persons be the original licensee or subsequent assignee.

(16) "Pasturing agreement" means an approved sublease in which the lessee personally retains full management and control of the land and livestock.

(17) "Person" means any individual, firm, association, corporation, governmental agency or other legal entity;

(18) "Qualified applicant" means any person who has filed an application and who may become a qualified lessee or licensee as set forth in Rule V;

(19) "Standard lease form" means the lease form then currently in use and approved by the board;

(20) "State" means the state of Montana;

(21) "State lands" means all lands for which the surface leasing is under the jurisdiction of the board as defined by section 77-1-202, MCA;

(22) "Sublease" means any agreement, written or oral, between a lessee and a third party whereby the third party is accorded the use of all or any part of the lessee's leasehold interest;

(23) "Sublessee" means the person or persons to whom a lessee has leased all or part of the unexpired term of his lease;

(24) "Surface" means the superficial part of land including the soil and waters which lie above any minerals;

(25) "Timber land" means land which is principally valuable for the timber that is on it, for the growing of timber or for watershed protection;

(26) "Tract" - the land or portion thereof as described by a specific lease or license or application for the same.

(27) "Unleased land" means land that is not under lease at the time of an application to lease or land on

which the lease has been recently cancelled by the department or surrendered by the lessee.

(28) "User" means any lessee, licensee or permittee. (AUTH: 77-1-209 MCA; IMP. 77-1-202, MCA)

RULE III - GENERAL PROVISIONS (1) The board, as established by the constitution of Montana (Article X, Section 4) "has the authority to direct, control, lease, exchange and sell school lands" and other lands granted for the support of education. It has the authority to issue leases for agriculture, grazing, mineral production, cabinsites, and other uses under such terms and conditions as best meet the duties of the board to the various trusts and the state of Montana. The board also has the authority to sell timber and other forest products. The board shall administer state land under the concept of multiple-use management.

(2) Failure to comply with any provisions contained in any rule is grounds for cancellation of the lease, permit or license, or assessment of any other penalty specified herein or by law. The department has the authority to make management decisions to protect the best interests of the state. (AUTH. 77-1-209, MCA; IMP. Secs. 77-1-202 through 77-1-204 MCA)

RULE IV - ADMINISTRATIVE DETAILS AND INFORMATION (1) General inquiries, applications for leases, easements, land use licenses or permits, improvements, and any questions regarding the leasing or usage of state land may be directed to any of the department offices. Payment of all money required or permitted under these rules or pursuant to the provisions of any surface use shall be made to the department. All checks, drafts and money orders shall be made payable to "Montana Department of State Lands." Sight drafts will not be accepted.

(2) The department shall maintain records of all state land. Such records shall contain all pertinent information concerning a particular tract of state land. Such records shall be open for public inspection at all times during regular business hours.

(3) Any notice or correspondence required to be sent to a lessee or licensee shall be sent to the name and address appearing on the lease, license or permit form filed in the department records. Correspondence sent by the department to such name and address shall be deemed sufficient notice for all purposes. If the lessee or licensee desires to change such address, he must request such change in writing to the department. Any change in name of the lessee shall be made only through assignment procedures in Rule XVIII. (AUTH. 77-1-209 MCA; IMP. 77-1-301 MCA)

RULE V - WHO MAY HOLD A LEASE OR LICENSE (1) Any person authorized by law to hold land may hold a lease or license on state land and may hold one or more leases or licenses on more than one section of land; however, to hold a state lease or license a person must be at least 18 years old or the head of a family.

(2) No employee, or spouse of an employee, of the department may hold a lease or license on state lands. When it is in the public interest the board may lease or license state land to the United States on terms which will protect the interest of the state and will promote the public welfare. (AUTH. Sec. 77-1-209 MCA; IMP. Secs. 77-6-103 and 77-6-108 MCA)

RULE VI - TERM OF LEASE OR LICENSE (1) In general, a lease or license for agricultural or grazing lands shall be for a 5 or 10 year period and shall expire February 28, 10 years or less from the beginning date of the lease or license. A cabinsite lease shall be for a period not to exceed 15 years and shall expire February 28, 15 years or less from the beginning date of the lease. In the event the lessee of a cabinsite needs a longer lease period for loan security purposes, the department may grant a cabinsite lease up to a maximum of twenty-five years. A lease for a use other than agricultural, grazing, cabinsite or mineral production may be for up to 40 years. Leases for power sites or school sites may be for longer than 25 years.

(2) A land use license may be for a term not to exceed 10 years. (AUTH. 77-1-209 and Sec. 3, Ch. 488, L. 1985; IMP. 77-6-109)

RULE VII - LEASE AND LICENSE FORMS, BID FORMS AND BONDING (1) The board must approve all lease forms and changes in lease forms prior to their use. The original of the lease shall be mailed to the lessee and the department shall keep the duplicate original on file.

(2) Leases shall be issued without bond unless required by the board. Licenses shall be issued without bond unless required by the department. If a bond is required it shall be under such conditions and in a form prescribed by the department.

(3) The department reserves the right to add special conditions to a lease or license to protect the interests of the trust and its resources. (AUTH. Sec. 77-1-209 MCA; IMP. Sec. 77-6-207 MCA)

RULE VIII - LANDS AVAILABLE FOR LEASING OR LICENSING (1) Lands available for leasing or licensing under these rules include any state land under the jurisdiction of the board.

(2) The department shall classify and reclassify land in accordance with its capability to support a particular

use. The following classes are established in accordance with section 77-1-401 MCA:

(a) Class 1 shall be grazing land:

(b) Class 2 shall be timber land;

(c) Class 3 shall be agricultural land;

(d) Class 4 shall be cabinsites and land uses other than grazing, timber or agricultural.

(3) This rule shall not be construed to prohibit multiple use management.

(4) In order to insure that any unleased or unlicensed portion of state land is not made more difficult to lease or license, lands shall be leased or licensed in compact bodies and an attempt will be made not to separate parts of any tract from public highways and available water supplies.

(5) Unsurveyed land, including islands, shall be available for leasing or licensing provided that any applicant for a lease or license on such lands shall supply the department with a legal and sufficient description thereof, by courses and distances (metes and bounds). The department shall assume no liability or responsibility for the correctness, completeness and validity of such description. The department shall issue all leases or licenses including unsurveyed lands and islands only under such title as the state of Montana then has or thereafter shall acquire. In the event it is established that the state has less than a fee simple title, it shall not be liable for any refunds or damages.

(6) The department does not guarantee that fences or other boundary indicators on site are a true indication of legal property boundaries. The lessee or licensee may be responsible for the cost of any survey which is made necessary by a challenge to the proper boundary of the state-owned land. Such costs may be considered an improvement on the land. (AUTH. Sec. 77-1-209 MCA; IMP. Sec. 77-1-401 and 77-1-402 MCA)

RULE IX - RECLASSIFICATION (1) Any person desiring to lease a tract of state land or portion thereof for any use other than the present classification must submit an application proposing such alternative use. If such application is received from anyone other than from the existing lessee for a reclassification, then proper notice shall be given to the appropriate lessee. The department shall conduct a capability inventory of the tract, and if it determines such proposed use to be in the best interests of the state, the tract may be reclassified and leased for such alternative use. The person submitting an application for reclassification will be notified of the department's decision at least

90 days prior to the date applications and bids for leases or licenses are due.

(2) Each tract of land reclassified to be leased for an alternative use shall be subject to the bidding procedures for unleased land as described in Rule XV; except

(a) where classified grazing land is reclassified to agricultural land upon application of the existing lessee; or

(b) land upon which a cabinsite was in existence on or before October 1, 1983.

(3) Each tract of land reclassified to be licensed for an alternative use shall only be subject to the bidding procedures for unleased or unlicensed land as described in Rule XV where such procedures are deemed to be in the best interest of the state.

(4) Prior to the cultivation of any land leased or licensed for grazing purposes, the lessee must apply and receive permission from the department, for reclassification to agriculture as provided in this rule. Failure to obtain written approval before cultivating state land shall result in either cancellation of the lease or license or a rental of twice the regular agricultural rental on the land illegally cultivated, as provided by section 77-6-209 MCA. Such determination shall be subject to the appeal procedures in Rule XXI.

(5) The department reserves the right to reclassify or issue a land use license on, or withdraw all or a portion of land without application which is leased or licensed for grazing, agricultural or timber purposes upon reasonable notice to the user. The lessee shall be entitled to reasonable compensation for any improvements on the withdrawn land and to an adjustment or return payment of rent. (AUTH. Sec. 77-1-209 MCA; IMP. Sec. 77-1-202 MCA)

RULE X - MINIMUM RENTAL RATES (1) As to agricultural lands, all leases shall be continued or made upon a crop share rental basis of not less than one-fourth of the annual crops to the state or the usual landlord's share prevailing in the district, whichever is greater. For purposes of this rule a district means the county or counties where the leased lands are located. "The board may, however, approve special crop share rentals of less than one-fourth for high production cost crops such as but not limited to potatoes and sugar beets or for high production cost methods when these methods would result in more income to the state. The board may not delegate the authority to approve such special crop share rentals" as per section 77-6-501 MCA.

(2) The department may authorize a lease or license upon other basis than cropshare, but in these cases the

rental shall at least equal the value of the usual landlord share prevailing in the district. This may only be accomodated once during the term of the lease unless changes in crops are contemplated. Such rental rate consideration may only be approved by the commissioner upon proper written application by lessee or licensee.

(3) The rental rate for all grazing leases and licenses shall be on the basis of the animal-unit-month carrying capacity of the land to be leased or licensed. The department shall appraise and reappraise the classified grazing lands and grazing lands within classified forest lands under its jurisdiction in accordance with section 77-6-201, MCA, to determine the carrying capacity and shall maintain records of such appraisals in its files. Such determination shall be made from time to time as the department considers necessary, but at least once during the term of every lease or license.

(4) When a lease or license term begins after February 28 but before July 1 during the first year of the lease or license, the lessee or licensee shall pay a rental price equal to the rental price for an entire year. When the lease or license term begins after June 30 but before February 28 of the next year, the lessee or licensee shall pay a rental price equal to 1/2 of the yearly annual rental. Summer fallowing shall not entitle any lessee or licensee to a refund or reduction of the rental.

(5) Upon renewal or assignment of a cabinsite lease or license that is in effect on October 1, 1983, the rental rate shall be 5% of the appraised market value of the property, excluding improvements, which value may be increased or decreased every fifth year by 5% of the change in the appraised market value. Access roads shall be included in the lease and in the appraised value of the leased land.

(a) All other leases of Class 4 land other than cabinsite leases shall be based on a determination of fair market value made by the department. This determination shall be made at least once during the term of every lease, and a record made thereof. (AUTH. Sec. 77-1-209 MCA and Sec. 2, Ch. 54, L. 1985; IMP. Secs. 77-1-208, 77-6-201, 501, 502 and 504, MCA)

RULE XI - COMPETITIVE BIDDING (1) All competitive bids for grazing leases or licenses shall be submitted in the form of $X.XX per A.U.M. In no case may the bid be less than the statutory minimum established by the legislature for that year. If in any succeeding year of the lease or license the amount bid is less than the statutory minimum for that year, then the rental shall be the amount set by the legislature. Bids for any lease or license may only be submitted for the present reclassified use unless the bidder submits a proposed reclassified use in accordance with Rule IX.

(2) Competitive bidding on agricultural leases or licenses shall be submitted based upon crop share rental. No cash bids will be accepted. In no case may the rate be less than the statutory minimum established by the legislature for that year.

(3) All competitive bids for unleased cabin sites shall be submitted in the form of $X per/year. In no case may the bid be less than 5% of the appraised market value of the property. If in any succeeding year of the lease the amount of the lease is less than the statutory minimum for that year, then the rental shall be the amount set by the legislature.

(4) All competitive bid signatures must be notarized.

(5) Competitive bids on a portion of a lease or license may be allowed upon approval from the Department. (AUTH. 77-1-209 MCA; Sec. 2, Ch. 54, L.1985; IMP. 77-6-202, 77-6-501, 77-1-208 MCA)

RULE XII - PAYMENTS - WHEN DUE (1) For grazing leases and licenses, the grazing portion of leases and licenses containing both agricultural and grazing land and agricultural leases not based on a crop share, the department will send written notices to the address on the lease or license beginning in January of each year stating the amount of rental due. The notice shall also state that payment is due by March 1, and if not paid by April 1, the lease or license is cancelled. At least two weeks prior to April 1 the department shall send by certified mail to each lessee or licensee who has not made payment a letter notifying the lessee or licensee that the lease or license is cancelled if payment is not received or postmarked on or before April 1. If payment is not received or postmarked by April 1, the entire lease is cancelled.

(2) For agricultural leases and licenses on the agricultural portion of leases and licenses containing both grazing and agricultural land, when the rental is paid on a crop share basis or on a crop share/cash basis, whichever is greater, the rental shall be due immediately after harvesting or before November 15 of the year in which the crop is harvested. The department shall compile a list as soon as possible after November 15 of those lessees or licensees with agricultural land who have not paid the agricultural rentals. A notice shall be sent to each lessee or licensee on the list by certified mail at least two weeks prior to December 31 advising such lessee or licensee that the lease or license is cancelled if payment is not received or postmarked on or before December 31. If payment is not received or postmarked by December 31, the entire lease is cancelled. All appropriate seeding and crop reports must be submitted with the payment. Partial payments shall be accepted, however, such payments will not prevent

cancellation of the lease or license if full payment as verified on the crop report is not received on the case required by law.

(3) When a lease or license takes affect after September 30 and before February 28 of the next year, the lessee or licensee shall pay both the rental for 1/2 of the yearly rental due and full yearly rental due for the next succeeding year before the lease or license is executed.

(4) If there are special circumstances, a lessee or licensee of agricultural land must write to the department prior to November 1 if they wish an extension for rental payment beyond the December 31 deadline. All extension requests must set forth the reasons for the extension and verification of those reasons by the appropriate sources. In all cases permission for an extension may only be given in writing by the department and such extension may not extend beyond April 1 of the following year.

(5) When the United States is the lessee or licensee of any state land the rental shall not be due until the expiration of each year of the lease or license. (AUTH. Sec. 77-1-209 MCA, and Sec. 4, Ch. 473, L. 1985; IMP. Secs. 77-6-103, 506 MCA)

RULE XIII - LEASE AND LICENSE REPORTS (1) The lessee or licensee is required to submit various reports on forms supplied by the department, including but not limited to the following:

(a) An agricultural seeding report shall be completed and returned to the department for each section or portion thereof immediately after spring planting, but not later than June 15, on all agricultural land. This includes all agricultural leases or licenses including those based on a cash lease or based on a cash lease/crop share, whichever is greater.

(b) A crop report shall be completed and returned to the department on each section or portions thereof, immediately after harvest and marketing, but no later than November 15, on all agricultural land. All elevator checks and stubs shall be included with the report. This includes all agricultural leases or licenses including those based on cash lease or based on a crop share/cash lease, whichever is greater.

(c) Failure to file seeding and crop reports by the specified date or failure to supply any other information pertinent to the lease or license may result in cancellation of the lease or license subject to the appeal procedures set forth in Rule XXI.

(2) The lessee or licensee of any state land shall comply with the provisions of the federal farm program when

applicable and shall indemnify the state against any loss occasioned by noncompliance with such provisions. The state shall receive the same share as it receives for crops of all payments pursuant to any act or acts of the congress of the United States in connection with state lands under lease or license and the crops thereof. (AUTH. Sec. 77-1-209 MCA; IMP. Secs. 77-1-202 and 301 MCA)

RULE XIV - DISPOSAL OF CROPS (1) The lessee or licensee shall deliver all grain crops to an elevator on or before November 15 in the year of harvest, free of charges, taxes or assessments to the credit of the state. If elevators cannot accommodate state grain at harvest time, the lessee or licensee shall provide storage free of charge until marketing. Other agricultural crops shall be disposed of at the going market price unless otherwise directed. The department shall permit lessees or licensees to purchase the state's share of all crops; however, department approval is required before a lessee or licensee may purchase state crops. Applications shall be made on the prescribed forms in current use, furnished at no cost by the department. The lessee or licensee shall be required to submit all applicable crop reports, a crop analysis and a certification of market price for the crop from a licensed dealer on forms provided by the department. The lessee or licensee shall make full payment within 10 days from the date of certification but no later than November 15. The lessee or licensee may also contract for purchase of state crops; however, all contracts must be approved by the department in advance and filed with the department. Extensions for rental payment may be granted in this instance pursuant to Rule XII. (AUTH. Sec. 77-1-209 MCA; IMP. Secs. 77-1-202 and 301 MCA)

RULE XV - ISSUANCE OF LEASE OR LICENSE ON UNLEASED OR UNLICENSED LAND AND RECLASSIFIED LAND (1) A person who desires to lease or license unleased or unlicensed state land may apply on the standard application form prescribed by the department. The application form must be returned to the department and must be accompanied by a nonrefundable application fee. Such application shall be deemed an offer to lease or obtain a license on the land described therein at a rental rate which reflects the fair market value of the lease or license.

(2) When the department receives an application to lease or obtain a license on an unleased or unlicensed tract of land or a tract which has been reclassified (except where grazing land is reclassified to agricultural land upon application of the existing lessee, or land upon which a cabinsite lease or license was in existence on or before October 1, 1983) it shall advertise for written bids on the tract once a week for two weeks in the official county newspaper of the county in which the unleased tract lies. The tract will be leased or licensed to the highest bidder unless the board determines that the bid is not in the best interests of the state. All bids shall be sealed bids and

will not be opened until a specified time and place. If the high bid is rejected, the board will issue its reasons for the rejection in writing. The lease or license shall then be issued, at the fair market value determined by the board, to the first bidder willing to pay the board-determined rental whose name is selected through a random selection process from all bidders on the tract.

(3) The lessee or licensee shall sign and return the lease or license to the department within 30 days of receipt of the lease or license. If the lease or license is not signed and returned to the department within 30 days, the department may re-advertise the lease or license.

(4) Cabinsite leases issued on previously unleased land shall be subject to the bid rental rate for the full term of the lease unless, after 5 years, 5% of the adjusted rental rate as determined by Rule X(5) is higher, and then the lessee or licensee shall pay the higher rate.

(5) When a lease or license is cancelled by the board or department or surrendered by the lessee or licensee, the department shall attempt to re-lease or re-license the land. The department shall advertise for written bids on the tract, and application and bid forms will be mailed to all persons who have expressed in writing an interest in leasing or licensing the land. The department shall receive applications and bid forms from potential lessees or licensees for a reasonable time after the date on which the first such application and bid form is mailed, and the land will be leased or licensed in accordance with subsections (1) and (2).

(6) Any person who has had his lease or license cancelled and not reinstated by the board or department for any reason except nonpayment of rentals shall not be allowed to bid upon the lease or license or upon any lease or license for land managed by the department. If no other bids are received, the former lessee or licensee may be allowed to bid, but the board may reject any or all bids from a lessee or licensee who has had his lease cancelled in the past. (AUTH. Sec. 77-1-209 MCA; IMP. Sec. 77-6-202 MCA)

RULE XVI - ISSUANCE OF LEASE OR LICENSE ON LAND CURRENTLY UNDER LEASE OR LICENSE (1) Any interested person may request notice of the expiration of any lease or license. Such requests shall be in writing and shall include an adequate description of the state land involved and the address of the person requesting notice. An application and bid form will be mailed to the last known address of each person requesting notice, allowing reasonable time for response.

(2) A person who desires to lease or obtain a license on state land currently under lease or license shall apply

for such lease or license in the manner specified in Rule XV, and the application shall be accepted under the same conditions as specified in that section. An application fee will be required and applications for land currently under lease or license will only be accepted after December 1 of the year preceding the expiration of the current lease. Application forms must be postmarked on or before January 28 of the year in which the lease expires. Only applications on the standard application form will be accepted.

(3) Any person who desires to bid must submit such bid along with his completed application form. The bid shall be in writing on the form prescribed by the department and then in current use. Blank forms may be secured from the department at no cost. Once a bid has been submitted to the department and opened it may not be withdrawn except for good cause as determined by the department. All bids shall be sealed bids and will not be opened until a specified time and place. A certified check, cashier's check or money order in an amount equal to $1 per acre for each acre of agricultural land and 20% of the annual rental bid for grazing and all other leases or licenses must be submitted as a deposit with any bid along with the nonrefundable lease or license application fee. The deposit of any unsuccessful bidder shall be returned when the lease or license is issued. The deposit or a portion thereof may be forfeited if the department determines that the bid which has been submitted is frivolous, forged, or a bad faith bid or a bid submitted for purposes of harassment.

(4) The high bidder for the lease or license of the land described in the application shall be deemed to have leased or licensed such land at the rental price bid by him, subject to the preference right of the current lessee as described in Rule XVII; however, the board may withdraw any land from further leasing or licensing for such period as the board determines to be in the best interests of the state.

(5) All lessees or licensees shall sign and return the lease to the department within 30 days of receipt of the lease. Failure to return the lease or license within 30 days may be cause for cancellation and re-advertisement. (AUTH. Sec. 77-1-209 MCA; IMP. Sec. 77-6-205 MCA)

RULE XVII RENEWAL OF LEASE OR LICENSE AND PREFERENCE RIGHT (1) A current lessee or licensee shall be sent an application to renew his lease or license if he has paid all rentals due. The application shall be accepted under the same conditions as specified in Rule XV; however, applications for renewal will only be accepted after December 1 of the year preceding the expiration of the lease or license and must be postmarked on or before January 28 of the year of expiration of the lease or license. Failure to submit a renewal application by the lessee or licensee postmarked on or before January 28 will result in an unleased or

unlicensed tract and will be subject to the requirements for leasing or licensing an unleased or unlicensed tract under Rule XV.

(a) If competitive bids have been submitted for such tracts before January 28 and the lessee or licensee has not submitted a renewal application, the bids shall remain confidential and may be returned to the bidder. The tract(s) will then be advertised for bids to qualified bidders as provided under Rule XV.

(2) A surface lessee or licensee has a preference right to meet the high bid offered for the lease or license and may retain the lease or license if all rentals have been paid and appropriate reports submitted and subparagraph (3) of this rule has not been violated. When an agricultural lessee or licensee meets the high bid and retains his lease or license, the new rental rate must be paid for all crops harvested after the renewal date even if such crops were planted before the lessee met the high bid. The lease or license shall be renewed at the fair market rental provided no other applications for the lease or license have been received by the department within the time limits as set forth by Rule XVI(2). Grazing or agricultural uses on classified forest lands may be terminated if it is determined that the resources under that classification are being damaged or not perpetuated.

(a) A cabinsite lease is not subject to bids upon renewal if the lessee continues the lease and the lessee has paid all rentals and paragraph (3) of this rule is not violated. The lease shall be renewed at the rental provided by law.

(3) A lessee or licensee who has allowed another person to use or operate more than 1/3 of the land included in a lease or license for more than 30% of the term of the lease or license shall not be entitled to exercise the preference right to meet any high bid offered for the lease or license. As examples, the lessee or licensee may allow 1/3 or less of the land to be used by another for the entire term of the lease or license, or may allow all of the land to be used by another for 30% or less of the lease or license term and still be entitled to exercise the preference right. However, all such arrangements must be reported to the department and approved as a sublease. A lessee or licensee who has accorded another the use of all, or a portion of, the allowable yearly AUM's during one year will be deemed, for the purposes of this section, to have subleased the entire tract for that year.

(4) If a lease or license is renewed pursuant to the preference right and it is later discovered that the lessee or licensee was not entitled to exercise such preference right pursuant to subsection (3) of this rule during the prior lease or license term, then the renewed lease or license shall be cancelled and readvertised for lease or

license. However, the department will retain all rentals paid until the time the renewed lease or license is cancelled. The prior lessee or licensee shall be allowed to bid in this instance.

(5) An exchange of use involving state lands is considered to be a sublease and subject to all the provisions of law which apply to other types of subleases.

(6) A surface lessee or licensee who has lost the opportunity to exercise a preference right because of a sublease or other arrangement may apply to the commissioner and set forth the specific grounds why the lessee or licensee is entitled to a hearing. If the grounds include a bonafide factual dispute, the commissioner shall order a hearing within twenty days. When such a hearing is granted the contested case provision of the Montana Administrative Procedure Act shall apply. The board shall make a final decision after considering the entire record or may delegate such authority to the commissioner. The commissioner may appoint a hearings examiner to conduct the hearing and produce proposed findings of fact, proposed conclusions of law and a proposed order. The hearings examiner may be from the department's staff or from another source.

(a) If a surface lessee or licensee has lost the opportunity to exercise a preference right because of a sublease or other arrangement and disputes only the legal ground upon which the rights were lost, then the lessee or licensee may apply to the commissioner for a declaratory judgment concerning such legal grounds. The application shall specify the legal grounds which the lessee or licensee disputes. The procedure of applying for and issuing such a declaratory judgment shall be that set forth in the Montana Administrative Procedure Act.

(7) If other applications are received by January 28 of the year the lease or license expires, and the lessee or licensee has not violated part 3 of this rule, the lessee or licensee shall have a preference right to renew his lease or license provided he meets the high bid for such lease or license. Such bid is deemed to be met if the amount of the high bid is received by the department prior to the expiration of the lease or license or, in the case of agricultural land leased solely on a crop share rental basis, if the lessee or licensee agrees in writing to meet the high bid prior to the expiration of the lease or license. A lessee or licensee who believes the bid to be excessive may request in writing a hearing before the commissioner after he meets the high bid. The request for a hearing must contain a statement of reasons and supporting evidence why the lessee or licensee believes the bid not to be in the state's best interest, because it is above community standards for a lease of such land; or would cause damage to the tract; or impair its long-term productivity. The lessee or licensee shall also submit evidence of rental rates for similar land

in the area with his request. The commissioner may grant or deny a request for a hearing and if the request is granted, the commissioner may recommend to the board that the bid be lowered only if he feels that it is in the best interests of the state to do so. The hearing is not subject to the Montana Administrative Procedures Act. The board may accept or reject the commissioner's recommendation. The lessee is obligated to lease or license the property at the rate determined by the board. It is the duty of the board to achieve fair market value. The lease or licensing of such land shall be such so as to generate revenue commensurate with the highest and best use of the land or portions thereof, as determined by the department.

(8) Regardless of any provision to the contrary in these rules, at renewal time the board may withdraw any land or portion of land from further leasing or licensing for an indefinite period. The department may provide in any lease or license at the time of execution or renewal that the land may be withdrawn from further leasing or licensing after reasonable notice if the department considers such action to be in the best interests of the state.

(9) When land under lease or license has previously been sold and the certificate of purchase has been cancelled, any later reinstatement of the certificate of purchase shall not have the effect of cancelling any lease or license except that the current lessee or licensee shall lose his right to renew the lease. (AUTH. Sec. 77-1-209, MCA and Sec. 2, Ch. 687, L. 1985; IMP. Sec. 77-6-205, MCA)

RULE XVIII - ASSIGNMENTS (1) Lessees' or licensees desiring to assign a lease or license may apply on the standard application form prescribed by the department. No assignment will be approved unless it is made upon the form prescribed by the department. An assignment in order to be binding on the state must be approved by the department. An assignment will not be approved if all rentals or payments due have not been paid or the terms of the lease or license have been violated. The department may disapprove any assignment application which is not in the best interests of the state. The state will not approve the assignment of any lease which is subject to a pledge or mortgage without written approval from the pledgee or mortgagee. If an assignment is made upon terms less advantageous to the assignee, than terms given by the state, the assignment shall not be approved. Assignments which result in a profit to the assignor over and above the value of improvements may result in cancellation of the lease subject to the appeal procedures under Rule XXI. An assignment which is signed by both parties shall be construed to be conclusive proof that all payments for improvements have been paid to the assignor from the assignee. The department will not approve conditional assignments. Such transactions may only be accomodated through the subleasing procedure contained in Rule XIX.

(2) No assignment or series of assignments will be recognized by the department if the assignment is solely an attempt to avoid the loss of the preference right. (AUTH. 77-1-209, MCA; IMP. 77-6-208 MCA)

RULE XIX - SUBLEASING (1) A lessee or licensee desiring to sublease may apply on the standard application form prescribed by the department. A sublease in order to be legal must be approved by the department. A sublease will only be approved if all rentals or other payments or reports due have been submitted, and if the terms of the lease or license have not been violated. If a sublease is made on terms less advantageous to the sublessee than terms given by the state or without filing a copy of the sublease and receiving the department's approval, the commissioner shall cancel the lease or license subject to the appeal procedures provided in Rule XXI.

(2) The subleasing of state land may result in loss of preference right to meet the high bid offered for the lease or license at renewal, as provided in Rule XVII.

(3) A lessee or licensee of state land shall not sublease such land as part of the sale of his own fee lands or the sale of any improvements, crops or leasehold interest. To transfer such lease or license as part of the sale of lands improvements, crops or leasehold interest, the lessee or licensee must assign the lease or license as provided in Rule XVIII. Failure to comply with the terms of this rule shall be grounds for cancellation of the lease or license, subject to appeal procedures in Rule XXI.

(4) The lessee or licensee is responsible for the actions of the sublessee. Any action committed by the sublessee which if committed by the lessee or licensee would result in cancellation of the lease or any other penalty will be deemed to have been committed by the lessee or licensee.

(5) Custom farming shall not be considered a subleasing situation for the purposes of these rules. Management of the lease or license must be exercised at all times by the lessee or licensee. Failure to provide such management in the absence of an approved sublease may be sufficient grounds for cancellation of the lease or license and/or loss of the preference right at the time of renewal. The state shall not be subject to any reduction in rentals due to custom farming methods. (AUTH. 77-1-209 MCA; IMP. 77-6-208 MCA)

RULE XX PASTURING AGREEMENTS (1) A lessee or licensee who has filed and obtained approval for a pasturing agreement prior to entering into such agreement shall be exempt from Rule XVII(3) if he has complied with the terms of such agreement as approved by the department. Such pasturing agreement shall allow a lessee or licensee to take in

livestock belonging to another individual on state land if the lessee provides all elements of management and labor associated with the utilization of the lease or license.

(2) The lessee or licensee may charge a management fee when there is an approved pasturing agreement, but may not charge more for the combined grazing and management fees than 2 times the grazing rate charged by the state for the lease or license. The pasturing agreement shall be on a form furnished by the department and shall state the rate charged for grazing on an AUM basis and the amount of the management fee if any. The agreement must be signed by the lessee or licensee and sublessee, and be notarized and approved by the department. The Department may charge a filing fee for such agreement. Failure to obtain an approved pasturing agreement may result in cancellation of the lease under Rule XIX. (AUTH. 77-1-209 MCA; IMP. 77-6-208, MCA)

RULE XXI - CANCELLATION OF LEASE OR LICENSE (1) The department may cancel any lease or license if the lessee or licensee commits fraud or misrepresents facts to the department which, if known, would have had an effect on the issuance of the lease or license, uses the land for any purpose not authorized in the lease or license, or violates the terms of the lease or license or these rules, fails to manage the land in a husband-like manner consistent with conservation of the land resources and the perpetuation of its productivity, or for any other reason provided by law. The lessee or licensee of a cancelled lease or license shall not be entitled to any refunds or exemptions from any payments due to the state.

(2) The department shall immediately notify the lessee or licensee by certified mail of the cancellation and the reason for it, and the lease or license shall be deemed cancelled 15 days after such notice is received by the lessee or licensee, unless the lessee or licensee files a notice of appeal with the department prior to the expiration of the 15-day period, in which case the lease or license remains in effect until the board decides the matter. Within 10 days after receipt of notice of appeal the department shall notify the lessee or licensee of the time and place of the hearing before the board. The time and place of the hearing may be changed by the board after 10 days notice to the lessee or licensee. The board shall conduct an open hearing under the rules set out in the Montana Administrative Procedure Act, section 2-4-101 et seq., MCA. The burden of proof to show why the lease or license should not be cancelled shall be borne by the lessee or licensee. The board may reinstate the lease or license where it finds that the violation is not serious enough to warrant cancellation and restore all rights and privileges upon payment of a penalty up to three times the annual rental against the lessee or licensee. Payment of the penalty may be considered as a notice of appeal for the purpose of keeping the lease in effect until the board decides the matter. If the board

does not reinstate the lease or license, the land shall be readvertised for lease or license in accordance with Rule XV. (AUTH. Sec. 77-1-209 MCA; IMP. Secs. 77-6-210 and 211 MCA)

RULE XXII - MORTGAGES AND PLEDGES (1) State land leases or licenses and leasehold interests may be pledged or mortgaged by the lessee or licensee. The pledgee or mortgagee shall file the pledge or mortgage or certified copy thereof with the department within 30 days of its receipt by him. Within 30 days after payment of the indebtedness, termination of the pledge agreement, or release of the mortgaged leasehold interest, the lessee or licensee shall file proof of that fact with the department.

(2) If a lessee or licensee mortgages his leasehold interest in state lands pursuant to section 77-6-401, MCA, then there must be an assignment, signed by the lessee or licensee/mortgagor and the mortgagee, and placed in escrow. A copy of such assignment must be filed with the department. Failure to execute the terms of this rule shall be cause for the department not to recognize the mortgage. (AUTH. 77-1-209 MCA; IMP. 77-6-401 through 404 MCA)

RULE XXIII - ESTATES (1) In the event of a lessee's or licensee's death, the lease or license shall be transferred to the decedent lessee's or licensee's estate. The department shall consider the estate to be the lessee or licensee until such time as proof of different ownership is received by the department. In most cases the department shall require a copy of the decree of distribution or assignment by a court-appointed personal representative. Exceptions to this rule may be allowed when the department determines that an unusual situation exists.

(2) All provisions of these rules, including but not limited to: leasing, licensing, subleasing, reporting, assignments, and payments; also apply to leases or licenses held by a decedent's estate. (AUTH. Sec. 77-1-209; IMP. Secs. 77-6-208,401 and 402 MCA)

RULE XXIV - SURRENDERS AND CONSOLIDATION OF LEASES OR LICENSES A lessee or licensee who wishes to surrender his lease or license in whole or in part must submit a request to the department for approval. Also upon request, two or more leases or licenses may be combined when held by the same lessee or licensee. The request from the lessee or licensee must be in writing and if approved, the leases or licenses will be combined with the lease or license which expires first so that no lease or license shall run longer than its prescribed term. The department may combine leases or licenses at renewal when such action is in the best interest of the state. (AUTH. 77-1-209 MCA; IMP. 77-1-202 MCA)

RULE XXV - IMPROVEMENTS (1) A lessee or licensee may place improvements on state land which are necessary for the conservation or utilization of such state land with the approval of the department; however, only a single one-family residence will be permitted on each cabinsite lease. The lessee or licensee shall apply for permission prior to placing any improvements on state land on the form prescribed by the department and then in current use. Blank forms shall be available at no cost. A lessee or licensee will not be entitled to compensation by a subsequent lessee or licensee for improvements which are placed on the land after May 10, 1979 and which are not approved by the department. Proof of the date of placement of improvements may be required by the department. Any improvements or fixtures paid for by state or federal monies shall not be compensable to the former lessee or licensee.

(2) It shall be the responsibility of the lessee or licensee to notify the new lessee or licensee of the improvements on the lease or licensed tract and the value of such improvements. Prior to the issuance of a new lease or license a new lessee or licensee shall prove that he has offered to pay or has paid the former lessee or licensee the value of the improvements and fixtures either as agreed upon with the former lessee or licensee or as fixed by arbitration or that the former lessee has decided to remove the improvements and fixtures from the lease or license. However, if the improvements and fixtures become the property of the state because the former lessee or licensee has failed to act within 60 days after expiration of the lease, then the new lessee or licensee shall not be required to prove that he(she) has offered to pay the former lessee or licensee for such improvements and fixtures. The department may require a written notice from the former lessee or licensee stating that he has been paid for or is removing the improvements and fixtures. If the former lessee or licensee does not agree on the value of the improvements and fixtures or begin arbitration procedures within 60 days after the expiration of the lease or license, then all improvements and fixtures remaining shall become the property of the state. This applies to permanent as well as movable improvements. The 60-day period for removal of improvements may be extended by the department upon proper written application.

(3) When the former lessee or licensee wishes to sell improvements and fixtures, and the new lessee or licensee wishes to purchase such improvements and fixtures, and the parties cannot agree upon a reasonable value, such value shall be determined by arbitration. When the new lessee or licensee does not wish to purchase the movable improvements and fixtures, then the former lessee or licensee shall remove such improvements immediately. Extensions for removing these improvements for good cause may be granted by the department.

(4) In case of arbitration, the lessee or licensee, or purchaser and the former lessee or licensee, shall each appoint an arbitrator with a third arbitrator appointed by the two arbitrators first appointed. No party may exert undue influence upon the arbitrators in an effort to affect the outcome of the arbitration decision. If any party refuses to appoint an arbitrator within 15 days of being requested to do so by the commissioner, the commissioner may appoint an arbitrator for that party. The value of the improvements and fixtures shall be fixed by the arbitrators in writing and submitted to the department and such determination shall be binding on both parties; however, either party may appeal the decision to the department within 10 days of the receipt of the arbitration decision by the department. If any relevant portion of the arbitration decision is vague or unclear, then the department may ask for written clarification of the intent of the arbitration panel. Upon appeal by either party, the department may examine such improvements to determine the value of the improvements and fixtures and the department's determination shall be final. The determination of the value of improvements by the department shall be limited to those improvements involved in the arbitration. The department shall charge the cost of its examination to the party or parties in such proportion as justice may require. The compensation for the arbitrators shall be paid in equal shares by both parties. If the former lessee or licensee refuses to pay his share of the cost of arbitration, then those costs may be deducted from the value of the improvements and fixtures. If the new lessee or licensee refuses to pay the cost of arbitration, the lease or license shall not be issued and the bid deposit shall be forfeited to the department, and the lease or license shall be put up for bid to qualified bidders.

(5) The lessee or licensee shall pay the former lessee or licensee for the improvements and fixtures within 30 days after the value has been determined. Failure to pay the former lessee or licensee within 30 days shall result in rebidding of the lease or license in accordance with Rule XV and the bid deposit shall be forfeited. The department may grant an extension in writing under special circumstances.

(6) Summer fallowing, necessary cultivation done after the last crop grown, seeding and growing crops shall all be considered improvements. The value of seeded acreage and growing crops shall be limited to costs for seeding, seedbed preparation, fertilization and agricultural labor at the prevailing rate in the area. The former lessee's or licensee's anticipated profit shall not be included in such value. If the parties cannot agree on the value of seeded acreage or growing crops, the arbitration procedure set out in paragraph (4) shall be followed. The original breaking of the ground shall also be considered an improvement; however, if one year's crops have been raised on the land, the value shall not exceed $2.50 per acre and if two year's

crops have been raised, there shall be no compensation. (AUTH. Sec. 77-1-209 MCA; IMP. Secs. 77-6-301 through 306 MCA)

RULE XXVI - CONSERVATION MEASURES (1) A lessee or licensee shall not destroy, obliterate, damage or allow the same of any conservation measures placed on state lands. Failure to comply with this rule may result in the cancellation of the lease or license. In addition, the lessee or licensee may be required to replace such conservation measures that may have been destroyed, obliterated or damaged to department specifications.

(2) A lessee or licensee shall not be entitled to compensation for those conservation or improvement measures placed on state lands using state or federal monies, except for the amount the lessee or licensee personally expended on such measures. Proof of payment may be required. (AUTH. 77-1-209 MCA; IMP. 77-1-202 MCA)

RULE XXVII - LIEN ON CROPS AND IMPROVEMENTS (1) The state has a lien on all improvements and crops growing or separated upon state lands for any payments due it for that year. This lien shall have priority over all liens except a thresherman's lien or a seed lien and in those cases only to the extent of the indebtedness as evidenced by the contract, excluding any future advances. Any person acquiring an interest in such improvements or crops shall take subject to the lien. The department or sheriff of the county where the land is located may demand payment of monies due and if not paid may seize such property and sell as much of it as is needed to meet the indebtedness at a public sale, giving at least three days notice. (AUTH. Sec. 77-1-209 MCA; IMP. Sec. 77-6-112 MCA)

RULE XXVIII - SALES (1) The board may sell any land under lease or license, except those lands classified as forest lands, under the same terms and conditions as land not under lease or license. The lessee or licensee shall be entitled to compensation for improvements as provided in Rule XXV. The purchaser will be given possession of land sold on March 1 next succeeding the date of the sale unless the lease or license expires prior to that date or the lessee or licensee and purchaser agree in writing on another date. (AUTH. Sec. 77-1-209 MCA; IMP. Secs. 77-2-326, 77-2-328 MCA)

RULE XXIX - WEEDS, PESTS AND FIRE PROTECTION (1) A lessee or licensee of state land shall keep the land free of noxious weeds and pests and assume responsibility for fire prevention and suppression necessary to protect the forage, trees and improvements. The lessee or licensee shall perform these duties at his own cost and in the same manner as if he owned the land. In the event that any state land shall be included in a weed control or weed seed extermination district, the lessee or licensee shall be required to comply with section 7-22-2149, MCA, which requires that the

lessee or licensee be responsible for all assessments and taxes levied by the board of county commissioners for the district. The lessee or licensee of state land must comply with Montana County Noxious Weed Management Act under Title 7, Chapter 22, Part 21, MCA. Failure to comply with this rule may result in cancellation of the lease or license, subject to the appeal procedures provided in Rule XXI. (AUTH. Sec. 77-1-209 MCA; IMP. Secs. 77-6-114 and 210 MCA)

RULE XXX - RESERVATIONS (1) The state reserves to itself and its representatives and authorized lessees and licensees the right to enter upon state lands for the purposes contained within the lease or license. The state also reserves the right for itself and representatives to enter upon state lands for any lawful purpose including inspections.

(2) Representatives of the Montana historical society have the right to enter any state lands at any reasonable time, upon notification to the department, to perform their duties in connection with the State Antiquities Act, Title 22, Chapter 3, Part 4, MCA. Any person discovering an object or site of historic, prehistoric, archeological, paleontological, scientific, architectural or cultural interest on state land shall report such discovery to the Montana historical society and the department and take all steps necessary to preserve such site or object. Wilful abuse of such sites or objects may constitute sufficient grounds for cancellation of the lease or license.

(3) The state reserves the right to sell or otherwise dispose of any interest other than that for which the lessee or licensee has leased or licensed the premises, including hunting or fishing access privileges on state land; however, the lessee may post state land to prevent trespass by unauthorized persons. (AUTH. 77-1-209 MCA; IMP. 77-1-202 MCA)

RULE XXXI - WATER RIGHTS (1) If a water right is or has been developed on state land by the lessee or licensee for use on the leased or licensed land, such water right shall belong to the state. The lessee or licensee shall be entitled to compensation for the reasonable value of the improvements associated with the water right by any new lessee, licensee or purchaser if such improvements are sold to a new lessee or licensee or purchaser as provided in Rule XXV. This shall not be construed to make the state liable for the value of any water right. Any water rights hereafter secured by the lessee and licensee on state lands shall be secured in the name of the state of Montana.

(2) A lessee or licensee of state-owned land may not sell or otherwise dispose of a state-owned water right for any purpose. Such practices may constitute sufficient grounds for cancellation of the lease or license. (AUTH. Sec. 77-1-209 MCA; IMP. Secs. 77-1-202 and 77-6-115 MCA)

RULE XXXII - EASEMENTS (1) The state reserves to itself the right to grant easements for public purposes on state lands, the surface of which is leased or licensed. The board may grant easements upon state lands without the prior consent of a lessee or licensee. However, the board will require the grantee to compensate the lessee or licensee for damages to improvements, crops or the leasehold interest and file proof of that fact with the department prior to the granting of such easement. When the grantee and lessee or licensee cannot agree on just settlement for damages, the arbitration procedure set forth in Rule XXV shall be followed to arrive at a just settlement. If an easement limits the use by a lessee or licensee the lease or license shall be adjusted to reflect the loss of use.

(2) Any person desiring an easement for public purposes shall apply to the department on a form prescribed by the department. The applicant shall pay full market value for the interest disposed of. The easement shall terminate when the land ceases to be used for its specified public purpose unless the easement is authorized by the board for a specific term. The department shall terminate the easement by notifying the grantee at his last known address that the public purpose has ceased or the specified term has expired. If the easement ceases to be used for the specified use, the grantee shall notify the department of the termination of the easement. The applicant shall be required to comply with the Montana Antiquities Act and all rules promulgated thereto.

(3) An easement issued after [December 31], 1986, may not be transferred or assigned without being approved and recorded on the prescribed forms issued by the department.

(4) Within five years of the granting of an easement by the board, the grantee must put the easement to the use which is allowed in the right-of-way deed. Failure to put the easement to such use shall be sufficient cause for forfeiture of the easement upon written notice by the department. (AUTH. Sec. 77-1-209 MCA; IMP. Sec. 77-2-101 MCA)

RULE XXXIII - LICENSES (1) The department may issue licenses for any secondary use of state land other than its primary classification except for timber sale permits and agreements when such use is compatible with the department's multiple use objective. Any person desiring a license shall apply on a form prescribed by the department and shall provide a map showing the area intended for use. The department may require a professional survey for which the applicant shall pay and other information necessary to issue such license. A license may be subject to competitive bidding when it is deemed to be in the best interests of the state.

(2) When issuing a license, the department may attach special stipulations for protection of state land resources, and require a bond to ensure compliance with all terms of the license.

(3) The cost of a license shall vary according to the use intended. A filing fee is required with application. (AUTH. 77-1-209 MCA, IMP. 77-1-202, 203 MCA)

RULE XXXIV - CABINSITES (1) A cabinsite lease may only include a maximum of 5 acres unless special circumstances exist for which the department may grant more than 5 acres to be included in the special lease.

(2) The department shall chain or measure in feet the area to be included in a cabin site lease. Each corner of the cabinsite shall be identified by a method to be determined by the department. A plat shall be made that will include all measurements and identified corners. The plat will include the location, width and length of the access road and other information the department deems necessary.

(3) The lessee shall be required to comply with all rules and regulations involving county planning, subdivision requirements, and other state and federal statutes and regulations. The successful bidder for a new cabinsite lease shall pay for the cost of such survey and preparation of the plat, including county planning, subdivision requirements and other state and federal statutes and regulations.

(4) The issuance of any cabinsite leases after [December 31], 1986, shall require reclassification of the land as provided by Rule IX.

(5) A lessee whose bid is accepted for a cabinsite lease shall purchase the fixtures and improvements from the former lessee. The parties shall determine the value of such fixtures and improvements by agreement. If the parties are unable to reach an agreement within 60 days of acceptance of the bid, then the parties shall enter into arbitration as set forth in Rule XXV. Extensions of the 60-day time limit may be granted by the department upon written application of one of the parties which sets forth good cause why such extension should be granted.

(6) A cabinsite lease grants the lessee the right of access and the right to place necessary utility facilities within the cabinsite lease area. For any such rights outside of the cabinsite area, the lessee must acquire an easement. (AUTH. 77-1-209 MCA; IMP. 77-1-208, 77-1-202 MCA)

RULE XXXV - LESSEE OR LICENSEE DAMAGE COMPENSATION REQUIREMENTS (1) A lessee or licensee holding a grazing or agricultural lease or forestry license shall be compensated for damages to his crops, improvements, or leasehold interest. When the board or department issues any other type of

lease or license for the same property, the lessee or licensee holding a grazing or agricultural lease or forestry license may not receive any compensation in excess of the value of the actual damages to the crops, improvements, or leasehold interest. Only in exceptional cases documented to and approved by the department may the lessee or licensee receive damages for natural resources or crops in excess of the annual rate that the lessee or licensee is making to the department for rental payments. If a lessee or licensee collects or attempts to collect an amount in excess of said actual damages, such action may constitute sufficient grounds for cancellation of the lease or license. The department may adjust the AUM's allocated to a grazing lease or license when there is issued a lease or license for another purpose and that other purpose interferes with the grazing on the state lease. (AUTH. 77-1-209 MCA; IMP. 77-1-202 MCA)

RULE XXXVI - CULTURAL RESOURCES INVENTORY (1) In the event a cultural resources inventory is necessary prior to the issuance of a lease, license, easement or other land use authorization the department may, in its discretion, require the applicant to provide the department with a copy of the inventory report. The department may require the applicant to bear the expense of the inventory and report. AUTH. 22-3-424, 77-1-209 MCA; IMP. 22-3-424 MCA)

RULE XXXVII - RESOURCE DEVELOPMENT PROJECT REQUESTS (1) Any lessee of state land may request that the department consider a resource development project. In order to consider such project the department may require the lessee to furnish certain information including a description of the land involved and a description of the proposed project, including areas involved, potential return to the state, potential costs and other pertinent details. Projects will be undertaken only when, in the judgment of the department, the lessee has a record of good management of the land or shows evidence of improving the management of the land. The department will consider projects to promote such development of land as is in the best interests of the state, including, but not limited to, stock water developments, saline seep control, irrigation project site preparation and development of certain vegetative practices. The department shall examine each proposal to determine its feasibility and may request assistance in such examination from appropriate state and federal agencies. The lessee shall cooperate with the department in planning the project and in negotiating for a fair return on the development. (AUTH. Sec. 77-1-603 MCA; IMP. Secs. 77-1-601 through 609 MCA)

5. The proposed new rules are proposed to clarify and establish procedures and policies concerning the management of the surface of state lands. It was found that the existing rules had become archaic and no longer permitted

the Board of Land Commissioners and the Department of State Lands to perform their constitutionally and statutorily mandated fiduciary duties. The proposed new rules are, therefore, necessary to allow the Board of Land Commissioners and the Department of State Lands to properly administer the state lands in accordance with such duties.

6. Interested persons may present data, views, or arguments, either orally or in writing, at the hearings. Written data, views or argument may also be submitted to Dennis Hemmer, Commissioner, Department of State Lands, Capitol Station, Helena, Montana 59620, no later than October 27, 1986.

7. Randy Mosley has been designated to preside over and conduct the hearings at Lewistown, Glasgow, Miles City and Billings. Kelly Blake has been designated to preside over and conduct the hearings at Dillon, Bozeman, Great Falls and Helena. Dennis Hemmer has been designated to preside over and conduct the hearings at Kalispell and Missoula.

8. The authority of the agency to repeal and adopt rules is based on Section 77-1-209, MCA, and the rules repealed and rules proposed to be adopted implement those sections of the Montana Code Annotated which are set forth at the end of each proposed rule.

Dennis Hemmer, Commissioner
Department of State Lands

Certified to the Secretary of State September 15, 1986.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION) of Rules I through V relating) to emergency telephone) service.)	NOTICE OF THE PROPOSED ADOPTION of Rules I through V relating to emergency telephone service.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On October 25, 1986, the Department proposes to adopt new rules I through V relating to emergency telephone service.

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

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

RULE I REPORTING REQUIREMENTS (1) Quarterly reporting forms must be completed by the provider on or before the last day of the month following the end of each calendar quarter.

(2) The quarterly reporting form must provide the following information:

(a) ending date of calendar quarter covered by return being filed;

(b) name and address of the provider of telephone exchange access services;

(c) total number of access lines for each month of the calendar quarter;

(d) number of nonexempt access lines for each month of the calendar quarter;

(e) amount of fee computed by multiplying the total number of nonexempt access lines times $.25 per month of service during the quarter;

(f) credits for uncollectible accounts, incorrect billings, and other appropriate adjustments;

(g) amounts collected that quarter for any accounts which were listed as uncollectible in a previous quarter; and

(h) amount remitted with return.

AUTH: 10-4-203, 10-4-212, and 15-1-201(1), MCA; IMP: 10-4-201 through 10-4-211, MCA.

RULE II REFUND PROCEDURES (1) Refunds due to overpayment of fees may be requested at any time within two years from the due date of the return to which the overpayment applies. Refunds may be requested by filing an amended return for the quarter in which the fee was overpaid together with a narrative explanation of the cause of the overpayment.

AUTH: 10-4-203, 10-4-212, and 15-1-201(1), MCA; IMP: 10-4-203 and 10-4-205, MCA.

RULE III EXAMINATION OF RECORDS (1) At any time during usual business hours, the department of revenue, or its duly authorized agents, may enter any office or other area where the provider maintains business records to examine the records and other supporting data from which the quarterly returns were prepared. These audits may be conducted at the same time as audits are conducted for other state taxes.
AUTH: 10-4-203, 10-4-212, and 15-1-201(1), MCA; IMP: 10-4-212, MCA.

RULE IV RETENTION OF RECORDS (1) Records and other supporting data used to prepare the quarterly returns must be maintained for a period of two years from the due date of the return or two years from the date of payment, whichever is later.
AUTH: 10-4-203, 10-4-212, and 15-1-201(1), MCA; IMP: 10-4-203 and 10-4-212, MCA.

RULE V EXEMPTIONS (1) The following agencies, individuals, and organizations are exempt from the 9-1-1 service fee:

(a) Federal agencies and tax exempt instrumentalities of the federal government;

(b) Indian tribes for access lines on the tribe's reservation;

(c) An enrolled member of an Indian tribe for access lines on the reservation who does not receive the 9-1-1 service and who annually files a signed statement with the provider that he is an enrolled member of an Indian tribe living on a reservation and does not receive the 9-1-1 service. The provider will maintain the statements as part of its business record for five years.

(2) All other subscribers are required to pay the fee.

AUTH: 10-4-203, 10-4-212, and 15-1-201(1), MCA; IMP: 10-4-202 and 10-4-203, MCA.

4. The Department is proposing new rules I through V because the 49th Legislative Session enacted Senate Bill No. 325 which provides for the implementation of emergency telephone service within Montana. The Statement of Intent which accompanied Senate Bill No. 325 directed the Department of Revenue to adopt rules to administer the act.

Rule I is necessary to establish and inform the providers on the information which the provider must provide on their quarterly return under § 10-4-204, MCA.

Rule II is necessary to establish a procedure for fee refunds in the case of overpayment by the provider.

Rule III is necessary to inform the provider of the method and manner of the department's audits under § 10-4-212, MCA.

Rule IV is necessary to establish how long a provider must retain records under the act.

Rule V is necessary to inform the providers which subscribers are considered exempt from payment of the fee and to provide a mechanism for processing a claim for exemption under § 10-4-202(1), MCA.

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

Irene LaBare
Department of Revenue
Office of Legal Affairs
Mitchell Building
Helena, Montana 59620

no later than October 23, 1986.

6. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Irene LaBare at the above address no later than October 23, 1986.

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

8. The authority of the Department to make the proposed adoptions is based on §§ 10-4-201(1), 10-4-203, 10-4-212, and 15-1-201(1), MCA, and the rules implement §§ 10-4-201 through 10-4-211, MCA.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 09/15/86

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

In the matter of the amendment of Rule 46.10.304A pertaining to unemployed parents in the AFDC program	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.10.304A PERTAINING TO UNEMPLOYED PARENTS IN THE AFDC PROGRAM

TO: All Interested Persons

1. On October 15, 1986, at 9:30 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana, to consider the proposed amendment of Rule 46.10.304A pertaining to unemployed parents in the AFDC program.

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

46.10.304A UNEMPLOYED PARENT Subsections (1) through (1)(e)(ii) remain the same.

(iii) working conditions such as risk to health, safety, or lack of ~~workmen's~~ worker's compensation protection.

(2) ~~A~~ The parent who is the primary wage earner must be currently registered with the employment security division and be available for work.

Subsection (3) remains the same.

~~(4)--A-parent--unemployed-because--of-conduct--or-circumstances-which-result--or-would--result-in-disqualification-for unemployed-compensation--under-state--law-is--disqualified-for AFDC/UP-assistance-payments.~~

(54) In a two-parent household, only one parent must meet the criteria of this rule.

(65) In conformity with Chapter No. 53 of the 1985 49th Legislature, this rule shall be effective March 11, 1985.

AUTH: Sec. 53-4-212 MCA; AUTH Extension, Sec. 3, Ch. 53, L. 1985, Eff. 3/11/85
IMP: Sec. 53-4-201 and 53-4-231 MCA

3. 45 CFR Section 233.100(a)(1)(ii) allows the states the option of excluding from the definition of unemployed parents those unemployed persons who are disqualified from receiving unemployment compensation by reason of conduct or circumstances. The proposed rule change expands the AFDC unemployed parent program to cover those who are unemployed due to conduct or circumstances which result or would result in disqualification under the state's unemployment compensation law.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written

data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than October 24, 1986.

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

Dave Lewis
Director, Social and Rehabilitation Services

Certified to the Secretary of State September 15, 1986.

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

In the matter of the repeal of Rule 46.5.621; the amendment of Rules 46.5.601 through 46.5.607, 46.5.609 through 46.5.612, 46.5.614, 46.5.615, 46.5.616, 46.5.620, 46.5.622, 46.5.630, 46.5.632, 46.5.635, 46.5.636, 46.5.657 and 46.5.669; and the adoption of rules pertaining to child and youth care facilities	SUPPLEMENTAL NOTICE OF THE WITHDRAWAL OF PROPOSED RULE VII AND EXTENSION OF COMMENT PERIOD FOR OTHER PROPOSED RULE CHANGES PERTAINING TO CHILD AND YOUTH CARE FACILITIES

TO: All Interested Persons

1. On April 10, 1986, the Department published notice of the proposed repeal of Rule 46.5.621; the amendment of Rules 46.5.601 through 46.5.607, 46.5.609 through 46.5.612, 46.5.614, 46.5.615, 46.5.616, 46.5.620, 46.5.622, 46.5.630, 46.5.632, 46.5.635, 46.5.636, 46.5.657 and 46.5.669; and the adoption of rules pertaining to child and youth care facilities at page 511 of the Montana Administrative Register, issue number 7.

2. Proposed Rule VII, "CHILD CARE AGENCY, RESIDENTIAL TREATMENT CENTER, PSYCHOTROPIC MEDICATION" is hereby withdrawn from proposed adoption.

AUTH: Sec. 41-3-1103, 41-3-1142 and 53-4-111 MCA; AUTH Extension, Sec. 2, Ch. 177, Laws of 1985; Sec. 7, Ch. 531, Laws of 1985
IMP: Sec. 41-3-1103, 53-4-111 and 53-4-113 MCA

3. A substantial number of issues concerning the other proposed changes remain unresolved. The Department has determined it is necessary to hold the record open until such time as the parties affected by the unresolved rule changes have an opportunity to meet with the Department concerning these issues. Therefore, the Department will hold the record open regarding proposed changes until December 11, 1986, after which final action will be taken.

4. The department has thoroughly considered all commentary received related to this notice:

COMMENT: On April 10, 1986, the department published the original notice. A public hearing was held on April 30, 1986. The Montana Residential Child Care Association (MRCCA) and its

members requested another hearing to address their concerns and the department responded by continuing the hearing on May 21, 1986. This hearing was scheduled to give the MRCCA a chance to respond. Based upon responses from MRCCA members, the department felt there were enough unresolved issues to warrant holding the record open to allow parties affected by the proposed rules to meet with the department and resolve the differences.

The primary concern of the MRCCA was the lack of group home representation on the committee that developed the rules, coupled with the fact that the department had inserted additional rules in the first notice that were not considered by the committee.

The newly organized and more representative committee has agreed to a new draft of proposed rules with few exceptions and has requested that the proposed rules be mailed to the affected providers and to the committee members for another final review and a new public hearing.

RESPONSE: The department agrees with the recommendations of the committee. The recommended changes of the committee, agreed to by the department have been made and will be mailed in their entirety to all of the affected providers. A final hearing on the new draft proposed rules will be scheduled and providers will be notified in accordance with MAPA of the time and place of this hearing.

COMMENT: The committee commented that proposed Rule VII was redundant. That rule is covered by proposed Rule I, "Administration of Medication", and by other state and federal laws governing medical practice.

RESPONSE: Proposed Rule VII will be deleted in the final notice.

5. Written comments on the proposed rules may be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than December 11, 1986.

Dave Lewis
Director, Social and Rehabilitation Services

Certified to the Secretary of State September 15, 1986.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment and repeal of rules regulating travel expenses of state employees while on official business.	) NOTICE OF AMENDMENT) OF RULES) 2.4.101 INTRODUCTION) 2.4.105 DEPARTURE AND RETURN) TIME) 2.4.111 USE OF STATE OWNED) VEHICLES) 2.4.112 USE OF PERSONAL) VEHICLES--REIMBURSEMENT) RATES--GENERAL REQUIREMENTS) 2.4.114 USE OF PERSONAL) VEHICLES--REIMBURSEMENT AT) HIGH RATE) 2.4.115 USE OF PERSONAL) VEHICLES--EXEMPTIONS) 2.4.116 PERSONAL VEHICLE USE) AUTHORIZATION FORM--WHERE) OBTAINED) 2.4.136 REIMBURSEMENT FOR) RECEIPTABLE LODGING) 2.4.141 REIMBURSEMENT FOR) MISCELLANEOUS TRAVEL EXPENSES) 2.4.146 OUT-OF-COUNTRY TRAVEL) 2.4.147 CHANGE IN TRAVEL) STATUS) 2.4.149 TRAVEL TIME ALLOWED) 2.4.150 USE OF TRANSPORTATION) PURCHASE ORDER FOR COMMERCIAL) TRANSPORTATION) 2.4.152 TRAVEL EXPENSE VOUCHER) FORM DA101. AND REPEAL OF) 2.4.121 STATE AIRCRAFT)

TO: All Interested Persons.

1. On July 17, 1986, the Department of Administration published notice of proposed amendment and repeal of rules concerning regulation and documentation of travel expenses of State employees engaged in official business, on pages 1124 through 1131 in issue 13 of the Montana Administrative Register.

2. The rules are amended and repealed as noticed.

3. No comments or testimony were received.

DEPARTMENT OF ADMINISTRATION

BY _____
Ellen Feaver, Director

Certified to the Secretary of State September 15, 1986.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF OPTOMETRISTS

In the matter of the amendments of 8.36.403 concerning applications, 8.36.406 concerning general practice requirements, 8.36.407 concerning unprofessional conduct, 8.36.411 concerning disciplinary actions, 8.36.601 concerning requirements	NOTICE OF AMENDMENTS OF 8.36.403 APPLICATION FOR EXAMINATION, 8.36.406 GENERAL PRACTICE REQUIREMENTS, 8.36.407 UNPROFESSIONAL CONDUCT - VIOLATIONS, 8.36.411 DISCIPLINARY ACTIONS, 8.36.601 REQUIREMENTS

TO: All Interested Persons:

1. On July 31, 1986, the Board of Optometrists published a notice of amendments of the above-stated rules at page 1269, 1986 Montana Administrative Register, issue number 14.

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

3. No comments or testimony were received.

BOARD OF OPTOMETRISTS
PAUL D. KATHREIN, OD
PRESIDENT

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

Certified to the Secretary of State, September 15, 1986.

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

In the matter of the amendment of ARM 16.32.328 concerning retention of medical records by hospitals	))))	NOTICE OF THE AMENDMENT OF RULE 16.32.328 (Minimum Standards for Hospitals)

TO: All Interested Persons

1. On June 26, 1986, the department published notice of a proposed amendment of rule 16.32.328 concerning retention of hospital medical records at page 1061 of the 1986 Montana Administrative Register, issue number 12.

2. The department has amended the rule with the following changes (text stricken is interlined, and new matter is capitalized):

16.32.328 MINIMUM STANDARDS FOR A HOSPITAL -- MEDICAL RECORDS Medical records shall comply with the following requirements:

(1) - (5) Same as proposed.

(6) Diagnostic imaging ~~studies;~~ FILM AND electrodiagnostic ~~studies,--and--their--interpretations~~ TRACINGS must be retained for A PERIOD OF FIVE YEARS; THEIR INTERPRETATIONS MUST BE RETAINED FOR the same periods required for the medical record in section (1), but need not be retained beyond those periods.

3. The only comments made on the above proposal were from Ray Gibbons of Montana Deaconess Medical Center, who felt it was unduly burdensome to have to keep x-ray film and electrodiagnostic studies more than 5 years, since they were rarely used after that period and their interpretations would still be in the medical record. The department agreed and made the suggested change.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State September 15, 1986.

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

In the matter of the amendments of 36.16.101 through 36.16.108, 36.16.110 through 36.16.114, and 36.16.116 concerning water reservations; repeal of 36.16.109 concerning board review of reservations and 36.16.115 concerning applications in the Yellowstone River Basin; and adoption of new rules concerning applications in the Missouri River Basin and reservation changes and transfers	NOTICE OF AMENDMENTS OF 36.16.101 THROUGH 36.16.108, 36.16.110 THROUGH 36.16.114, AND 36.16.116; REPEAL OF 36.16.109 BOARD REVIEW OF RESERVATIONS AND 36.16.115 APPLICATIONS IN THE YELLOWSTONE RIVER BASIN; AND ADOPTION OF NEW RULES 36.16.117 RESERVATIONS IN THE MISSOURI RIVER BASIN AND 36.16.118 CHANGES AND TRANSFERS

TO ALL INTERESTED PERSONS:

1. On May 29, 1986, a notice of public hearing was published on pages 920 through 939 of the Montana Administrative Register, issue number 10.

2. On Thursday, July 10, 1986, at 1:15 p.m., the public hearing was held in the main conference room of the Department of Natural Resources and Conservation, 1520 East Sixth Avenue, Helena, Montana 59620.

Present were G. Steven Brown, attorney for the board, who presided over and conducted the hearing; DNRC staff members Susan Higgins, Gerhard Knudsen, Faye McKnight, Gary Fritz, John Sanders and John Tubbs; and board members Gordon Holte (Chairman), Joan Toole, Bill Shields, Carroll Graham, and Dan Rieder. In addition to the board members and staff, 8 persons attended.

The hearing was tape-recorded; the tapes and transcripts are included with the file on this matter. Formal testimony was made by two parties: the Department of Natural Resources and Conservation, which presented a review of the events leading to the water reservation rules revision process and testimony of recommended modifications to the rules as proposed; and the Department of Fish, Wildlife, and Parks, which, for the record, offered comments when opponents were called to testify even though the department was generally positive in its statement.

Formal written or telephoned comment was submitted by John Moorhouse, Bureau of Land Management (BLM); Lorents Grosfield, rancher representing the Montana Association of Conservation Districts (MACD); John MacMaster, Legislative Council (LC); Bob Lane and Larry Peterman, Department of Fish, Wildlife and Parks (DFWP); and Gary Fritz, Department of Natural Resources and Conservation (DNRC).

A summary of the rule changes, comments and board responses follows with references to the parties making the comments in parentheses. Note that rule changes are presented first, followed by specific comments and responses.

3. Based on the comments at the hearing and in the letters and phone calls, the rules are being amended, repealed, and adopted with the following changes (new matter underlined, deleted matter interlined):

"36.16.101 POLICY AND PURPOSE OF THE 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 of the state, Montana must be responsive to the need for establishing options for future diversionary uses of Montana's water resource and for maintaining streamflows for the protection of existing water rights, aquatic life, and water quality.

(2) The water reservation process, as presented in 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 for beneficial uses that are necessary and shown to be in the public interest. Section 85-2-331, MCA provides for a comprehensive water reservation proceeding within the Missouri River Basin.

(3) The purpose of these rules is to provide guidelines and procedures for the preparation and processing of correct and complete water reservation applications and for the adoption and implementation of board orders reserving water in order to assure, to the fullest extent possible, that the proposed use of reserved water is not speculative."

"36.16.102 DEFINITIONS

(1) ....

(5) "Department" means the department of natural resources and conservation provided for in 2-15-3301, MCA ~~Title 2, Chapter 15, part 33~~.

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

(7) ....

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

(9) ....

(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) ....

(16) "Management plan" means a detailed plan that accompanies~~ying~~ a reservation application and that will be used as guidance in the application of reservation waters to beneficial use, if the reservation is granted. Management plans for diversionary uses ~~that~~ contains information on proposed project design and operation. Management plans for instream uses must contain a schedule for estimating and monitoring flows not quantified at the time the application is submitted, and for reporting findings to the board, if required.

(17) ....

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

(19) "Permit" means the permit to appropriate water issued by the department under section 85-2-301 to 314, MCA~~, et seq.~~

(20) ....

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

(25) ....

36.16.103 FORMS is amended as proposed.

"36.16.104 APPLICATIONS - GENERAL (1) ....

(5) The text and appendices must be consecutively numbered.

(6) ....

(7) The application must be organized as follows:

(a) ...

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

(c) ...

(e) an analysis of the amount of water requested and water availability, as required in ARM 36.16.105B;

(f) ...."

"36.16.105 APPLICATION CONTENT - SUMMARY ~~INTRODUCTION~~ AND PURPOSE (1) The summary ~~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.

(2) ...."

Rule I now "36.16.105A 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, or where the applicant may not be eligible to apply for a water right permit, a description of the water resource ~~uses~~ values 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~~ development 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."

Rule II now "36.16.105B 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. The firm yield of any proposed reservoir, as defined in ARM 36.16.102 (11) and as required in ARM 36.16.106 (1)(a), shall be considered when determining the desired amount. 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~~ of the existing projects.

(a) ....

(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 (15) 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) ....

(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~~ the applicants' 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~~ the amount of water physically available 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 exceedance frequency flows. The applicant must consult with the department to assure, to the fullest extent possible, 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) ...

(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 hydrologic 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."

Rule III now "36.16.105C APPLICATION CONTENT - PUBLIC INTEREST (1) In making a showing that the reservation is in the public interest, the application shall contain the following ~~information to support that the proposed reservation is in the public interest, including~~:

(a) ...

(c) A discussion of the effects of not granting the reservation, including a description of reasonable alternative actions that could be taken if the reservation is not granted.

(d) ...."

"36.16.106 APPLICATION CONTENT - MANAGEMENT PLANS (1) A management plan shall accompany all applications. Plans for diversionary uses shall contain the technical information needed to adequately define project size, and function, ~~and costs~~. The plan must be accompanied by maps or drawings showing the project locations, including, where applicable, point(s) of diversion, place(s) of storage, main delivery systems, and place(s) of water use, ~~shown~~ indicated to an accuracy of the nearest ¼¼¼ section. Such maps shall include

section, township, and range, numbers and other relevant information. All project plans shall demonstrate a consideration of water conservation measures.

(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. Ownership of lands that would be inundated by a proposed storage facility must be indicated.

(b) 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 applications involving irrigation, the proposed water distribution systems, drainage systems, places of use, and types of irrigation systems shall be delineated, after consultation with the department, 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 predominate 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) ...

(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.

(d) ...

~~(e) If applying the reservation to beneficial use requires private investments, a survey shall be conducted of potential users to show their support of the reservation.~~

(e~~f~~e) ...

(f~~g~~) ~~The applicant shall demonstrate its plans and ability to administer the process of applying reserved water to beneficial use. 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.~~ Where individual users or groups of users will be responsible for applying the reservation to beneficial use, the applicant must present a set of administrative procedures that describes who shall qualify to use the reservation water, the steps such users must take to apply the reservation water to beneficial use and, as appropriate, the means by which the reservation waters would be allocated during shortages.

(2) A management plan shall accompany all reservation applications for instream use(s), as defined in ARM 36.16.102 (14), ~~applications~~ and shall include:

(a) ...

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

(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 reservation flows in ungaged reaches will be estimated and protected from future depletions, as determined after consultation with the department and after consideration of items described in ARM 36.16.105B(1)(f) and ARM 36.16.105B(2).~~; and~~

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

"36.16.107 PROCESSING APPLICATIONS AND MONITORING RESERVATIONS - DEPARTMENT RESPONSIBILITIES (1) ....

(2) The department shall determine if an application is correct and complete within ~~60~~ 90 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, ARM 36.16.105A, ARM 36.16.105B, ARM 36.16.105C 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. All department staff who provided technical assistance in the preparation of the application or participated in the review shall be listed in a memorandum to be attached to the application file.

(3) ....

(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 to 207 ~~et. seq.~~, MCA.

(5) ....

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

(7) ...."

Rule IV now "36.16.107A 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.~~ The board may grant a reservation for less than the amount of water requested in an application, but in no case may it grant a reservation for more water than is requested.

(2) ....

(3) When several applications are being considered concurrently within the same drainage basin, the board shall establish the priority of granted reservations by the chronological order in which the reservations are adopted pursuant to 85-2-316 (9), MCA, or by the order of the board for reservations within the Missouri Basin pursuant to 85-2-331, MCA. Such priorities will be established only after a consideration of the positive as well as detrimental effects of establishing such priorities 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) ...."

Rule V now "36.16.107B ACTION ON APPLICATIONS - BOARD DECISION CRITERIA (1) ....

(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) ...

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

(c) ...

(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 other reasonable 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 find ~~establish~~, in its judgment and discretion, that the reservation is in the public interest, as required in 85-2-316 (4)(a)(iv), MCA ~~by finding that~~ based on a weighing and balancing of the following factors, after making a specific finding for each factor:

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

(i) ...

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

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

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

(d) whether 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) whether there are no significant adverse impacts to public health, welfare, and safety~~.~~; and

(f) any other factors the board finds relevant, based on the record.

(5) ....

(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 contemplated in the application and applying the reserved water to beneficial use~~,~~ in accordance with a management plan as required in ARM 36.16.106(1); or toward measuring, quantifying, protecting, and reporting instream uses in accordance with an ~~established~~ management plan as required in ARM 36.16.106(2).

(7) ....

36.16.108 RECORDING ORDER RESERVING WATERS is amended as proposed.

~~36.16.109~~ BOARD REVIEW OF RESERVATIONS is repealed as proposed.

"36.16.110 WATER USE UNDER A RESERVATION - RESERVANT RESPONSIBILITIES (1) A reservant may use water in accordance with the board order granting the reservation and the administrative procedures developed in ARM 36.16.106(~~g~~f) as approved or amended by the board. A reservant holding a reservation for a diversionary use shall, upon applying water to a beneficial use, file form No. 623, Notice of Beneficial Use of Reserved Waters, with the department.

(2) ...."

36.16.111 STATUS OF WATER RESERVATION is amended as proposed.

"36.16.112 INDIVIDUAL USERS (1) The act does not provide for the reservation of water by individuals~~. A water reservation right must be held by the reservant if approved by the board and may not be~~ and no reservation right may be transferred in whole or in part to private individuals or entities. However, an applicant's request for a reservation is appropirate if it is based on ~~and on~~ behalf of the needs of a number of individual users."

"36.16.113 ENVIRONMENTAL IMPACT STATEMENT (EIS) (1) ....

(2) ~~A cumulative programmatic EIS may be prepared if~~ If several applications are received or expected to be filed in a common drainage basin, the department may choose to prepare one EIS that addresses all applications.

(3) An EIS, if required, shall be prepared by the department ~~or its designee~~ sufficiently in advance of board action on the reservation application to allow for full public review and comment. If necessary, the department may require the applicant to submit information needed to assess the impacts of the proposed reservation."

"36.16.114 FEES AND COSTS (1) As required by ARM 36.16~~2~~.104, a $100 fee must be paid to the department when filing an application for reservation of water. In addition to the $100 fee ~~and~~, as required by section 85-2-316, MCA, the department's cost 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, 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 to be paid to the department after consultation with the applicant."

36.16.115 APPLICATIONS IN YELLOWSTONE RIVER BASIN is repealed as proposed.

36.16.116 APPLICABILITY is amended as proposed.

Rule VI now 36.16.117 APPLICATIONS IN MISSOURI RIVER BASIN is adopted as proposed.

Rule VII now "36.16.118 CHANGES AND TRANSFERS (1) Points of diversion and places of storage and use not indicated in the original public notice of the reservation, and otherwise not the subject of proceedings authorized in 85-2-316(10) and (11), MCA, may be included in the reservation at a later date if approved by the board.

(2) ....

(3) All decisions regarding changes and transfers shall reflect a consideration of the decision criteria listed in ARM 36.16.107B."

COMMENT: Two parties noted general mistakes in the heading, justifications, and proposed rules as presented in the original notice published in the Administrative Register (LC, DNRC). Although these oversights will not affect or be reflected in the rules as finalized in this notice, note should be made for historical reference. Specifically, the heading for the original notice failed to list the repeal of ARM 36.16.109, although it was addressed in the text. In addition, justifications 9 and 23 wrongfully refer to the 79th legislature rather than the 49th legislature. New rule II (2), ARM 36.16.107 (2), and ARM 36.16.107 (7), as proposed, all contain reference to new rules that should have been noted as Roman numerals. Instead, they were assigned numbers that will appear in the finalized rules.

RESPONSE: Although these oversights will not affect the final rules they are noted here for the record.

COMMENT: One respondent pointed out that the authority notation for each of the rules should be 85-2-113, MCA, instead of 85-1-201, MCA (LC). In addition, because the water reservation statute was amended in 1985, the authority extension should be listed with each rule. That extension of authority is codified as Chapter 573, Sec. 22 (L. 1985).

RESPONSE: The board agrees, and the correct legal citations will be made in the history note for each rule.

COMMENT: Several comments were submitted which involved recommended minor changes in phraseology, structuring, grammar, style, and format (DNRC). These comments are not noted specifically in this comment/response section of this notice, but are addressed in the rule changes found at the beginning of this notice.

RESPONSE: The board is in agreement and all minor changes as recommended will be made.

COMMENT: Because two statutes address water reservation proceedings in Montana, 85-2-316 Reservation of Waters, and 85-2-331 Reservation within Missouri River Basin, one respondent (DFWP) recommended that reference to the latter be added to the rules.

RESPONSE: The board concurs, and reference to 85-2-331 will be made in ARM 36.16.101(2).

COMMENT: One respondent (DFWP) suggested that, since the new rules are much more specific in their data and report requirements in an attempt to avoid speculation, a statement should be added regarding this policy in ARM 36.16.101.

RESPONSE: The board agrees, and a phrase to this effect will be added to ARM 36.16.101(3).

COMMENT: Some of the definitions require clarification. One respondent (MACD) felt that the definition for "management plan" should contain information on why a certain instream flow methodology was used by instream flow applicants. Another respondent (DNRC) recommended that a distinction be made in that definition clarifying that there are two types of management plans (one is prepared by diversionary use applicants and one is developed by instream use applicants). It was also suggested that the definition for "period of use" be amended to include an expression of the water use "in days" as well as "in months" in order to maintain conformance with data requirements of water permit applications handled by the department (DNRC).

RESPONSE: The board agrees that instream flow methodologies should be well-documented and justified. However, justification of methodologies is required in the rule which addresses determination of amount (ARM 36.16.105B) and not in the rule regarding management plans (ARM 36.16.106). Therefore, adding the requirement for justification of methodologies in the "management plan" definition is not appropriate. The board agrees with all other clarifications as recommended and they will be added to the rules.

COMMENT: One party (DNRC) felt that it would be more appropriate for the applicants to provide a "summary" rather than an "introduction" as the first chapter of reservation applications. The chapter is designed to be read by a reviewer who may need a quick overview of all aspects of the proposed reservation. An "introduction", by definition, may not contain this broad spectrum of information.

RESPONSE: The board agrees, and all references to "introduction" in the rules will be changed to "summary".

COMMENT: Several respondents commented on the need assessment required of all applicants (ARM 36.16.105A), and on the criteria the board must consider in its finding of need (ARM 36.16.107B) (DNRC, DFWP, BLM). As stated in the rules as noticed on May 29, 1986, ARM 36.16.105A required applicants to show that the reservation is needed by showing: (a) the threat to the future availability of water; (b) where information to support this threat is not available, the importance of preserving the water to maintain resource uses; or (c) the economic and timing constraints to project development. Where instream flow applicants are unable to address item (a), their only recourse is to focus on item (b) as item (c) pertains only to diversionary use applicants. Therefore, item (b) allows the instream applicants to present a detailed discussion of unquantifiable environmental values that would be maintained by the granting of a reservation, only if information regarding threat is not available.

However, instream proponents argue that, while a showing of competing future uses certainly is a component of need, information may indeed be available, but it may not show that there is a threat to future water availability. They argue that this determination of threat to water availability should not be the pivotal factor in the determination of need. If need is defined solely in terms of the threat posed by future uses, then, at least in some cases, the required showing of such a threat may be made only where it is already too late. In addition, the reservation process may be the only process available for legal protection of instream flows, as instream users may not be eligible to obtain a water use permit.

The respondents therefore recommend that modifications be made in the applicant's need analysis requirements and in the board's decision criteria regarding need. Specifically, those rules should indicate that a description of the instream values associated with the reservation is appropriate not only if information regarding threat is not available, but also if the applicant is otherwise unable to obtain a water use permit.

RESPONSE: The board agrees the applicant's analysis of need is one of the most important portions of a reservation application, as it provides a justification of why water should be reserved and made legally unavailable to other future users. All reservation applicants, whether applying for diversionary or instream uses, must provide the best available, concrete information to justify need. However, the board agrees that, where proof of the threat to water availability is unavailable, applicants should have another recourse.

Therefore, the recommended changes will be added to ARM 36.16.105A(1)(b) and ARM 36.16.107B(1)(2)(b). Diversionary use applicants may also address subsection (b). However, if their available information shows there is no threat to future water availability, they may present their case regarding need in subsection (c) of the rule.

COMMENT: Four of the respondents (DNRC, DFWP, MACD, LC) commented on application requirements regarding the determination of amount of water needed for the reservation (ARM 36.16.105B), and on the criteria the board must consider in determining that the amount requested is appropriate [ARM 36.16.107B(3)].

A. The DNRC recommended that applicants should consider the firm yield of any proposed reservoir when determining the total amount required, thus assuring that reservoirs are sized properly.

B. The DFWP felt that the last sentence in ARM 36.16.105B(1)(f) may be confusing because several interpretations could be associated with "a range of flows" determined by an instream flow methodology and how that range relates to "the desired instream benefits". The DFWP also stated that subsection (2)(a) of the rule may be confusing in its requirement for an assessment of "physical water availability". The agency felt that this requirement could be

misconstrued to be a requirement for a showing that water requested is available for appropriation. Properly stated, the rule should ask for an analysis of water available, regardless of whether it is enough to meet the amount optimally required.

C. The MACD commented that subsection (f) of the rule regarding determinations of amount for instream flows should contain a requirement for the applicant to perform a comparative analysis of available instream flow methodologies with a thorough justification of why the chosen methodology was selected. MACD's concern focused on the fact that some instream flow methodologies may result in more water being requested in the application.

D. With regard to the board's decision criteria on the determination of amount, DNRC felt that the board should consider in its finding on amount the methodologies and assumptions used by the applicant and by the department in its EIS and by others supplying information. Therefore, the department suggested that reference solely to the applicant's assumptions and methodologies be deleted as other information provided in the record may be used by the board in making its decision.

E. The LC questioned the board's authority to make a determination, in its finding of the amount needed for a reservation, 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.

RESPONSE: A. The board agrees that a requirement for a consideration of reservoir firm yield be added to ARM 36.16.106(1).

B. Although the instream flow applicants must show why a specific flow is appropriate for a specified instream use, the board agrees that the language in ARM 36.16.105B(1)(f) may be confusing; ARM 36.16.105(B)(1)(f) will be modified.

C. The board agrees that methodologies should be well justified, but believes that the rule as it stands is adequate in its requirement of the instream applicant. It would be difficult for the board or qualified experts to determine what is the "best" of the state-of-the-art methodologies when each has merit for specific applications. A complete justification by the applicant for selection of its methodology, information presented in the EIS and by opponents and proponents during hearings, and the board's analysis of the applicants' justification and information presented by other parties will adequately ensure that the amount granted is appropriate.

D. The board agrees that its decision on amount of water required should be made on the basis of all information in the record, not just on information provided by the applicant. Therefore, "by the applicant" will be deleted from ARM 36.16.107B(3)(a).

E. The language and intent of the water reservation statutes supports the conclusion that the board has the authority to require that there are no other reasonable cost

effective measures that could be taken to increase the water use efficiency for diversionary uses. The board is mandated by statute to determine the purpose of the reservation, the need for the reservation, the amount of water necessary for the purpose of the reservation, and that the reservation is in the public interest. §85-2-316(4)(a)(i)-(iv), MCA. Examination and determination of the efficiencies of water use is required in order to find the amount of water necessary to accomplish the purpose of the reservation. Water reservation legislation and rules are prospective in nature; not affecting existing rights but creating new ones. Therefore, the legislature can establish more stringent standards for acquiring new rights.

The intent of the legislature in establishing water reservations clearly supports the board's authority to require that all cost effective measures that lessen the amount of water required to be reserved are taken. It is the policy of Montana to manage its water resources for full utilization, conservation, and protection of the water. §85-1-101(3). As stated in the preamble to House Bill 952, L.1985: "Montana's water policy [is] to maximize Montana's authority over management of state waters...and to conserve water for existing and future beneficial uses by Montanans..." Water reservations are an integral part of a comprehensive water policy to manage Montana's water. Conservation and efficient use of existing and future uses are key elements for allocation and protection of Montana's water resources. See., Colorado v. New Mexico, 459 U.S. 176, 103 S.Ct. 539, 74 L.Ed.2d 348 (1982). Furthermore, reservations have the effect of limiting issuance of permits where the proposed present use would unreasonably interfere with other planned uses or development for which water has been reserved. §85-2-311(i)(e), MCA. Therefore it is essential that the board examine water use efficiencies and require that no cost-effective measure exist that would lessen the amount of water to be reserved in order to have full utilization of Montana's waters.

The words "other reasonable" were added before cost-effective measures to clarify that there may be instances where there are cost-effective measures available to lessen the amount of water necessary to accomplish the purposes of the reservation which may not be reasonably taken under the circumstances. In such case, the board may determine that those measures are not required to be taken in order to meet this criteria.

COMMENT: Two parties (DNRC, DFWP) commented on public interest application requirements (ARM 36.16.105C) and on criteria the board must consider in its finding that the reservation is in the public interest [ARM 36.16.107B(4)]. It was recommended that language be added requiring a general description of alternative actions that an applicant could take to achieve its objectives if its proposed reservation was not granted by the board, thus providing the board with information on other options available to the applicant.

With regard to the board's decision criteria on public interest one respondent felt that requiring the board to make an absolute finding on all of the factors constituting public interest in ARM 36.16.107B(4) would result in undesired and unintended results. Rather, the board should make findings on each factor, but should not then be required to make an affirmative finding on each factor before the reservation could be granted. The board should have the discretion to weigh and balance the competing social, environmental, and economic elements that underlie the concept of public interest. It was also felt that the intent language in ARM 36.16.107B(4)(a)(iii) may be confusing and should be rephrased.

RESPONSE: The board agrees with these recommendations and changes will be made to reflect these suggestions in ARM 36.16.105C(1)(c) and ARM 36.16.107B(4). Where possible, the board's decision criteria for granting the reservation should be explicit and exact in order to inform the applicant of criteria used, to guide the board, and to render the board's decision complete. Therefore specific findings should be made on each public interest criterium. However, because of the nature of water reservations and the fact that they involve projections about the future, the board, in its judgment and with full justification, should have the ability to "weigh and balance" certain factors in its finding that the reservation is in the public interest.

COMMENT: Several comments were made regarding the management plan application requirements (DNRC, BLM). With regard to management plan requirements for diversionary uses, recommendation was made to require an identification of the ownership of lands that would be inundated by a proposed reservoir [ARM 36.16.106(1)(a)]. This information would be needed for subsequent assessment of project impacts.

Mapping requirements for diversionary uses were also a subject of comment; it was recommended that the transparent mapping overlay delineating soil mapping units may not be required because soil surveys are not available for many of Montana's counties and their preparation, as well as the overlay itself, would be very costly. Much of the needed information can be determined from another required overlay of irrigable lands and the application text.

It was also recommended that ARM 36.16.106(1)(e) be dropped. This subsection requires, where applying the reservation to beneficial use requires private investments, the circulation of a survey of potential users to prove their support of the reservation. This requirement already appears in the rules [ARM 36.16.105(1)(b)] for agricultural users, because it is the individual user who will actually build the projects needed to apply the reservation to beneficial use. Therefore, the requirement as stated in ARM 36.16.106(1)(e) already appears in the rules for the appropriate class of applicants.

It was suggested that, as worded, ARM 36.16.106(1)(f) regarding administrative procedures was not clear and should be substituted with clarifying language.

With regard to management plan requirements for instream uses, comment was made on the requirement for monitoring flows as prescribed in ARM 36.16.106(2)(d). Specifically, there could be many cases where continuous stream gaging would not be cost effective or necessary, especially in headwater areas where competing uses are not likely to occur. In these cases, streamflow estimates would be adequate.

RESPONSE: ARM 36.16.106 will be modified to reflect these recommendations. With regard to the instream flow management plan comment, ARM 36.16.106(2)(d) will be deleted but "and protected from future depletions" will be added to subsection (c). This will clarify that the applicant is still responsible to quantify the instream flow and assure that the reservation will be properly managed and protected.

COMMENT: A comment was made that all department staff who provide technical assistance in the preparation or review of the applications should be listed in a file attached to the application to ensure that ensuing questions on the application be directed to the proper reviewers (DNRC).

RESPONSE: The board agrees with this recommendation and necessary changes will be made in ARM 36.16.107(2).

COMMENT: Comment was made on the time period needed for department review of applications (DNRC). Specifically, "60 days" should be changed to "90 days" because it constitutes a more appropriate timeframe for a thorough review, especially in light of the multiple applications that will be received during the Missouri Basin process.

RESPONSE: The board concurs and ARM 36.16.107(2) will be modified accordingly.

COMMENT: Changes and transfers (ARM 36.16.118) should be made by the board only after consideration of the board's decision criteria (DNRC); i.e., the board should not require a full, detailed application for each transfer or change proceeding even if the proposed change or transfer is not substantive (DNRC), nor should the board be required to make formal findings on the basis of its decision criteria when the proposed change or transfer is non-substantive. In these cases, although the change of transfer should be noticed, a full contested case hearing may not be necessary. Also, the rule should be clarified to show that the changes and transfers being referenced are not intended to be a response to the board's statutory mandate to review reservations every 10 years [85-2-316(10) and (11)] (DFWP).

RESPONSE: ARM 36.16.118 will be modified to reflect these suggested changes.

No other comments or testimony were received.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

BY: _____

Gordon G. Holte, CHAIRMAN
BOARD OF NATURAL RESOURCES
AND CONSERVATION

Certified to the Secretary of State, September 15, 1986.

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

In the matter of the amendment of rule 36.21.410 concerning examinations	)))	NOTICE OF AMENDMENT OF ARM 36.21.410 EXAMINATIONS

TO: ALL INTERESTED PERSONS:

1. On July 17, 1986, the Board of Water Well Contractors published a notice of proposed amendment of ARM 36.21.410 on page 1146, Montana Administrative Register, issue number 13.
2. The rule is amended exactly as proposed.
3. No comments or testimony were received.

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

BY: Wesley Lindsay
WESLEY LINDSAY, CHAIRMAN
BOARD OF WATER WELL CONTRACTORS

Certified to the Secretary of State, September 15, 1986.

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

In the matter of the adoption of Rule (I) 46.5.1301 pertaining to the interstate compact on the placement of children	))))	NOTICE OF THE ADOPTION OF RULE (I) 46.5.1301 PERTAINING TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

TO: All Interested Persons

1. On July 31, 1986, the Department of Social and Rehabilitation Services published notice of the proposed adoption of Rule (I) 46.5.1301 pertaining to the interstate compact on the placement of children at page 1290 of the 1986 Montana Administrative Register, issue number 14.

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

RULE I INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN The department of social and rehabilitation services hereby adopts and incorporates by reference the regulations adopted by the association of administrators of the interstate compact on the placement of children, as amended through September 1, 1986. These regulations interpret the interstate compact on the placement of children and include clarifications of the applicability of the interstate compact on the placement of children with regard to the following: interstate relocation by foster parents; programs in which children are placed in family homes as an incident to their attendance at schools in other states; interstate placement of a child into the home of his parent, relative or non-agency guardian; interstate placements of children in educational institutions, hospitals and institutions for the mentally ill or mentally defective; and the requirement of a central state office for all compact referrals. A copy of the regulations adopted by the association of administrators of the interstate compact on the placement of children, as amended through September 1, 1986, can be obtained from the Department of Social and Rehabilitation Services, 111 Sanders, Box 4210, Helena, Montana 59601.

AUTH: Sec. 53-4-111 MCA
IMP: Sec. 41-4-101, Art. VII, and 53-4-114 MCA

3. An attorney from Legislative Council commented on the necessity of identifying by date the regulations incorporated so interested parties could distinguish the incorporated regulations from possible subsequent amended versions. The

department has revised the rule to accommodate this suggestion.

Director, Social and Rehabilitation Services

Certified to the Secretary of State Sept 15, 1986.

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

In the matter of the amendment of Rules 46.10.324 and 46.12.3401 pertaining to AFDC eligibility of minor custodial parents and AFDC-related Medicaid eligibility	)))))	NOTICE OF THE AMENDMENT OF RULES 46.10.324 AND 46.12.3401 PERTAINING TO AFDC ELIGIBILITY OF MINOR CUSTODIAL PARENTS AND AFDC-RELATED MEDICAID ELIGIBILITY

TO: All Interested Persons

1. On August 14, 1986, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.10.324 and 46.12.3401 pertaining to AFDC eligibility of minor custodial parents and AFDC-related Medicaid eligibility at page 1379 of the 1986 Montana Administrative Register, issue number 15.

2. The Department has amended Rule 46.10.324 as proposed.

3. The Department has amended the following rule as proposed with the following change:

46.12.3401 GROUPS COVERED, NON-INSTITUTIONALIZED AFDC-RELATED FAMILIES AND CHILDREN Subsections (1) through (2)(d) remain as proposed.

(de) individuals who would be eligible for AFDC except for failure to meet the ~~child--support-requirements--found--in ARM-46.10.314--or--the~~ WIN participation requirements found in ARM 46.10.308;

Subsections (2)(f) through (6) remain as proposed.

AUTH: Sec. 53-6-113 MCA; AUTH Extension, Sec. 3, Ch. 53, L. 1985, Eff 3/11/85
IMP: Sec. 53-6-131 and 53-4-231 MCA

4. A department representative noted that department Medicaid rules will soon be amended to reflect a change in eligibility requirements dealing with child support assignments. Public Law 98-369 requires that the assignment of medical support rights and other third party payments and cooperation in establishing paternity and seeking support and other payments will be requirements of Medicaid eligibility. Consequently, the AFDC assignment requirements may be applied for Medicaid eligibility determination purposes. Therefore,

the proposed wording adding AFDC requirements should be withdrawn.

Dane Lewis

Director, Social and Rehabilitation Services

Certified to the Secretary of State September 15, 1986.

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

In the matter of the adoption of Rule I and amendment of Rules 46.13.302, 46.13.303, 46.13.304, 46.13.401 and 46.13.402 pertaining to low income energy assistance	))))))	NOTICE OF THE ADOPTION OF RULE (I) 46.13.502 AND AMENDMENT OF RULES 46.13.302, 46.13.303, 46.13.304, 46.13.401 AND 46.13.402 PERTAINING TO LOW INCOME ENERGY ASSISTANCE

TO: All Interested Persons

1. On August 14, 1986, the Department of Social and Rehabilitation Services published notice of the proposed adoption of a rule and amendment of Rules 46.13.302, 46.13.303, 46.13.304, 46.13.401 and 46.13.402 pertaining to low income energy assistance at page 1365 of the 1986 Montana Administrative Register, issue number 15.

2. The Department has amended Rules 46.13.303 and 46.13.402 as proposed.

3. The Department has adopted the following rule as proposed with the following changes:

46.13.502 SUPPLEMENTAL ASSISTANCE (1) One-time supplemental assistance not to exceed $250.00 is available to LIEAP clients at or below 50% of Office of Management and Budget (OMB) poverty standards, as listed in ARM 46.13.303, who have paid at least 5% of their income, as defined in ARM 46.13.304, toward their home energy heating costs for the October 1 through April 30 heating season.

Subsections (1)(a) and (1)(b) remain as proposed.

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 53-2-201 MCA

4. The Department has amended the following rules as proposed with the following changes:

46.13.302 ELIGIBILITY REQUIREMENTS FOR CERTAIN TYPES OF INDIVIDUALS AND HOUSEHOLDS Subsections (1) through (3) remain as proposed.

~~(4)--Eligible--individuals--living-in--rental-housing-who also-receive-a-heating-subsidy-are-eligible-for-the-difference between-the-portion-of--that-heating--subsidy--attributable-to the-seven-(7)-month-heating-season-(October-through-April)-and the-LIEAP-matrix-benefit-when-the-LIEAP-matrix-benefit-exceeds the-heating-subsidy-by-$10.00.~~

Subsections (5) and (5)(a) remain the same in text but will be renumbered (4) and (4)(a).

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 53-2-201 MCA

46.13.304 INCOME Subsections (1) through (2)(q) remain as proposed.

(R) PROCEEDS FROM SALE OF THE FAMILY HOME.

Subsections (3) through (4)(j) remain as proposed.

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 53-2-201 MCA

46.13.401 BENEFIT AWARD MATRICES Subsections (1) through (2) remain as proposed.

The Maximum Benefit Award Matrices for LC Districts I through IX, XI and XII remain as proposed.

MAXIMUM BENEFIT AWARD MATRIX FOR
LC DISTRICT X

Lincoln, Flathead, Lake
and Sanders Counties

	1 Bedroom Home			2 Bedroom Home		
Type Fuel	Single Family Unit	Multi-Family Unit	Mobile Home	Single Family Unit	Multi-Family Unit	Mobile Home
Natural Gas	288 ~~212~~ ~~309~~	251 ~~184~~ ~~216~~	268 ~~197~~ ~~263~~	353 ~~309~~	308 ~~272~~	329 ~~331~~
Fuel Oil	466 ~~620~~	405 ~~434~~	433 ~~527~~	568 ~~756~~	494 ~~529~~	528 ~~643~~
Propane	625 ~~660~~	544 ~~467~~	582 ~~560~~	764 ~~816~~	665 ~~571~~	711 ~~693~~
Electricity M.P.C.	635 ~~571~~	553 ~~400~~	591 ~~485~~	777 ~~690~~	676 ~~489~~	722 ~~593~~
Electricity P.P.L.	671 ~~650~~	584 ~~461~~	624 ~~559~~	820 ~~804~~	713 ~~563~~	763 ~~684~~
Coal ~~(tons)~~	252 ~~247~~	219 ~~173~~	234 ~~210~~	315 ~~252~~ ~~309~~	274 ~~219~~ ~~216~~	293 ~~234~~ ~~263~~
Wood ~~(cords)~~	273 ~~268~~	238 ~~187~~	254 ~~228~~	341 ~~335~~	297 ~~234~~	317 ~~285~~

	3 Bedroom Home			4+ Bedroom Home		
Type Fuel	Single Family Unit	Multi-Family Unit	Mobile Home	Single Family Unit	Multi-Family Unit	Mobile Home
Natural Gas	401 ~~446~~	349 ~~313~~	373 ~~380~~	452 ~~509~~	393 ~~356~~	420 ~~432~~
Fuel Oil	646 ~~860~~	562 ~~602~~	601 ~~731~~	724 ~~964~~	630 ~~675~~	673 ~~819~~
Propane	868 ~~927~~	755 ~~649~~	807 ~~788~~	972 ~~1038~~	846 ~~727~~	904 ~~882~~
Electricity M.P.C.	883 ~~793~~	768 ~~555~~	821 ~~674~~	988 ~~888~~	860 ~~622~~	919 ~~755~~
Electricity P.P.L.	932 ~~914~~	811 ~~640~~	867 ~~777~~	1044 ~~1024~~	908 ~~717~~	971 ~~870~~
Coal ~~(tons)~~	378 ~~371~~	329 ~~260~~	352 ~~315~~	441 ~~433~~	384 ~~303~~	410 ~~368~~
Wood ~~(cords)~~	410 ~~402~~	356 ~~281~~	381 ~~341~~	478 ~~469~~	416 ~~328~~	444 ~~398~~

The Maximum Benefit Award Matrices for LC Districts XI and XII remain as proposed.

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 53-2-201 MCA

5. An administrative error in the matrices has been corrected in this final notice. Additionally, the Department thoroughly considered all commentary received:

COMMENT: The Department is in violation of the federal mandate to target the most aid to those most in need.

RESPONSE: The federal law states that a state agrees to "provide, in a manner consistent with the efficient and timely payment of benefits, that the highest level of assistance will be furnished to those households which have the lowest income and the highest energy cost in relation to income, taking into account family size".

The state system does that and more. The 1985 - 1986 program made payments on behalf of LIEAP clients using a matrix system which had approximately 3,000 different payment levels. Individual levels were determined by a formula which included:

1. Income level (the lower the income, the higher the benefit)
2. Cost of fuel (higher priced fuels result in higher benefits)
3. Size of home (larger families may require larger homes which in turn require more heat)
4. Type of home (mobile homes, apartments and single family homes have different heating requirements)
5. Geographic location (degree days differ around the state)

According to a report issued by the Department of Health and Human Services (FSA-GIEM-86-3), 49 states use some variation of this system. Clearly, last year's system is in line with the federal mandate.

However, an analysis issued by the Montana Low Income Coalition indicated that 63% of Montana LIEAP households having zero income paid more than 5% of their income toward heat. Despite the fact that it would seem difficult for households having zero income to pay 5% of their income for anything, we are concerned that very low income people may be paying an amount that is higher than other low and middle income people for heat.

Therefore, we are promulgating a rule which will allow people below 50% of poverty who have paid over 5% of their income toward heat to receive a supplement of up to $250 above their basic award.

This would make Montana unique, certainly in this region, in that a very low income person could receive an initial benefit, a supplemental benefit and, in certain situations, an emergency benefit.

According to a March 31, 1985 Department of Health and Human Services Report (SSA-1M-86-11) Montana's program covers

the highest average percentage of energy costs in the country. The system has been designed so that, unlike other states, we have never had to turn away eligible households needing help.

As the Montana Low Income Coalition's Preliminary Study Results and Analysis of Home Energy Costs of Low Income Montanans states, "The program comes very close to doing what SRS says it does -- pay the full cost, on average, of winter heating bills."

We hope that recent changes ensure that we are targeting our efforts to the very poorest.

COMMENT: Address the findings, conclusions and recommendations of the Home Energy Costs of Low Income Montanans study.

Finding #1

Clients with different utilities experience different degrees of costs coverage.

RESPONSE: Without replicating the study it is difficult to ascertain whether or not this finding, or any finding, is accurate. However, it should be noted that, for all findings, the study related to the program in operation two years ago. Since then, several significant changes have occurred which certainly address the finding that some people received more help than needed.

First, a sliding scale has been implemented which reduces benefits to those at the upper end of the eligibility scale.

Second, excess credits (above $100) are now recovered.

Finding #2

There was a definite bias against the lowest income group. Many of those people were paying more than 5% of their income for heat. MLIC's goal is that no one pay more than 5% of their income for heat.

RESPONSE: Our new rule specifically addresses both points in this finding.

Finding #3

Apartment and mobile home dwellers were underserved.

RESPONSE: Even though we have no way of assuring the accuracy of the statement contained in the MLIC study, the 1986 - 1987 matrix uses the figures presented by the study to increase benefits to those two groups. We will attempt to monitor a sample of both groups to see if this winter's experience confirms those findings.

Finding #4

Unlike many states, Montana determines benefits strictly according to a matrix; income is not considered.

RESPONSE: As noted earlier, 49 other states also use some variation of the matrix system. Also, as noted earlier, Montana does vary benefits according to income.

Conclusion/Finding

The matrix system is inaccurate and should be replaced with the Coalition's percentage of income plan.

RESPONSE: The matrix system is as accurate as any such system of which we are aware, be it the other states' LIEAP matrix or similar assistance program matrixes. They all attempt to standardize benefits and reduce administrative costs. Indeed, the Coalition continually refers to the National Consumer Law Center's (NCLC) endorsement of a percentage of income or guaranteed services plan. They neglect to point out that NCLC also has stated that, "Our biggest concern about the Guaranteed Service Plan lies with the administrative complexity and costs attendant to its operation".

They also tout NCLC's review of a pilot project in Warwick, Rhode Island without mentioning that, as the review states, "accordingly, the Center found that, at the level of household contribution needed to place a percentage of income plan relying only on federal LIEAP funding within the range of financial feasibility, significant portions of Rhode Island's LIEAP participating population either would receive less assistance or would not find it valuable to participate at all" and that, "some of the households losing benefits also carry significant arrearages and they are all poor". (emphasis added.)

Although in the MLIC study there is a chart describing various percentages of heating costs LIEAP clients would be responsible for, (significantly, the MLIC recommendation would require that a person only contribute a percentage of his heating bill, not his income as every other pilot project would), there was no analysis done of how much such a plan would cost either in benefits or administrative costs. Significant work needs to be done on such a plan before it could be implemented.

The point is, that except for pilot projects, a guaranteed heat or percentage of income plan is still an unproven new concept. To replace a system which overall has worked well with one that is still in an experimental phase would not be in the best interests of the Department, the state or the low income clients who depend on LIEAP for help.

COMMENT: The Department should use satellite hearings for the LIEAP rule.

RESPONSE: The Department is in compliance with statutes regarding promulgating regulations. All written comments received are given the same consideration as any oral testimony given at its rule hearings. If a person cannot travel to a rule hearing, we invite their written comments.

COMMENT: The Department's proposal to serve those below 50% of poverty with supplemental benefits does not help those above that level.

RESPONSE: The Department agrees. It has tried to give additional assistance to those with the lowest income which is in line with the federal mandate and the findings of the MLIC's study.

COMMENT: The program should pay arrearages from 1985 - 1986.

RESPONSE: The Department agreed to present such an idea to the special legislative session since it would reduce the amount of carryover we could use to help people in the upcoming winter. The Human Services Appropriation Subcommittee refused to endorse such an idea.

COMMENT: The Department should not use energy conservation as a primary purpose of the LIEAP program.

RESPONSE: Only through conservation can Montana continue to meet the energy needs of its low income citizens. Indeed, the NCLC Rhode Island study submitted by the MLIC states that NCLC, "recommends the incorporation into (the Rhode Island plan) of a conservation incentive, or waste disincentive." Montana's program has that in its allowance of a $100 credit carryover and will expand such a concept through insistence that all applicants for supplemental assistance agree to apply for home weatherization.

COMMENT: Section 8 recipients are underserved by LIEAP relative to other applicants.

RESPONSE: The Department agrees. Benefits paid for heating subsidy by the Department of Housing and Urban Renewal (HUD) to households living in Section 8 or other federally subsidized housing will no longer be deducted from regular LIEAP benefits. While the Department has serious reservations concerning the equity of potentially paying less benefits to nonsubsidized households to provide double benefits to Section 8 applicants, the legality of deducting the Section 8 subsidy is in question.

The increased costs of such an amendment will be made up, in part, by limiting supplemental assistance to no more than $250.

COMMENT: The Department should not count as income the sale of a home.

RESPONSE: The Department has amended 46.13.304(2) to exclude the proceeds from the sale of the family home from countable income. Please note that the retained proceeds will be counted as a resource under 46.13.305.

COMMENT: The Department should not supplement the basic award but allow people to apply for $250 of Emergency Assistance instead.

RESPONSE: The Emergency Assistance program is very specific as to what can be covered. It does not address the need that some people may have for additional heating assistance, but rather concentrates on circumstances beyond a household's control such as severe weather conditions or disruption in the supply of energy. This restrictive approach, which does what it is intended to do, that is meet specific unforeseen events beyond a household's control, does not help those who would qualify for supplemental assistance. The suggestion to limit assistance has been adopted.

COMMENT: Will the Department develop a contingency schedule for unanticipated fuel oil/propane price increases?

RESPONSE: The Department's matrixes are based on the most current information available at the time. The supplemental assistance rule should protect the lowest income people from any unanticipated price increase for any fuel.

COMMENT: LIEAP clients should receive a flat grant irrespective of housing type or geographical location.

RESPONSE: Federal law requires that the state consider differences in energy costs and household income.

COMMENT: LIEAP should be provided during twelve months rather than seven.

RESPONSE: It is true that approximately 10% of heating needs fall outside of the present LIEAP heating season. However, since there are no additional funds to utilize, the Department feels that LIEAP funds are best utilized to assist only with the seven month period that is traditionally associated with heating. As an incentive to conserve, $100 can be carried

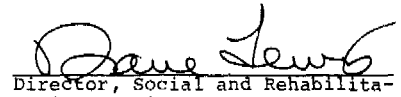
over for heating needs that exist outside the LIEAP covered period.

COMMENT: Applicants for supplemental assistance may not be able to document the total of the amount of supplementation they need by April 30, 1987.

RESPONSE: Claimants for supplemental assistance must apply by April 30, 1987 and must present supporting documentation within forty-five days.

COMMENT: The term "home energy costs" in Rule I is defined in federal law as home heating costs. The Department should clarify their meaning of this word usage.

RESPONSE: The Department has amended Rule I (46.13.502) to clarify that supplementation will be for "home heating costs" alone.



Director, Social and Rehabilitation Services

Certified to the Secretary of State September 15, 1986.

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

In the matter of the amendment of Rules 46.25.101, 46.25.711, 46.25.722, 46.25.727 through 46.25.730, 46.25.738 and 46.25.744 pertaining to the General Relief Assistance and General Relief Medical programs	)))))))	NOTICE OF THE AMENDMENT OF RULES 46.25.101, 46.25.711, 46.25.722, 46.25.727 THROUGH 46.25.730, 46.25.738 AND 46.25.744 pertaining to the General Relief Assistance and General Relief Medical programs

TO: All Interested Persons

1. On July 31, 1986, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.25.101, 46.25.711, 46.25.722, 46.25.727 through 46.25.730, 46.25.738 and 46.25.744 pertaining to the General Relief Assistance and General Relief Medical programs at page 1292 of the 1986 Montana Administrative Register, issue number 14.

2. The Department has amended Rules 46.25.101, 46.25.711, 46.25.722, 46.25.727 through 46.25.730, 46.25.738 and 46.25.744 as proposed.

3. No comments or testimony were received.

Director, Social and Rehabilitation Services

Certified to the Secretary of State Sept 11, 1986.

VOLUME NO. 41 OPINION NO. 81

CONFLICT OF INTEREST - No inherent conflict of interest when city council member is also a city employee;
EMPLOYEES, PUBLIC - City employee may hold position on city council;
LOCAL GOVERNMENT - Elected city official may retain position as a city employee;
MUNICIPAL CORPORATIONS - Municipal official may retain position as a city employee;
MUNICIPAL GOVERNMENT - City council member may retain position as a city employee;
PUBLIC OFFICERS - Elected city official may be employed by municipality;
MONTANA CODE ANNOTATED - Sections 2-2-101, 2-2-103 to 2-2-105, 2-2-125 to 2-2-131, 2-2-201, 7-4-4104, 7-5-4109, 13-1-111, 45-7-401;
MONTANA CONSTITUTION - Article IV, section 4.

HELD: 1. There is no inherent conflict of interest when a city employee is also an elected city councilman in a city which has a municipal council-mayor form of local government.

2. A municipality may not enact an ordinance which prohibits city employees from holding office on the city council.

4 September 1986

Gerald S. Navratil
Glendive City Attorney
300 South Merrill
P.O. Box 1307
Glendive MT 59330

Dear Mr. Navratil:

You have requested my opinion concerning two questions:

1. Is there an inherent conflict of interest between the positions of city employee and elected city councilman in a city

which has a municipal council-mayor form of local government?

2. May such a city pass an ordinance prohibiting a city employee from running for the city council?

Your first question addresses a potential conflict of interest where a Glendive city councilman is also a city employee. Section 7-5-4109, MCA, is the controlling statute regarding conflicts of interest in a city such as Glendive, which has a municipal council-mayor form of local government. That statute provides:

> The mayor, any member of the council, any city or town officer, or any relative or employee thereof must not be directly or indirectly interested in the profits of any contract entered into by the council while he is or was in office.

This statute finds a conflict of interest where one of the listed persons has an interest in the profits resulting from a contract with a city or town council. It does not prohibit a city employee from acting as a city councilman. Thus, I conclude that the situation you describe does not involve a conflict of interest pursuant to section 7-5-4109, MCA.

I also see no violation of the relevant statutory guidelines regarding standards of conduct for city officials. These guidelines are found in Title 2, chapter 2, part 1, MCA.

> The purpose of this part is to set forth a code of ethics prohibiting conflict between public duty and private interest as required by the constitution of Montana. This code recognizes distinctions between legislators, other officers and employees of state government, and officers and employees of local government and prescribes some standards of conduct common to all categories and some standards of conduct adapted to each category. The provisions of this part recognize that some actions are conflicts per se between public duty and private interest while other

actions may or may not pose such conflicts depending upon the surrounding circumstances.

§ 2-2-101, MCA.

Section 2-2-103, MCA, defines a public official's responsibility to act in the public trust and for the benefit of the people. Section 2-2-104, MCA, sets forth standards of conduct for public officers and employees and lists acts which constitute breaches of their fiduciary duty. It provides that a public officer or employee breaches his fiduciary duty if he discloses or uses confidential information acquired in the course of his official duties in order to further substantially his personal economic interests. He also breaches his duty if he accepts a gift which would tend to improperly influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties, or which he knows or should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken. Section 2-2-125, MCA, also lists acts by local government officers and employees which constitute a breach of fiduciary duty.

Section 2-2-105, MCA, sets forth ethical principles for public officers. It provides:

(1) The principles in this section are intended as guides to conduct and do not constitute violations as such of the public trust of office or employment in state or local government.

(2) A public officer or employee should not acquire an interest in any business or undertaking which he has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by his agency.

(3) A public officer or employee should not, within the months following the voluntary termination of his office or employment, obtain employment in which he will take direct advantage, unavailable to others, of matters with which he was directly involved during his term or employment. These matters are rules, other than rules of general application, which

he actively helped to formulate and applications, claims, or contested cases in the consideration of which he was an active participant.

(4) A public officer or employee should not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when he has a substantial financial interest in a competing firm or undertaking.

See also § 2-2-201, MCA.

The fact that a city employee is also a city councilman does not in itself constitute a breach of the fiduciary duty of the councilman/employee. Sections 2-2-104 and 2-2-105, MCA, require more than the opportunity to commit a breach.

Your next question concerns whether a city with general powers may pass an ordinance prohibiting a city employee from running for city council.

Article IV, section 4 of the Montana Constitution provides that any qualified elector is eligible to hold any public office, subject to additional qualifications as provided by the Legislature. Section 13-1-111, MCA, provides elector qualifications. Additionally, the Legislature has granted municipalities authority to adopt by ordinance qualifications for municipal office. § 7-4-4104, MCA.

However, a municipality may not adopt qualifications in an arbitrary manner. The United States Supreme Court in Slochower v. Board of Higher Education, 350 U.S. 551, 555-56 (1956), reh'g denied, 351 U.S. 944 (1956), held that if qualifications are employed, they must have a rational relationship to a legitimate state interest. In Turner v. Fouche, 396 U.S. 346, 362 (1970), the Court held there is "a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualification."

The California Supreme Court in Zeilenga v. Wilson, 484 P.2d 578, 580 (Cal. 1971), held that the right to hold public office is a fundamental right which the First Amendment protects against infringement. The Zeilenga

court also held that to justify any impairment of such First Amendment rights, there must be a compelling state interest. 484 P.2d at 580.

The Montana Supreme Court has not addressed the question of an individual's right to hold public office. Therefore it is unclear whether the court would adopt California's "fundamental right" approach or the federal "rational relationship" test. However, the Montana Legislature has enacted a number of statutes which establish a public official's fiduciary duty to avoid a conflict of interest. §§ 2-2-104, 7-5-4109, MCA. Sections 2-2-103 to 105 and 2-2-125 to 131, MCA, provide a comprehensive outline for standards of conduct for public officers and employees. Also provided are remedies for breach of such standards of conduct. §§ 2-2-103, 45-7-401, MCA.

In the situation you present, the City of Glendive seeks to prevent, by passage of a city ordinance, the election of a city employee to the position of city councilman. It appears that the city, by passing such an ordinance, is seeking to avoid any conflict of interest which may arise due to a city employee being a city councilman. As stated earlier in this opinion, an inherent conflict of interest does not exist in that situation. And because it does not, an ordinance prohibiting an employee from holding a position on the city council would not be based on a legitimate or compelling state interest. A court may find such an ordinance to be arbitrary or in violation of a person's right to hold a public office. See Slochower and Zeilenga, supra.

Any breach of a councilman/employee's fiduciary duty should be found pursuant to the statutes discussed above and should be handled pursuant to section 2-2-103, MCA.

THEREFORE, IT IS MY OPINION:

1. There is no inherent conflict of interest when a city employee is also an elected city councilman in a city which has a municipal council-mayor form of local government.

2. A municipality may not enact an ordinance which prohibits city employees from holding office on the city council.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 41 OPINION NO. 82

COURTS, CITY - Residency requirements for justice of the peace appointed as city judge;
JUDGES - Residency requirements for justice of the peace appointed as city judge;
RESIDENCE - Residency requirements for justice of the peace appointed as city judge;
MONTANA CODE ANNOTATED - Sections 3-11-205, 7-4-4103, 7-4-4103(3);
MONTANA CONSTITUTION - Article VII, section 9(4);
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 80 (1980).

HELD: A justice of the peace may not be appointed to serve as a city judge in a town in which he does not reside.

5 September 1986

Alex C. Morrison
Plains Town Attorney
Plains MT 59859

Dear Mr. Morrison:

You have asked my opinion on the following question:

> May a justice of the peace be appointed to serve as a city judge in a town in which he does not reside?

As you have pointed out in your opinion request, section 7-4-4103, MCA, was amended in 1981 to authorize the governing body of a town to appoint a city judge or to designate a justice of the peace to act as city judge as provided in section 3-11-205, MCA. § 7-4-4103(3), MCA. To the extent that a town may now appoint a city judge other than a justice of the peace, the amended statute supersedes 38 Op. Att'y Gen. No. 80 (1980). That opinion, however, did not address the residency requirements for a city judge.

The Montana Constitution, article VII, section 9(4), requires that every judge other than a Supreme Court justice "shall reside during his term of office in the

district, county, township, precinct, city or town in which he is elected or appointed." Section 3-11-205, MCA, permits a town council to designate a justice of the peace "of the county in which the town is situated" to act as city judge. A justice of the peace is a county officer who, as you point out, obviously does not reside at the time of election in more than one city or town within the county. The question that arises then is whether the Montana Constitution, article VII, section 9(4), requires that a justice of the peace appointed by a town to serve as city judge under sections 7-4-4103(3) and 3-11-205, MCA, must be a resident of the town which appoints him.

Article VII, section 9(4) was enacted as a part of the Montana Constitution of 1972. The Constitutional Convention transcripts indicate that the residence provision was offered as an amendment from the floor on February 29, 1972, by Delegate Aronow on behalf of the Convention's Judiciary Committee. The only remarks concerning the purpose of the amendment were those of Delegate Berg, who stated:

> Mr. Chairman, I simply want to point out that this amendment does cover, for example, Police Court judges and justices of the peace or any other inferior court judge, and it was the thinking of our committee that if a Police Court judge is either elected or, in the case of a commission-management form of government, appointed, he ought at least to live within the area where the taxpayers are paying his salary.

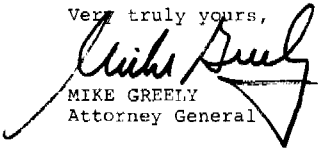
1972 Montana Constitutional Convention transcripts, February 29, 1972, p. 1121.

Although it may result in hardship to a town which does not have a county justice of the peace residing therein, my conclusion is that the language of article VII, section 9(4) does apply to city judges, whether they also happen to serve as justices of the peace or not. The language of the Constitution does not make exceptions for appointed city judges, and I cannot impute the intent to provide such an exception to the drafters of the Constitution. Delegate Berg's remarks concerning the purpose of the constitutional provision are consistent with my interpretation.

THEREFORE, IT IS MY OPINION:

A justice of the peace may not be appointed to serve as a city judge in a town in which he does not reside.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 41 OPINION NO. 83

COUNTIES - Tax on personalty lien on realty--separate assessment;
DEPARTMENT OF REVENUE - Tax on personalty lien on realty--separate assessment;
LIENS - Tax on personalty lien on realty--separate assessment;
PROPERTY, PERSONAL - Tax on personalty lien on realty--separate assessment;
PROPERTY, REAL - Tax on personalty lien on realty--separate assessment;
TAXATION AND REVENUE - Tax on personalty lien on realty--separate assessment;
MONTANA CODE ANNOTATED - Sections 15-16-401, 15-16-402;
OPINIONS OF THE ATTORNEY GENERAL - 16 Op. Att'y Gen. at 337 (1936), 40 Op. Att'y Gen. No. 80 (1984).

HELD: 1. A mortgage or lien holder is not generally required pursuant to section 15-16-402(2), (3), and (4), MCA, to file annual notices to prevent taxes on personal property that is valued in excess of $1,000 from becoming a first and prior lien against the real property.

2. Section 15-16-402(5), MCA, requires that where the taxes have been delinquent for one or more years the owner of a mortgage on real property must comply with the procedural requirements of the section on an annual basis in order to prevent any personal property from becoming a lien upon the real estate.

9 September 1986

David L. Nielsen
Valley County Attorney
Valley County Courthouse
Glasgow MT 59230

Dear Mr. Nielsen:

You have requested my opinion concerning the application of the procedural requirement of section 15-16-402, MCA.

> Must a mortgage or lien holder who wishes to prevent personal property taxes from becoming a prior lien upon the mortgage property comply on an annual basis with the procedural requirements set forth in section 15-16-402(5), MCA?

Subsections (2) to (5) were enacted in 1935 and have been a part of section 15-16-402, MCA, since that time. 1935 Mont. Laws, ch. 199, § 1. No legislative history is extant. Prior to enactment of that section, however, tax liens on personal property had absolute priority upon the personal property and the real property of the owner thereof. There was no provision to allow the owner or holder of any mortgage or other lien upon the real estate to perfect a superior lien.

The rules of statutory construction require that a statute be read as a whole and construed so as to avoid absurd results. Dover Ranch v. Yellowstone County, 187 Mont. 276, 283, 609 P.2d 711, 715 (1980). The statute as it now exists provides:

> 15-16-402. Tax on personalty lien on realty--separate assessment. (1) Every tax due upon personal property is a prior lien upon any or all of such property, which lien shall have precedence over any other lien, claim, or demand upon such property, and except as hereinafter provided, every tax upon personal property is also a lien upon the real property of the owner thereof from and after 12 midnight of January 1 in each year.
>
> (2) The taxes upon personal property based upon a taxable value up to and including $1,000 shall be a first and prior lien upon the real property of the owner of such personal property. Taxes upon personal property based upon the taxable value thereof in excess of $1,000 shall be a first and prior lien upon the real property of the owner unless the owner or holder of any mortgage or other lien upon said real property appearing of record in the office of the clerk and

recorder of the county where such real property is situated, at or before the time such personal property tax attached thereto, shall have filed the notice hereinafter provided for, in which event the taxes upon such excess of $1,000 of taxable value shall not be a lien on the real property of such owner. It shall be the duty of the county treasurer to issue to any mortgagee or lien holder, upon his request, a statement of the personal property tax due upon the taxable value up to and including $1,000. Personal property taxes upon a taxable value up to $1,000 may be paid, redeemed from a tax sale as by law provided, or discharged separately from any personal property taxes in excess of such amount. Payment of such taxes upon a taxable value up to $1,000, as herein provided, shall operate to discharge the tax lien upon the personal property of the owner to the extent of such payment in the order that the person paying such tax shall direct.

(3) The holder of any mortgage or lien upon real property who desires to obtain the benefits of this section shall file in the office of the county treasurer of said county a notice giving:

(a) the name and address of the mortgagee and holder of the mortgage or lien;

(b) the name of the reputed owner of the land;

(c) the description of the land;

(d) the date of record and expiration of the mortgage or lien;

(e) the amount thereof; and

(f) a statement that he claims the benefit of the provisions of this section.

(4) Such notice shall be ineffectual as to any taxes which shall have become a lien on real property prior to the filing of such notice as aforesaid. If the mortgage be not paid at

maturity, such notice shall thereafter be filed annually unless the mortgage be extended for a definite period to be stated in such notice.

(5) Any owner of a mortgage on real estate upon which personal property taxes are by this section made a lien, where the owner of such real estate and personal property has failed to pay taxes due upon such real estate and personal property for 1 or more years, may file with the department of revenue or its agent in the county in which such property is located a written request to have the personal property and real estate of the owner separately assessed. Such request must be made by registered or certified mail at least 10 days prior to January 1 in the year for which property is assessed. Upon receipt by the department or its agent of such request, it is hereby made the duty of the department or its agent to make a separate assessment of real and personal property of the owner thereof, and such personal taxes shall not be a lien upon the real estate so mortgaged of the owner thereof, and the personal property taxes shall be collected in the manner provided by law for other personal property. [Emphasis added.]

Montana law expressly provides that every tax has the effect of a judgment against the person, and every lien created by Title 15 has the force and effect of an execution duly levied against all personal property in possession of the person assessed from and after the date the assessment is made. § 15-16-401, MCA. The tax liens attach to personal property or to the realty owned by the person against whom the property assessment is made. Stensvad v. Musselshell County, 180 Mont. 489, 496, 591 P.2d 225, 229 (1979). See also O'Brien v. Ross, 144 Mont. 115, 119-20, 394 P.2d 1013, 1015-16 (1964) (lien attaches to all real and personal property owned by the person assessed pursuant to sections 15-16-113 and 15-17-901, MCA).

I have previously examined section 15-16-402(1), MCA. 40 Op. Att'y Gen. No. 80 (1984). In that opinion, I held that local tax liens on personal or real property

have priority over liens or private mortgages. Section 15-16-402, MCA, expressly confers priority of tax liens on personal property over the liens of private mortgagees except as provided within the statute. In my earlier opinion, I noted that tax liens are superior to all other liens. I relied upon United States v. Christensen, 218 F. Supp. 722 (D. Mont. 1963), which analyzed sections 15-16-401 to 403, MCA, and the Montana cases of State ex rel. Malott v. Board of Commissioners, 89 Mont. 37, 296 P. 1 (1930), and Hartman v. City of Bozeman, 116 Mont. 392, 154 P.2d 279 (1944). I agreed with the holding in Christensen that those statutes and cases compel the conclusion that tax liens on real property take priority over mortgages. See also 16 McQuillan, Municipal Corporations: Taxation § 44.144 n.4 (rev. ed. 1984).

Section 15-16-402, MCA, establishes the exclusive means by which a mortgage holder or other lien holder upon real property may prevent taxes upon personal property from becoming a first and prior lien upon the real property of the owner. There are two methods set forth in the statute. The first method protects the mortgage or lien holder's interest in the property value which is in excess of the initial $1,000 of taxable value of the personal property. The county has a first and prior lien upon that property. That method does not generally require that the mortgage holder comply with notice provisions on an annual basis. The second method provides that the mortgage holder may in some cases assert a first and prior lien which protects his entire interest ahead of any personal property tax lien. That method does require that a request be filed annually. They are two distinct privileges in the holder of the mortgage or lien. See 16 Op. Att'y Gen. at 337 (1936).

Section 15-16-402(2), MCA, provides that the initial $1,000 in taxes upon personal property is a first and prior lien upon the real property of the owner of the personal property. Taxes upon personal property in excess of $1,000 are also a first and prior lien against the real property unless the owner or holder of the mortgage complies with the notice provisions set forth in subsections (3) and (4). Where the owner or mortgage holder complies with those provisions, the personal property tax in excess of $1,000 is not a prior lien upon the property. Subsection (4) specifically provides, however, that where a mortgage is not paid at

maturity, future notices shall be filed annually unless the mortgage is extended for a definite period of time stated in the notice. No such requirement for an annual notice is set forth where the notice gives the information required by subsection (3) and the mortgage has not yet expired. A mortgage or lien holder is not generally required to file annual notices to prevent personal property taxes in excess of $1,000 from becoming a first and prior lien against the real property.

Section 15-16-402(5), MCA, provides for separate assessment of taxes upon real property and personal property where the owner of the real estate and personal property has failed to pay the taxes due on the property for one or more years. That section allows the owner of a mortgage on real estate which is subject to a tax lien for personal property to file a request that the assessments for the real property and the personal property be made separately. That request must be made by registered or certified mail at least ten days prior to January 1 in the year for which property is assessed.

Personal property taxes are assessed on an annual basis. § 15-8-201, MCA. The language of the statute is clear. A request for separate assessment must be filed at least ten days prior to January 1 in the year for which the property is assessed. Where that request is properly made, the statute provides that those personal property taxes will not become a lien upon the real estate. This subsection allows any mortgage holder to prevent personal property taxes in any amount from becoming a first and prior lien against the property where the owner of the real estate and personal property has failed to pay taxes due on the real estate and personal property for one or more years. The delinquency period of "1 or more years" provides an opportunity for the county to timely pursue the taxes on the initial $1,000 of taxable value of the personal property that is protected as a first and prior tax lien in subsection (2). Where the county fails to pursue its tax claim, the owner of the mortgage may request separate assessment on an annual basis and thus prevent personal property taxes in any amount from becoming a lien of any sort upon the real property. Such filing will protect all prior liens upon the property.

THEREFORE, IT IS MY OPINION:

1. A mortgage or lien holder is not generally required pursuant to section 15-16-402(2), (3), and (4), MCA, to file annual notices to prevent taxes on personal property that is valued in excess of $1,000 from becoming a first and prior lien against the real property.

2. Section 15-16-402(5), MCA, requires that where the taxes have been delinquent for one or more years the owner of a mortgage on real property must comply with the procedural requirements of the section on an annual basis in order to prevent any personal property from becoming a lien upon the real estate.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 41 OPINION NO. 84

ALCOHOL - Authority of town to prohibit presence of persons under age 19 on premises where alcoholic beverages are sold and consumed and provide fine for conviction of illegal possession of alcoholic beverages;
CITIES AND TOWNS - Authority of town to prohibit presence of persons under age 19 on premises where alcoholic beverages are sold and consumed and provide fine for conviction of illegal possession of alcoholic beverages;
CRIMINAL LAW AND PROCEDURE - Authority of town to prohibit presence of persons under age 19 on premises where alcoholic beverages are sold and consumed and provide fine for conviction of illegal possession of alcoholic beverages;
JUVENILES - Authority of town to prohibit presence of persons under age 19 on premises where alcoholic beverages are sold and consumed and provide fine for conviction of illegal possession of alcoholic beverages;
MUNICIPAL GOVERNMENT - Authority of town to prohibit presence of persons under age 19 on premises where alcoholic beverages are sold and consumed and provide fine for conviction of illegal possession of alcoholic beverages;
MONTANA CODE ANNOTATED - Sections 7-1-4123, 7-32-4302, 16-1-101 to 16-1-104, 16-1-303(2)(n), 16-3-304, 16-3-309, 16-4-503, 45-5-624, 53-24-106;
MONTANA CONSTITUTION - Article XI, section 4(1)(a) and (2);
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 93 (1980), 40 Op. Att'y Gen. No. 48 (1984), 41 Op. Att'y Gen. No. 75 (1986).

HELD: 1. An incorporated town may not enact an ordinance prohibiting persons under the age of 19 years from being on licensed premises where alcoholic beverages are sold and consumed.

2. An incorporated town may not enact an ordinance which provides a minimum fine of $300 for a person under the age of 19 years who is convicted of possession of alcoholic beverages.

10 September 1986

R. W. Heineman
Town Attorney
P.O. Box 313
Wibaux MT 59353

Dear Mr. Heineman:

You have asked my opinion on the following questions:

1. May an incorporated town enact an ordinance prohibiting persons under the age of 19 years from being on licensed premises where alcoholic beverages are sold and consumed?

2. May the town enact an ordinance which provides a minimum fine of $300 for anyone under the age of 19 years who is convicted of possession of alcoholic beverages?

Your letter states that the Wibaux Town Council is considering the ordinances in response to public concern over the presence of persons under the legal drinking age in places where alcoholic beverages are sold for on-premises consumption. The council wishes to reduce the risk that such persons may come into possession of alcoholic beverages.

These questions require a determination of the limits of the town's legislative power to adopt ordinances regulating the sale and use of alcoholic beverages. I have previously discussed these limits in 41 Op. Att'y Gen. No. 75 (1986) and 40 Op. Att'y Gen. No. 48 at 197 (1984).

Wibaux is an incorporated town without self-government powers and therefore has the legislative powers of a municipal corporation and such other powers provided or implied by law. Mont. Const. art. XI, § 4(1)(a). The legislative powers of a municipality with general powers are set forth in section 7-1-4123, MCA, and include the power, subject to state law, to adopt ordinances required to preserve peace and order, secure and promote

the general public health and welfare, and exercise any powers granted by state law. The Legislature has expressly granted the town council the power to prevent and punish intoxication (subject to the limits established in section 53-24-106, MCA) and acts or conduct offensive to public morals. § 7-32-4302, MCA.

The Montana Supreme Court has recognized that a local government with general powers is entitled to have its express and implied powers liberally construed. Stevens v. City of Missoula, 40 St. Rptr. 1267, 667 P.2d 440 (1983); see Mont. Const. art. XI, § 4(2). However, the Court has also determined that the State has preempted the field of liquor regulation and that a local government does not have authority or jurisdiction to enact ordinances dealing with the control of the sale of beer and liquor. State ex rel. Libby v. Haswell, 147 Mont. 492, 414 P.2d 652 (1966). The Court has reaffirmed its holding in Haswell with respect to local governments which choose to retain general government powers rather than adopt self-government powers. D&F Sanitation Service v. City of Billings, 43 St. Rptr. 74, 713 P.2d 977 (1986).

In Haswell the City of Libby sought by city ordinance to prevent and punish the sale of liquor to minors. Noting that the Legislature in 1947 had expressly deleted the statutory provision permitting towns to enforce liquor laws and regulate places of business where alcoholic beverages are sold, the Montana Supreme Court held that the entire control of the sale of liquor and beer reposes in the Liquor Control Board (now the Department of Revenue) and not with local municipalities. See §§ 16-1-101 to 104, MCA.

The Legislature has created certain exceptions to state preemption (see §§ 16-3-304, 16-3-309, 16-4-503, MCA), but has given local governments no express authority to prohibit classes of persons from entering or remaining upon the premises of state liquor licensees. While I have held that section 53-24-106(2), MCA, permits a city to enact an open container ordinance (38 Op. Att'y Gen. No. 93 at 318 (1980)), I do not find in that statute an independent grant of authority to local governments to enact ordinances regulating the conduct and management of licensed premises. Cf. § 16-1-303(2)(n), MCA. Nor do I find section 7-32-4302, MCA, to be such a grant of

authority in view of the Montana Supreme Court's broad holding in Haswell.

The proposed ordinance's prohibition against the presence of minors where alcoholic beverages are sold and consumed could be enacted as a statute by the Legislature or established in a rule promulgated by the Department of Revenue. In other jurisdictions similar regulations have been found to constitute a valid exercise of state police power. See 45 Am. Jur. 2d Intoxicating Liquor § 291. However, in Montana a local government with general powers does not have the authority to enact and enforce such a prohibition; this authority rests solely with the state.

The town is also without authority to enhance the punishment for a violation of section 45-5-624, MCA, which prohibits a person under the age of 19 from knowingly having an alcoholic beverage in his possession. The proposed ordinance establishing a minimum fine of $300 would conflict with section 45-5-624(2)(a), MCA, which sets a maximum fine of $50 for violation of the statute. A municipal ordinance must be in harmony with the general laws of the state; whenever an ordinance comes into conflict with a statute, the ordinance must give way. See State ex rel. Libby v. Haswell, supra. Although the Montana Supreme Court has not determined whether state preemption applies to the regulation of the possession (as opposed to the sale) of alcoholic beverages, it is nevertheless generally accepted that a penalty provided for the violation of an ordinance is invalid if it exceeds the maximum limitation on the penalty fixed by statute for the same offense. See 56 Am. Jur. 2d Municipal Corporations § 376.

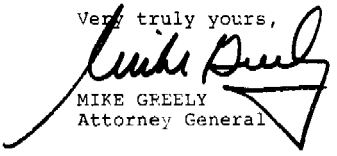
THEREFORE, IT IS MY OPINION:

1. An incorporated town may not enact an ordinance prohibiting persons under the age of 19 years from being on licensed premises where alcoholic beverages are sold and consumed.

2. An incorporated town may not enact an ordinance which provides a minimum fine of

$300 for a person under the age of 19 years who is convicted of possession of alcoholic beverages.

Very truly yours,



MIKE GREELY
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules or amendment or repeal of existing rules filed with the Secretary of State. Proposals of the Department of Revenue are reviewed only in regard to the procedural requirements of the Montana Administrative Procedure Act. The Committee has the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. In addition, the Committee may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt or amend a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with the existing or proposed rules. The address is Room 138, Montana State Capitol, Helena, Montana 59620.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions:

Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter

1. Consult ARM topical index, volume 16. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute Number and Department

2. Go to cross reference table at end of each title which list MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through June 30, 1986. This table includes those rules adopted during the period June 30, 1986 through September 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 June 30, 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

I-X	Leaves of Absence Due to Disability, p. 1423
I-XII	Administration of a Sick Leave Fund for State Employees, p. 864, 1297
2.4.101	and other rules - Regulating Travel Expenses of State Employees While on Official Business, p. 1124
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
(Public Employees' Retirement Board)	
2.43.301	and other rules - Administration of Public Retirement Systems and the State Social Security Program, p. 702, 1454
(State Tax Appeal Board)	
2.51.307	and other rules - Operation of and Public Participation in the County and State Tax Appeals Process, p. 862, 1174
(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-III Designation of Noxious Weeds Pursuant to the County Weed Control Act, p. 88, 337
I-VI Emergency Rules - Cropland Insect Detection and Spraying Program, p. 1175
I-VIII Establishing 1080 Livestock Protection Collar Regulations, p. 396, 775
I-VIII Establishing Civil Penalties for Pesticide Act Violations, p. 618, 1013
I-X and other rules - Commodity Dealers and Public Warehousemen - Grain Rules - Dry Beans, p. 872, 1178
I-XII Noxious Weed Trust Fund, p. 1, 651
I-XLIII Establishing Standards for Anhydrous Ammonia Facilities, p. 1231
4.10.101 and other rules - Pesticide Sale and Use, p. 589, 1007
4.10.1501 Definition of Terms in the Pesticide Act, p. 725, 1071
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-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-IX Montana Insurance Assistance Plan, Commercial Liability, p. 879, 1460
6.6.2003 Unfair Trade Practices on Mid-term Cancellations of Casualty or Property Insurance, p. 10, 538

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 Chiropractors)
8.12.601 Applications, Educational Requirements - Renewals - Continuing Education Requirements, p. 730, 1182
(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 Radiologic Technologists)
8.56.409 and other rule - Fee Schedule - Permit Fees, p. 1490
(Board of Realty Regulation)
8.58.401 Purpose of Board, p. 307, 661
8.58.414 Trust Account Requirements, p. 1492
(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, 948
(Milk Control Bureau)
8.79.101 Transactions Involving Purchase and Resale of Milk Within the State, p. 883, 1183
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, 1016
8.86.301 Pricing Rules - Class I Price Formula to Change On-the-farm Retail Prices, p. 1134, 1504
(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)
8.97.308 Rates, Charges and Fee Schedule, p. 1430
8.97.404 Permissible Investments and Deposits, p. 636, 1074
(Hard Rock Mining Impact Board)
8.104.203 and other rules - Format of Plan - Content of Objection to Plan - Implementation of an Approved Plan - Definitions - Waiver of Impact Plan Requirement - Modification of Plan - Financial Guarantee of Tax Prepayments - Evidence of the Provision of Service or Facility - Contents of Petition for Plan Amendment, p. 1052

EDUCATION, Title 10

(Superintendent of Public Instruction)
I-III Special Education Transportation, p. 1003, 1383

16.6.303 Recording of Delayed Birth Records, p. 1432
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, 1021
16.10.207 and other rules - Regulation of Food Service Establishments, p. 501, 1076
16.18.201 and other rule - Water Treatment Operators Requirement to Earn Continuing Education Units, p. 498, 1078
16.28.201 and other rule - Communicable Diseases - AIDS, Who must Report a Communicable Disease - What Diseases are Reportable - Reporting Requirements, p. 1949, 254
16.32.328 Minimum Standards for a Hospital - Retention of Medical Records, p. 1061
16.44.104 and other rules - Hazardous Waste Management - Updating State Regulations to Bring Them into Conformance with the Federal Hazardous Waste Program, p. 890, 1309

HIGHWAYS, Department of, Title 18

18.6.202 and other rules - Regulation of Outdoor Advertising, p. 1482, 339

INSTITUTIONS, Department of, Title 20

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

JUSTICE, Department of, Title 23

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, 1023
23.14.416 and other rules - Basic Course - Intermediate Course - Advance Course, p. 1434

LABOR AND INDUSTRY, Department of, Title 24

24.16.9007 Changing the Annual Effective Date of the Standard Rate of Wages Applicable to Public Works from October 1st to December 1st, p. 1141, 1466
(Human Rights Commission)
Public Hearing and Petition for Declaratory Ruling as to whether Montana Department of Institutions, a

State Governmental Agency may Employ only Female Cottage Life Attendants at its Correctional Facility for Female Youth under Certain Circumstances, p. 1495

(Workers' Compensation Division)

I Relative Value Fee Schedule for Medical, Chiropractic and Paramedical Services, p. 1970, 454

24.29.702 Self-Insurers, p. 1273

24.29.3801 Attorney Fee Regulation and Submission of Attorney Fee Contracts, p. 27, 458

STATE LANDS, Department of, Title 26

I Shut-in Oil Royalties for Oil and Gas Leases on State Land, p. 1144

I-XI Consultation of the Department of State Lands with the State Historic Preservation Office Under the Antiquities Act, p. 1849, 953

LIEUTENANT GOVERNOR, Title 30

(Montana Statehood Centennial Commission)

I-IX Sanctioning Official Centennial Commemorative Products and Projects, p. 1437

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

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

(Board of Natural Resources and Conservation)

36.16.101 and other rules - Water Reservations - Applications in the Yellowstone River Basin - Applications in the Missouri River Basin - Reservation Changes and Transfers, p. 920

(Board of Water Well Contractors)

I-VII Definitions - Disciplinary Action, p. 235, 671, 797

36.21.410 Examinations, p. 1146

36.21.601 and other rules - Current Construction Standards - Minimum Construction Standards for Water Wells in Montana, p. 1148

(Board of Oil & Gas Conservation)

36.22.1242 Increasing the Oil and Gas Privilege and License Tax, p. 742, 1063, 1384

PUBLIC SERVICE REGULATION, Department of, Title 38

I-XXXIX Telecommunications Act - Minimum Rate Case Filing Requirements for Telephone Utilities, p. 166, 799

REVENUE, Department of, Title 42

I SRS Inspection of Income Tax Returns, p. 1318, 51, 261
I-III Adjusting a Jointly Filed Tax Return, p. 509, 1026
I-IV Seven Day Credit Limit of Cigarette and Tobacco Products, p. 940, 1320
I-VI Reporting Requirements for New Production of Oil and Gas, p. 1974, 817
I-IX Disclosure of Child Support Information, p. 1065
42.17.120 Individual Liability for State Withholding Taxes, p. 1443
42.20.113 Valuation of Agricultural and Timberland - Christmas Trees, p. 92, 558
42.22.1102 and other rule - Net Proceeds Reclamation Costs, p. 1604, 30, 1080
42.22.1212 and other rules - Oil and Gas Net Proceeds Deductions, p. 1909, 460
42.27.102 and other rule - Gasoline Tax and Distributor's Bond, p. 240, 823

SECRETARY OF STATE, Title 44

I Fees for Clerks and Recorders for Filing Certified Copies of Agricultural Liens and Continuations and Prescribing a Method of Payment, p. 744, 1082
I-XIV Interpretative Rules for the Implementation of Public Law 98-435, Voting Accessibility for the Elderly and Handicapped Act, p. 180, 462
44.3.1737 and other rules - Processing and Counting of Computer Election Services Votomatic Punchcard Ballots, p. 1445

SOCIAL AND REHABILITATION SERVICES, Department of, Title 46

I Interstate Compact on the Placement of Children, p. 1290
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
46.8.102 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, 1083