RESERVE

MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 22

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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

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BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the Matter of the Amendment of ARM 23.4.101 through 103, 23.4.105, 23.4.107, 23.4.110, 23.4.115, 23.4.116, 23.4.118, 23.4.119, 23.4.121, 23.4.132, 23.4.133, 24.3.135, and 23.4.136 and the repeal of ARM 23.4.120.	)	NOTICE OF PROPOSED AMENDMENT AND REPEAL OF RULES PERTAINING TO ALCOHOL ANALYSIS. NO PUBLIC HEARING CONTEMPLATED

TO: ALL INTERESTED PERSONS:

1. On December 31, 1986, the Department of Justice proposes to amend the rules concerning alcohol analysis and to repeal ARM 23.4.120, found on page 23-330.

2. The proposed changes are as follows:

23.4.101 CERTIFICATION OF PERSONS, ~~FACILITIES~~, AND/OR INSTALLATIONS (1) Every person, ~~facility~~, and/or installation performing alcohol analyses pursuant to the provisions of section 61-8-405, MCA, must have valid certification issued in accordance with this subchapter. All testing devices and methodology are subject to approval of the department.
AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

23.4.102 DEFINITIONS Subsection (1) remains the same.
(2) "Agency" means any law enforcement agency in which a breath-testing device has been installed and is being maintained by the department.
Subsections (2) through (6) remain the same, but will be renumbered (3) through (7).
(8) ~~(7)~~ "Certificate" means a document issued by the department certifying that a person, ~~facility~~, or installation has fulfilled the requirements set by this subchapter and may practice in the field of alcohol analysis.
(9) ~~(8)~~ "Clinical laboratory" means a ~~facility~~ laboratory for the microbiological, serological, chemical, hematological, radiobiossay, cytological, immunohematological, pathological, or other examination of materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or assessment of a medical condition.
Subsections (9) through (11) remain the same, but will be renumbered (10) through (12).
~~(12) "Facility" means any location or law enforcement agency in which a department approved breath-testing device has been installed and maintained.~~
Subsections (13) through (15) remain the same.

(16) "Installation" refers to the location of an alcohol analysis device or a laboratory where such analyses are performed. This excludes ~~facilities~~ agencies utilizing department installed and maintained breath-testing devices.

Subsections (17) through (25) remain the same.

AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

23.4.103 INITIAL CERTIFICATION (1) Every person~~,~~ ~~facility,~~ and/or installation involved in alcohol analyses must be certified by the department. Every person~~,~~ ~~facility,~~ and/or installation not already certified must become certified before such analyses are considered valid by the department.

(2) Certification does not imply approval of any tests or procedures carried out by an installation~~,~~ ~~facility,~~ and/or person other than what the certificate specifies.

AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

23.4.105 REQUIREMENTS FOR CERTIFICATION OF PERSONS, AND/OR ~~FACILITIES,~~ OR INSTALLATIONS NOT EXEMPT FROM CERTIFICATION REQUIREMENTS (1) Certification requirements shall include, but are not limited to the following:

(a) An individual~~,~~ ~~facility director or personnel,~~ or installation director or personnel who will be performing alcohol analyses shall submit evidence to the department, in writing, of the scientific training and experience in clinical chemistry or toxicology of the individual~~,~~ ~~facility director or personnel,~~ or installation director or personnel;

Subsections (b) and (c) remain the same.

AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

23.4.107 CERTIFICATION APPLICATION FORMS Subsection (1) remains the same.

(2) Copies of the application form are available upon request from the Department of Justice, Division of Forensic Science, Providence Building, 6th Floor, 554 West Broadway, ~~Laboratory of Criminalistics Bureau, 275 West Front Street,~~ Missoula, Montana 59802.

AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

24.4.110 RENEWAL OF CERTIFICATION (1) Every certified person~~,~~ ~~facility, or installation~~ shall renew certification with the department every three years from the date of initial certification~~,~~. Each installation shall renew certification with the department every year from the date of initial certification so long as the activity requiring such certification continues.

Subsection (2) remains the same.

AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

23.4.115 TRAINING COURSE APPROVAL (1) Any agency, laboratory, institution, school or college conducting a course of instruction for persons to be certified under this subchapter shall submit a course resume and list of instructors and their qualifications to the department for approval. The

course of instruction must be approved by the department if the participants are to be eligible for initial certification. Any program conducted by the department is considered department-approved.
AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

23.4.116 BREATH TEST RECORDS A ~~facility~~ (1) An agency performing breath analysis shall maintain the following records:

~~(1)~~ (a) Copies of certificates;

~~(2)~~ (b) Records of training levels of certified personnel;

~~(3)~~ (c) Records of tests performed on samples and the results;

~~(4)~~ (d) A copy of this rule.
AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

23.4.118 REPORTING TEST RESULTS (1) ~~Every person, facility,~~ Each agency and installation shall complete a monthly report form. The report forms will be furnished by the department. The ~~persons, facilities,~~ agencies and installations shall submit the form to the department not later than the tenth day of the month following the month of record.

(2) Copies of the report form are available upon request from the Department of Justice, ~~Laboratory of Criminalistics Bureau, 275 West Front Street,~~ Division of Forensic Science, Providence Building, 6th Floor, 554 West Broadway, Missoula, Montana 59802.
AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

23.4.119 REQUIRED CERTIFICATION FOR BREATH ALCOHOL TESTING (1) The following persons and/or ~~facilities~~ installations are required to be certified in order to administer breath alcohol testing:

~~(1)~~ (a) All law enforcement personnel administering breath alcohol tests in accordance with this subchapter;

~~(2)~~ (b) All individuals or laboratories except the department of justice, ~~Criminalistics Laboratory,~~ division of forensic science;

~~(3)~~ (c) All clinical and/or hospital laboratories not meeting requirements for exemption from certification.
AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

23.4.121 OPERATOR SUPERVISOR REQUIRED (1) Each ~~breath testing facility~~ agency shall have at least one operator supervisor who is responsible for the maintenance and calibration monitoring of testing devices; record keeping; result reporting; and ensuring that the ~~facility~~ agency adheres to this chapter.
AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

23.4.132 URINE SAMPLING Subsection (1) remains the same.

(2) When urine collection is necessary, the subject should ~~employ~~ empty his or her bladder. Twenty (20) minutes after first voiding the bladder, a urine specimen should be collected

and deposited into a clean, dry container and capped or stoppered. The container should be sealed and the following information provided:

(a) name of subject;

(b) date and time of collection; and

(c) name or initials of person witnessing collection and/or sealing sample.

Subsections (3) through (5) remain the same.

AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

23.4.133 BREATH SAMPLING (1) Breath samples must be collected according to techniques supplied by the manufacturer of the testing or sampling device employed. ~~The device and the technique must be department-approved.~~

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

AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

23.4.135 BREATH-TESTING INSTRUMENTS ~~(1) A breath-testing instrument or technique, including a manufacturer suggested technique, employed pursuant to this subchapter must be approved by the department.~~

(1) ~~(2)~~ A breath-testing instrument may be submitted to the department for approval. The instrument must be accompanied by a detailed set of instructions which includes information concerning its operation and interpretation of its results.

(2) ~~(3)~~ The department shall examine and evaluate any breath-testing instrument submitted for its approval. The department may approve the instrument if the instrument meets the following criteria:

(a) The quantity of breath analyzed for its alcohol content is established only by direct volumetric measurement or by collection and analysis of a fixed breath volume;

(b) The instrument is capable of analyzing a suitable reference sample, such as air equilibrated with a reference solution of known alcohol content at a known temperature. The results of such analysis ~~must agree with the reference sample value to within 0.01 of the appropriate weight/volume (Ref. ARM 23.4.102(23) of this subchapter)~~ must fall within a range defined by plus or minus one-tenth of the alcohol concentration of the reference solution or such other limits set by the department; and

(c) The specificity of the procedure for the analyses of breath specimens for the determination of alcohol concentration is adequate and appropriate for use in traffic law enforcement.

AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

23.4.136 OPERATION OF BREATH-TESTING DEVICES (1) Breath-testing instruments or devices must be operated in compliance with manuals provided by the manufacturer of the instrument or device. ~~and approved by the department.~~

AUTH: § 61-8-405, MCA; IMP: § 61-8-405, MCA.

3. The rules regarding alcohol analysis are being amended to remove the references to "facilities" and to change the certification requirements of persons and installations. ARM 23.4.120 is being repealed because it is no longer needed. These changes are necessary to accurately reflect the current methods for certifying persons and installations which perform alcohol analysis.

4. Interested parties may submit their data, views, or arguments concerning the proposed rules in writing to Mike Greely, Attorney General, 215 North Sanders, Helena, Montana 59620, no later than December 29, 1986.

5. If a person who is directly affected by the proposed amendments and repeal 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 his request along with any written comments he has to Mike Greely, Attorney General, 215 North Sanders, Helena, Montana 59620, no later than December 29, 1986.

6. If the agency receives requests for a public hearing on the proposed adoption and repeal from either 10 percent or 25, whichever is less, of the persons who are directly affected by the proposed adoption, or a request from a government subdivision or agency or from the administrative code committee or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. The amended rules will affect licensed drivers in the state, law enforcement officials, and technicians who do alcohol analysis. Notice of the hearing will be published in the Montana Administrative Register.

Mike Greely

MIKE GREELY

Certified to the Secretary of State 11/7/86

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the Amendment of Rule 32.2.401, Updating Fees and Licenses to Reflect Cost to the Department	)))))	NOTICE OF PROPOSED AMENDMENT OF RULE 32.2.401 DEPARTMENT OF LIVESTOCK FEES AND LICENSES NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On December 29, 1986 the Board of Livestock proposes to amend Rule 32.2.401 by updating the cost of several fees and licenses to reflect cost changes.

2. The proposed amendment provides as follows:

32.2.401 DEPARTMENT OF LIVESTOCK LICENSE FEES, PERMIT FEES, AND MISCELLANEOUS FEES. The department of livestock shall charge:

(1) as is

(2) as is

(3) as is

(4) for inspection of livestock before removal from a county or before change of ownership as required by 81-3-205 M.C.A., a fee of 35 cents per head; for cow/calf pairs to pasture only, a fee of 35 cents per pair;

(5) for issuance of a market consignment permit or transportation permit before removal from a county as required by 81-3-205 M.C.A., a fee of $1 per ~~head~~ permit;

(6) as is

(7) as is

(8) as is

(9) for inspection of horses, mules, or asses before removal from a county or before change of ownership as required by 81-3-205 M.C.A., a fee of $3 per head; if more than 10 animals of the same type are offered for inspection on the same day by the same owner a fee of $1 per head starting with the eleventh animal;

(10) as is

(11) as is

(12) for a permanent horse transportation permit as required by 81-3-211 M.C.A., a fee of $10; also for rodeo roping steers if single brand and single ownership;

(13) - (20) as is

(21) for a slaughterhouse, meat packing house, or meat depot license as required by 81-9-201 M.C.A., a fee of ~~$1~~ $5;

(22) - (37) as is

3. The reason for the amendment is to ensure that the funds received for licenses and fees reflect the costs to the Department, as required by Section 81-1-102 M.C.A.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to Les Graham, Executive Secretary to the Board of Livestock, Capitol Station, Helena, Montana 59620, no later than December 29, 1986.

5. If a person is directly affected by the proposed rules 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 Les Graham, Executive Secretary to the Board of Livestock, no later than December 29, 1986.

6. If the agency receives requests for a public hearing on the proposed adoption from either 10 or 25%, whichever is less, of the persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be (250) persons, based on a survey by the Montana Stockgrowers Association.

7. The authority to adopt the proposed amendment is based on Sections 81-1-102 and 81-22-102 MCA. It implements Sections 81-1-102, 81-2-502, 81-3-107, 81-3-205, 81-3-211, 81-3-214, 81-5-202, 81-7-504, 81-8-256, 81-8-276, 81-8-304, 81-9-112, 81-9-201, 81-9-301, 81-9-411, 81-20-201, 81-21-102, 81-22-102, 81-22-204, 81-22-205, 81-22-208, 81-23-202 MCA.

Nancy Espy by NCP
NANCY ESPY
Chairman, Board of Livestock

Les Graham by NCP
LES GRAHAM, Executive Secretary
to the Board of Livestock

Certified to the Secretary of State November 17, 1986.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT) of Rule 42.11.104 relating to) retail liquor/wine price) restructuring.)

NOTICE OF PUBLIC HEARING on the PROPOSED AMENDMENT of Rule 42.11.104 relating to retail liquor/wine price restructuring.

TO: All Interested Persons:

1. On December 19, 1986, at 9:00 a.m., a public hearing will be held in the SRS Auditorium, SRS Building, 111 Sanders, Helena, Montana, to consider the amendment of rule 42.11.104 relating to retail liquor/wine price restructuring.

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

42.11.104 RETAIL SELLING PRICE (1) ~~Except as provided in subsection (6), the~~ The retail selling price of liquor, other than fortified wine, as defined in ~~16-1-106(9)~~ 16-1-106(11), MCA, is determined by adding:

(a) the department's base case cost; and

(b) the state markup ~~of 40% on the department's base case cost,~~ for liquor bottled in the following sizes:

(i) 1.75 liter is marked up at 40% on the department's base case cost;

(ii) 1.00 liter is marked up at 40% on the department's base case cost;

(iii) .750 liter is marked up at 46.01% on the department's base case cost plus 28 cents per bottle;

(iv) .375 liter is marked up at 52.81% on the department's base case cost plus four cents per bottle;

(v) .200 liter is marked up at 54.22% on the department's base case cost plus one cent per bottle;

(vi) .050 liter is marked up at 55.01% on the department's base case cost.

(c) The retail selling price of liquor that results from adding subsections (a) and (b) is indexed annually as determined in subsection (6).

(d) The selling price of liquor that results from adding subsections (a) and (b) and indexing in subsection (c) is rounded up to the nickel.

(2) ~~Except as provided in subsection (6), the~~ The retail selling price of fortified wine containing more than ~~14%~~ 16% but no greater than 24% alcohol by volume is determined by adding:

(a) the department's base case cost; and

(b) the state markup ~~of 60% on the department's base case cost if less than $18 or 40% on the department's base case cost if equal to or more than $18,~~ for fortified wine bottled in the following sizes:

(i) 1.50 liter is marked up at 42.77% on the department's base case cost plus 27 cents per bottle;

(ii) .750 liter is marked up at 51.25% on the department's

base case cost plus 12 cents per bottle;

(iii) .375 liter is marked up at 59.35% on the department's base case cost plus two cents per bottle;

(c) The retail selling price of fortified wine that results from adding subsections (a) and (b) is indexed annually as determined in subsection (6).

(d) The selling price of fortified wine that results from adding subsections (a) and (b) and indexing in subsection (c) is rounded up to the nickel.

(e) Fortified wine bottled as .720 liter is marked up the same as .750 liter.

(3) The retail selling price of table wine as defined in 16-1-106(22), MCA, containing not less than ~~7%~~ 0.5% or more than ~~14%~~ 16% alcohol by volume is determined by adding:

(a) the department's base case cost; and

(b) the state markup ~~of 60% on the department's base case cost if less than $10 or 40% on the department's base case cost if equal to or more than $10,~~ for table wine bottled in the following sizes:

(i) 1.50 liter and larger sizes are marked up at 41.02% on the department's base case cost plus 68 cents per bottle;

(ii) 1.00 liter is marked up at 58.55% on the department's base case cost plus 25 cents per bottle;

(iii) .750 liter and smaller sizes are marked up at 49.14% on the department's base case cost plus 49 cents per bottle;

(c) The retail selling price of table wine that results from adding (a) and (b) is indexed annually as determined in subsection (6).

(d) The selling price of table wine that results from adding subsections (a) and (b) and indexing in (c) is rounded up to the nickel.

(4) For liquor and fortified wine, "base case cost" means the supplier's quoted price plus ~~all~~ freight charges from the supplier to the state warehouse and the average freight to all state liquor facilities. For table wine, "base case cost" means the statewide weighted average cost, which is the supplier's quoted price plus ~~all~~ freight charges from the supplier to the state warehouse and the average freight to all state liquor facilities, and applicable taxes as provided in Title 16, chapter 1, part 4, MCA.

(5) For liquor and fortified wine, the cost to the retail purchaser is the retail selling price plus applicable state taxes as provided in Title 16, chapter 1, part 4, MCA. For table wine, the cost to the retail purchaser is the retail selling price as provided in subsection (3).

(6) The ~~state mark up of liquor shall be reduced by 10% as provided in 16-2-202, MCA~~ retail selling price is indexed annually, effective February 1 of each year after 1987, by multiplying the index times the retail selling price determined in subsections (1)(a) and (1)(b); (2)(a) and (2)(b); and (3)(a) and (3)(b).

(a) The index is determined by dividing eligible expenses by 87% of net sales.

(b) Eligible expenses are all expenses charged against the liquor division in a fiscal year, provided that expenses other than product costs, freight charges, or expenses allocable to other divisions or the licensing bureau are limited to 15% of net sales.

(c) Net sales are gross sales less discounts and all taxes collected.

(d) Expense and net sales amounts come from the liquor division annual report for the most recent fiscal year.

(7) The department may reduce the retail selling price of products which the department has designated for closeout or are determined to be overstocked in order to encourage their purchase and elimination from the state inventory. Closeout products are those that the department has removed from its published listing of classes, varieties, and brands of liquor and table wine to be kept for sale at any state liquor facility. Overstocked products are those classes, varieties, and brands of liquor and table wine which are in the state's inventory in an amount greater than would be sold in a 12-month period.

AUTH: 16-1-303 MCA; IMP: 16-1-103, 16-1-301, 16-1-302, 16-1-401, 16-1-404, 16-1-411, 16-2-101, and 16-2-301 MCA.

3. Rule 42.11.104 is proposed to be amended because the current markup rate is insufficient to cover costs and provide a profit from the sale of some items. Furthermore, the current markup rates for fortified wine and table wine create large markup differences for some products that have small base case cost differences. The proposed amendment would graduate the markup according to bottle size and base case cost for each item. It also provides a method to adjust the markup rate up or down once a year according to prior year expense and revenue experience.

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:

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

no later than December 26, 1986.

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

6. The authority of the Department to make the proposed amendment is based on § 16-1-303, MCA, and implements

§§ 16-1-103, 16-1-301, 16-1-302, 16-1-401, 16-1-404, 16-1-411, 16-2-101, and 16-2-301, MCA.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 11/17/86

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

ADDENDUM NOTICE to MAR Notices 42-2-327 and 42-2-329 relating to industrial machinery and equipment trend factors and equipment depreciation schedules and personal property taxes respectively.	ADDENDUM NOTICE to MAR Notices 42-2-327 and 42-2-329 relating to industrial machinery and equipment trend factors and equipment depreciation schedules and personal property taxes respectively.

TO: All Interested Persons:

1. On October 30, 1986, the Department published MAR Notices 42-2-327 relating to industrial machinery and equipment trend factors and industrial machinery and equipment depreciation schedules and 42-2-329 relating to personal property taxes in the Montana Administrative Register, issue no. 20.

2. This Addendum is being published to further explain the necessity of the rules in these notices.

3. Section 15-8-111, MCA, requires the Department of Revenue to assess all property at 100% of its market value except as provided in subsection (5) of that section and in 15-7-111 through 15-7-114, MCA. The statute does not address in detail how the Department of Revenue is to arrive at market value. Through various administrative rules, the Department has adopted the concept of trending and depreciation in arriving at market value for property in instances where the present market value is unknown. Examples of administrative rules already in place embodying that concept would be ARM 42.21.155, 42.21.157, 42.22.1307, 42.22.1308, and 42.22.1310. Montana District Court Judge Gordon R. Bennett of the First Judicial District recently determined that in addition to the concept of trending and depreciation, the actual schedules used to implement that concept should be adopted as a rule.

While the process used to determine the schedules used by the Department of Revenue has been in administrative rule for some time, and the schedules available to the general public at the assessment and appraisal office in the county seat of each county, the Department of Revenue proposes the adoption of these schedules in administrative rule as a further step to full public disclosure on the various valuation processes used by the Department of Revenue.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 11/17/86

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PHARMACY

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

TO: All Interested Persons:

1. On September 25, 1986, the Board of Pharmacy published a notice of amendment of the above-stated rule at page 1534, 1986 Montana Administrative Register, issue number 18.

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

3. No comments or testimony were received.

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

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

Certified to the Secretary of State, November 17, 1986.

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

In the matter of the amendment and adoption of rules concerning applications, licensing, comity, disciplinary action, etc.	NOTICE OF AMENDMENTS OF 8.48.501, 8.48.502, 8.48.504, 8.48.507, 8.48.508, 8.48.601 THROUGH 8.48.604, 8.48.801, 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 8.48.509 APPLICATION FOR EMERITUS STATUS, 8.48.510 APPLICATIONS BY JOINT PARTNERSHIPS AND CORPORATIONS, AND 8.48.1110 DISCIPLINARY ACTION

TO: All Interested Persons:

1. On September 25, 1986, the Board of Professional Engineers and Land Surveyors published a notice of amendments, repeal and adoption of the above-stated rules at page 1536, 1986 Montana Administrative Register, issue number 18.

2. The board has amended, repealed and adopted the rules as proposed with the exception of 8.48.1106 with change as follows: (new matter underlined, deleted matter interlined)

"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~~."

3. The Board decided the words "and destroyed" were incorrect because of public records management policies.

4. The Board also made the following change to new rule 8.48.1110 Disciplinary Action to identify the statutory language. (new matter underlined, deleted matter interlined)

"8.48.1110 DISCIPLINARY ACTION (1) through (2)(h) will remain the same.

(3) (2)(a) through (d) are provided for in section 37-1-136(1), MCA.

(3) and (4) will be renumbered (4) and (5)."

5. No other comments or testimony were received.

BOARD OF PROFESSIONAL ENGINNERS
AND LAND SURVEYORS
DICK GUENZI, CHAIRMAN

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

Certified to the Secretary of State, November 17, 1986.

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

In the matter of the amendment of rule 24.16.9007	)	NOTICE OF ADOPTION OF RULE AMENDING 24.16.9007, ADOPTING BY REFERENCE THE STANDARD PREVAILING RATES OF WAGES EFFECTIVE DECEMBER 1, 1986 THROUGH NOVEMBER 30, 1987

TO: All Interested Persons

1. On October 16, 1986, the Department of Labor and Industry published notice of the proposed amendment of rule 24.16.9007, by reference, setting forth the standard prevailing rate of wages effective December 1, 1986 through November 30, 1987, at pages 1669-1670 of the 1986 Montana Administrative Register, issue number 19.

2. The rule is adopted as proposed.

3. Oral and written comments were received by the Department. In response to comments, some classifications and rates proposed by reference in the "Montana Prevailing Wage Rates" are changed. The comments, the Department's responses, and the changes made to the "Montana Prevailing Wage Rates" are as follows:

Comment: The Montana Contractors Association advocated the use of the median wage rate rather than the weighted average wage rate when the 50% rule cannot be applied.

Response: When the 50% rule cannot be applied the Department sought to find the measure of central tendency that avoided bias of extremely high or low wage rates.

Comment: The building and construction trades unions recommended expansion of the use of the 50% rule instead of the median.

Response: This calculation would have required either hand calculation or purchase of additional software, both of which were beyond budget limits.

Comment: Heavy highway rates should include utilities such as water, sewer and electrical projects.

Response: The Department concurs and will add reference to utility projects under section #1.

Comment: Provision should be made for sub-occupations that include higher rates than the prevailing rates as well as sub-occupations with rates lower than the prevailing wage.

Response: Prevailing wage rules currently provide that a standard rate of wages determined according to these rules is not a prescribed wage rate, but is rather a minimum at which or above which an individual performing labor on a public work project can be compensated.

Comment: Size of project by dollar amount or length of time was not given adequate consideration.

Response: The Department did initially consider project size, but the data was inconsistent. Additionally, there was no specific direction given in the statute or statement of intent for considering the size of the project.

Comment: Many members of organized labor felt the Department should use only the collective bargaining rate as a prevailing rate.

Response: Legislative intent specifically directed that five additional factors be considered.

Comment: IBEW and the National Electrical Contractors Association jointly endorsed use of rates determined in a market survey of electrical work done in Montana in place of the Department's prevailing wage rates for electricians in Regions 1 and 5.

Response: The independent survey indicated that the rate in Region #5 determined by the Department's survey may be an extreme rate because the Department's rate was below the two rates in the independent survey. The Department's proposed rate is therefore disregarded, and the low median from the other 4 regions is substituted for Region #5. The Department's rate in Region #1 is between the two rates in the independent survey, therefore not extreme, and will remain as proposed.

Comment: Line erectors should be considered under heavy highways.

Response: The Department concurs. Line erectors will be moved from the section II wage rate category to section I.

Comment: No rates were provided for roofers and glaziers.

Response: No wages were reported by employers who were surveyed, therefore no rates were calculated. If requested, the Commissioner will determine rates.

Comment: Many contractors, school districts and unions indicated they did not receive a survey.

Response: 4,816 surveys were sent from the Unemployment Insurance employer files and should represent a suitable cross-section of employers doing public works projects or work of a similar nature.

Comment: Labor organizations indicated that the Department misinterpreted some wage and fringe benefits rates. Also, some labor organizations had failed to submit currently bargained rates, so the Department's proposed rates did not consider them. Currently bargained rates were then submitted and specific misinterpretations were explained.

Response: Previously misinterpreted rates were corrected and current collectively bargained rates were taken into consideration by the Department.

Comment: The rate should be determined by smaller region or by county.

Response: Survey data was inadequate to compute county by county occupational rates.

Comment: Several unions felt their jurisdictions should be used as regions.

Response: One of the purposes of Montana's Little Davis-Bacon Act is the protection of local labor markets. Therefore, the Department's intent is for regions to reflect local labor market areas rather than collectively bargained jurisdictions.

Comment: School districts should be surveyed.

Response: The rates were determined by surveying vendors who supply the service rather than by users of the service.

Comment: Contractors and organized labor indicated that the proposed rates for heavy highway classifications and rates were too broad and unfamiliar to employers currently working with the Davis-Bacon rates.

Response: The Department is convinced that the proposed classification and rates could cause significant problems in the bidding process for the bulk of the heavy highway projects. Therefore, the Department adopts the federal Davis-Bacon rates for heavy highway projects.

Comments: The proposed rates show rates for supervisors. However, management is excluded from the prevailing wage rates by law.

Response: Supervisors under the DOT code are actually working foremen and are covered under the prevailing wage. To minimize confusion, the word "foreman" will be substituted for "supervisor".

Comment: Survey data was gathered on a plumbers DOT code that included sprinkler fitters. These two occupations need to be separated. Sprinkler fitters are not a sub-occupation of plumbers.

Response: The Department concurs. The classifications and rates will be determined separately.

5. The Legislative Council staff requested more rationale for the necessity of adopting new prevailing wage rates annually. Rates need to be updated annually to keep pace with changes in wages and collective bargaining agreements and federal Davis-Bacon and Service Contract Act rates. The legislature's Statement of Intent for rule-making authority for prevailing wage rates requires consideration of these rates and agreements.

DEPARTMENT OF LABOR AND INDUSTRY

EUGENE HUNTINGTON
Commissioner

Certified to the Secretary of State this _____ day of November, 1986.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rules I through V (42.31.401) through 42.31.405) relating to emergency telephone service.	NOTICE OF THE ADOPTION of Rules I through V (42.31.401 through 42.31.405) relating to emergency telephone service.

TO: All Interested Persons:

1. On September 25, 1986, the Department of Revenue published notice of the proposed adoption of Rules I through V (42.31.401 through 42.31.405) relating to emergency telephone service at pages 1574 through 1576 of the 1986 Montana Administrative Register, issue no. 18.

2. The Department has adopted these rules with the following changes:

42.31.401 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) for subscribers connecting or disconnecting during a month, the fee does not apply to the month connected, but does apply to the month disconnected;

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

~~(f)~~ (g) credits for uncollectible accounts, incorrect billings, and other appropriate adjustments should the provider elect to do so;

~~(g)~~ (h) amounts collected that quarter for any accounts which were listed as uncollectible in a previous quarter should the provider elect credit under subsection (g) above; and

~~(h)~~ (i) amount remitted with return.

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

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

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

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

42.31.405 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) Official station testing lines owned by the provider are exempt.
~~(2)~~ (3) All other subscribers not listed above are required to pay the fee.
AUTH: 10-4-203 and 15-1-201(1), MCA; IMP: 10-4-202 and 10-4-203, MCA.

3. Comments were received and will be addressed individually as follows:
Mountain Bell - Rule I(g) (42.31.401) Thomas P. McGree, Government Relations Manager, requested the phrase "should the provider elect to do so" be added as Mountain Bell felt the utilization of this section would be more expensive than the benefit realized from the credit received. Mr. McGree also

requested this phrase be added to subsection (h) so that the provider could utilize the benefit of subsection (g) if the provider elected to do so. The Department concurs with these changes and the phrase has been added.

Blackfoot Telephone Cooperative, Inc. - Rule V (42.31.405) - The Cooperative suggested amending this rule to deal with all entities who are exempt. Rule V (42.31.405) currently lists all entities or individuals which are exempt. However, subsection (3) will be amended to clarify this point by inserting the phrase "not listed above" following the word "subscribers".

The Cooperative requested a clarification of Rule VIII which was proposed by the Department of Administration and will be responded to by them.

3 Rivers Telephone Cooperative, Inc. - This Cooperative was concerned about keeping records of the fees on accounts which were written off and which are subsequently collected. The Cooperative felt this method of recordkeeping would be burdensome and unproductive. The law does not allow an exemption for these accounts. The Department feels that the election amendment on the credits will be a solution to this recordkeeping problem.

The Cooperative requested clarification of the application of the fee for partial month subscribers (subscribers who connect or disconnect during a month). The Department concurs with this comment and Rule I is changed to require application of the fee to the first full month of service and the last partial month of service.

The Cooperative requested clarification of the entities which are exempt and how the exemption for Indian Tribes applied. The response to the comment by Blackfoot Telephone Cooperative answers the first question raised by 3-Rivers. In answer to the other questions, the exemption in (1)(b) of Rule V (42.31.405) applies to access lines for tribal governments and their agencies. The exemption for tribal members applies if a signed statement is filed annually stating that the individual is an enrolled member living on a Reservation and does not receive 9-1-1 service. The Cooperative is not required to audit the statements. Its only obligation is to maintain the statements so that the Department of Revenue can audit them. The Cooperative is not required to distinguish between enrolled and nonenrolled members. Also, it is contemplated as suggested in the comment that if a Reservation has 9-1-1 service, all individuals with access lines on the Reservation will pay for the service.

The Cooperative proposed an exclusion for official station access lines that are used primarily for testing. The Department concurs with the proposal and has added subsection 42.31.405(d) to include this exemption.

The Cooperative inquired whether semiprivate pay telephones and WATS/800 service, data lines, and private lines are exempt from the fee. Section 10-4-202(2), MCA, exempts coin operated

telephones that are available to the public from the fee. If a coin operated pay telephone is available to the public, it is exempt. Section 10-4-101(6), MCA, excludes the WATS/800 service, data lines, and private lines from the fee.

The last question posed by this Cooperative was whether the 9-1-1 fee was exempt from federal excise taxes. This question is not an appropriate one to address in the Department's rules. The question is better answered by the District Director of the Internal Revenue Service, Federal Building, Helena, Montana.

Montana Telephone Association - Calvin K. Simshaw - The Association requested clarification of the requirement that an Indian be receiving the service in order to be required to pay the fee. The Department believes that the law regarding taxation of Indians requires that individuals living on Reservations receive definite benefits for any state taxes paid. Therefore, it is not legally possible to tax Indians living on Reservations who do not receive the 9-1-1 service.

4. The authority of the Department to make the proposed adoptions is based on § 15-30-305, MCA, and § 2, Ch. 131, L. 1985, and the rules implement § 15-30-303, MCA, and § 1, Ch. 131, L. 1985.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 11/17/86

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

In the matter of the amendment of Rules 46.12.102 and 46.12.703 pertaining to medical assistance reimbursement for outpatient drugs	)))))	NOTICE OF THE AMENDMENT OF RULES 46.12.102 AND 46.12.703 PERTAINING TO MEDICAL ASSISTANCE REIMBURSEMENT FOR OUTPATIENT DRUGS

TO: All Interested Persons

1. On October 16, 1986, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.12.102 and 46.12.703 pertaining to medical assistance reimbursement for outpatient drugs at page 1684 of the 1986 Montana Administrative Register, issue number 19.

2. The Department has amended the rules as proposed.

3. The Department has thoroughly considered all commentary received:

COMMENT: The proposal to lower the dispensing fee from $3.75 to $3.50 in the face of pharmacist's rising costs is an unfair penalty in view of the way other providers are treated.

RESPONSE: The Department is not lowering the dispensing fee(s). The allowable dispensing fees are still $2.00 to $3.75 and the average fee is $3.50. Effective December 1, 1986, all dispensing fees that were in effect November 30, 1986, will not be increased and new or out-of-state providers will only be able to receive a dispensing fee up to $3.50. All providers who have a dispensing fee on November 30, 1986 between $3.51 through $3.75 will continue to receive this fee unless their usual and customary charge(s) or the results of a new survey show a lower dispensing fee.

Cost containment measures are being applied to all Medicaid providers consistent with State and Federal law or court order.

COMMENT: The reduction in the state dispensing fee does not take into account costs of rural pharmacists to mail prescriptions, additional costs to pharmacists if Medicaid rates don't keep up with prescription drug cost increases or time inconveniences to pharmacists who must work nights or holidays to provide drugs to keep Medicaid recipients out of more expensive in-patient care situations.

RESPONSE: The Medicaid dispensing fee rates take into account the total cost of delivery and other expenses. The new rules,

however, do not allow for any increases until the Legislature authorizes an increase in the Medicaid rates.

COMMENT: The Department should employ the Health Care and Finance Administration's (HCFA) 1977 guidelines in the Medical Assistance Manual at Section 6-160-2, paragraph 2, and use the results of the periodic dispensing fee survey to establish a fair and equitable dispensing fee.

RESPONSE: Federal regulations require the Department to periodically survey the costs of pharmacy operations in the state. These regulations allow, but do not mandate, the Department "to take into account" the results of the survey to establish dispensing fees. To the extent allowed under current legislative appropriations, the Department does use the results of the survey.

COMMENT: The Montana Medical Care Advisory Council should include a pharmacist among its members.

RESPONSE: This comment is beyond the scope of these rules. However, federal regulations do not require that all provider groups be represented on the Montana Medical Care Advisory Council. As currently established, the Council is comprised of board-certified physicians, recipient representatives, other third party payers, and such mandated members as the Director of the Department of Health and Environmental Sciences. The Council is purely advisory in nature.

COMMENT:

A. The states that have increased their fees to pharmacies between the years 1975 to 1985 have done so in the neighborhood of 4.4 to 5.7 percent while Montana's pharmacists have received only a 1.1 percent increase, the lowest in the nation.

B. In 1984, the Department was informed of surveys indicating that an increase in fee of fifty cents was necessary to bring the dispensing fee more in line with the cost to dispense. The Department chose not to do so and the spread has now become even greater. Based on a recent survey of several high volume prescription outlets (T1 in exhibits), the stores in Montana are projected to lose $1.01 on every Medicaid prescription filed.

C. A 1986 survey of high volume pharmacies not at the present maximum fee shows cost to dispense has increased by 13 percent and that the cost to dispense is 66 cents per prescription greater than the maximum Medicaid fee.

RESPONSE: Based on the annual statistics found in the "Pharmaceutical Benefits under State Medical Assistance Programs" published each September by the National Pharmaceutical Council, the Department believes it has been fair and equitable in the amount(s) allowed provider for dispensing fees.

In the twentieth edition (September 1985), the statistics show that 36 of the 47 states (76.6%) which have a Medicaid outpatient drug program have dispensing fees lower than Montana's maximum allowable dispensing fee of $3.75.

The twenty-first edition (September 1986) figures show that 33 of the 42 states (70.2%) had dispensing fees lower than Montana maximum allowable dispensing fee.

In addition, 22 of the 47 states (46.8%) had dispensing fees which were lower than Montana's average dispensing fee of $3.50. All increases in the amount(s) and upper limits of reimbursement must be authorized by the Legislature.

COMMENT: Delays in communicating eligibility information from the County office to the State office and then to the State's fiscal agent are resulting in unnecessary claim denials. Resubmission of these claims has an impact on a pharmacy's operational costs. This rule demonstrates no sensitivity to this problem.

RESPONSE: These comments are beyond the scope of these rules. However, the Department has established interim procedures for resolving claims with eligibility problems. A provider may avail himself of these procedures by contacting the Department.

The long range solution to the eligibility problem is adequate staffing in the county offices and major revision to our eligibility computer system. These will be major changes for the Department during the next Legislative session.

4. This rule will be effective December 1, 1986.

Dave Lewis
Director, Social and Rehabilitation Services

Certified to the Secretary of State November 17, 1986.

VOLUME NO. 41 OPINION NO. 90

EXEMPTIONS - State not bound by exemption provision protecting property from sale for judgment unless State specifically named;
PROPERTY, PERSONAL - State not bound by exemption provision protecting property from sale for judgment unless State specifically named;
PROPERTY, PERSONAL - Personal property taxes attach to all personal property held by owner of taxed property;
PROPERTY, REAL - State not bound by exemption provision protecting property from sale for judgment unless State specifically named;
TAXATION AND REVENUE - State not bound by exemption provision protecting property from sale for judgment unless State specifically named;
TAXATION AND REVENUE - Personal property taxes attach to all personal property held by owner of taxed property;
MONTANA CODE ANNOTATED - Sections 15-16-113, 15-16-401, 15-16-402, 25-13-601 to 25-13-617.

HELD: 1. The word "such" in section 15-16-402(1), MCA, refers to any personal property in the possession of the owner of property which has been assessed.

2. The exemption provisions of sections 25-13-601 to 617, MCA, do not apply when personal property is seized and sold for payment of delinquent personal property taxes.

5 November 1986

David G. Rice
County Attorney
Hill County Courthouse
Havre MT 59501

Dear Mr. Rice:

You have requested my opinion on the following questions:

1. Does the word "such" in the above statute refer only to the property assessed or

all personal property, i.e., a motor vehicle upon which taxes have been paid at the time of its registration?

2. Do the exemption provisions of sections 25-13-601 to 617, MCA, have any application when personal property is seized and sold for payment of delinquent personal property taxes?

Title 15, chapter 16, part 4, MCA, provides that taxes are due as judgments or liens, and also provides limitations where those taxes do not have precedence over any other lien. Section 15-16-401, MCA, specifically 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 the possession of the person assessed from and after the date the assessment is made. Your questions relate specifically to section 15-16-402, MCA. That statute provides:

> (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. [Emphasis added.]

The Montana Supreme Court has on several occasions examined the statutes dealing with property taxes on personal property. In Stensvad v. Musselshell County, 180 Mont. 489, 496-97, 591 P.2d 225, 229-30 (1979), the Court held that a tax upon personal property is a lien upon the real property of the owner of the personal property. The Court specifically examined sections 15-16-401 and 15-16-402, MCA, in O'Brien v. Ross, 144 Mont. 115, 120, 394 P.2d 1013, 1015 (1964). In that case, the Court specifically held that a lien arising from a taxpayer's failure to pay a tax assessed on all his cattle was not limited to the lien upon the cattle but extended to all of his personal property. That analysis was based upon section 84-4202, R.C.M. 1947. That statute is now codified as section 15-16-113, MCA. It provides:

> The county treasurer shall ... levy upon and take into his possession the personal property against which a tax is assessed or any other personal property in the hands of the delinquent taxpayer and proceed to sell the same in the same manner as property is sold on execution by the sheriff. [Emphasis added.]

The language of sections 15-16-113 and 15-16-402, MCA, is identical to the statutes examined by the Montana Supreme Court in O'Brien v. Ross. That decision controls. A tax lien attaches to the taxpayer's property which has been assessed and to any other personal property in his possession.

Your second question is whether the exemptions provided in sections 25-13-601 to 617, MCA, have any application when personal property is seized and sold for payment of delinquent property taxes. The general rule is that a state is not to be bound by an exemption provision unless the state is expressly named in the statute. Therefore, in the absence of an express provision to that effect, exemption laws do not apply against the State. See Morrison v. Barham, 7 Cal. Rptr. 442, 445-46 (1960). See generally 31 Am. Jur. 2d Exemptions §§ 130, 131; Annot., 159 A.L.R. 458; Hedden's Succession, 146 So. 732, 733 (La. Ct. App. 1932); White v. Martin, 23 So. 289, 290 (Miss. 1898); Christgau v. Woodlawn Cemetery Assoc., Winona, 293 N.W. 619, 626 (Minn. 1940). Cf. State ex rel. Harry v. District Court, 38 St. Rptr. 818, 628 P.2d 657 (1981) (workers' compensation benefits specifically exempted); see also 16 McQuillan, Municipal Corporations: Taxation § 44.142; Faust v. Louisville Trust Company, 232 S.W. 58, 59-60 (Ky. Ct. App. 1921); Highland Park Independent School District v. Thomas, 139 S.W.2d 299, 301 (Tex. Civ. App. 1940).

Since the exemptions in sections 25-13-601 to 617, MCA, do not specifically pertain to executions by the State, they do not apply to personal property seized and sold for payment of delinquent property taxes. A taxpayer may not protect his personal property from being executed against to satisfy tax liens in the absence of a specific statutory exemption.

THEREFORE, IT IS MY OPINION:

1. The word "such" in section 15-16-402(1), MCA, refers to any personal property in the possession of the owner of property which has been assessed.

2. The exemption provisions of sections 25-13-601 to 617, MCA, do not apply when personal property is seized and sold for payment of delinquent personal property taxes.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 41 OPINION NO. 91

COUNTIES - Authority of county library trustees;
COUNTY COMMISSIONERS - Authority over county library matters;
LIBRARIES - Authority of library trustees;
TAXATION AND REVENUE - Obligation of county commissioners to levy property taxes for county library expenses;
MONTANA CODE ANNOTATED - Sections 22-1-304, 22-1-309(6), 22-1-310, 39-31-103(1), 39-31-208;
OPINIONS OF THE ATTORNEY GENERAL - 35 Op. Att'y Gen. No. 71 (1974), 39 Op. Att'y Gen. No. 5 (1981), 39 Op. Att'y Gen. No. 38 (1981), 41 Op. Att'y Gen. No. 45 (1986).

HELD: 1. A board of county commissioners does not have the authority to modify the decision of county library trustees concerning wage and salary amounts for library employees.

2. A board of county commissioners does not have the authority to modify an annual library budget adopted by county library trustees.

3. A board of county commissioners does not have the authority to refuse, within statutory millage limits, to levy some or all of the property taxes necessary to satisfy an annual budget adopted by county library trustees.

13 November 1986

John P. Connor, Jr.
Jefferson County Attorney
Jefferson County Courthouse
Boulder MT 59632

Dear Mr. Connor:

You have requested my opinion concerning the following questions:

1. Does the Jefferson Board of County Commissioners have the authority to

override a determination by the trustees of the Jefferson County Library to grant pay increases to library personnel?

2. Does the Jefferson Board of County Commissioners have the authority to modify the annual budget submitted by the trustees of the Jefferson County Library even though the amount of property taxes necessary to satisfy such budget falls within the statutory limit of five mills under section 22-1-304(1), MCA?

3. Does the Jefferson Board of County Commissioners have the discretion to levy no millage for funding of the Jefferson County Library?

I conclude that each of these questions must be answered negatively.

The Jefferson County Library was established under sections 22-1-301 to 22-1-317, MCA. In summary those provisions authorize the formation of a city, county, or consolidated city-county free public library. Once created the library is governed by a board of trustees with broad powers and duties, including the obligation to prepare an annual budget "indicating what support and maintenance of the public library will be required from public funds" and to employ a chief librarian and such other employees as are deemed necessary to administer the library. §§ 22-1-309(6), 22-1-310, MCA. The latter responsibility further expressly extends to fixing and paying library employees' salaries and compensation. § 22-1-310, MCA. The annual budget must be submitted by the trustees to the governing body of the city or county which, in turn, may impose a property tax levy not to exceed five mills for the purpose of raising the funds required to maintain the library. § 22-1-304(1), MCA. All monies deriving from such levy must be placed into the public library fund, may not be used for any purpose other than operation of the library, and cannot be distributed from the fund without order or warrant of the trustees. § 22-1-304(4) and (5), MCA.

This brief description of the library trustees' powers and duties reflects substantial autonomy from the governing body of the local governmental unit within

which the library has been established. See Municipal Employees Local 2390 v. City of Billings, 171 Mont. 20, 24, 555 P.2d 507, 509 (1976) ("[u]nder the Library Systems Act, as a whole, the board of trustees is given independent powers to manage and operate the library"). The trustees are thus quite clearly granted direct responsibility for administering the library in a manner largely independent of city or county control. That the fiscal operation of the library is heavily interrelated with that of the local government does not, at least insofar as the trustees have been accorded explicit authority, mean their determinations are subject to plenary review and possible modification by, in this instance, a board of county commissioners. Any different conclusion would eviscerate the trustees' authority and render them little more than the county's agents--a conclusion which is simply unsupported by a fair reading of the involved statute.

I recognize that library employees may well be considered city or county employees for certain purposes. See Municipal Employees Local 2390 v. City of Billings, supra; see 39 Op. Att'y Gen. No. 38 (1981) (soil conservation district and district court employees considered county employees); 35 Op. Att'y Gen. No. 71 (1974) (fire district employees considered county employees). However, such status does not subordinate the trustees' express grant of authority to fix compensation levels to county commissioner control. Cf. 41 Op. Att'y Gen. No. 45 (1986) (mayoral appointment of administrative assistant not subject to city council approval). Municipal Employees Local 2390, in particular, does not militate against the trustees' authority in such matters as to library employees; there the Court merely concluded that a library employee, who had participated in union representation election under section 39-31-208, MCA, and became part of a diverse city employee bargaining unit, was subject to the terms and conditions of the collective bargaining agreement covering such unit and to which the City of Billings was signatory. Under those circumstances the city was held to be the employee's "public employer" as that term is defined in section 39-31-103(1), MCA, and used throughout the public employee collective bargaining law. The unique facts and statutory considerations underlying Municipal Employees Local 2390 clearly do not stand for the proposition that the trustees here are subject to the control of the county commissioners

concerning questions of library employee compensation. The trustees' express authority under section 22-7-310, MCA, to fix such employees' compensation accordingly prohibits the commissioners from establishing a different wage level.

The trustees' power under section 22-1-309(6), MCA, to adopt an annual budget forecloses the board of county commissioners from effecting changes in such budget. The obvious purpose of the trustees' authority in library budget matters is to allow application of their informed judgment to fiscal issues. Such authority is, moreover, an integral aspect of the trustees' independence without which many of their other express powers would be rendered meaningless. The board of county commissioners' only role in library budget matters is to assign a property tax levy amount, which presently cannot exceed five mills, sufficient to satisfy the budgetary needs. The commissioners' function is thus purely ministerial with respect to the imposition of the levy.

Finally, use of the permissive "may" in section 22-1-304(1), MCA, does not, in view of the trustees' independent budgetary authority, grant the county commissioners discretion not to levy any millage, since the existence of such discretion would effectively supersede the trustees' express powers. Section 22-1-304(1), MCA, must instead be read together with the trustees' broad control over library operations and, if so construed, does not permit an interpretation which leaves within the county commissioners' determination whether some or none of the millage necessary to meet library budget demands should be assessed. See 39 Op. Att'y Gen. No. 5 (1981).

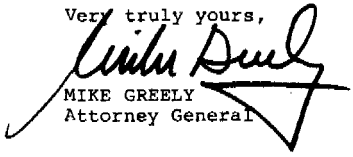
THEREFORE, IT IS MY OPINION:

1. A board of county commissioners does not have the authority to modify the decision of county library trustees concerning wage and salary amounts for library employees.

2. A board of county commissioners does not have the authority to modify an annual library budget adopted by county library trustees.

3. A board of county commissioners does not have the authority to refuse, within statutory millage limits, to levy some or all of the property taxes necessary to satisfy an annual budget adopted by county library trustees.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 41 OPINION NO. 92

CRIMINAL LAW AND PROCEDURE - Administration of Crime Victims Compensation Act;
CRIMINAL LAW AND PROCEDURE - Confidential criminal justice information obtainable under Crime Victims Compensation Act;
PRIVACY - Confidential criminal justice information obtainable under Crime Victims Compensation Act;
PRIVACY - Public and confidential records maintained under Crime Victims Compensation Act;
RIGHT TO KNOW - Confidential criminal justice information obtainable under Crime Victims Compensation Act;
RIGHT TO KNOW - Public and confidential records maintained under Crime Victims Compensation Act;
MONTANA CODE ANNOTATED - Title 53, chapter 9; sections 39-71-221, 39-71-224, 44-5-102, 44-5-103(3)(a), 44-5-303, 53-9-104(2), 53-9-107;
MONTANA CONSTITUTION - Article II, sections 9, 10.

HELD: 1. Section 53-9-104(2)(a), MCA, authorizes the Workers' Compensation Division to obtain confidential criminal justice information.

2. The confidentiality of such information must be maintained when received by the Division.

14 November 1986

John C. McKeon
Phillips County Attorney
Phillips County Courthouse
Malta MT 59538

Dear Mr. McKeon:

You requested an opinion concerning the availability of confidential criminal justice information to the Workers' Compensation Division pursuant to the Crime Victims Compensation Act.

The Workers' Compensation Division (Division) administers the Crime Victims Compensation Act, Tit. 53, ch. 9, MCA. Briefly, the Act authorizes the Division to

compensate victims of crimes for bodily injury or death. The Act contains general requirements for eligibility, as well as procedures for applying for and awarding benefits.

A claimant's eligibility and amount of award depend upon various findings of the Division, such as whether a crime was committed and the claimant is a victim thereof or a dependent of a victim, whether the claimant contributed to the crime in any way, and whether the claimant is receiving compensation from collateral sources.

These determinations necessitate the Division's obtaining information from law enforcement agencies, especially in those cases where the defendant has not been identified, or where there has been no trial or other formal disposition. The Crime Victims Compensation Act enables the Division to obtain such information. Section 53-9-104(2), MCA, provides in pertinent part:

> The division may:
>
> (a) request and obtain from prosecuting attorneys and law enforcement officers investigations and data to enable the division to determine whether and the extent to which a claimant qualifies for compensation. ...

This language is clear and unambiguous, and needs no further interpretation. See Missoula County v. American Asphalt, Inc., 42 St. Rptr. 920, 701 P.2d 990, 992 (1985). The Division is entitled to obtain from law enforcement agencies any information--including investigative information--it deems relevant to determine a claimant's eligibility and amount of award.

Section 53-9-104(2), MCA, does not exclude confidential criminal justice information. Indeed, it expressly includes such information. Investigative information is designated confidential criminal justice information in the Montana Criminal Justice Information Act of 1979, section 44-5-103(3)(a), MCA.

Section 44-5-303, MCA, delimits dissemination of confidential criminal justice information:

> Dissemination of confidential criminal justice information is restricted to criminal justice agencies or to those authorized by law to receive it. A criminal justice agency that accepts confidential criminal justice information assumes equal responsibility for the security of such information with the originating agency. Whenever confidential criminal justice information is disseminated, it must be designated as confidential.

Clearly, then, the Division may obtain such confidential information, because section 53-9-104(2)(a), MCA, authorizes it to do so.

Your next question is whether the Division must treat this information as confidential or as public record.

Section 53-9-107, MCA, provides: "The records the division maintains in its possession in the administration of this part are open to public inspection and disclosure in accordance with the provisions of 39-71-221 through 39-71-224." Title 29, chapter 71, MCA, sets forth Montana's laws on workers' compensation.

Section 39-71-221, MCA, defines "public record" as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by a public body regardless of physical form or characteristics."

Section 39-71-224, MCA, provides in pertinent part:

> (1) In assuring that the right of individual privacy so essential to the well-being of a free society shall not be infringed without the showing of a compelling state interest, the following public records of the division are exempt from disclosure:
>
> (a) information of a personal nature such as personal, medical, or similar information if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall

> have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy.

This section does not expressly exempt confidential criminal justice information from public disclosure. However, it is my opinion that this statute must be read together with the Criminal Justice Information Act and pertinent provisions of the Montana Constitution. When so harmonized, the result compels continued confidentiality of the information. See City of Billings v. Smith, 158 Mont. 197, 490 P.2d 221, 230 (1971) (where statutes relate to the same general subject they should be construed together to give effect to both where possible).

The Montana Constitution guarantees both the public's access to documents of public bodies, and the individual's right of privacy. Art. II, §§ 9, 10. Those sections provide that public documents may only be withheld when the demand of individual privacy clearly exceeds the merits of public disclosure, and that the right of privacy may be infringed only with a showing of a compelling state interest.

Section 39-71-224, MCA, and the Criminal Justice Information Act are legislative declarations that certain kinds of information weigh in the balance in favor of individual privacy, and that no compelling state interest exists to infringe on that privacy. These legislative enactments were made with the Constitutional guarantees of public access and individual privacy in mind. Section 39-71-224(1), MCA, adopted the language of article II, section 10 of the Montana Constitution:

> In assuring that the right of individual privacy so essential to the well-being of a free society shall not be infringed without the showing of a compelling state interest, the following public records of the division are exempt from disclosure ....

This section has taken records that were initially public and designated them private.

The Criminal Justice Information Act was likewise enacted with the constitutional guarantees in mind. One

of the purposes of the Act is "to establish effective protection of individual privacy in confidential and nonconfidential criminal justice information collection, storage, and dissemination." § 44-5-102, MCA. The Act was enacted to protect the public's right of access as well as the individual's right of privacy. (See Minutes of Senate Judiciary Committee, February 7, 1979; House Judiciary Committee, March 13, 1979.) In defining "confidential criminal justice information" to include "criminal investigative information," the Legislature deemed such information to weigh in the balance of individual privacy, with no compelling state interest, in and of itself, to infringe on that privacy at any time, now or in the future. Section 44-5-303, MCA, not only limits the dissemination of confidential material to certain recipients, but also requires its continued designation as confidential.

It is clear that confidential criminal justice information received by the Division is intended to remain confidential. The information is often unsubstantiated and is potentially harmful to the reputations of persons who are presumed innocent prior to any convictions. Premature disclosure of witness statements could pose a threat to the personal safety of the witnesses as well as to successful prosecution of the case.

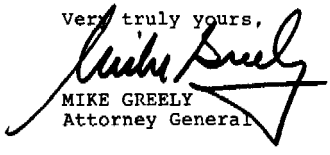
The confidential criminal justice information received by the Division should thus be treated in accordance with section 39-71-224(2), MCA, which requires that confidential information be separated from the material available for public access.

THEREFORE, IT IS MY OPINION:

1. Section 53-9-104(2)(a), MCA, authorizes the Workers' Compensation Division to obtain confidential criminal justice information.

2. The confidentiality of such information must be maintained when received by the Division.

Very truly yours,



MIKE GREELY
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules or amendment or repeal of existing rules filed with the Secretary of State. Proposals of the Department of Revenue are reviewed only in regard to the procedural requirements of the Montana Administrative Procedure Act. The Committee has the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. In addition, the Committee may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt or amend a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with the existing or proposed rules. The address is Room 138, Montana State Capitol, Helena, Montana 59620.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions:

Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter

1. Consult ARM topical index, volume 16. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute Number and Department

2. Go to cross reference table at end of each title which list MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 1986. This table includes those rules adopted during the period September 30, 1986 through December 31, 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 September 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.

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