MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 4

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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

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

In the matter of the proposed adoption of new rules concerning definitions and disciplinary action	NOTICE OF PUBLIC HEARING IN THE MATTER OF THE PROPOSED ADOPTION OF A NEW RULE UNDER SUB-CHAPTER 4, DEFINITIONS AND PROPOSED ADOPTION OF NEW RULES UNDER SUB-CHAPTER 5 ENTITLED DISCIPLINARY ACTIONS

TO: ALL INTERESTED PERSONS:

1. On Friday, March 21, 1986, at 9:00 A.M., in the conference room of the Department of Natural Resources, 1520 East Sixth Avenue, Helena, Montana, a public hearing will be held to consider the above-stated rules.

2. The rules as proposed will read as follows:

Under Sub-chapter 4, Substantive Rules.

I "DEFINITIONS (1) 'Adequate equipment,' as it pertains to water well contractor applicants (section 37-43-305(1)(e), MCA), will be determined on a case by case basis, based on the information shown on the application relative to equipment.

(2) 'Adequate equipment', as it pertains to applicants for Montana water well drillers licenses (section 37-43-305(1)(e), MCA), is that equipment owned by the responsible water well contractor in whose employ the driller will be working.

(3) 'Financial responsibility--contractor,' (section 37-43-305(1)(f), MCA) shall mean the filing of the $4,000 bond or in lieu thereof, its equivalent in a certificate of deposit, cashier's check, bank draft or certified check approved by the board necessary to obtain a contractors license.

(4) 'Financial responsibility--driller,' (section 37-43-305(1)(f), MCA) will be verification of the driller's employment by a bonded, licensed water well contractor."

Auth: 37-43-202, MCA Auth. Extension: Sec. 11, Chapter 728, Laws of 1985 Imp: 37-43-305, MCA

Under Sub-chapter 5, Disciplinary Actions.

II "DEFINITIONS (1) 'Gross negligence' as referred to in section 37-43-311(1)(c), MCA is defined as a person acting with gross negligence when he consciously disregards a risk of which he is or should be aware. The risk must be of such nature and degree that disregarding it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. A 'gross deviation' is one that is considerably greater than lack of ordinary care.

(2) 'Incompetency' as referred to in section 37-43-311(1)(d), MCA, shall mean lack of technical ability, legal qualification, or physical, intellectual, or moral fitness to discharge the required duty."

Auth: 37-43-202, MCA Auth. Extension: Sec. 11, Chapter 728, Laws of 1985 Imp: 37-43-311, MCA

III "VIOLATION AND COMPLAINT PROCEDURES (1) Whenever the board shall have reason to believe that any person to whom a license has been issued has become unfit to practice as a water well contractor or driller or has violated the provisions of Title 37, chapter 43, MCA and/or Title 36, chapter 21, Administrative Rules of Montana, or whenever written complaint, charging the holder of a license with the violation of any provision of Title 37, chapter 43, MCA and/or Title 36, chapter 21, ARM, is filed with the board, the board shall start an investigation. When the board receives a complaint, the board shall initiate an investigation within 30 days of receipt of the complaint. If from such investigation it shall appear to the board that the licensee may not be in compliance with statute or rules, the board may initiate disciplinary action."

Auth: 37-43-202, MCA Auth. Extension: Sec. 11, Chapter 728, Laws of 1985 Imp: 37-43-203, 311, MCA

IV "HEARING PROCEDURES (1) No action to suspend, revoke, reprimand or censure, place the licensee on probation, or take action against the contractor's bond shall be taken by the board until the licensee has been furnished with a statement of the charges against him and a notice of an opportunity for hearing. The furnishing of such notice and the charges shall be sent the licensee at least 20 days prior to the date of hearing. The notice shall be mailed to the licensee at his last known place of residence. The licensee may be present at such hearing in person or by counsel or both to contest the charges made against him. The licensee has the right to require the presence of the complainant at any hearing. If at such hearing the charges are proved, the board may revoke, suspend, place on probation, censure or reprimand the licensee, or take action against the contractor's bond."

Auth: 37-43-202, MCA Auth. Extension: Sec. 11, Chapter 728, Laws of 1985 Imp: 37-43-203, 311, MCA

V "DISCIPLINARY ACTIONS (1) For purposes of implementing section 37-43-203, MCA, the board of water well contractors may initiate disciplinary action for reasons including, but not limited to the following:

(a) habitual use of alcohol or drugs to the point where it interferes with the individual's job performance;

(b) being unfit to practice because of physical or psychological impairment;

(c) misrepresentation or fraud committed as a holder of a license;

(d) false or misleading advertising;

(e) fraud or misrepresentation in obtaining a license or renewal;

(f) knowingly making false statements regarding qualifications and abilities of other licensed water well contractors or drillers;

(g) failure to report, through proper channels, facts known to the individual regarding the incompetent, unethical, or illegal practice of any licensed contractor or driller;

(h) violation of the construction standards established by board rule;

(i) violation of federal, state, municipal or county ordinances or regulations affecting the construction of water wells;

(j) violation of Title 37, Chapter 43, Montana Codes Annotated and/or Title 36, Chapter 21, Administrative Rules of Montana;

(k) lack of technical competence to carry out water well construction;

(l) failure to file well logs with the proper authorities within the required time period;

(m) failure to provide the customer with an accurate well log upon completion of the well;

(n) allowing license number to be used on a well log when the licensee was not actually involved in the construction of the well;

(o) knowingly making false statements on a well log;

(p) hiring of an individual whose water well contractor's or driller's license has been suspended or revoked, during the period of revocation or suspension;

(q) failure to exercise proper supervision as required by board rule;

(r) drilling of water wells by a contractor who does not have a current bond or in lieu thereof, a cashier's check, certificate of deposit, or bank draft in the correct amount, on file in the board office;

(s) performing as a contractor without a contractor's license and bond;

(t) falsifying apprenticeship records;

(2) When, after an opportunity for hearing, the board finds that a contractor or driller has failed to comply with the requirements of statute and rules, the board may take any of the following actions:

(a) revoke a license;

(b) suspend its order of revocation, on terms and conditions determined by the board;

(c) suspend the right to practice for a period not to exceed one year;

(d) place a licensee on probation;

(e) reprimand or censure a licensee; and

(f) order forfeiture of a licensee's bond or its equivalent (cashier's check, certificate of deposit, bank draft or certified check).

Auth: 37-43-202, MCA Auth. Extension: Sec. 11, Chapter 728, Laws of 1985 Imp: 37-43-203, 311, MCA

VI "FORFEITURE OF BOND OR OTHER SECURITY (1) When it appears that the proposed action may result in forfeiture of a surety bond, the Board shall send notice of the proposed disciplinary action to the surety.

(2) When the board finds, after an opportunity for hearing, that a licensed contractor has violated any of the requirements of Title 37, chapter 43, MCA or of Title 36, chapter 21, ARM, the board may issue an order of forfeiture of the licensee's bond or other security. The order of forfeiture shall be in writing and shall refer to the violations upon which the order is based. Copies of the order shall be sent to the licensee and surety, if any. After issuing an order of forfeiture, the board may take any steps necessary to collect the amount of the bond or other security.

(3) In order to further the purposes of the Act as stated in 37-43-101, MCA, and in particular to promote the conservation of underground water resources and to protect the public, the board may, in its discretion, apply the forfeited bond or security to remedy defects or compensate for damages caused by the licensee's violation of the requirements of Title 37, chapter 43, MCA, or of Title 36, chapter 21, ARM."

Auth: 37-43-202, MCA Auth. Extension: Sec. 11, Chapter 728, Laws of 1985 Imp: 37-43-203, 311, MCA

VII "LICENSURE REINSTATEMENT AFTER REVOCATION (1) A license which has been revoked may be reinstated after the period of time specified in the revocation order has elapsed provided that the licensee complies with the requirements of sections 37-43-303 and 37-43-305, MCA, including successful completion of the appropriate examination.

(2) Additional training may be required at the discretion of the board.

Auth: 37-43-202, MCA Auth. Extension: Sec. 11, Chapter 728, Laws of 1985 Imp: 37-43-203, 311, MCA

3. The rules are proposed for the following reasons: Rule I is proposed to offer a definition as to what is meant by adequate equipment and financial responsibility under section 37-43-305(1)(e) and (f), MCA. Although the statute refers to "applicants," the board has determined that the requirements for adequate equipment and financial responsibility should relate to the contractor because the drillers must be employed by a licensed and bonded water well contractor. Rules II through VII under Sub-chapter 5, Disciplinary action are proposed grounds and procedures for disciplinary action. Rule II defines gross negligence and incompetence. Rule III provides complaint procedures. Rule IV provides details on hearing procedures. Rule V outlines grounds for action against a licensee. Rule VI provides procedures for forfeiture of a bond after a contested case hearing. Rule VII provides a means for reinstatement of a license after it has been revoked. All procedures and guidelines have been reviewed and are now proposed as guidelines for the licensees and board.

4. Interested parties may present their data, views and arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Board of Water Well Contractors, 1520 East Sixth Avenue, Helena, Montana 59620, no later than March 27, 1986.

5. Jim Madden, Attorney, Helena, Montana, has been designated to preside over and conduct the hearing.

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
BOARD OF WATER WELL CONTRACTORS

BY: Wesley Lindsay
WESLEY LINDSAY, CHAIRMAN

Certified to the Secretary of State, February 14, 1986.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION) of Rule I, and the AMENDMENT) of Rule 42.27.102 relating to) gasoline tax and distribu-) tor's bond.)	NOTICE OF THE PROPOSED ADOPTION of Rule I, and the AMENDMENT of Rule 42.27.102 relating to gasoline tax and distributor's bond. NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On April 14, 1986, the Department proposes to adopt new rule I and amend rule 42.27.102 relating to gasoline tax and distributor's bond.

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

RULE I INCIDENCE OF THE GASOLINE TAX (1) The incidence of the gasoline distributor's license tax is on the distributor and not on the user. Gasoline is not exempt from taxation because the ultimate user or consumer is an agency of the United States government, including the United States armed forces, Montana, or other states, counties, incorporated cities and towns, and school districts of this state, or any other tax exempt entity, group, or individual.
AUTH: 15-70-104 MCA; IMP: 15-70-202 MCA.

42.27.102 DISTRIBUTOR'S BOND (1) Gasoline distributors must furnish the department of revenue a corporate surety bond executed by the distributor as principal with a corporate surety authorized to transact business in this state or other collateral security or indemnity. The total amount of bond or collateral security or indemnity shall be equivalent to twice the distributor's estimated monthly gasoline tax, but never less than $2,000 and in no case greater than $500,000 except as provided in subsection (2).

(2) Upon written application by a distributor and the showing of good cause, the department may, at its discretion, accept a bond or collateral security or indemnity in an amount less than twice the distributor's estimated monthly gasoline tax if the distributor reports and pays its tax more frequently than monthly. For example, if the distributor pays his tax weekly, his bond would be twice the estimated weekly tax payment. In no instance will the amount of the bond be less than twice the distributor's estimated tax payment.
AUTH: 15-70-104 MCA; IMP: 15-70-204 MCA.

3. Under 15-70-202, MCA, the Department may accept a bond or other form of security less than twice the amount of the gasoline distributor's estimated monthly tax payment. The bond

is to ensure that Montana collects all the tax if the distributor is unable to pay the tax. Recent changes in the insurance industry have made it more difficult and costly to secure bonds. Because of this difficulty, the Department has agreed to accept a bond less than twice the amount of the estimated monthly tax if the distributor agrees to a correspondingly accelerated tax payment schedule.

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

Dawn Sliva
Department of Revenue
Office of Legal Affairs
Mitchell Building
Helena, Montana 59620

no later than March 27, 1986.

5. If a person who is directly affected by the proposed adoption and amendment 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 Dawn Sliva at the above address no later than March 27, 1986.

6. If the agency receives requests for a public hearing on the proposed adoption and amendment 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 have no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25.

7. The authority of the Department to make the proposed adoption is based on § 15-70-104, MCA, and the rules implement §§ 15-70-202 and 15-70-204, MCA.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 02/14/86

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE adoption of Rules relating to the procurement of used equipment; procurement from sheltered workshops and work activity centers, the amendment of Rules 2.5.301 Delegation of Purchasing Authority; 2.5.502 Bid and Performance Security; 2.5.601 Competitive Sealed Bids and 2.5.603 Small Purchases of Supplies and Services.	NOTICE OF Adoption of 2.5.606 Procurement from Sheltered Workshops or Work Activity Centers; 2.5.607 Procurement of Used Equipment; and Amendments to Rule 2.5.301, Delegation of Purchasing Authority; Rule 2.5.502, Bid and Performance Security; 2.5.601, Competitive Sealed Bids; and Rule 2.5.603 Small Purchases of Supplies and Services.

TO: All Interested Persons:

1. On December 12, 1985, the Department of Administration published notice of proposed adoption and amendments to rules relating to procurement procedures on pages 1900-1904 of the Montana Administrative Register, issue number 23.

2. The department has adopted Rules I and II (2.5.606, 2.5.607) and 2.5.502 as proposed, and has amended rules with the following changes:

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

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

2.5.601 COMPETITIVE SEALED BIDS (1) - (8) remains the same.

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

predictors of actual future costs, but to the extent possible such evaluation factors shall:

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

(b) treat all bids equitably.

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

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

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

(6) - (8) remains the same.

3. A written statement was received from Department of Administration, Publications and Graphics Division which resulted in the change listed in Rule 2.5.301 above. The change was made to provide additional clarification for agencies. The Publications and Graphics Division suggested further expansion of the list to include classified and display ads. Since the Department has not received inquiries in these areas, they will not be added to the list.

Written statements were received from the University of Montana, Purchasing Department. The University commented on language in Rule II. They expressed concern over being required to competitively bid used equipment when used equipment is known to be available from only a sole source. The rule allows for a direct purchase of used equipment when justified as a sole source. If the purchase is not justified as a sole source or exigency, the rule requires that the competitive bidding process be used. Since the rule allows for sole source purchases when justified, the Department will adopt the rule as noticed.

The University took exception to amendments to rules 2.5.601(8) and 2.5.603(7). They felt that it was not appropriate to place the burden totally upon state agencies to perform any and all tests and to provide technical expertise in determining a products' acceptability. The Department prepared the amendment to give legal authority for requesting outside technical expertise when needed to make an equitable bid award. The Department will request assistance only when the department determines it does not have sufficient expertise to make the award. The department will consider agencies' staff time and budget constraints when making the request. The Department, after considering the University's comments, will adopt the amendments as noticed.

4. The authority for the Department to adopt rules is Section 18-4-221 and 18-5-102, MCA. The rule implement sections 18-1-201, 18-4-221, 18-4-222, 18-4-303, 18-4-305, 18-4-312, 18-5-102, and 18-5-103, MCA.

ELLEN FEAVER, Director
Department of Administration

Certified to Secretary of State February 14, 1986.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of adopting amendments to certified seed potato rules	)))	NOTICE OF AMENDMENT OF ARM 4.12.3503, 14.12.3504 Relating to Certified Seed Potatoes

TO: All Interested Persons

1. On January 16, 1986, the Department published proposed amendments relating to the grading of certified seed potatoes at pages 8 and 9 of the 1986 Montana Administrative Register, Issue No. 1.

2. The department has adopted the amendments as follows:

4.12.3503 BLUE TAGS

(1) (a) through (l) no changes

(1) (j) A Freezing injury other than the condition of being frozen or affected by soft rot or net breakdown, shall be scored when removal of the affected area causes a loss of more than 10 percent of the total weight of the tuber.

4.12.3504 RED TAGS adopted as proposed.

3. The above changes to Rule 4.12.3503 are made to clarify the language only and arise upon the suggestion of Dave Cogley, legislative counsel. Dave Cogley also suggested the department amplify its statement of necessity for the amendments.

Response: The department received requests from the seed potato industry to amend the rules relating to freezing damage. They expressed a need to permit seed potatoes that suffered some freezing damage that didn't result in soft rot or wet breakdown to be scored in a manner different than the requirements for U.S. No. 1 or U.S. No. 2 consumable potatoes. Because seed potatoes are not sold for human consumption, the tolerance can be greater than that of the consumable potatoes. This amendment is necessary to permit good seed potatoes to remain in compliance with the Montana grades which would otherwise be out of grade.

4. No other comments or testimony were received.

Keith Kelly
Director

Certified to the Secretary of State February 18, 1986

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

In the matter of the adoption of rules pertaining to Voluntary Payroll Deductions	)))))	NOTICE OF ADOPTION OF RULES VOLUNTARY PAYROLL DEDUCTIONS ARM 6.14.201 through 6.14.208

TO: All Interested Persons

1. On December 26, 1985, the State Auditor published notice of proposed rules concerning voluntary payroll deductions at pages 1941 through 1944 of the 1985 Montana Administrative Register, issue number 24.

2. The State Auditor has adopted the rules as follows.

RULE I 6.14.201 DEFINITIONS For purposes of these rules pertaining to voluntary payroll deductions, the following definitions apply:

(1)-(3) Same as proposed.

(4) The term "voluntary payroll deductions" means automatic deductions requested by a state employee to be withheld from his state payroll warrant which are not otherwise provided for by federal or state law, rule or regulation, or as required under any collective bargaining agreement.

(5)-(6) Same as proposed.

AUTH: 17-1-122(3), MCA IMP: 17-1-121(1), MCA

RULE II 6.14.202 TYPES OF VOLUNTARY PAYROLL DEDUCTIONS Same as proposed.

AUTH: 17-1-122(3), MCA IMP: 17-1-121(1), MCA

RULE III 6.14.203 PROCEDURE FOR OBTAINING APPROVAL FOR VOLUNTARY PAYROLL DEDUCTIONS

(1)(a)-(b) Same as proposed.

(c) An agreement not to solicit state employees during normal working hours unless ~~authorized by the appropriate supervisor,~~ a permit has been granted by the Department of Administration under ARM 2.11.101.

(d)-(f) Same as proposed.

AUTH: 17-1-122(3), MCA IMP: 17-1-121(1), MCA

RULE IV 6.14.204 PAYROLL DEDUCTION APPROVAL

(1) ~~If the purpose of the deduction is for the purchase of insurance the firm or organization offering the insurance program shall have a minimum of 100 state payroll employees enrolled before requesting approval for a deduction. If the purpose of the deduction is for the deposit or payment of~~

~~money into a financial institution, investment program or contribution to a charitable non-profit organization the firm or organization~~ Any firm or organization operating as an insurance or financial institution, investment program or charitable non-profit organization requesting approval of a deduction shall have a minimum of 50 state payroll employees enrolled before requesting approval for a deduction. If at any time the number of employees requesting a deduction falls below the established number, the deductions may be discontinued by the State Auditor.

(2) Same as proposed.

AUTH: 17-1-122(3), MCA IMP: 17-1-121(1), MCA

~~RULE V~~ 6.14.205 CONDITIONS FOR REVOCATION OF APPROVAL

(1) Same as proposed.

(a) The number of state employees authorizing the voluntary payroll deduction falls below ~~100 for insurance or~~ 50 ~~for financial or charitable non-profit organizations~~ the State Auditor may discontinue the deduction. The State Auditor shall send immediate notice to the authorized representative for the voluntary payroll deduction that the deduction has fallen below the minimum requirement and that the firm or organization has 30 days to meet the requirement; or

(b) There was solicitation of state employees during normal working hours without proper authorization, or if the firm or organization or agents thereof solicits employees of the state by giving the impression their product is approved, authorized or in any way supported by the state; or

(c) There was noncompliance with any of the factors listed in ~~Rule IV~~ 6.14.204(2)(a), (2)(b), or (2)(c).

(2) If the discontinuation action is taken under ~~Rule V~~ 6.14.205(1)(a) and if the firm or organization does not meet the requirement within 30 days, the deduction may be discontinued. If the discontinuation action by the State Auditor is based on ~~Rule V~~ 6.14.205(1)(b) or (1)(c), the firm or organization may request a hearing pursuant to the procedures outlined in Section 33-1-701 et seq., MCA. The decision of the State Auditor will be final only when the hearings procedure is complete.

AUTH: 17-1-122(3), MCA IMP: 17-1-121(1), MCA

~~RULE VI~~ 6.14.206 NOTICE OF REVOCATION OF APPROVAL

Same as proposed.

AUTH: 17-1-122(3), MCA IMP: 17-1-121(1), MCA

~~RULE VII~~ 6.14.207 EFFECTIVE DATE OF REVOCATION OF APPROVAL

Same as proposed.

AUTH: 17-1-122(3), MCA IMP: 17-1-121(1), MCA

~~RULE VIII~~ 6.14.208 GRACE PERIOD
Same as proposed.

AUTH: 17-1-122(3), MCA IMP: 17-1-121(1), MCA

3. The State Auditor received written comments in support and in opposition to the proposed rules. The comments and the State Auditor's response to them, are summarized as follows:

a. Bob Pyfer, representing the Montana Credit Union Network, asserted that the proposed rules would effectively deny access to the payroll deduction program to eight Montana credit unions who have less than 50 enrollees, unless some arrangement can be made for use of Treasure State Corporate Central Credit Union as a clearinghouse. Mr. Pyfer also stated that it is unlawful discrimination to set an enrollee minimum for insurance companies or other business entities unless a rational basis for the particular cut off point can be shown. The proposed rules are amended to provide for an across the board minimum of 50 enrollees. This minimum level will not exclude any credit unions as the State Auditor will utilize the Treasure State Corporate Central Credit Union as a clearinghouse for all credit unions.

(b) Ellen Feaver, representing the Department of Administration, asserted that proposed Rule III(1)(c) be amended to require an agreement not to solicit employees during normal working hours unless a permit has been granted by the Department of Administration. The State Auditor agreed with this comment and amended the rules to reflect the suggested change.

(c) Ellen Feaver, representing the Department of Administration, asserted that proposed Rule IV(1) gives the appearance that insurance companies must meet a more stringent test than other eligible institutions. Mrs. Feaver also asserted that some financial products may be both investment and insurance related and it may be difficult to decide whether those requests must meet the 50 or 100 deduction criteria. The State Auditor agreed with these comments and amended rules as adopted to reflect an across the board minimum of 50 enrollees for any defined group requesting a deduction.

(d) Ellen Feaver, representing the Department of Administration, asserted that collective bargained pension plans be considered mandatory deductions in accordance with Section 19-3-403(8)(a), MCA, as opposed to voluntary. The State Auditor agreed with this comment and amended the rules accordingly.

(e) Ellen Feaver, representing the Department of Administration, asserted that proposed Rule V include a provision for revocation of an organization's payroll deduction code if the company or organization or agents thereof solicit employees of the state by giving the impression their product is approved, authorized or in any way supported by the state. The State Auditor agreed with these comments and amended the rules accordingly.

(f) Jack D. Wickware, representing Metropolitan Insurance Companies, commented that the proposed rules were completely satisfactory. The State Auditor acknowledges this comment.

(g) Donna Warner, representing the Central Payroll Division of the State Auditors Office submitted written comments which support the need for the adoption of the rules. These comments reflect the agency's basis for the adoption of the rules. As they do not conflict with any of the other written comments received by the agency, they are accepted.

4. The authority for these rules is Section 17-1-122(3), MCA, and the rules implement Section 17-1-121(1), MCA.

Andrea "Andy" Bennett
State Auditor

Certified to the Secretary of State February 14, 1986.

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

In the matter of the amendment) NOTICE OF AMENDMENT OF
of 8.20.402 concerning fees) 8.20.402 FEES

TO: All Interested Persons:

1. On November 30, 1985, the Board of Hearing Aid Dispensers published a notice of public hearing to consider the amendment of the above-stated rule at page 1822, 1985 Montana Administrative Register, issue number 22. The hearing was held on January 8, 1986 at 10:00 a.m. in the conference room of the Department of Commerce at 1424 9th Avenue, Helena, Montana.

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

3. No comments or testimony were received.

BOARD OF HEARING AID
DISPENSERS
DUDLEY ANDERSON
CHAIRMAN

BY: _____
ROBERT J. WOOD, GENERAL COUNSEL

Certified to the Secretary of State, February 14, 1986.

BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA

IN THE MATTER OF THE PROMULGATION OF AN EMERGENCY RULE FOR A LIMITED SERVICE WHOLESALE ALLOWANCE	))))	ORDER PROMULGATING AN EMERGENCY LIMITED SERVICE WHOLESALE ALLOWANCE

Petitioners, Ken Kelly, having filed a limited service wholesale allowance and the Board having heard evidence presented to the Board in convened session on February 8, 1986, the Board finds as follows:

1. Gallatin Dairies, Inc. now known as Country Classic Dairies, Inc. (herein Gallatin), a Montana Corporation, for months has been and is selling milk to Associated Grocers for consumption in Montana at less than the minimum wholesale price as reflected in the Milk Control Bureau's investigations and the court documents in the state and federal court proceedings between the Department of Commerce, Milk Control Bureau and Gallatin. Gallatin's actions have undermined the minimum wholesale price established by the Board and has placed all other licensed distributors and jobbers at a serious competitive disadvantage.

2. Gallatin will engage in the same or a similar type of sale of milk or transaction with Super Valu beginning next week. This action will compound and increase the harmful effects described in paragraph 3.

3. The actions of Gallatin described in paragraphs 1 and 2 have and will continue to undermine and destroy the minimum wholesale price; will undermine or destroy the effectiveness of all other Board of Milk Control laws and regulations; will place all other licensed distributors and jobbers at a serious competitive disadvantage; will cause the destruction of the business of some licensed distributors and jobbers; will cause the destruction of the business of some licensed producers; and will seriously jeopardize or interfere with the Montana consumers right to an adequate supply of wholesome Class I milk.

4. Section 2-4-303, MCA, (1) provides if the agency finds that an imminent peril to the public health, safety or welfare requires adoption of a rule upon fewer than thirty (30) day's notice and states in writing its reasons for that finding, it may proceed, without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period not longer than 120 days, but the adoption of an identical rule under 2-4-302 is not precluded. (Emphasis supplied)

This provision applies and requires emergency Board action in order to effectuate the policies of the Montana Milk Control laws including Sections 81-23-102 and 81-23-302, MCA.

5. The harm identified in paragraph 3 mandates that the Board issue an immediate order for a limited service wholesale allowance on an emergency basis in accordance with Section 2-4-303, MCA, without prior notice for a period not longer than 120 days.

6. Based upon the above findings, there is imminent peril to the public health, safety and welfare which requires the adoption of the emergency rule which is attached hereto:

RULE I TEMPORARY WHOLESALE PRICES

Any milk purchased under subsections (a), (b) and (c) must be paid within ten (10) days after invoicing.

(a) LIMITED SERVICE - Delivery limited to four (4) days per week to the retail store, distributor pick up on returns and stocking of original delivery (not to exceed one per day) but no shelf pull up or any distributor services.

$2.09 gallon homo.
1.05 ½ gallon homo.
1.96 gallon 2%
.98 ½ gallon 2%
.90 ½ gallon skim

(b) DROP DELIVERY - to the back door of the retail store.

(i) distributor delivery shall be limited to the back door or refrigerated storage box at the rear of the store.

(ii) deliveries shall be limited to a maximum of three (3) times per week.

(iii) the retail store must place an order for the next delivery at the time the current delivery is made.

(iv) the retail store shall assume all responsibility for servicing the dairy case and rotating the stock. In store service by the distributor is not permitted.

(v) the retail store shall assume all responsibility for loss or occasional expiration of product codes or dates.

(vi) all product orders must be in full case lots.

$1.99 gallon homo.
1.00 ½ gallon homo.
1.86 gallon 2%
.94 ½ gallon 2%
.86 ½ gallon skim

(c) F.O.B. PROCESSING PLANT - 500 gallons mimimum purchase per pickup.

$1.86 gallon homo.
.93 ½ gallon homo.
1.75 gallon 2%
.88 ½ gallon 2%
.80 ½ gallon skim

7. It is hereby ordered that the emergency rule attached hereto be and hereby is adopted effective February 10, 1986 for a period of 120 days ending June 9, 1986.

8. It is further ordered that the administrator of the Milk Control Bureau send a copy of this order to all persons licensed by the Bureau, to the state wire service, and other news media.

9. The authority of the Board to make the emergency rule is 81-23-302 and the rule implements 81-23-302, MCA.

Dated February 10, 1986

CURTIS C. COOK, Chairman
MONTANA BOARD OF MILK CONTROL

BY: William E. Ross
WILLIAM E. ROSS, Bureau Chief
MILK CONTROL BUREAU

Certified to the Secretary of State February 10, 1986.

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

In the matter of the amendment of rules 16.28.201, defining who must report a communicable disease, and 16.28.202, stating what diseases are reportable and setting reporting requirements	NOTICE OF THE AMENDMENT OF ARM 16.28.201 AND 16.28.202 (Communicable Diseases-AIDS)

TO: All Interested Persons

1. On December 26, 1985, the department published notice of proposed amendments of rules 16.28.201 and 16.28.202 concerning reporting requirements for communicable diseases at page 1949 of the 1985 Montana Administrative Register, issue number 24.

2. The department has amended the rules with the following changes (matter to be stricken is interlined, new material is capitalized):

16.28.201 REPORTERS (1)-(3) Same as proposed.

(4) A physician or laboratory performing a blood test which shows the presence of the antibody to the human T-lymphotropic virus type III must:

(a) submit to the department the report required by ARM 16.28.202(5)(d); and

(b) ~~Obtain, if possible, and submit~~ SUBMIT to the department laboratory a ~~second~~ blood specimen FROM THE PERSON TESTED in order to confirm the test results.

(5) The administrator of a laboratory in which a test of blood is made to determine whether the antibody to the human T-lymphotropic virus type III is present must submit to the department by the 15th day following the month in which the test was performed a report on a form supplied by the department indicating the number of tests with negative results for that antibody which were done during that month.

16.28.202 REPORTABLE DISEASES Reportable communicable diseases include:

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

(5)(a) Category E diseases and conditions are:

(i) Acquired immune deficiency syndrome (AIDS).

(ii) Potential AIDS, as indicated by the presence of the human T-lymphotropic virus type III antibody.

(b) A category E disease or condition must be reported to the department and, in the case of AIDS, TO the local health officer of the county from which the report is made, by 5:00 p.m. Friday of the week in which the diagnosis of AIDS is made or the test showing potential AIDS is performed.

(c) The report for AIDS must include the information required by the department's communicable disease confidential case report form available from the department.

(d) The report of potential AIDS must include:
(i) the date the test identifying the antibody was performed;
(ii) the name and address of the reporter; and
(iii) the initials of the person tested OR ANY OTHER IDENTIFIER, SUCH AS A NUMBER, ASSIGNED BY THE REPORTER WHICH DOES NOT REVEAL THE NAME OF THE PERSON TESTED.
(e) The name of any category E case and the name and street address of the reporter of any such case are confidential and not open to public inspection.

3. Comments made on the rules, and the department's responses, follow:

Comments: Dr. John Salisbury of the Rocky Mountain Eye Center expressed concerns about confidentiality and a possible invasion of privacy if the Center released the names of diagnosed AIDS victims or of those whose donated tissues tested positive for the presence of HTLV-III antibodies, and recommended that the confidential case report be made to DHES and the health officer of the county where the donation originated, and that test results be reported, not by name, but by number assigned by the eye bank.

Response: The department did not adopt all of Dr. Salisbury's suggestions because they are apparently based upon a partial misconception about what the proposed rules require. From the letter's context, it appears that Dr. Salisbury is concerned about reporting of HTLV-III positive test results rather than of diagnosed AIDS cases, since the eye center would be involved in testing but would not be diagnosing AIDS. The donor's physician, not the Center, is held responsible by the proposed rules for reporting names of AIDS cases. As for Dr. Salisbury's concern about reporting the names of those whose tissues test positive for the HTLV-III antibody -- which does not by itself mean the donor was an AIDS victim -- the rules do not require names be reported, but rather that initials be provided. The department has amended the rule to allow use of other identifiers such as the eye bank number referred to by Dr. Salisbury.

Comments: Rolland D. Pratt, Executive Director of the Funeral Directors' Association, requested that morticians be notified whenever a person dies of a communicable disease and suggested that whoever makes a diagnosis of death due to a communicable disease tag the body for cause of death before it is removed for preparation and burial.

Response: Since the two proposed rules state reporting requirements rather than control measures, Mr. Pratt's suggestions were not incorporated into them. However, DHES is currently working on a revision of all of the communicable disease rules and will seriously consider incorporating those suggestions in specific control measures set by other rules.

Comments: Dr. Peggy Schlesinger from Columbus Hospital, Great Falls, conveyed the concern of others at that facility that requiring reporting of the names of those who are tested for the HTLV-III antibody was counterproductive in that it made people reluctant to be tested, and was an unjustifiable invasion of their privacy; she also objected to referring to presence of the HTLV-III antibody as a "disease".

Response: No change in the rules was made because the comments were based on a misunderstanding about what the rules actually required. The initials, not names, of those whose blood tests positive for the HTLV-III antibody are required to be reported. The report of negative test results requires no identifier of any sort, but rather requires reporting of the total number of those who test negative. As for the reference to "disease", Category E's heading [16.28.202(5)(a)] refers to "diseases and conditions"; "disease" is intended to mean AIDS itself, while "condition" refers to the presence of the HTLV-III antibody.

Comment: Dr. Schlesinger also pointed out that 16.28.201(4)(b) appears to require a second, separate, sample of blood to be drawn to be sent to DHES's lab for confirmation of the presence of the antibody, and that a sample from the original specimen would be sufficient.

Response: DHES agreed that a second blood drawing was unnecessary and amended the rule to indicate that a specimen from the initial sample was acceptable.

Comment and Response: Minor editing was done to clarify the meaning of 16.28.202(5)(a), at the suggestion of Legislative Council staff.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State February 14, 1986.

BEFORE THE DEPARTMENT OF INSTITUTIONS
OF THE STATE OF MONTANA

In the matter of the adoption of new rules setting forth an admission policy for the Center for the Aged and REPEAL OF 20.14.101, 20.14.102, and 20.14.103.	)))))	NOTICE OF ADOPTION OF NEW RULES I - IX (20.14.104 through 20.14.112) FOR ADMISSION TO MONTANA CENTER FOR THE AGED AND REPEAL OF 20.14.101, 20.14.102, AND 20.14.103.

TO: All Interested Persons

1. On December 26, 1985, the department of institutions gave notice of proposed adoption of new rules I through IX (20.14.104 through 20.14.112) setting forth an admission policy for the center for the aged, on page 1965 of the Montana Administrative Register issue number 24.

2. The rules replace sections 20.14.101, 20.14.102, and 20.14.103 currently found in the Administrative Rules of Montana. ARM 20.14.101, 20.14.102, and 20.14.103 are hereby repealed.

3. No public hearing was held nor was one requested. The department of institutions has received no written or oral comments concerning these rules.

4. On December 30, 1985, legal counsel for the department of institutions received a phone call from Greg Petesch, chief counsel, legislative code committee, concerning Rule VII, which is the transfer and discharge rule. He felt that subsection 2 of these rules, may actually conflict with subsection 4 when read with the existing authority found in Section 53-21-130 MCA.

RESPONSE: The use of the transfer authority under Section 53-21-130, MCA, would only occur in extreme cases such as an emergency situation. Since the 10 day transfer provision is limited in its scope, the department prefers to follow the provisions of Section 53-21-412, MCA. Subsection (4) of Rule VII is intended to be used when a competent resident requests his release and does not require intense psychiatric treatment as provided at the Montana state hospital.

5. Based on the foregoing, the department hereby adopts the rules as proposed, setting forth an admission policy for the Montana Center for the Aged and repeals ARM 20.14.101, 20.14.102 and 20.14.103.

CARROLL SOUTH, Director
Department of Institutions

Certified to the Secretary of State February 13, 1986.

BEFORE THE DEPARTMENT OF INSTITUTIONS
OF THE STATE OF MONTANA

In the matter of the adoption of new rules for voluntary admissions to Montana State Hospital	)))))	NOTICE OF ADOPTION OF NEW RULES I - VI (20.14.301 through 20.14.306) FOR VOLUNTARY ADMISSIONS TO MONTANA STATE HOSPITAL

TO: All Interested Person

1. On December 26, 1985, the department of institutions gave notice of proposed adoption of new rules I through VI (20.14.301 through 20.14.306) setting forth a voluntary admission policy for Montana State Hospital, on page 1960 of the Montana Administrative Register issue number 24.

2. A public hearing was conducted by the department of institutions on the proposed rules on January 16, 1986.

3. Jerry Hoover, administrator of the mental health and residential services division testified in favor of the adoption of the proposed rules. No adverse written or oral comments were received.

4. On December 30, 1985, the hearings officer received a telephone call from Dave Cogley, attorney for the Legislative Council.

Comment: Regarding Rule I, Mr. Cogley felt that our reference to Chapter 603 of the 1985 legislative session which speaks to only confirmation by mental health professionals was too narrow. We should reference the authority granted in both Section 53-21-111 MCA and Section 53-21-203 MCA.

Response: The department agrees with the recommendation.

Comment: In Rule V, which is the direct application to the state hospital, Mr. Cogley felt that our legislative authority to implement the rule, especially basing it on Section 53-21-111 MCA and Section 53-1-203 MCA, was weak. While the concept of the rule as a hospital policy is sound, he questioned our authority to adopt the rule.

Response: On February 13, 1986, Mr. Cogley called to indicate that Section 53-21-111 MCA, may allow a direct application if Rule V was rewritten to state that the professional person at the state hospital would contact the appropriate mental health center for confirmation that it is unable to provide adequate services, or if they are, arrange for release and transfer. The rule has been changed as follows:

RULE V DIRECT APPLICATION (1) Applicants who apply in person for admission to the hospital ~~must be~~ may only be admitted if they are:

~~(i) An immediate threat to himself or others; or~~

~~(ii) in need of treatment and security available only at the hospital.~~

(a) at least 18 years of age; and

(b) suffering from a mental disorder; and

(c) in the opinion of a hospital professional person, ~~either~~ an immediate threat to themselves or others.

(2) If the conditions described in (1)(a), (b), and (c) are met, a hospital professional person may certify the applications as required; ~~and the applicant may be admitted~~ and

~~(3) If only the conditions described in (1)(a), and (b) are met and the hospital staff determines that the applicant requires mental health treatment more appropriately provided by a center, the applicant may be treated until appropriate accommodations are made.~~

~~(4) If the hospital staff determines that the applicant does not require mental health treatment, the applicant may be refused admission.~~

~~(a) A written record of each such refusal must be maintained by the hospital detailing the reasons for the refusal and signed by a professional person.~~

(a) call the designee of the mental health region in which the applicant resides for confirmation that adequate facilities do not exist in the region for the evaluation and treatment of the applicant; or

(b) if the applicant is from out of state, call the designee of mental health region IV to confirm that adequate facilities do not exist in the region for the evaluation and treatment of the applicant.

(3) If the hospital professional person receives confirmation that adequate facilities do not exist in the appropriate region, the applicant may be admitted.

(4) If all the conditions in (1) above are not met the applicant may not be admitted.

(a) Each refusal of admission shall be maintained in a written log. The log shall detail the reasons for refusal and be signed by the professional person who denied the applicant admission.

AUTH: 53-21-111 and 53-1-203, MCA IMP: 53-21-111, MCA

Comment: In paragraph 7, Mr. Cogley indicated that our authority to adopt the rules should be expanded to include not only Section 53-1-203 MCA, but also Section 53-21-111 MCA.

Response: The authority to adopt these rules will be changed.

5. Based on the foregoing, the department hereby adopts the proposed rules with requested changes.

CARROLL V. ~~SOUTH~~
Director
Department of Institutions

CERTIFIED TO THE SECRETARY OF STATE FEBRUARY 14, 1986.

BEFORE THE DEPARTMENT OF INSTITUTIONS
OF THE STATE OF MONTANA

In the matter of the adoption of rules for the certification of mental health professional persons.	))))	NOTICE OF THE ADOPTION OF NEW RULES I - XII (20.14.501 - 20.14.512) PROFESSIONAL PERSONS CERTIFICATION

TO: All Interested Persons

1. On December 26, 1985, the department of institutions gave notice of proposed adoption of new rules I through XII. (20.14.501 through 20.14.512) for the certification of professional persons, on page 1953 of the Montana Administrative Register, issue number 24.

2. A public hearing was conducted by the department of institutions on the proposed rules on January 16, 1986.

3. Jerry Hoover, administrator of the mental health and residential services division testified in favor of the adoption of the proposed rules. No adverse written comments were received.

4. On December 30, 1985, legal counsel for the department of institutions received a telephone call from David Cogley, attorney for the legislative council. Regarding Rule II, Mr. Cogley indicated that Section 53-21-106 MCA was also to be implemented. He felt, Section 53-21-102 MCA should also be listed as the authority that the agency has to implement the proposed rules.

Response: The agency agrees with this recommendation.

Mr. Cogley also felt it was unclear as to the certification of developmental disabled professionals and that the rule should be made clearer as to these individuals.

Response: These Rules are only intended to affect mental health professional persons and do not impact professional persons in the field of the developmentally disabled. These people will continue to enjoy their certification under the rules adopted for them.

5. Based on the foregoing, the department hereby adopts the proposed rules with changes in the authority and implementation as requested.

CARROLL V. SOUTH
Director
Department of Institutions

CERTIFIED TO THE SECRETARY OF STATE February, 13, 1986.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE CORRECTION of the Adoption of Rule I (42.15.105) relating to SRS inspection of income tax returns.	NOTICE OF CORRECTION of Rule I (42.15.105) relating to SRS inspection of income tax returns.

TO: All Interested Persons:

PLEASE NOTE: The Department of Revenue's adoption notice published at page 51, 1986 Montana Administrative Register, issue number 1, adopted a new rule, relating to SRS inspection of income tax returns. This rule was numbered 42.15.501. It should have been numbered 42.15.105.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 02/14/86

VOLUME NO. 41 OPINION NO. 44

COUNTY GOVERNMENT - Amendments to form of local government recommended by a local government study commission;
LOCAL GOVERNMENT - Amendments to form of local government recommended by a local government study commission;
LOCAL GOVERNMENT STUDY COMMISSIONS - Election procedures for voting on commission recommendations;
MONTANA CODE ANNOTATED - Title 13; Title 7, chapter 3, parts 2 to 7; sections 7-3-102, 7-3-121 to 7-3-161, 7-3-124, 7-3-149, 7-3-156, 7-3-158, 7-3-160, 7-3-171 to 7-3-193, 7-3-187, 7-3-192(1), 7-3-193, 7-4-2102(1), 7-4-2102(3), 7-4-2104, 13-3-102(1), 13-10-201(6), 13-13-205;
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 1 (1983).

HELD: 1. A local government study commission is responsible for calling and establishing an election date for the purpose of voting on the study commission's recommendations.

2. Where a local government study commission proposal recommends that the county commission be increased in size from three to five members, the proposal may provide that incumbent county commissioners whose terms have not expired retain their offices for the remainder of the terms to which they were elected. If no such provision is made and the study commission proposal is adopted, the incumbent commissioners would lose their positions when the newly-elected commissioners take office.

3. Recommendations of a local government study commission concerning an increase in the number of members on the board of county commissioners, alterations in commissioner districts, and a change to nonpartisan elections for commissioners would take effect upon adoption of the recommendations. Recommendations of a local government study commission to change to nonpartisan elections for other elected county officials would take

effect at the beginning of the local government's fiscal year.

4. A local government study commission is responsible for setting the dates of a special primary and a general election to elect new officers required by the adoption of the study commission proposal.

5. The residency requirements of section 7-4-2104(2), MCA, apply to candidates for county commissioner positions created by the adoption of a local government study commission proposal.

6. The timetables for filing declarations of nomination and changing precinct boundaries, found in Title 13, MCA, apply to candidates for county commissioner positions created by the adoption of a local government study commission proposal.

5 February 1986

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

Dear Mr. Miller:

You have requested my opinion on several questions concerning the election procedure to be followed when a local government study commission recommends a modification of an existing form of government.

You indicate in your letter that the Big Horn County Local Government Study Commission (hereinafter referred to as the "Study Commission") is considering a proposal that would retain the county's commission form of government but would amend certain features of the existing government to increase the number of county commissioners from three to five, alter the districts from which county commissioners must be elected, and

change from partisan to nonpartisan elections for all elected positions.

Your questions are predicated upon an assumption that the Study Commission proposals will be approved by the electors. I do not usually issue opinions on hypothetical questions. However, the statutory requirements for scheduling an election on study commission recommendations and an election of new county officials include rather rigid deadlines that permit no delay for the purpose of obtaining a legal interpretation of the applicable statutes. Therefore, I believe the issuance of an Attorney General's Opinion at this time is necessary under the circumstances presented by your request.

Your letter identifies several areas of confusion and inconsistency in the local government statutes, particularly in the procedures to be followed in making changes to existing forms of local government. A preliminary matter of concern involves certain phrases used in the statutes. Before responding to your specific questions, these phrases must be addressed.

The statutes which deal with making changes to an existing form of government refer to the adoption of an "alternative form" or "alternative plan" of government. It is important at the outset to determine whether these statutes have any application to elections on amendments to existing forms of government, such as are being considered by your Study Commission. Amendments to existing forms of government involve changes to the features of the governmental structure without adoption of an entirely new form of government.

The statutes that were adopted in 1975 to implement article XI, section 3(1) of the Montana Constitution refer to the term "alternative form" of government as one of the five basic optional forms, plus a charter form, that are currently provided for in parts 2 through 7 of Title 7, chapter 3, MCA. See § 7-3-102, MCA. However, as other statutes were subsequently adopted to permit alteration of existing forms of local government by petition (in 1979) and by study commission (in 1983), the phrases "alternative form of government" and "alternative plan of government" lost their precise meaning. An examination of the more recently-enacted statutes suggests that the phrases were often used, not

only when referring to the actual adoption of a basic form of local government, but also when referring to the process of making amendments to certain features of a governmental structure, while retaining its basic form.

Section 7-3-149, MCA, for example, sets forth the procedure for calling a special election on the question of an "alternative form of government," directs which entity shall pay the costs of the election, and determines how many votes are necessary for adoption of the ballot measure. Subsection (3)(d) requires: "If the electors disapprove the proposed new form of local government, amendments, or consolidation plan, the local government retains its existing form." § 7-3-149(3)(d), MCA (emphasis added). A reading of section 7-3-149, MCA, in its entirety suggests that it deals not only with an election on adoption of one of the six alternative forms of local government provided for in parts 2 through 7 of Title 7, chapter 3, MCA, but also an election on proposed amendments to an existing form of government.

The significance of this point will be apparent in the responses to your specific questions, which I have consolidated into seven areas in an effort to avoid undue confusion.

1. Which entity must establish the date of the election on the Study Commission's recommendations?

Your first question concerns which entity must call for and schedule the date of an election on the Study Commission's recommendations: the Study Commission itself, pursuant to section 7-3-187(1)(b), MCA, or the Board of County Commissioners under section 7-3-149(1), MCA.

Sections 7-3-121 to 161, MCA, were originally adopted in 1979 as procedures for altering existing forms of local government by petition of the electors. See § 7-3-121, MCA. One of those statutes, section 7-3-149, MCA, sets forth various procedures for an election on an alternative form of government, including a requirement that the governing body call for the election.

The statutes that deal with local government study commissions were adopted in 1983 and are found in sections 7-3-171 to 193, MCA. Section 7-3-192(1), MCA,

provides that an alternative plan of government recommended by a study commission is to be submitted to the voters as provided in section 7-3-149, MCA:

> [E]xcept that the study commission shall authorize the submission of the alternative plan of government to the voters at a special election to be held no less than 75 or more than 120 days from the date of the adoption of the final report. The special election may be held in conjunction with any regularly scheduled election. Study commissions elected on the general election date in 1984 shall submit a final report allowing for a vote on any recommendation no later than the general election date in 1986. [Emphasis added.]

Section 7-3-187(1)(b), MCA, is consistent with this exception. It describes the means by which the study commission, in its final report, shall certify the election date. It provides that if a study commission recommends an alternative form of government, the study commission's final report must contain a certificate establishing the date of the special election at which the alternative form of government shall be presented to the electors.

In summary, while section 7-3-149(1), MCA, generally assigns the responsibility of calling and scheduling an election to the local governing body, section 7-3-192(1), MCA, provides an exception for those elections that are held in order to vote on the recommendations of a study commission. Section 7-3-187(1)(b), MCA, is consistent with section 7-3-192(1), MCA, in granting the authority to the study commission itself to call an election to vote on study commission recommendations. Specific statutes control over general statutes to the extent of any inconsistency. Department of Revenue v. Davidson Cattle Co., 37 St. Rptr. 2074, 2077, 620 P.2d 1232, 1234 (1980).

In addition to sections 7-3-187(1)(b) and 7-3-192(1), MCA, being more specific than section 7-3-149(1), MCA, sections 7-3-187(1)(b) and 7-3-192(1), MCA, were enacted more recently than section 7-3-149(1), MCA. Earlier statutes, to the extent of any repugnancy, are controlled by later statutes. State ex rel. Wiley v.

District Court, 118 Mont. 50, 55, 164 P.2d 358, 361 (1946).

For these reasons, I conclude that the Study Commission, rather than the Board of County Commissioners, is authorized to call for and establish an election date on the question of amendments to the existing form of government proposed in the Study Commission's final report.

2. May those incumbent county commissioners whose terms of office have not expired remain in office if the number of commissioner positions is increased and the commissioner districts are altered?

You have also asked whether those county commissioners with unexpired terms would lose their seats or remain in office as "holdover" commissioners, should the electors approve a proposal to increase the size of the county commission and alter commissioner district boundaries.

Section 7-3-158, MCA, which applies to study commission proposals by operation of section 7-3-193(1), MCA, provides, in pertinent part:

> (1) The members of the governing body holding office on the date the new plan of government is adopted by the electors of the local government continue in office and in the performance of their duties until the governing body authorized by the plan has been elected and qualified, whereupon the prior governing body is abolished.
>
> ....
>
> (3) A charter or a petition proposing an alteration to an existing form of local government may provide that existing elected officers shall continue in office until the end of the term for which they were elected or may provide that existing elected officers shall be retained as local government employees until the end of the term for which they were elected, and their salaries may not be reduced. [Emphasis added.]

As a preliminary matter, a reading of subsections (1) and (3) together suggests that the phrase "new plan of government" in subsection (1) includes amendments to an existing form of government, including an increase in the size of a county commission or a change in district boundaries. "Holdover" commissioners, then, would not be permitted to remain in office once the new governing body has been elected and qualified, unless the adopted study commission proposal included a specific provision that they be retained, pursuant to section 7-3-158(3), MCA. This interpretation is consistent with section 7-3-193(2)(c), MCA, which permits a study commission to "provide for existing elected officers under 7-3-158(3)."

You point out in your letter that such an interpretation appears to conflict with section 7-4-2102(1), MCA, which provides, in pertinent part:

> However, no commissioner district shall at any time be changed to affect the term of office of any county commissioner who has been elected. No change in the boundaries of any commissioner district shall be made within 6 months next preceding a primary election.

There is an exception to the operation of the above-quoted prohibition. Section 7-4-2102(3), MCA, provides that the prohibition "shall not apply to counties adopting an optional or alternative form of government authorized by law." At the time the exception was enacted, however, the phrase "optional or alternative form of government" referred only to the basic statutory forms of local government, and did not refer to amendments to existing forms of government. Thus, the exception is inapplicable, and section 7-4-2102(1), MCA, would seem to operate to require that "holdover" county commissioners retain their positions even if a study commission proposal makes no provision for their remaining in office.

On the other hand, section 7-3-158, MCA, which prohibits "holdovers" unless specifically provided for in the adopted plan for change, was enacted more recently than section 7-4-2102, MCA. As has been noted earlier in this opinion, where two statutes are irreconcilable, the more recently-enacted statute controls. State ex rel. Wiley v. District Court, supra.

Thus, I conclude that if the electors adopt a proposal to increase the number of county commissioners, all of the incumbent commissioners would lose their positions unless otherwise required by the adopted plan, pursuant to section 7-3-158, MCA. If no provision is made for holdovers in the Study Commission's plan, then they would remain in office only until the newly-elected commissioners take office, under section 7-3-158(1), MCA.

A related question concerns whether the adopted plan may provide for "holdover" commissioners where the plan alters the districts from which county commissioners must run in the future. The majority of courts have ruled that representation of a newly-formed district by a holdover elected official does not violate the one-person one-vote rule set forth in Reynolds v. Sims, 377 U.S. 533 (1964). This subject was addressed in 40 Op. Att'y Gen. No. 1 (1983). The opinion points out that the notion of representative government does not mean that an elected official represents only those people who voted for him or even those who had the opportunity to vote for him. An elected official does not constantly represent the same individuals, and it is impossible to avoid having some voters represented by an official whom they had no opportunity to support or oppose.

The case law, which is more thoroughly summarized in 40 Op. Att'y Gen. No. 1 (1983), persuades me that a study commission proposal is not invalid because it provides for "holdover" county commissioners, even where the proposal alters the commission district boundaries.

3. What is the effective date of the Study Commission recommendations should they be adopted by the electors?

You have asked when the Study Commission recommendations become effective if they are adopted by the electorate. The controlling statute here is section 7-3-156, MCA. This statute, unlike most of the statutes on altering forms of local government by petition or by study commission recommendation, makes a clear distinction among the adoption of an alternative plan of local government, the creation of new offices, and the adoption of an amendment to an existing plan of government. Section 7-3-156, MCA, which applies to

study commission proposals by operation of section 7-3-193(1), MCA, provides:

> (1) An alternative plan of local government approved by the electors takes effect when the new officers take office, except as otherwise provided in any charter or consolidation plan. A consolidation or merger plan adopted by the electors takes effect in the same manner.
>
> (2) Provisions creating offices and establishing qualifications for office under any apportionment plan become effective immediately for the purpose of electing officials.
>
> (3) An amendment to an existing plan of government becomes effective at the beginning of the local government's fiscal year commencing after the election results are officially declared.

You indicate in your letter that the Study Commission is contemplating the creation of new county commissioner positions and establishing qualifications to include that the commissioners run in nonpartisan elections from new districts. Because the proposal involves the creation of new positions, section 7-3-156(2), MCA, is applicable. Subsection (2) requires such changes to take effect immediately, i.e., upon adoption of the change by the electors. Unless the adopted changes include a provision that those commissioners with unexpired terms retain their seats (see the response to question No. 2, supra), the positions of all five commissioners would have to be filled at the ensuing election, and the changes concerning new districts and nonpartisan elections would necessarily apply to all five positions.

As for changing to nonpartisan elections for elected officials other than the county commissioners, section 7-3-156(3), MCA, is applicable. This change involves an amendment to an existing plan of government, i.e., a change to one of the features of the existing plan. The change does not involve the adoption of an entirely new plan of government nor does it relate to the creation of new offices. Thus, subsections (1) and (2) of section 7-3-156, MCA, do not apply. Under subsection (3), then, the beginning of the local government's fiscal year

commencing after adoption of the amendments is the effective date for changing to nonpartisan elections for officers other than county commissioners.

4. Which entity must set the dates of the special primary and general elections for the purpose of electing new county commissioners if the Study Commission proposal is adopted by the electors?

Section 7-3-187(1)(c), MCA, requires a study commission to include in its final report "a certificate establishing the dates of the first primary and general elections for officers of a new government if the proposal is approved." Section 7-3-160(1), MCA, which applies to elections on study commission recommendations by operation of section 7-3-193(1), MCA, provides that the governing body must establish the dates for electing officials required by a new form of government. The two statutes are in conflict, and the more recently-enacted statute, which specifically addresses procedures for voting on study commission recommendations, should prevail, according to the rule cited in State ex rel. Wiley, supra. Thus, section 7-3-187(1)(c), MCA, is controlling, and the responsibility for setting election dates belongs to the Study Commission.

Although you do not ask about the application of section 7-3-160(2), MCA, which sets the period of time in which elections are to be held, I believe a discussion of that subsection is warranted. Subsection (2), unlike subsection (1), is not inconsistent with any of the statutes that specifically address study commission recommendations. Therefore, subsection (2) is applicable. As a result, while the Study Commission is responsible for establishing election dates, those dates must fall within the time period provided in section 7-3-160(2), MCA. Pursuant to section 7-3-160(2), MCA, the primary election would have to be held not more than 120 days nor less than 75 days after the election approving the study commission proposal, and the general election would have to be held 75 days after the primary.

5. If the Study Commission recommendations are adopted, do the residency requirements of section 7-4-2104(2), MCA, apply to candidates for county commissioner?

study commission proposals by operation of section 7-3-193(1), MCA, provides:

> (1) An alternative plan of local government approved by the electors takes effect when the new officers take office, except as otherwise provided in any charter or consolidation plan. A consolidation or merger plan adopted by the electors takes effect in the same manner.
>
> (2) Provisions creating offices and establishing qualifications for office under any apportionment plan become effective immediately for the purpose of electing officials.
>
> (3) An amendment to an existing plan of government becomes effective at the beginning of the local government's fiscal year commencing after the election results are officially declared.

You indicate in your letter that the Study Commission is contemplating the creation of new county commissioner positions and establishing qualifications to include that the commissioners run in nonpartisan elections from new districts. Because the proposal involves the creation of new positions, section 7-3-156(2), MCA, is applicable. Subsection (2) requires such changes to take effect immediately, i.e., upon adoption of the change by the electors. Unless the adopted changes include a provision that those commissioners with unexpired terms retain their seats (see the response to question No. 2, supra), the positions of all five commissioners would have to be filled at the ensuing election, and the changes concerning new districts and nonpartisan elections would necessarily apply to all five positions.

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5. If the Study Commission recommendations are adopted, do the residency requirements of section 7-4-2104(2), MCA, apply to candidates for county commissioner?

Section 7-4-2104(2), MCA, prohibits the election of a county commissioner who has not resided in his district for at least two years preceding his candidacy. I am unaware of any statutory exception to this residency requirement. The exception to the operation of the residency requirement found in section 7-4-2102(3), MCA, applies to counties adopting an "optional or alternative form of government authorized by law." As noted earlier in the discussion of question No. 2, the exception found in section 7-4-2102(3), MCA, was enacted at a time when the reference to an alternative form of government meant the adoption of one of the five basic forms of government, plus the charter form. Thus, I conclude that the residency requirements in section 7-4-2104(2), MCA, apply to any candidates for county commissioner who may run for office as a result of the adoption of the Study Commission recommendations.

6. If the Study Commission recommendations are adopted, do the timetables for filing declarations of nomination and changing precinct boundaries, found in Title 13, MCA, apply?

The statutes that address the procedure for changing existing forms of local government do not include specific filing deadlines for candidates who run for offices created by the adoption of study commission recommendations. However, section 7-3-124, MCA, provides that except as otherwise provided in sections 7-3-121 to 161, MCA, "each election ... is conducted in the same manner as an election involving ballot issues or of local officials." Section 7-3-124, MCA, applies to elections on study commission recommendations by operation of section 7-3-193(1), MCA.

The general statutes that address elections on ballot issues and local officials are found in Title 13, MCA. Section 13-10-201(6), MCA, requires that declarations for nomination shall be filed no sooner than the first business day in January of an election year for that office and no later than 5 p.m., 75 days before the date of the primary election. I conclude, therefore, that the timetable for the filing of declarations of nomination found in section 13-10-201(6), MCA, would apply to any elections of public officials that are required by adoption of the Study Commission recommendations.

By the same token, section 13-3-102(1), MCA, which prohibits the changing of precinct boundaries within 100 days of a primary election, is also applicable. The statute is not totally irreconcilable with section 7-3-160(2), MCA, which requires that the special primary election be held between 75 and 120 days from the date of the adoption of the study commission recommendations. Statutes are to be harmonized if possible. State Consumer Counsel v. Montana Dept. of Public Service Regulation, 181 Mont. 225, 229, 593 P.2d 34, 36 (1979). Thus, the 100-day limit found in section 13-3-102(1), MCA, applies.

Please note that the schedule for holding an election of new officers (§ 7-3-160(2), MCA), the schedule for filing declarations of nomination (§ 13-10-201(6), MCA), the schedule for changing precinct boundaries (§ 13-3-102(1), MCA), and the schedule for making absentee ballots available (§ 13-13-205, MCA) must be harmonized so that the election of new officers is held on a date that does not violate any of these statutes.

7. What is the legality of an apportionment plan and election scheme which include an at-large election provision?

It is neither appropriate nor possible for me to advise whether a districting plan would be upheld in a court of law. Challenges to districting schemes are dealt with on a case-by-case basis by the courts themselves, and the outcome depends upon a great many factual considerations which vary with each case.

As a general matter, at-large elections are not unconstitutional, per se. However, if such elections are imposed or applied in a manner which results in a denial of voting rights, they may be subject to a court challenge. The courts consider many factors, but are primarily concerned with a disenfranchised minority, as set forth in such cases as White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973); and United States v. Dallas County Commission, 548 F. Supp. 875 (S.D. Ala. 1982).

As you are aware, Big Horn County is involved in pending litigation involving its currently-existing county commissioner districts. The ongoing litigation is an

additional reason I must decline to answer this final question.

THEREFORE, IT IS MY OPINION:

1. A local government study commission is responsible for calling and establishing an election date for the purpose of voting on the study commission's recommendations.

2. Where a local government study commission proposal recommends that the county commission be increased in size from three to five members, the proposal may provide that incumbent county commissioners whose terms have not expired retain their offices for the remainder of the terms to which they were elected. If no such provision is made and the study commission proposal is adopted, the incumbent commissioners would lose their positions when the newly-elected commissioners take office.

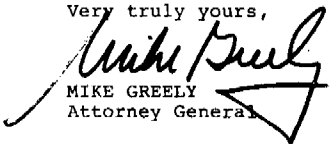
3. Recommendations of a local government study commission concerning an increase in the number of members on the board of county commissioners, alterations in commissioner districts, and a change to nonpartisan elections for commissioners would take effect upon adoption of the recommendations. Recommendations of a local government study commission to change to nonpartisan elections for other elected county officials would take effect at the beginning of the local government's fiscal year.

4. A local government study commission is responsible for setting the dates of a special primary and a general election to elect new officers required by the adoption of the study commission proposal.

5. The residency requirements of section 7-4-2104(2), MCA, apply to candidates for county commissioner positions created by the adoption of a local government study commission proposal.

6. The timetables for filing declarations of nomination and changing precinct boundaries, found in Title 13, MCA, apply to candidates for county commissioner positions created by the adoption of a local government study commission proposal.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 41 OPINION NO. 45

CITIES AND TOWNS - Authority of mayor to appoint administrative assistant;
EMPLOYEES, PUBLIC - Status of administrative assistant to mayor as officer or employee;
MUNICIPAL GOVERNMENTS - Authority of mayor to appoint administrative assistant;
PUBLIC OFFICERS - Status of administrative assistant to mayor as officer or employee;
MONTANA CODE ANNOTATED - Sections 7-3-113, 7-3-203, 7-3-212(2), 7-3-213, 7-3-214(2), 7-3-215(2), 7-3-216(2), 7-4-4101(3), 7-4-4105, 7-4-4108, 7-4-4303, 7-5-4101, 7-5-4102, 7-5-4301(1), 7-6-4103, 7-6-4224 to 7-6-4231;
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 46 (1984).

HELD: Section 7-3-212(2), MCA, authorizes mayoral appointment of an administrative assistant without city council approval.

7 February 1986

Jim Nugent
City Attorney
201 West Spruce
Missoula MT 59802-4297

Dear Mr. Nugent:

You have requested my opinion concerning a question which I have phrased as follows:

> Is the mayor, in a municipal council-mayor government provided under section 7-3-113, MCA, required to secure city council approval of his appointment of an administrative assistant pursuant to section 7-3-212(2), MCA?

I conclude, based principally on the language of sections 7-3-212(2) and 7-3-213(3), MCA, that such approval is not necessary.

The City of Missoula has chosen to retain the municipal council-mayor form of government provided under section

7-3-113, MCA. As a general matter, the mayor, or "executive," in that governmental structure is responsible for the day-to-day administration of the municipality, while the city, or "municipal," council discharges traditionally legislative functions such as enacting ordinances and budgets. See §§ 7-3-203, 7-4-4303, 7-5-4101, 7-5-4102, 7-6-4103, 7-6-4224 to 4231, MCA. The mayor's and city council's responsibilities are largely complementary; i.e., the mayor is charged with enforcing, inter alia, the council's lawful actions in administering the city's affairs and is further obligated to assist the council in its legislative activities. See §§ 7-3-203, 7-3-215(2), 7-3-216(2), 7-4-4303, 7-5-4102, MCA. Relevant statutory provisions are, moreover, explicit concerning when the mayor must seek city council approval of his actions and when he may veto council actions. See, e.g., §§ 7-3-203, 7-3-213(3), 7-3-214(2), MCA.

The carefully structured relationship between the mayor and city council indicates generally that, when the Legislature intended to require council approval of mayoral actions, it said so. This conclusion is illustrated graphically by section 7-3-213, MCA, which contains four different approaches to an executive's authority to appoint and remove employees:

> The executive may:
>
> (1) appoint and remove all employees of the local government;
>
> (2) appoint and remove, with the consent of a majority of the commission, all employees of the local government;
>
> (3) appoint, with the consent of a majority of the commission, all department heads and remove department heads and may appoint and remove all other department employees; or
>
> (4) appoint and remove, with the consent of a majority of the commission, all department heads and appoint and remove all other employees of the local government.

Under section 7-3-113(1)(e), MCA, subparagraph 3 above applies to Missoula and unequivocally mandates city

council consent as to the appointment of department heads but not to their removal or to the appointment or removal of any other department employees. Similarly unambiguous is section 7-3-212(2), MCA, which specifically addresses appointment of mayoral administrative assistants in Missoula: "The executive ... may appoint one or more administrative assistants to assist him in the supervision and operation of the local government, and such administrative assistants shall be answerable solely to the executive." Construed in pari materia with section 7-3-213(3), MCA, section 7-3-212(2), MCA, grants the mayor authority to appoint an administrative assistant without city council consent unless such assistant also serves as a department head. Neither your letter nor the attached Ordinance 2146 indicates that the position at issue involves discharge of department head duties, and city council approval of the mayor's appointment is consequently unnecessary.

You also ask whether, section 7-3-212(2), MCA, notwithstanding, administrative assistants are nonelective officers subject to approval by the city council under section 7-4-4303, MCA. The distinction between public officers and mere employees has been discussed in various Montana Supreme Court decisions and Attorney General Opinions. See, e.g., Forty-Second Legislative Assembly v. Lennon, 156 Mont. 416, 481 P.2d 330 (1971); State ex rel. Running v. Jacobson, 140 Mont. 221, 370 P.2d 483 (1962); Turnbull v. Brown, 128 Mont. 254, 273 P.2d 387 (1954); State ex rel. Rusch v. Board of County Commissioners, 121 Mont. 162, 191 P.2d 670 (1948); Aleksich v. Industrial Accident Fund, 116 Mont. 127, 151 P.2d 1016 (1944); Adami v. Lewis and Clark County, 114 Mont. 557, 138 P.2d 969 (1943); State ex rel. Dunn v. Ayers, 112 Mont. 120, 113 P.2d 785 (1941); State ex rel. Nagle v. Kelsey, 102 Mont. 8, 55 P.2d 685 (1936); State ex rel. Nagle v. Page, 98 Mont. 14, 37 P.2d 575 (1934); State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 P. 411 (1927); 40 Op. Att'y Gen. No. 46 (1984). The leading decision is State ex rel. Barney v. Hawkins, 79 Mont. at 528-29, 257 P. at 418, which identified the essential indicia of officer status:

> After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order to make it a public

> office of a civil nature: (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission or other written authority and give an official bond, if the latter be required by proper authority.

Even a cursory analysis of Ordinance 2146 establishes that at least the fourth factor is lacking since the administrative assistant is directly supervised by the mayor and is principally responsible for implementing, and not independently determining, municipal policy. The administrative assistant thus falls within that class of individuals, often referred to as "assistants," "whose duties are to help his superior and who must look to him for his authority to act. In the ordinary use of the word, it does not contemplate persons who ... are given the dignity of officers." State ex rel. Dunn v. Ayers, 112 Mont. at 126, 113 P.2d at 789. City of Missoula administrative assistants also do not take or file an oath of office. See § 7-4-4108, MCA.

It seems equally clear, moreover, that the administrative position was authorized by Ordinance 2146 in direct response to section 7-3-212(2), MCA, which, if interpreted harmoniously with sections 7-4-4101(3) and 7-4-4105, MCA, does not contemplate creation of a nonelective officer position because city council approval is not required and the council may not unilaterally abolish such position. Thus, while it may

be theoretically possible for a municipal council to establish a nonelective office with the title of "administrative assistant" under section 7-4-4101(3), MCA, Ordinance 2146 has not done so. I must emphasize here that section 7-3-212(2), MCA, does not require affirmative action by a municipal council to create the administrative assistant position.

Finally, the city council's authority under section 7-5-4301(1), MCA, to make contracts and under section 7-6-4231, MCA, to approve final budgets including, inter alia, employee salaries is not inconsistent with my interpretation of section 7-3-212(2), MCA. Although the city council's contract and budget approval powers may affect the mayor's practical ability to provide a particular compensation amount to an administrative assistant or establish other employment conditions, they do not obviate his authority to fill that position without council approval.

THEREFORE, IT IS MY OPINION:

Section 7-3-212(2), MCA, authorizes mayoral appointment of an administrative assistant without city council approval.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 41 OPINION NO. 46

CORPORATIONS - Tax situs for personal property of;
PROPERTY, PERSONAL - Tax situs of, for individual and business;
TAXATION AND REVENUE - Tax situs of personal property owned by individual or business;
MONTANA CODE ANNOTATED - Sections 15-8-402, 15-8-404, 61-3-301;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 139 (1978).

HELD: 1. Personal property owned by an individual acquires its tax situs by reference to the residence of its owner absent specific statutory direction.

2. Personal property of a partnership or corporation acquires its tax situs primarily by the location of the property. If the current location is temporary or transitory, the tax situs becomes the principal place of business of the organization.

13 February 1986

John LaFaver, Director
Department of Revenue
Room 455
Sam W. Mitchell Building
Helena MT 59620

Dear Mr. LaFaver:

You have requested my opinion on the following questions:

1. With respect to personal property owned by an individual, is the proper tax situs for purposes of personal property taxation the county in which the personal property is situated on January 1 of the tax year or the county in which the owner of the property maintains his domicile or residence?

2. With respect to personal property owned by a partnership or corporation, is the proper tax situs the county where the property is situated on January 1 of the tax year or the county in which the partnership or the corporation has its principal place of business?

Under Montana law tax situs is established by statute for certain specific types of personal property such as automobiles, mobile homes, airplanes, and livestock, etc. For instance, section 61-3-301, MCA, provides that automobiles shall be licensed in "the county of his [applicant's] permanent residence at the time of application for registration," and this has been extended to school districts. 37 Op. Att'y Gen. No. 139 (1978).

Your question relates to those types of personal property which are not addressed specifically by statute. With respect to personal property owned by an individual, the ancient maxim "mobilia sequuntur personam" retains its force today. Absent statutory direction, it remains a first principle of personal property taxation that, as the phrase translates, the situs of personal property follows the residence of the owner. See 71 Am. Jur. 2d State and Local Taxation § 658 (1973); Cooley, Taxation § 440, ch. 9. Therefore, it is my opinion that, absent specific statutory direction, the residence of the owner determines the situs of personal property of an individual for purposes of taxation.

The answer to your second question, concerning the tax situs of personal property owned by a partnership or corporation, is more complex. With respect to all property (real and personal) held by a business enterprise, Montana law provides:

> The property of every firm and corporation must be assessed in the county where the property is situate and must be assessed in the name of the firm or corporation.

§ 15-8-402, MCA.

More specifically, as to personal property, section 15-8-404, MCA, states in pertinent part:

> (1) The personal property belonging to the business of a merchant or of a manufacturer must be listed in the town or district where his business is carried on.

These statutes establish that the actual physical location of business property is of primary importance in establishing its tax situs. However, "situated" means a presence in the county which is more than transitory or temporary. See generally 39 Words and Phrases 463 "situated" (and pocket supplement). One of the cases cited in the foregoing reference involved a statute similar to Montana's about which the Missouri court said:

> The provision that tangible personal property "shall be taxable in the county in which such property may be situated" on a stated day is not the same as providing that the property shall be taxable where "physically present" on that day. In its application to personal property, the word "situated" as used in a statute authorizing or directing the taxation of property, connotes a more or less permanent location or situs. [Citations omitted.]

Buchanan County v. State Tax Commission, 407 S.W.2d 910, 914 (Mo. 1966).

If it is unclear where the personal property of a business is "situated," then the principal place of business becomes the tax situs. The general rule is stated in American Jurisprudence 2d:

> Under the usual statutory provisions relating to the taxation of the property of corporations, such organizations, whether domestic or foreign, are, as between different political subdivisions within a particular state, to be regarded as residents of the municipality or county in which is located their principal office or place of business, and are prima facie taxable on their personal property in such county or municipality.

71 Am. Jur. 2d State and Local Taxation § 680 (1973).

THEREFORE, IT IS MY OPINION:

1. Personal property owned by an individual acquires its tax situs by reference to the residence of its owner absent specific statutory direction.

2. Personal property of a partnership or corporation acquires its tax situs primarily by the location of the property. If the current location is temporary or transitory, the tax situs becomes the principal place of business of the organization.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 41 OPINION NO. 47

CITIES AND TOWNS - Mandatory seat belt ordinance;
FINES - Mandatory seat belt ordinance;
LOCAL GOVERNMENT - Mandatory seat belt ordinance;
MOTOR VEHICLES - Mandatory seat belt ordinance;
MUNICIPAL GOVERNMENTS - Mandatory seat belt ordinance;
SENTENCE - Mandatory seat belt ordinance;
TRAFFIC - Mandatory seat belt ordinance;
MONTANA CODE ANNOTATED - Sections 7-1-101, 7-1-106, 7-5-4207, 61-9-409, 61-9-410, 61-9-420, 61-9-516, 61-12-101;
MONTANA CONSTITUTION - Article XI, section 6.

HELD: The City of Helena may enact a mandatory seat belt ordinance which provides for a fine and/or jail sentence for violation of the ordinance, as long as the fine or penalty does not exceed $500 and the imprisonment does not exceed six months for any one offense.

14 February 1986

Jeffrey M. Sherlock
Helena City Attorney
316 North Park
Helena MT 59623

Dear Mr. Sherlock:

You have requested my opinion on the following question:

> Whether or not the City of Helena may enact a mandatory seat belt ordinance which provides for fines and/or jail sentences as penalties for violations.

The City of Helena is a municipality with self-governing powers. Article XI, section 6 of the Montana Constitution provides in part:

> A local government unit adopting a self-government charter may exercise any power

> not prohibited by this constitution, law, or charter.

See also § 7-1-101, MCA. The powers and authority of a local government unit with self-government powers are to be liberally construed, and every reasonable doubt as to the existence of a local government power or authority shall be resolved in favor of the existence of that power or authority. § 7-1-106, MCA. Thus, the City of Helena has the authority to enact a mandatory seat belt ordinance within its jurisdiction if such an ordinance is not prohibited by the Montana Constitution, Montana law, or the charter of the City of Helena.

I find no provision in the Montana Constitution which would prohibit enactment of a mandatory seat belt ordinance, and you have informed me that the charter of the City of Helena contains no such prohibition.

Nor does state law prohibit enactment of a seat belt ordinance. Section 61-12-101, MCA, provides in pertinent part:

> The provisions of chapter 8 and chapter 9 [of Title 61] shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from:
>
> ....
>
> (14) enacting as ordinances any and all provisions of chapter 8 or chapter 9 and any and all other laws regulating traffic, pedestrians, vehicles, and operators thereof, not in conflict with state law or federal regulations and to enforce the same within their jurisdiction.

A mandatory seat belt ordinance would not conflict with state law. The Montana Code Annotated contains references to seat belts, but only section 61-9-420, MCA, contains any reference to mandatory seat belt use. See §§ 61-9-409, 61-9-410, 61-9-420, 61-9-516, MCA. Section 61-9-420, MCA, pertains to the mandatory use of child restraint systems or safety belts on young children and would not conflict with a mandatory seat

belt ordinance. I have located no federal regulations which would conflict with a mandatory seat belt ordinance.

Further, enactment of a mandatory seat belt ordinance would be a reasonable exercise of the police power of the City of Helena. The mandatory seat belt law of the State of New York was challenged as exceeding the permissible scope of the state's police power in People v. Weber, 494 N.Y.S.2d 960 (Town Ct. 1985). The court held the mandatory seat belt law of New York was a proper exercise of the state's police power, stating:

> The [police] power is governed by "the rule of reason." That is, it extends to any reasonable rule or regulation designed to promote or protect the public's health, safety or morals.
>
> In determining what is "reasonable" in any particular case, it is incumbent on the Court to weigh the burden imposed by the restrictions against the public benefits derived therefrom. In virtually all cases, fastening a seat belt can hardly be termed burdensome at all, particulary when practiced with a regularity that makes it a habit. The benefits flowing from the use of seat belts may well be vast. This is indicated by the statistics cited in the Attorney General's brief and excerpted in Appendix A [omitted from publication] to this Opinion. The use of safety belts may well be an important and vital step toward the solution of a national problem of huge dimensions. Accordingly, in weighing of "costs" against "accomplishments" this State's seat belt law must be, and is found by this Court to constitute, a reasonable and constitutional exercise of the State's police power.

494 N.Y.S.2d at 962. See also City of Albuquerque v. Jones, 535 P.2d 1337 (N.M. 1975) (ordinance requiring operators of motorcycles to wear safety helmets appropriate exercise of city's police power).

I conclude the City of Helena may enact a mandatory seat belt ordinance. As to the possible penalties for

violations, section 7-5-4207, MCA, authorizes cities to impose fines and penalties for the violation of any city ordinance, but provides that no fine or penalty may exceed $500 and no imprisonment may exceed six months for any one offense.

THEREFORE, IT IS MY OPINION:

The City of Helena may enact a mandatory seat belt ordinance which provides for a fine and/or jail sentence for violation of the ordinance, as long as the fine or penalty does not exceed $500 and the imprisonment does not exceed six months for any one offense.

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 December 31, 1985. This table includes those rules adopted during the period January 1, 1986 through March 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 December 31, 1985, this table and the table of contents of this issue of the MAR.

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