RESERVE

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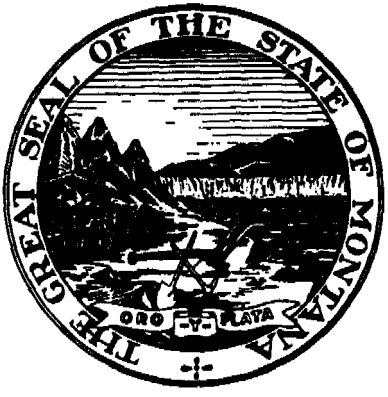

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 21

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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 COMMERCE
BEFORE THE MONTANA SCIENCE AND TECHNOLOGY DEVELOPMENT BOARD

In the matter of the proposed adoption of new rules, amendment of rules 8.122.101 and 8.122.203 and repeal of rules pertaining to investments by the Montana Science and Technology Development Board	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED NEW RULES, PROPOSED AMENDMENT OF RULES AND PROPOSED REPEAL OF RULES PERTAINING TO INVESTMENTS BY THE MONTANA SCIENCE AND TECHNOLOGY DEVELOPMENT BOARD

TO: All Interested Persons.

1. On December 4, 1987, at 10:00 a.m., a public hearing will be held at the office of the Commissioner of Higher Education, 33 South Last Chance Gulch, Helena, Montana, in the conference room, to consider the proposed adoption, amendment, and repeal of rules pertaining to investments by the Montana Science and Technology Development Board.

2. The rules proposed to be repealed, ARM 8.122.301, 8.122.302, 8.122.303, 8.122.304, 8.122.305, 8.122.306, 8.122.307, 8.122.308, 8.122.309, 8.122.310, 8.122.316, 8.122.317, 8.122.318, 8.122.319, 8.122.320, 8.122.321, 8.122.322, 8.122.323, 8.122.324, 8.122.325, 8.122.331, 8.122.332, 8.122.333, 8.122.334, 8.122.335, 8.122.336, 8.122.337, 8.122.338, 8.122.339, 8.122.340, 8.122.346, 8.122.347, 8.122.348, 8.122.349, 8.122.350, and 8.122.351, can be found on pages 8-4755, 8-4756, 8-4757, 8-4761, 8-4762, 8-4763, 8-4767, 8-4768 and 8-4773 of the Administrative rules of Montana.

3. The rules as proposed to be amended will read as follows:

"8.122.101 ORGANIZATIONAL RULE (1) The Montana science and technology development board ("board") was created in 1985 by section 2-15-1810, MCA.

(2) The board consists of 15 members appointed by the governor in the manner prescribed in section 2-15-124, MCA. By statute the board must be chosen from people with broad interest and experience in science and technology and the application of such interest and experience to economic development in Montana. At least 11 members of the board must be from the private sector.

(3) The board is attached to the department of commerce ("department") for administrative purposes. The department selects, prescribes the duties for, and supervises staff to administer board activities.

(4) The board is designated a quasi-judicial board for purposes of section 2-15-124, MCA, except that section 2-15-124(1) does not apply.

~~(5) Inquiries regarding the board, including a list of its members, may be addressed to the Montana Science and Technology Development Board, Department of Commerce, Capitol Station, Helena, Montana.~~"

Auth: 90-3-203, MCA Auth Extension, Sec. 25., Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, MCA

"8.122.203 DEFINITIONS ~~As-used-in-these--rules,--unless the--context-or-subject-matter-clearly-requires-otherwise,-the following-words-and-phrases-have-the-following--meanings:~~---In addition to the definitions set forth in section 90-3-102 and 90-3-403, MCA, the following definitions shall apply for purposes of these rules.

(1) ~~"Administrator"-means-the--person--selected--by--the department---to---administer--technology--investments--or--his designee.~~ "Act" means the provisions of Title 90, Chapter 3, MCA.

(2) "Alliance" means the Montana Science and Technology Alliance, which is the administrative unit of the department of commerce responsible for the daily administration of the programs of the board.

~~(2)~~(3) ~~"Board"-means-the-Montana-science-and--technology development-board-created-by-section-2-15-1810,-MCA.~~ "Capital company" means a certified Montana capital company.

~~(3)~~(4) ~~"Department"-means---the--department--of--commerce created--by--section--2-15-1801,-MCA.~~---"Company" means a firm, partnership, corporation, association or other entity authorized to conduct business in the state of Montana.

~~(4)~~(5) "Executive committee" means the committee composed of board members and appointed by the board chairman which makes recommendations to the board as to the funding of technology development projects and the general conduct of board business.

~~(5)---"Investment--agreement"--means--the--final---formal agreement--between--the--board-and-an-applicant-for-technology investment.~~

(6) "Portfolio company" means a seed, start-up or an expansion stage company which has received a technology investment from the board or from a capital company pursuant to the provisions of this act and these rules.

(7) ~~"Technology-development-project"-means--an--activity designed---to---discover,---develop,---transfer,--utilize,--or commercialize--new--technology--in--order--to--strengthen--and enhance---economic--development--in--Montana.---~~"Research and development committee" means the committee composed of board members appointed by the board chairman which makes recommendations to the board as to the need for and funding of applied research and development, research capability development and technology transfer projects and technical assistance activities."

(8) ~~"Technology-investment"-means-an-award-of-funds--for a---technology--development--project--to--stimulate--Montana's economy.--Technology-investments-are-not-investments-of-public funds-for-purposes-of-Article-VIII,-section-13,-of-the-Montana Constitution,-or-Title-17,-Chapter-6,-Montana-Code--Annotated, relating--to--the--unified-investment-of-public-funds,-but-are investments--of--public--resources---intended---to---encourage technologically-based-economic-development-that-may-eventually resulting-a-financial-return-on-those-investments.---~~"Research

and development project" includes projects which fall into the categories of research capability development, applied research and technology transfer and technical assistance.

(9) ~~"Technology transfer committee" means the committee composed of board members and appointed by the board chairman which makes recommendations to the board as to the need for and funding of technology transfer projects and technical assistance activities.~~ "Seed capital investment committee" means the committee composed of board members appointed by the board chairman which makes recommendations to the board as to the need for and funding of direct seed capital technology investments and investments in Montana capital companies.

(10) "Seed capital technology investments" means technology investments in seed, start-up, and expansion capital projects."

(11) "State" means the state of Montana."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, MCA

4. The proposed new rules will read as follows:

"I. TYPES OF PROJECTS (1) The board makes technology investments and provides related assistance to projects in four program categories. These categories include:

(a) seed capital awards for development and commercialization of new products and processes;

(b) research capability development;

(c) technology transfer and technical assistance; and

(d) applied technology research.

(2) As required by section 2-4-305, notice is hereby given that (1) above repeats 90-3-203(3), and is included in this rule to provide full notification to applicants concerning the scope of the board's investment programs."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, MCA

"II. TARGET TECHNOLOGIES (1) Priority for investment shall be given to those technology development projects described in section 90-3-203, which incorporate advanced or innovative technologies, and involve, but are not limited to, one or more of the following target technologies:

(a) mineral technology;

(b) agricultural technology;

(c) forestry technology;

(d) energy technology;

(e) materials science;

(f) information sciences;

(g) biotechnology; and

(h) microelectronics and computer sciences."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/84 Imp: 90-3-203, 90-3-402, MCA

"III. SEED, START-UP AND EXPANSION CAPITAL PROJECTS - ELEMENTS - GOALS - OBJECTIVES (1) Seed capital technology investments are made directly by the board in seed, start-up

and expansion capital projects and by capital companies in which the board has made an investment.

(2) The goal of this program is to assist in the acceleration of development of technology in the state by providing a source of risk capital to the technology-based entrepreneurial sector of Montana's economy.

(3) The objectives of this program are as follows:

(a) to provide investment and follow-along management support for seed, start-up and early expansion stage entrepreneurial companies in the state which are attempting to develop products and/or processes based on innovative and advanced technologies;

(b) to stimulate the formation of additional private sector risk capital by investing in capital companies which can in turn provide investment capital for technology-based companies; and

(c) to provide a liaison between entrepreneurial companies in the state and out-of-state venture investors in an effort to enhance the pool of expansion capital available to technology-based companies in the state."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-402, 90-3-415, MCA

"IV. RESEARCH CAPABILITY DEVELOPMENT - ELEMENTS - GOALS - OBJECTIVES (1) Technology investments in this program are made to finance individual research capability development projects and to support advanced technology centers of excellence.

(2) The goal of this program is to significantly upgrade existing research capabilities within the state's research and development institutions and organizations so as to enable them to produce results that can substantially enhance technology development projects for the state's economy.

(3) The objectives of this program are to:

(a) provide financial support for the development of world-class research capabilities within the state's university system through the acquisition of facilities, equipment, and/or personnel which will result in such improvement;

(b) support the creation of a series of advanced technology centers of excellence which will institutionalize cooperative arrangements between the public and private sectors and which will significantly build on existing research and development capabilities so as to stimulate in-state economic development; and

(c) create a mechanism for producing research which may be steadily transferred to the private sector for commercialization."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-402, MCA

"V. TECHNOLOGY TRANSFER AND TECHNICAL ASSISTANCE - ELEMENTS - GOALS - OBJECTIVES (1) Technology investments in this program are made to support a technology business incubator network designed to provide ready access to

professional services and support for technology-based seed and start-up entrepreneurial companies; a technology information clearinghouse; technology transfer projects sought from Montana's university system; a series of entrepreneurial and investment capital conferences which facilitate contact by Montana entrepreneurs with interested investors, other sources of capital, and sources of professional expertise; technology transfer projects which have the potential to improve economic profitability and productivity through the application of new technology to new or existing problems confronting business development in Montana.

(2) The goal of this program is to support the transfer of technology research from the laboratory to the marketplace and to provide better access to business development assistance for seed and start-up businesses commercializing advanced technology products.

(3) The objectives of this program are to:

(a) aid in the development of an incubating process which will provide assistance to new technology-based businesses in achieving commercial success;

(b) identify and facilitate the transfer of applied research from the laboratory to companies interested in commercializing such research;

(c) provide a clearinghouse for information relating to technology development, business development, and research capabilities to researchers and entrepreneurs in need of such support; and

(d) gather and disseminate information regarding research, technology, and business development in Montana in the form of conferences and forums to interested researchers and entrepreneurs."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-402, MCA

"VI. APPLIED TECHNOLOGY RESEARCH - ELEMENTS - GOAL - OBJECTIVES (1) Technology investments in this program are made in individual applied technology research product development projects leading to eventual commercialization and production. Technology investments are made in projects sponsored by private industry, universities, colleges and other research and development organizations and which have the prospects for leading to a product or process intended for eventual commercialization and production in the state.

(2) The goal of this program is to provide financial support to individual research projects which have significant potential to advance the state of technology development in the state and to be readily commercialized upon completion of the research phase.

(3) The objectives of this program are to:

(a) provide financial support for projects which build upon existing research and development strengths in the state; and

(b) insure whenever possible that research results obtained through board investment are commercialized as quickly as possible."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-402, MCA

"VII. CRITERIA FOR TECHNOLOGY INVESTMENTS (1) Technology investments including but not limited to those made from money in the technology development account may be made only upon a favorable determination by the board of:

(a) the relevance of the proposed technology development project to the purpose of the act and its basis on innovative and/or advanced technology;

(b) the prospects for collaboration on the project between public and private sectors of the state's economy in the target technologies as set forth in rule II;

(c) the prospects for achieving commercial success in general and for creating significant numbers of new jobs in the state in particular;

(d) the quality of the specific product and business development methodology proposed;

(e) the suitability of any proposed milestone for evaluating progress of technology development project results; and

(f) the availability of matching funds required under 90-3-301(2).

(2) In this evaluation process, the board shall consider the investment's:

(a) job creation potential;

(b) potential benefit for existing industry;

(c) potential for creating new industry; and

(d) involvement of existing institutional research strength or whether it involves a newly targeted technology area with development potential.

(3) Each return-on-investment agreement for all technology investments including but not limited to those made from money in the technology development account shall:

(a) require periodic financial and progress reports concerning the technology development project; and

(b) require the technology development project to be conducted in the state.

(4) Technology investments made from the technology development account may only be made after the board makes the findings and determinations required by (1) and (2) above.

(5) As required by section 2-4-305, notice is hereby given that (1), (2) and (3) above repeat 90-3-413 and are included in this rule to provide full notification to applicants of the criteria that will be applied by the board prior to making a technology investment."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-402, 90-3-413, MCA)

"VIII. SEED CAPITAL TECHNOLOGY INVESTMENTS - SIZE AND TYPES (1) The board makes technology investments in seed, start-up and expansion stage capital projects attempting to commercialize technology-based products and processes, and in

capital companies for management of investments having primary emphasis in start-up and expansion stage capital projects.

(2) The board's investments generally range from $10,000 to $300,000, depending on the development stage of the company and the uses of proceeds of the investment. The board generally reserves similar amounts of additional capital in order to participate in subsequent rounds of financing for seed stage portfolio companies.

(3) The board's due diligence investments generally do not exceed $20,000.

(4) The board's investments are generally made for working capital and operating expenses related to product development and early stage manufacturing.

(5) The board does not invest in real estate acquisition or development.

(6) The board generally makes investments with maturity dates of five to seven years.

(7) The board may make a direct investment in any seed stage company. The board may make a direct investment in any start-up or expansion stage capital projects only after timely notification in writing to all existing capital companies of the opportunity to invest in such projects.

(8) The board's investment in a capital company typically ranges from $500,000 to $1,000,000.

(9) The board invests only in a capital company that agrees to apply the investment criteria set forth in rules VII and IX for its investments."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987; Imp: 90-3-203, 90-3-402, 90-3-412, 90-3-415, MCA

"IX. INVESTMENT CRITERIA FOR DIRECT SEED CAPITAL TECHNOLOGY INVESTMENTS (1) In addition to the criteria set forth in rule VII, the board may make a direct seed capital technology investment in a project only if it substantially complies with the following criteria:

(a) the project develops and/or employs advanced and/or innovative technologies to produce products or processes that promise a significant competitive advantage;

(b) the project requests early stage investment with primary focus on seed stage investments;

(c) the project provides an opportunity to earn a substantial return on the board's original investment in a five to seven-year period;

(d) the project has potential to realize substantial growth in sales and a sales revenue level of three to five million dollars or more per year over the term of the investment;

(e) the company is located or preparing to locate within the state;

(f) the project demonstrates a capacity to diversify or add value to Montana's basic industries;

(g) the company's management team possesses appropriate experience in the relevant industry; and

(h) the company has strong potential for creating and retaining jobs and stimulating tax revenue growth in the state."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-402, 90-3-412, 9-3-413, MCA

"X. APPLICATION PROCEDURES FOR DIRECT SEED CAPITAL TECHNOLOGY INVESTMENTS - SUBMISSION AND USE OF EXECUTIVE SUMMARY (1) An applicant shall submit a brief executive summary of the proposal to the alliance.

(2) The executive summary must include the following items:

(a) a description of the technology and/or product being developed or marketed by the company, with particular emphasis on any proprietary characteristics which would result in a competitive advantage for the company;

(b) a characterization of the market for the product, including potential size, customers, and methods required to sell the product to the market;

(c) a description of the management team's experience and qualifications which are relevant to the particular industry area in which the company is operating;

(d) an estimate of sales revenue and new jobs created or existing jobs retained after the fifth year of operations; and

(e) the amount of investment capital needed for the current round of financing, along with other potential investors who could help provide that capital.

(3) The executive summary should not contain any information that the applicant does not want subject to public inspection.

(4) The executive summary is evaluated by the seed capital investment committee of the board for a determination of whether the project complies with (2) above, the criteria set forth in rules VII and IX, and whether the project should be advanced to the business plan development and review phase."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-412, 9-3-413, MCA

"XI. APPLICATION PROCEDURES FOR DIRECT SEED CAPITAL TECHNOLOGY INVESTMENTS - SUBMISSION OF BUSINESS PLAN (1) When the executive summary is deemed complete and the project deemed appropriate for further consideration, the applicant must submit a full business plan to the alliance.

(2) This plan must contain the following items:

(a) an executive summary;

(b) the company history and business development objectives;

(c) the product and technology description;

(d) the market size and characteristics assessment;

(e) the sales and marketing strategy;

(f) a description and assessment of the competition;

(g) the financial projections, including income statements, balance sheets, and cash flow projections for five years;

(h) the historical financial statements of the company including balance sheets and income statements for the three previous years or as many as are available;

(i) a description of the management team, including a detailed resume for each member;

(j) a manufacturing and operations plan;

(k) the ownership structure; and

(l) an organization and personnel plan.

(3) If deemed necessary, personal financial data may be requested.

(4) A cover letter must also accompany the business plan and include a description of other capital or matching fund efforts and the names of up to six individuals who could provide the alliance with a threshold review of the product, technology, and market potential of the company."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-412, 90-3-413, MCA

"XII. DIRECT SEED CAPITAL TECHNOLOGY INVESTMENTS - REVIEW PROCESS (1) The following steps are taken by the seed capital investment committee to complete its evaluation to arrive at a funding recommendation:

(a) Upon receipt of the completed business plan, threshold evaluations are obtained from technical and financial reviewers.

(b) Once the threshold evaluation step is completed, the alliance staff will schedule an on-site meeting with the company's management team to comprehensively discuss the company, its business development objectives, and its financing needs.

(c) The company shall make a formal presentation to the seed capital investment committee.

(d) Upon the recommendation of the seed capital investment committee, the board may, at this stage, make a seed capital technology investment in a company for due diligence purposes.

(e) The alliance will then conduct its own in-depth due diligence examination which involves, at a minimum, a thorough assessment of company management, potential market, other investors, ownership, management and financial references.

(f) The alliance will then formulate a recommendation for the seed capital investment committee. This recommendation may be presented in the form of a due diligence package.

(g) The seed capital investment committee then formulates a recommendation to the board."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-412, 9-3-413, MCA

"XIII. DIRECT SEED CAPITAL TECHNOLOGY INVESTMENTS - BOARD ACTION (1) Upon receipt of the seed capital investment committee's recommendation, the board shall apply the

following criteria in determining whether to make a seed capital technology investment:

(a) compliance with rules VII and IX;

(b) quality of the management team;

(c) degree of the company's competitive advantage;

(d) quality of the company's business plan and its prospects for implementation; and

(e) opportunity for the board to exit the investment with a substantial return.

(2) If the board approves funding of a project, the board chairman will designate a member of the board to work with the alliance staff project manager to monitor negotiations of the term sheet, closing documents, and post-investment activities, and where appropriate to establish observer rights of the company's board of directors."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-412, 9-3-413, MCA

"XIV. DIRECT SEED CAPITAL TECHNOLOGY INVESTMENTS - POST-DISBURSEMENT ACTIVITIES (1) The alliance may take an active role in working with a portfolio company in which it has invested.

(2) The activities in which the alliance may participate include, but are not limited to:

(a) designating a person to sit on the company's board of directors or other governing body and/or hold observer rights for up to two additional alliance designees;

(b) assisting the company in seeking additional investment capital when necessary; and

(c) requiring the company to submit periodical financial and performance reports."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-412, MCA

"XV. INVESTMENT IN CAPITAL COMPANIES - PURPOSE - ELIGILIBITY REQUIREMENTS (1) The purpose of technology investments through capital companies is to assist the acceleration of development of technology in the state by leveraging public sector resources with private sector business development dollars and expertise in order to further the development of private sector seed, start-up, and expansion capital resources. These investments will facilitate the growth of young technology companies and foster entrepreneurship in Montana.

(2) In order to qualify for board investment, the capital company must be able to provide a comprehensive array of business development, investment and management services including, but not limited to:

(a) legal establishment of the capital company pursuant to Title 90, Chapter 8, MCA;

(b) substantial capability to raise private sector investment capital;

(c) ability to generate an adequate deal flow;

(d) capability to screen potential portfolio companies and perform adequate and appropriate due diligence;

(e) ability to make investment decisions and structure investments;

(f) establish benchmarks and track portfolio company performance; and

(g) provide value-added management assistance to portfolio companies."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-402, 90-3-413, 90-3-415, MCA

"XVI. INVESTMENTS IN CAPITAL COMPANIES - CRITERIA (1) The board will invest in a capital company on the basis of the company's demonstrated ability to make sound investments and its business development experience.

(2) The capital company must be an early-stage fund with primary focus on start-up and expansion stage investments.

(3) In addition to (1) and (2) above, the board may invest in a capital company only if it substantially complies with the following criteria. The capital company must:

(a) retain a fund manager who has demonstrated experience in early-stage business investment and development;

(b) orient itself toward making early-stage technology investments;

(c) commit to making seed capital technology investments in companies located in Montana in an aggregate amount equivalent to the board's investment in the capital company plus the company's matching contribution less any preapproved management fees;

(d) agree to create an investment advisory committee to periodically review the investments and portfolio's value with at least one seat reserved for an alliance representative;

(e) have its investment strategy oriented toward high growth opportunities; and

(f) be willing to serve as a lead investor in later rounds of financing."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-402, 90-3-413, 90-3-415, MCA

"XVII. INVESTMENT IN CAPITAL COMPANIES - PORTFOLIO COMPANY INVESTMENT CRITERIA (1) After the board invests in a capital company pursuant to the requirements of rule XVI, the capital company must agree to make seed capital technology investments which meet the requirements of rules VII and IX.

(2) Prior to the capital company making a seed capital technology investment in a portfolio company, it must determine that the company meets the requirements of rules VII and IX, forward such determination to the board for its review, and receive the board's approval."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-402, 90-3-415, MCA

"XVIII. INVESTMENT IN CAPITAL COMPANIES - APPLICATIONS FOR INVESTMENT (1) Applications for board

investment shall be accepted by the board on at least an annual basis until all available funds have been committed.

(2) Applications shall be in the form of a statement of qualifications as described in rule XIX.

(3) Two copies of the statement must be submitted to the alliance. If deemed complete, additional copies of the statement will be required.

(4) The board will advertise for statements of qualifications from capital companies having an interest in qualifying for a board investment.

(5) Prospective applicants will be asked to send the alliance an executive summary of their statement of qualifications.

(6) For a capital company applicant the statement of qualifications will serve in lieu of a business plan and a technical review will not be conducted."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-413, 90-3-415, MCA

"XIX. INVESTMENTS IN CAPITAL COMPANIES - CONTENTS OF STATEMENT OF QUALIFICATIONS (1) A statement of qualifications must provide a comprehensive description of the capital company, the fund it proposes to operate in Montana, and must include the following:

(a) a title page;
(b) an executive summary;
(c) a detailed statement of fund manager qualifications;
(d) a fund capitalization;
(e) a fund manager compensation plan;
(f) a three-year administrative budget;
(g) a fund outreach plan;
(h) a statement of screening and due diligence;
(i) a description of the investment decision process;
(j) a portfolio characteristics plan;
(k) a monitoring and management assistance plan;
(l) a later-stage financing strategy;
(m) the capital company accounting plan;
(n) the fund termination and distributions plan; and
(o) personal resumes which describe the education and employment experience of each of the principal participants in the capital company.

(2) Additional information may be submitted with the formal statement of qualifications, but the statement will not be considered complete if any of the above mentioned sections are incomplete. If deemed incomplete, the statement will be returned to the capital company applicant for timely revision and resubmission."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-413, 90-3-415, MCA

"XX. INVESTMENTS IN CAPITAL COMPANIES - MONITORING - RIGHTS (1) Throughout the duration of the return-on-investment agreement between the capital company and the board, the alliance and board-appointed member of the investment advisory committee will monitor the progress of the

capital company. Monitoring will be in addition to the submission of reports from the fund manager and regularly scheduled meetings of investors.

(2) The alliance or board may conduct on-site inspections of the capital company's investments.

(3) The alliance or board may require periodic financial and progress reports from the capital companies on its portfolio companies.

(4) Failure by a capital company investment recipient to comply with the reporting requirements or the investment criteria of the board will be considered a breach of the return-on-investment agreement between the capital company and the board and may result in termination by the board.

(5) All financial records and reports pertaining to the capital company and ordinarily available to investors will be made available to the alliance during regular business hours upon receipt of customary notification."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-413, 90-3-414, 90-3-415, MCA

"XXI. RETURN ON SEED CAPITAL TECHNOLOGY INVESTMENT - FORM OF INVESTMENT - RETURN-ON-INVESTMENT AGREEMENT (1) The board requires a return on its seed capital technology investments and on its capital company investments in order to retire the bonds issued to finance its technology development account.

(2) For a direct seed capital technology investment, the debt instrument that will be used includes, but is not limited to, a convertible debenture.

(a) A convertible debenture will be purchased from the company by the board and, if converted, may only be converted by a party other than the board.

(b) If a convertible debenture is purchased, it will typically have a maturity date of seven years. The board, however, may agree to an extension of the term. In no case may the maturity date extend beyond April 13, 1999.

(3) The form of the board's investment in a capital company includes, but is not limited to the following:

(a) acquisition of a limited partnership interest in a capital company; or

(b) the purchase of a debenture from the capital company which, if convertible to stock ownership, may be converted only by a party other than the board.

(4) For all seed capital technology investments, a written return-on-investment agreement will be executed between the board and the portfolio company."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-413,90-3-414, 90-3-415, MCA

"XXII. TECHNOLOGY INVESTMENTS IN RESEARCH AND DEVELOPMENT PROJECTS - CRITERIA (1) In addition to the criteria set forth in rule VII, investment preference will be given to those projects which:

(a) address a target technology;
(b) have the potential to add value to a basic industry sector of Montana's economy;
(c) can demonstrate a clear path to commercial development of the research results within Montana;
(d) involve university system research participation;
(e) have the potential to generate at least a dollar-for-dollar matching contribution for the project;
(f) employ or otherwise take advantage of existing research and development strengths within the state's university and private research establishment;
(g) involve a realistic and achievable research project design; and
(h) employ a collaborative approach involving both public-private and inter-university unit cooperation.
(2) Any project which meets the board's investment criteria is eligible for consideration for a technology investment."
Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, MCA

"XXIII. TECHNOLOGY INVESTMENTS IN RESEARCH AND DEVELOPMENT PROJECTS - SUBMISSION AND USE OF EXECUTIVE SUMMARY (1) An applicant must submit a brief executive summary of the project to the alliance.
(2) The executive summary should include the following items:
(a) a description of the proposed project, including the product or process and the technology involved;
(b) an analysis of the project's commercial potential and prospective commercial partners;
(c) a discussion of the feasibility and/or availability of private matching funds;
(d) an estimate of total financing needs; and
(e) the amount of funds requested from the board, including the expected use of proceeds.
(3) The summary should not contain any information that the applicant does not want subject to public inspection.
(4) The executive summary is evaluated for determination of whether the project should be advanced to the research and development proposal phase by the research and development committee. "
Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, MCA

"XXIV. TECHNOLOGY INVESTMENTS IN RESEARCH AND DEVELOPMENT PROJECTS - SUBMISSION OF RESEARCH AND DEVELOPMENT PROPOSAL (1) When the executive summary is deemed complete and the project deemed appropriate for further consideration, the applicant must submit a research and development proposal to the alliance. This proposal must contain the following items:
(a) a title page;
(b) a table of contents;

(c) an executive summary;
(d) the project objectives;
(e) a background review of the technology;
(f) the project design;
(g) a list of required facilities and equipment;
(h) a description of commercial potential and potential commercial partners;
(i) a description of the project's potential impact on the state's economy;
(j) a list of milestones which describes specific tasks to be achieved delineated on a time line;
(k) the budget and use of proceeds, plus documentation showing source of funds and use of proceeds for each line of the budget;
(l) the feasibility and/or availability of match;
(m) a description of funding efforts made to obtain funding for the proposed project;
(n) the resumes of the major principals identified in the project design describing the education and employment experience of each; and
(o) a list of five technical reviewers who are technically competent to review the proposal, as the last page of the proposal, including their names, addresses and phone numbers."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, MCA

"XXV. TECHNOLOGY INVESTMENTS IN RESEARCH AND DEVELOPMENT PROJECTS - EVALUATION - DUE DILIGENCE (1) After receipt of the research and development proposal, the alliance will determine if it is complete. Once the proposal is deemed complete, the formal review process will begin.

(2) Upon receipt of a complete research and development proposal, the proposal will be subjected to a rigorous outside technical review conducted by reviewers selected by the alliance. Each reviewer will be asked to comment on the technical feasibility of the proposed project design and implementation, the technical competence of the investigators, as well as the project's prospects for market success, when applicable.

(3) If deemed necessary, a research and development proposal may also be subjected to a rigorous financial review by the members of the alliance's financial advisory panel.

(4) If the technical and financial reviews are favorable, the alliance will initiate and rigorously pursue its own due diligence process on the project. The purpose of this process is to further verify the feasibility of the technology involved, the credibility and expertise of the project principals and the market or commercial potential of the proposed product or process. A summary of this due diligence process will be presented to the research and development committee at its next meeting."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, MCA

"XXVI. TECHNOLOGY INVESTMENTS IN RESEARCH AND DEVELOPMENT PROJECTS - REVIEW PROCESS (1) In addition to the technical and financial reviews, the project proposal will also, be reviewed by the research and development committee of the board.

(2) The committee will evaluate each proposal in light of the investment criteria set forth in rules VII and XXII, the technical reviews, the financial reviews, and any additional technology reviews, including those of the alliance. The applicant will be asked to attend the research and development committee meeting to make a brief presentation and answer any questions regarding the proposal.

(3) Based on compliance with the investment criteria, the reviews, the applicant's presentation, and alliance's evaluation and due diligence, a preliminary determination will be made by the committee whether the project should be recommended to the board, or whether the applicant should be requested to modify the proposal prior to the research and development committee making a funding recommendation."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, MCA

"XXVII. TECHNOLOGY INVESTMENTS IN RESEARCH AND DEVELOPMENT PROJECTS - BOARD ACTION (1) Upon receiving a recommendation from the research and development committee, the board shall determine whether the proposal complies with rules VII and XXII.

(2) The board may vote to:

(a) invest in the proposal as recommended;

(b) invest in the proposal provided certain conditions are met;

(c) invest in the proposal for a larger or smaller amount then requested;

(d) refer the proposal back to the applicant for revisions; or

(e) reject the proposal as not appropriate for technology investment for failure to comply with the applicable criteria.

(3) All decisions by the board are final."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, MCA

"XXVIII. TECHNOLOGY INVESTMENTS IN RESEARCH AND DEVELOPMENT PROJECTS - RETURN-ON-INVESTMENT AGREEMENT - RETURN-ON-INVESTMENT (1) Upon approval of a proposal by the board, the applicant must enter into a formal return-on-investment agreement with the board before any investment is made. Each return-on-investment agreement will be negotiated on an individual basis.

(2) The terms of the payback arrangement will be negotiated as part of the return-on-investment agreement.

(a) The payback or return-on-investment may be in the form of a portion of the users fees assessed against the users of a facility funded with a research capability development investment, a royalty stream on the products or process

developed with the board's investment, or such other mechanism as the board deems appropriate.

(b) The board will require a return-on-investment of either two times its original investment paid as a percentage of gross revenues resulting from the sale of the product or process which is commercialized from the research project, or as the result of the application of an annual discounted rate of return to be paid as a percentage of gross revenues resulting from the sale of the products or processes developed from the research activity."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, MCA

"XXIX. TECHNOLOGY INVESTMENTS IN RESEARCH AND DEVELOPMENT PROJECTS - MONITORING REPORTS (1) A funding recipient must submit progress reports to the alliance as specifically required in the return-on-investment agreement.

(2) The progress reports shall include, but not be limited to:

(a) financial status of the funding recipient;

(b) overall project performance; and

(c) progress in accomplishing milestones.

(3) A final project report is due upon completion of the project term.

(4) Annual commercialization reports are required until the funding recipient has satisfied the return-on-investment or payback terms contained in the return-on-investment agreement."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, MCA

"XXX. FAILURE TO COMMERCIALIZE OR PRODUCE IN MONTANA - ALL INVESTMENT PROGRAMS (1) All funding recipients must agree that the production or manufacturing of new technology shall occur in the state and should production or manufacturing be located out-of-state, the funding recipient shall immediately reimburse the board for its original investment plus interest.

(2) The board may determine that a funding recipient is not complying with the return-on-investment agreement if:

(a) commercial production, marketing and sale of the product is not commenced by the company within a reasonable time;

(b) commercial production, sale or marketing is discontinued for a continuous period without good cause;

(c) the company fails to use its best efforts to achieve the benefits of increased employment in Montana; or

(d) the company fails to maintain such offices or facilities in Montana.

(3) Action by the board may include termination of the funding."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-413, MCA

"XXXI. MATCHING FUND REQUIREMENTS (1) Where required, matching funds shall be contributed on at least a dollar-for-dollar basis and shall not include state appropriated funds.

(2) Equipment and in-kind contributions do not qualify as matching funds.

(3) Funds previously spent may, at the board's discretion, qualify for matching purposes.

(4) Although matching funds are not required by statute for technology transfer and technical assistance projects, they may be provided by the applicant.

(5) After a proposal is approved for a technology investment by the board but before any state funds are disbursed, the applicant must document the receipt of matching funds.

(6) For capital companies, the following requirements also apply:

(a) Matching funds are required in the amount of at least one dollar in private sector investment in capital company capitalization for each dollar of board investment.

(b) The capital companies must receive the minimum required private sector match prior to disbursement of the board's investment funds.

(c) Acceptable private sector match includes, but is not limited to, dollars eligible for the 50 percent capital companies tax credit as set forth in Title 90, Chapter 8, Part 1, as well as investment by the Montana state board of investments pursuant to Title 17, Chapter 6, Part 2."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-301, MCA

"XXXII. REVIEW OF INVESTMENT RECOMMENDATION - ALL INVESTMENT PROGRAMS (1) If a proposal or business plan is deemed ineligible for a board investment, by either the seed capital investment or the research and development committee, for failure to comply with applicable investment criteria, the applicant has 30 days from such determination to request the executive committee to conduct a review of the proposal or business plan to determine whether the recommendation of the appropriate committee should be concurred in. The executive committee shall have 60 days to conduct its review. The executive committee will then formulate a final recommendation to the board."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-301, MCA

"XXXIII. FAILURE TO COMPLY - ALL INVESTMENT PROGRAMS (1) Failure by a funding recipient to comply with the reporting requirements of the board will be considered a breach of the return-on-investment agreement and may result in its termination by the board."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, 90-3-301, MCA

"XXXIV. RIGHTS TO INTELLECTUAL PROPERTY - CONFIDENTIALITY - ALL INVESTMENT PROGRAMS (1) All intellectual property rights including any patents, copyrights, trademarks, and trade secrets developed by the funding recipient with use of funds provided by the board will be owned by the recipient.

(2) The funding recipient shall have each of its employees, agents, independent contractors and others who may reasonably be expected to create intellectual property rights sign an agreement with the funding recipient, subject to approval by the alliance, whereby such other persons shall assign any and all intellectual properties to the funding recipient where any invention, discovery, improvement or other intellectual property right is conceived, created or reduced to practice during the term of the investment."

Auth: 90-3-203, MCA Auth Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, MCA

4. The board is proposing to adopt the new rules in order to implement the "Science and Technology Development Board Seed Capital Bond Act" enacted by the fiftieth legislature and to amend the existing rules to better implement the existing powers and duties of the board. The board is proposing to repeal the rules noted because the new rules proposed for adoption and amendment more comprehensively address the applicable policies and requirements.

5. Interested persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Montana Science and Technology Alliance, 24 North Last Chance Gulch, Suite 2B, Helena, Montana 59620, no later than December 11, 1987.

6. R. Stephen Browning has been designated to preside over and conduct the hearing.

MONTANA SCIENCE AND TECHNOLOGY
DEVELOPMENT BOARD
R. STEPHEN BROWNING, CHAIRMAN

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

Certified to the Secretary of State, November 2, 1987.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the proposed adoption of Rules I through XXVI pertaining to licensing requirements for youth detention facilities	))))	NOTICE OF PUBLIC HEARING -- PROPOSED ADOPTION OF RULES I-XXVI PERTAINING TO LICENSING REQUIREMENTS FOR YOUTH DETENTION FACILITIES

TO: All Interested Persons

1. On December 2, 1987, at 1:30 p.m. a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed adoption of Rules I through XXVI pertaining to licensing requirements for youth detention facilities.

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

RULE I YOUTH DETENTION FACILITY, PURPOSE (1) These rules establish licensing requirements and procedures for youth detention facilities.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE II YOUTH DETENTION FACILITY, DEFINITIONS (1) The following definitions apply to all youth detention facility licensing rules:

(a) "Chemical restraint" means the use of psychotropic medication to subdue, inhibit, confine or control a youth's behavior.

(b) "Contraband" means anything that could be used to endanger health or safety of the youth or others, is illegal or compromises the security of a facility.

(c) "Custodian" means a person other than a parent or guardian to whom legal custody of the youth has been given but does not include a person who has only physical custody.

(d) "Delinquent youth" means a youth as defined by 41-5-103(13), MCA.

(e) "Detention" means the temporary substitute care of youth in physically restricting facilities.

(f) "Detention facility" means a facility that uses locked doors or windows or other means to prevent a youth from departing at will.

(g) "Department" means department of family services.

(h) "Facility" means youth detention facility.

(i) "Mechanical restraint" means the restriction by mechanical means of a youth's mobility and/or ability to use his/her hands, arms or legs.

(j) "Parent" means the natural or adoptive parent but does not include a person whose parental rights have been judicially terminated, nor does it include the putative father of an illegitimate youth unless his paternity is established by an adjudication or by other clear and convincing proof.

(k) "Passive physical restraint" means the least amount of direct physical contact required by a staff member using approved methods of making such physical contact to restrain a youth from harming self or others.

(l) "Temporary lock up/secure observation" means isolation of a youth in a locked room to protect the youth, other youths, and staff and to give the youth the opportunity to regain control of his or her behavior and emotions by providing definite external boundaries and decreased stimulation.

(m) "Youth" means any person under the age of 18 years, without regard to sex or emancipation.

(n) "Youth in need of care" means a youth as defined in 41-3-102, MCA.

(o) "Youth in need of supervision" means a youth as defined in 41-5-103(14), MCA.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE III YOUTH DETENTION FACILITY LICENSES (1) The department shall issue a one-year youth detention facility license to any license applicant which meets the requirements established by these rules, as determined by the department after a licensing study.

(a) The department shall renew the license annually on the expiration date of the previous year's license if:

(i) the facility makes written application for renewal at least 60 days prior to the expiration date of its current license; and

(ii) the facility continues to meet the licensing requirements established by these rules, as determined by the department after a relicensing study.

(b) If a facility makes timely application for renewal of a license, but the department fails to complete the relicensing study before the expiration date of the previous year's license, the previous year's license will continue in effect for the time necessary for the department to complete the relicensing study.

(2) The department may in its discretion issue a provisional license for any period up to 6 months to any license applicant which:

(a) has met all applicable requirements for fire safety; and

(b) has agreed in writing to comply fully with all requirements established by these rules within the time period covered by the provisional license.

(i) The department may in its discretion renew a provisional license if the license applicant shows good cause for failure to comply fully with all of the requirements within the time period covered by the prior provisional license, but the total time period covered by the initial provisional license and renewals may not exceed one year.

(3) The facility shall not detain more youths at one time than the number specified on the license.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE IV YOUTH DETENTION FACILITY, LICENSING PROCEDURES (1) Application for a youth detention facility license must be made on an application form provided by the department.

(2) Upon receipt of an application for license or renewal of license, the department shall conduct a licensing study to determine if the applicant meets applicable licensing requirements established in these rules.

(3) If the department determines that an application or accompanying information is incomplete or erroneous, it will notify the applicant of the specific deficiencies or errors, and the applicant shall submit the required or corrected information within 60 days. The department shall not issue a license or renew a license until it receives all required or corrected information.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE V YOUTH DETENTION FACILITY, LICENSE REVOCATION AND DENIAL (1) The department, after written notice to the applicant or licensee, may deny, suspend, restrict, revoke or reduce to provisional status a license upon finding that the facility:

(a) is not in compliance with fire safety requirements;

(b) is not in substantial compliance with any other licensing requirements established by these rules;

(c) has made any misrepresentations to the department, either negligent or intentional, regarding any aspect of its operations or facility;

(d) has failed to take corrective action when a staff member has been found guilty of a criminal offense;

(e) failed to report an incident of abuse or neglect within the facility to the county attorney, the department and its local affiliate as required by section 41-3-201, MCA; or

(f) failed to comply with its plan to correct deficiencies identified by an inspection as required in Rule IX.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE VI YOUTH DETENTION FACILITY, HEARING (1) Any person dissatisfied because of the department's action refusing to grant a license, suspending a license, reducing to provisional license or revoking a license may request a hearing as provided in ARM 11.2.203.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE VII YOUTH DETENTION FACILITY, CONFIDENTIALITY OF RECORDS AND INFORMATION (1) All records maintained by a facility and all personal information made available to a facility pertaining to an individual youth must be kept confidential and may be released only to the following:

(a) the youth court and its professional staff;

(b) representatives of any agency providing supervision and having legal custody of a youth;

(c) any other person, by order of the court, having a legitimate interest in the case or in the work of the court;

(d) any court and its probation and other professional staff or the attorney for a youth who had been a party to proceedings in the youth court;

(e) the county attorney; and

(f) the youth who is the subject of the report or record, after he has been emancipated or reaches the age of majority.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE VIII YOUTH DETENTION FACILITY, REPORTS (1) The facility shall agree to submit to the department, upon its request, any reports required by federal or state law or regulation.

(2) The facility shall report any of the following changes to the department prior to the effective date of the change:

(a) a change of administrator;

(b) a change in location;

(c) a change in the name of the agency, program or facility; or

(d) a significant change in the organization, administration, purposes, programs, or services.

(3) Staff members shall report within 24 hours any incidents of known or suspected child abuse or neglect to the local and state department of family services office and to the county attorney in the county where the facility is located.

(a) Each facility shall require each staff member to read and sign a statement which outlines the state law on child abuse and neglect and the staff member's responsibility

to report all incidents of child abuse or neglect according to state law.

(b) Each facility shall cooperate fully in the investigation of any incident of suspected child abuse or neglect.

(c) Each facility shall have written procedures for handling any incident of suspected child abuse including:

(i) a procedure for ensuring that the staff member involved does not have contact with the youth involved until the investigation is completed; and

(ii) a procedure for disciplining any staff member involved in an incident of child abuse.

(d) At the discretion of the department and for protection of the youths in detention, the department may request that the staff member alleged to have committed sexual or physical abuse be moved immediately upon receipt of the allegation to a position where that person does not have contact with youths.

(4) Any serious incident involving a youth shall be reported within the next working day to the parent, the juvenile probation officer and the licensing worker.

(a) A "serious incident" means suicide attempts, use of excessive physical force by staff, sexual assault by another youth or staff, injury to a youth which requires hospitalization, or the death of a youth.

(b) The facility shall complete a written incident report concerning any serious incident involving a youth. The report shall include the date and time of the incident, the youth involved, the nature of the incident, description of the incident and the circumstances surrounding it. A copy of the report shall be filed at the facility and a copy shall be sent to the licensing worker.

(5) Escapes shall be reported immediately to the police and to the youth's probation officer.

(6) Disasters or emergencies which require closure of the facility shall be reported to the licensing worker within the next working day.

(7) The current youth detention facility license shall be publicly displayed at the facility.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE IX YOUTH DETENTION FACILITY, ADMINISTRATION

(1) Each facility shall be purchased or leased by or under contract with one or more counties.

(a) The facility shall ensure that the county commissioners shall provide for inspection of any facility every 3 months. Inspection must include but is not limited to health, fire safety, security, rehabilitation programs, recreation, treatment of youths, and personnel training.

(b) The facility shall ensure that the judge of the youth court for the county shall inspect any facility at least once a year.

(c) Within 30 days of an inspection, the facility shall develop a plan to correct any deficiencies identified by the inspection.

(i) The facility shall notify the department of the results of an inspection, its plan to correct any deficiencies identified, and its time frame for correcting deficiencies.

(2) The facility shall not be used for the confinement of adults.

(3) The facility must have written policies and procedures which describe the purpose, program and services offered by the facility. Such written policies and procedures shall include: admissions, medical care, emergencies, discipline, recreation, food, clothing, visiting, transportation, mail, religious services, grievances, discharge, access by media, fiscal management, an organizational chart, and personnel consistent with these rules.

(a) The policies and procedures shall be explained to each new staff person prior to his having direct contact with youth in the facility.

(b) A copy of the policies and procedures shall be made available to all employees at the time of their employment and be continually available thereafter.

(c) The policies and procedures shall be developed in consultation with employees, county commissioners, law enforcement, youth court personnel and other relevant agencies or persons.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE X YOUTH DETENTION FACILITY, FISCAL MANAGEMENT (1) The facility or county commissioners shall have written procedures which govern fiscal management consistent with accepted accounting practices.

(2) All financial records shall be retained for three years and subject to audit in accordance with accepted auditing procedures.

(a) A copy of any audit of the facility performed shall be forwarded to the department.

(3) The facility shall have adequate fire and public liability insurance coverage.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XI YOUTH DETENTION FACILITY, PERSONNEL (1) The facility shall have written personnel policies and procedures

which shall include: job qualifications, descriptions and responsibilities; employee grievance procedure; employee evaluations; recordkeeping; leave; work hours; salary; disciplinary procedures; staff training; equal opportunity employment provisions; retirement; resignation and termination.

(a) The personnel policies and procedures shall be explained fully to each employee prior to employment.

(b) The facility shall maintain a current and accurate personnel record for each employee. The record shall include: qualifications, references, dates and terms of employment, annual written performance evaluations, training record, letters of reprimand, and termination information.

(2) Each facility shall have a director to whom all employees or units are responsible and who shall have responsibility and accountability for the day to day operations of the facility. The director's duties include supervision of the care and services provided to the youths, personnel matters, fiscal procedures and any other specific matters determined by the county commissioners or the board of directors of the facility.

(a) A director must meet the following qualifications:

(i) have a bachelor's degree supplemented with experience in an area relating to professional child care or appropriate graduate education or an equivalent combination of education and experience;

(ii) have a thorough understanding of the purposes and programs of youth detention facilities in general;

(iii) have general leadership, administrative, and management ability, including the ability to supervise youth care personnel; and

(iv) have a thorough working knowledge of the youth court act and related laws of Montana regarding law enforcement, apprehension and detention of youth and the youth's rights under the law.

(3) The facility shall employ, train and supervise an adequate number of staff necessary to provide continuous awake supervision of youths and at least one immediately available staff member of the same sex as the youths.

(a) The minimum ratio of staff on duty to numbers of youth shall be:

(i) 1:6 from 7:00 a.m. to 11:00 p.m.; and

(ii) 1:12 from 11:00 p.m. to 7:00 a.m.

(b) At any time when youth are being detained and there is only one awake staff person, there shall be immediately available backup staff.

(c) No staff member or other person having direct contact with the youth in the facility shall conduct themselves in a manner which poses any potential threat to the health, safety and well-being of the youth in detention.

(d) The facility shall investigate the personal and past employment references of all staff prior to hiring.

(e) All youth care staff facility must meet the following general qualifications on their first day of employment:

(i) be at least 18 years of age;

(ii) be of good character;

(iii) be physically, mentally and emotionally competent to care for youth;

(iv) be in good general health;

(v) understand the purpose of the youth detention facility and be willing to carry out its policies and programs; and

(vi) be certified in cardiopulmonary resuscitation.

(f) Each youth care staff member must complete an initial 16 hours of orientation and at least 40 hours of in-service training each year, in an area directly related to the staff member's duties.

(i) Training must be documented in each staff member's personnel file.

(ii) The training may include formal course work, workshop attendance, or the reading of appropriate literature and shall include instruction on the Youth Court Act.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XII YOUTH DETENTION FACILITY, ENVIRONMENT (1) The facility shall provide an adequate and potable supply of water. The facility shall:

(a) connect to a public water supply system approved by department of health and environmental sciences; or

(b) for a facility utilizing a nonpublic water system, the department hereby adopts and incorporates by reference the following circulars setting forth relevant water quality standards prepared by and available from the Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana:

(i) circular #11 for springs;

(ii) circular #12 for water wells; and

(iii) circular #17 for cisterns.

(c) If a non-public water supply is used, the facility shall submit a water sample at least quarterly to a laboratory licensed by the department of health and environmental sciences for a determination of microbiological contaminants.

(d) The water system shall be repaired or replaced when the supply:

(i) contains unacceptable levels of microbiological contaminants; or

(ii) does not have the capacity to provide adequate water for drinking, cooking, personal hygiene, laundry, and water carried waste disposal.

(2) To insure sewage is safely disposed of, the facility shall either:

(a) connect to a public sewer approved by the department of health and environmental sciences; or

(b) if a non-public system is utilized, the department hereby adopts and incorporates by reference bulletin 332, which sets forth standards for sewage disposal. A copy of bulletin 332 may be obtained from the Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana.

(c) The sewage system shall be repaired or replaced whenever:

(i) it fails to accept sewage at the rate of application;

(ii) seepage of effluent from or ponding of effluent on or around the system occurs;

(iii) contamination of a potable water supply or state waters is traced to the system; or

(iv) a mechanical failure occurs.

(3) The facility shall:

(a) store all solid waste in containers which have lids and are corrosion-resistant, flytight, watertight, and rodent-proof;

(b) clean all solid waste containers frequently; and

(c) transport or utilize a private or municipal hauler to transport the solid waste at least weekly to a landfill site approved by the department of health and environmental sciences in a covered vehicle or covered containers.

(4) A facility shall comply with the following structural requirements:

(a) All rooms and hallways shall have adequate lighting.

(b) Adequate space shall be provided for all phases of daily living, including recreation, privacy, group activities and visits.

(c) Youth shall have indoor areas of at least 40 square feet of floor space per youth for quiet, reading, study, relaxing, and recreation. Halls, kitchens, and any rooms not used by youths shall not be included in the minimum space requirement.

(d) Sleeping areas shall contain at least 50 square feet of floor space per youth and bedrooms for single occupancy must have at least 80 square feet.

(5) Bath areas shall be cleaned thoroughly with a germicidal cleaner at least weekly and more often if needed.

(6) Other areas shall be cleaned on a regular basis.

(7) There shall be hot and cold water available in the facility. Water temperature for hot water must be limited to 120° or below.

(8) The facility and all areas used by youth shall have an adequate ventilation system.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XIII YOUTH DETENTION FACILITY, FIRE SAFETY (1) The department hereby adopts and incorporates by reference group I division 3 of the uniform building code which sets forth the fire safety regulations which shall apply to newly constructed facilities and which may be obtained from the Building Codes Division, Department of Commerce, 1424 Ninth Avenue, Helena, Montana 59620.

(2) Smoke detectors approved by a recognized testing laboratory shall be located at stairways and in any areas requiring separation as set forth in the uniform building codes.

(3) A fire extinguisher approved by a recognized testing laboratory with a minimum rating of 2A10BC shall be readily accessible to the kitchen area.

(4) The date and signature of the person checking both the batteries in the smoke detectors and the fire extinguisher shall be recorded and filed at the facility.

(a) Smoke detector batteries shall be checked by the facility at least once each month and the batteries replaced at least once each year.

(b) Fire extinguishers shall be checked by the facility at least quarterly.

(5) The staff shall be trained in the proper use of the fire extinguisher and the training recorded in the files.

(6) Staff and youths shall be instructed upon arrival in the procedure for evacuation in case of fire. The procedure shall be posted in a conspicuous place in the facility.

(7) Paint, flammable liquids and other combustible material shall be kept in locked storage away from heat sources or in outbuildings not used by the youth.

(8) Polyurethane foam mattresses or furniture shall not be used in the facility.

(9) The facility shall be equipped with a fire alarm system.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XIV YOUTH DETENTION FACILITY, ADMISSION (1) The facility shall obtain in writing the youth court's order for the detention of a youth.

(a) A youth who has been placed in detention shall not be held longer than 24 hours, excluding weekends and legal holidays, unless a hearing has been held by the court to determine whether there is probable cause to believe the youth is a delinquent youth or a youth in need of supervision.

(2) The facility shall develop written policy and procedures governing the admission and orientation of admitted youth which includes the following requirements:

(a) A staff member of each sex shall be available or on call at all times to receive youth for detention;

(b) Staff members accepting youth for detention must determine that each youth is being held under proper legal authority, and the identity of the youth being admitted must be verified as soon as possible;

(c) A pat down search of the youth shall be performed to prevent the introduction of weapons or contraband.

(i) All pat down searches shall be conducted by a person of the same sex as the youth being searched.

(ii) A strip search or body cavity search shall be performed only in accordance with Rule XVII(12).

(iii) All personal clothing shall be carefully searched for contraband.

(d) The youth's personal property, if removed, shall be properly itemized, signed for by the youth and staff, and held safely. The youth shall be advised that all personal belongings will be returned to him when he leaves, with the exception of illegal contraband or evidence.

(e) Each youth shall be given a shower and clean under and outer clothing, a clean towel, clean bedding, and necessary toiletry and personal hygiene articles, including soap, toothbrush, toothpaste, comb and the youth's own clothing shall be laundered if needed and safely stored.

(f) Blankets shall be provided in sufficient number to maintain warmth under prevailing climactic conditions.

(g) The youth's physical and emotional condition shall be noted and recorded, along with identifying data.

(i) The admitting staff member shall inquire into and examine the youth for any obvious injuries, medical tags, rashes, unusual cough or high temperature and determine, by questioning, if there are medical problems, including drug or alcohol abuse, asthma, diabetes, epilepsy, mental distress or other conditions, which require medical attention.

(ii) Any youth showing signs of or reporting physical or mental distress or drug or alcohol abuse shall be referred to health care personnel, as appropriate.

(iii) Any prescription medication in the possession of a youth at admission shall be labeled for identification and determination shall be made at the earliest possible time regarding the need for its continued use by contacting the prescribing health care professional.

(iv) Any seriously injured or seriously ill youth shall not be admitted to the facility until a medical examination has been conducted by a licensed physician. A written record of the diagnosis, treatment, and medication prescribed shall be placed in the youth's detention file.

(h) Treatment, as directed by medical personnel, shall be initiated immediately when body pests are detected.

(i) Staff shall contact parents or other responsible persons as soon as possible following the detaining of the youth. Verification of such contacts or attempted contacts shall be recorded in writing.

(j) If a youth is hungry at admission, he shall be given sufficient food to sustain the youth until the next regular meal.

(k) After a youth has been admitted, showered, issued clothing and other essentials, he shall receive orientation on the policies and procedures of the facility before he is isolated in a room.

(i) The youth shall be given a copy of the printed facility rules and the youth's rights. Staff shall explain or clarify the contents of the material, especially for youth who do not have adequate reading or comprehension skills.

(ii) Completion of orientation shall be documented by a statement that is signed and dated by the youth.

(l) A notice of facility rules and youth's rights shall be posted in the facility in an area where the youths can view it.

(m) A record for each youth shall be established at admission and shall be maintained throughout the period of detention.

(n) Facility policy and procedure shall grant all youth the right to make at least two local or long-distance telephone calls to family members, attorneys or other approved individuals at sometime during the admission process.

(i) If the youth is unable to complete the call without assistance, a staff member shall provide assistance or, if requested, shall make the call for the youth.

(ii) These phone calls shall not be electronically monitored.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-303, 41-5-802 and 41-5-809, MCA

RULE XV YOUTH DETENTION FACILITY, SUPERVISION OF MEDICATION (1) The facility shall have written policies and procedures governing the use and the supervision of prescription medication to youth. These policies and procedures shall be disseminated to all persons responsible for supervising medication. These procedures shall provide for:

(a) documenting the supervision of medication and medication errors and drug reactions;

(b) notification of the attending physician in cases of medication errors and/or drug reactions; and

(c) maintaining a cumulative record of all medication dispensed to youth including:

(i) the name of the youth;

(ii) the type and usage of medication;

(iii) the condition for which the medication is prescribed;

(iv) the time and date the medication was taken by the youth;

(v) the name of the supervising person; and

(vi) the name of the prescribing physician.

(2) If the decision is made to reconsider the medication needs of the youth, the prescribing physician shall be immediately contacted and necessary arrangements shall be made by the facility for a re-evaluation by a physician of the youth's medication needs.

(3) The facility shall provide a copy of the youth's medication schedule to all staff members responsible for supervising the medication of the youth. The schedule shall also be placed in the youth's detention record(s).

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XVI YOUTH DETENTION FACILITY, COMMUNICATION

(1) The facility shall have written policies and procedures governing correspondence. The policies and procedures shall include the following:

(a) There shall be no limitations on the volume of correspondence a youth may receive or send.

(b) If requested, the facility administration shall provide postage for the mailing of a maximum of two letters per week for each youth.

(c) Appropriate stationery, envelopes and a writing implement shall be supplied.

(d) Outgoing correspondence shall not be opened, inspected, read or censored.

(e) Incoming correspondence may be opened and inspected for cash, checks, money orders or contraband but only in the presence of the youth to whom it is addressed.

(i) All cash, checks, and money orders sent to youth shall be documented and retained for the youth in accordance with the written procedures of the facility.

(f) Incoming correspondence, other than privileged correspondence, shall only be read if there are identifiable and articulate facts showing clear and convincing evidence that the correspondence contains plans for sending contraband into or out of the facility, plans for criminal activity including escape, or information which would create a clear and present danger to the security of the facility.

(i) Privileged correspondence is correspondence between youths and attorneys, courts, government officials, officials of the facility or probation officers.

(ii) The reading shall be in the presence of the youth after he has been advised of the reasons for reading.

(iii) If the youth wishes to contest the decision to read his correspondence, he may appeal it to the director of the facility and the reading will be held in abeyance until the review by the director.

(g) Youth shall not be denied mail rights for disciplinary purposes.

(2) The facility shall adopt policies and procedures governing visitation including the following requirements:

(a) The facility shall provide visiting facilities to permit informal communication, including opportunity for physical contact.

(b) The use of barriers or devices to prevent physical contact between visitors and youth is prohibited unless there is a clear and present danger of physical injury or introduction of contraband.

(c) All visitors must register their name and relationship to youth.

(d) Visitors must submit packages, purses, handbags and briefcases for inspection by facility personnel.

(e) Visitors must submit to a frisk and pat-down search by an employee who is of the same sex.

(i) In the event that there is probable cause to believe that weapons or contraband will be found by more extensive search, admission to the facility shall be denied.

(ii) A "search notice" sign which advises visitors of the foregoing provisions must be conspicuously posted and pointed out to all visitors.

(f) Youth shall be searched after each contact visit.

(g) The visiting area shall be thoroughly searched before and after each visiting period.

(h) During a visit there shall be a system for residents and staff to communicate with one another at all times.

(3) The facility shall adopt policies and procedures governing telephone use which shall include the following:

(a) The facility must be equipped with a telephone.

(b) Telephone numbers of the hospital, police department, fire department, ambulance, and poison control center must be posted by each telephone.

(c) Telephone number of the parent(s) shall be readily available.

(d) Youths must be permitted reasonable and equitable access to the telephone according to the facility's policy which may establish hours of availability and time limits.

(i) Youths shall have the right to call attorneys at all reasonable times at facility expense. These telephone calls shall be confidential.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XVII YOUTH DETENTION FACILITY, SECURITY (1) The facility shall have written policies and procedures for security and control including detailed instructions on:

(a) searches of residents, their rooms or property;

(b) control of contraband;

(c) population counts;

(d) key, tool or utensil control;

(e) visitation;
(f) emergency procedures;
(g) staffing; and
(h) locking of doors.

(2) Staff members must control security measures, and shall not permit youth to assist with these security measures.

(3) Procedures shall provide for regular and frequent inspections and maintenance of all security devices, locks and doors, to ensure their proper working order and to detect escape efforts. Any damaged or non-functioning security equipment must be promptly repaired.

(4) Procedures shall provide that, except in emergency situations, weapons including those of law enforcement personnel, must not be permitted beyond a designated area to which detained youth have no access.

(5) Procedures shall govern the control and use of keys, to include:

(a) Youth shall not be permitted to handle, use or have detention keys in their possession.

(b) An inventory of all keys shall be made each day.

(c) Detention keys shall be stored in a secure key locker when not in use.

(6) Procedures shall govern the control and use of tools and culinary equipment, to include:

(a) After use, tools and equipment shall be accounted for by the staff member on duty and returned to their proper storage space.

(b) Eating utensils shall be accounted for after each meal and returned to the kitchen.

(c) Kitchen cutlery shall be inventoried daily.

(7) Procedures shall provide that when it is necessary for outside maintenance men to work in a detention living area, youth must be removed from the area and the living area carefully searched before youth are re-admitted. Maintenance tools must be carefully checked into and out of the detention area.

(8) Procedures shall govern the control and use of all flammable, toxic and caustic materials.

(9) Procedures shall provide for reporting escapes or runaways. Such procedures shall be reviewed at least annually and updated as necessary.

(10) Procedures shall provide for a plan to be followed in emergency situations (e.g., fire, disturbance, taking of hostages) which shall be made available to all personnel. These plans shall be reviewed annually and updated as necessary.

(11) Procedures shall provide for regular searches of the facility, the youth confined, and any vehicles which are used to transport youth, however the searches shall:

(a) be no more frequent than necessary to control contraband;

(b) avoid undue force, embarrassment or indignity to the individual.

(12) With the exception of visual inspection of the mouth, no search of residents shall be conducted by a person of the opposite sex.

(a) Strip searches shall be performed only when there is probable cause to believe that weapons or contraband will be found.

(b) Body cavity searches shall be performed only when there is probable cause to believe that weapons or contraband will be found.

(i) With the exception of the mouth, during all body cavity searches performed visually, at least two personnel of the same sex as the youth being examined shall be present.

(ii) With the exception of the mouth, all body cavity searches performed manually shall be done by a doctor or a nurse. At least one member of the examining team must be a member of the same sex as the youth being examined.

(13) Youth permitted to leave the facility or grounds temporarily shall be searched upon re-entry.

(a) The search shall be limited to the scope necessary to uncover items to which the youth had access while away from the facility.

(b) When the youth's absence from the facility is the result of voluntary participation in an outside program, the youth shall be given prior notice that such participation will subject the youth to routine searches upon re-entering the facility.

(14) Material used for security purposes shall be designed so the material will not cause injury to youth or staff.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XVIII YOUTH DETENTION FACILITY, RIGHTS OF YOUTH

(1) The facility shall implement the following policies and procedures governing the rights of youths which shall include:

(a) The facility's written grievance procedure for youths and the youth's right to make requests or complaints to the facility's administration without censorship.

(b) No youth shall be subjected to medical or pharmaceutical testing for experimental or research purposes or the use of chemical restraint.

(c) The youth shall have the right to determine the length and style of their hair, including facial hair.

(d) The youth's right to be separated from the general population.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XIX YOUTH DETENTION FACILITY, DISCIPLINE (1) The facility shall use appropriate forms of discipline but must not use any form of corporal punishment or any other technique which is humiliating, shaming or otherwise damaging to youths.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XX NUTRITION (1) Youths shall be given three well-balanced meals daily, appropriate to the nutritional needs of the youth, and including the four basic food group requirements.

(2) Special diets shall be provided for youths as ordered in writing by a physician. Such orders shall be kept on file at the facility.

(3) Copies of menus as served shall be kept on file for one month and shall be available for inspection.

(4) All food shall be transported, stored, covered, prepared and served in a sanitary manner.

(5) Use of home canned products, other than jams, jellies and fruits is prohibited.

(6) Hands shall be washed with warm water and soap before handling the food.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XXI YOUTH DETENTION FACILITY, HOUSEKEEPING (1) The facility may require the youth to perform housekeeping functions, such as necessary housekeeping in his own room and assisting with general housekeeping duties in the living unit except that:

(a) Youth shall not have primary responsibility for any phase of operation such as cooking, laundry, housekeeping, or maintenance work which is the duty of regular staff.

(b) Assignments shall be made in relation to the age and abilities of the youth.

(c) The work does not have as its primary purpose monetary benefit to the facility.

(d) Work assignments shall not include areas to which the youth do not have regular access.

(e) Staff are responsible for the safety of youths while they are near equipment and machinery.

(f) Youth shall not be permitted to perform any work prohibited by state and federal regulations and statutes pertaining to child labor.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XXII YOUTH DETENTION FACILITY, SERVICES AND PROGRAM (1) There shall be a range of resources to meet the needs of youth, including individual and family counseling and community services.

(a) Youths shall be afforded access to mental health counseling and crisis intervention services in accordance with their needs.

(b) Psychiatric, psychological, medical and other diagnostic services, as determined by the youth court, shall be available to every youth either provided directly by the facility or by contracting with another county or agency which provides such services.

(c) Other professional services shall be provided as needed.

(2) The facility shall have a recreational program.

(a) There shall be opportunities for exercise and leisure-time activity, indoors and outdoors. All youth shall be permitted and encouraged to participate in supervised outdoor recreation unless restricted for health or security reasons.

(b) No youth shall be required or forced to participate in recreational activities.

(c) Exercise areas shall be equipped and used within the limitations of security requirements.

(3) Procedures shall allow youth to participate in religious services and counseling within the facility on a voluntary basis. All youth shall have the opportunity to voluntarily practice their respective religions and to receive visits from representatives of their respective faiths.

(4) The facility shall provide library services which are available to all youth.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XXIII YOUTH DETENTION FACILITY, PASSIVE PHYSICAL RESTRAINT (1) The facility must provide training in passive physical restraint to all staff members who may be required to use passive physical restraint and shall provide at least yearly refresher courses.

(2) Passive physical restraint of a youth may only be used to end a disturbance by the youth that immediately threatens physical injury to the youth, other persons, or property.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XXIV YOUTH DETENTION FACILITY, TEMPORARY LOCKUP/SECURE OBSERVATION (1) Temporary lockup/secure observation may be used as a means of intervention only when the

youth is in danger of harming himself, others, or property and less restrictive alternatives have been attempted and failed to control the youth.

(2) Temporary lockup/secure observation shall be used only for the time needed to change the behavior necessitating its use and shall not be used as punishment.

(3) Each facility which utilizes temporary lockup/secure observation shall have a written statement of its policies which describe, at a minimum:

(a) the criteria for use of temporary lockup/secure observation;

(b) the procedure for its use;

(c) emergency procedures for special circumstances occurring while the youth is in temporary lockup/secure observation (i.e., fire, internal or external disaster, etc.);

(d) the method for youth to express grievances regarding the use of temporary lockup/secure observation.

(4) The youth shall be informed of the reason for temporary lockup/secure observation at the time of the youth's placement in it.

(5) If soundproof, the room shall have an intercom system which shall be activated when in use.

(6) Placement in temporary lockup/secure observation may not exceed one (1) hour unless specifically authorized by the director, shift manager or other designated person in charge. There shall be a review of the continuing need for temporary lockup/secure observation at least every hour.

(a) A youth who requires temporary lockup/secure observation in excess of twenty-four (24) hours shall be evaluated by a mental health professional.

(7) A staff member shall continuously monitor the youth placed in temporary lockup/secure observation by visual or auditory means and shall remain within twenty (20) feet of the room. If continuous monitoring is by auditory means, the staff member shall visually check on the youth at least every ten (10) minutes.

(8) Upon the placement of a youth in temporary lockup/secure observation, the following minimum items shall be recorded, updated and maintained:

(a) a written report which states the youth's name, date, time of placement, staff member initiating the placement, staff member authorizing placement and narrative describing the following: the precipitating event, youth's behavior before placement, and actions taken by staff of a less restrictive nature in an attempt to control, calm or contain the youth;

(b) written notation of visual checks at least every ten (10) minutes and notation of behavior and time occurring;

(c) notation regarding opportunity to use toilet facilities once per hour;

(d) notations regarding when the youth had opportunity to exercise;

(e) notation of medications administered, time given and staff administering;

(f) notation of all staff contact including a description of the resolution of the placement incident which results in the termination of temporary lockup/secure observation.

(9) Staff of the facility shall be trained in the use of temporary lockup/secure observation and its effects upon youth.

(10) Records of the use of temporary lockup/secure observation, the youth's records, staff records and the room shall be made available to the department for inspection.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XXV YOUTH DETENTION FACILITY, MECHANICAL RESTRAINT (1) A facility may use handcuffs or soft cuffs when transporting a youth to or from the facility.

(2) Any other use of mechanical restraint is prohibited.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

RULE XXVI YOUTH DETENTION FACILITY, RELEASE, TRANSFER AND TRANSPORTATION (1) A youth's release from or continuance in detention shall be determined by order of the youth court or by authority delegated by the court.

(a) The release from detention shall be in writing and on file at the facility and the youth court.

(b) If a release is made by phone, it shall be recorded in writing.

(2) Procedures for the authorized release of youths shall include:

(a) verification of identity;

(b) verification of release papers;

(c) completion of release arrangements, including the person or agency to whom the youth is to be released;

(d) recording of the date, time, and authority;

(e) return of personal property and funds; and

(f) instruction on forwarding of mail.

(3) Transfers to other facilities shall be by youth court order.

(4) Personal property of youth being transferred to another agency shall be turned over to the transporting officer in the presence of the youth, and the signature of the transporting officer obtained.

(5) Procedures shall address and govern escorted leaves into the community.

(6) The facility shall have policy and procedures for transportation of youth which shall include:

(a) The driver of any vehicle transporting youth shall be at least 18 years of age and shall be properly licensed to operate the vehicle.

(b) The driver and vehicle must have adequate insurance coverage for personal liability and property damage.

(c) Youth shall not be transported in the back of a pick-up truck.

(d) Youth shall be secured in a seat belt whenever the vehicle is in motion.

AUTH: Sec. 41-5-809, MCA
IMP: Sec. 41-5-802 and 41-5-809, MCA

3. The 50th Legislature specified upon passage of Senate Bill 226 that the Department of Family Services shall adopt rules concerning licensing procedures for youth detention facilities. The Statement of Intent specifies the rules would govern such matters as "the capacity of the facility, its location, design, construction, equipment and operation, fire and safety precautions, medical services, qualifications and number of personnel, and the quality of services". Additionally, the Statement of Intent specifies that licensing procedures such as notification of deficiencies, cure of deficiencies, state inspections and enforcement of standards would be dealt with by rules. These rules are necessary to establish licensing procedures for youth detention facilities as mandated by 41-5-809.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Family Services, P.O. Box 8005, Helena, Montana 59604, no later than December 11, 1987.

5. Randi M. Hood, Legal Counsel for the Department of Family Services has been designated to preside over and conduct the hearing.

Director, Family Services

Certified to the Secretary of State November 2, 1987.

BEFORE THE DEPAPTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the Matter of the Adoption of Rules Providing Exemptions from the Seatbelt Use Act.	)))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION OF RULES PROVIDING EXEMPTION FROM THE SEATBELT USE ACT

To All Interested Persons

1. On December 4, 1987, at 8:30 a.m., a public hearing will be held in the auditorium of the Scott Hart Building, 303 Roberts, Helena, Montana, to consider the adoption of rules providing for exemptions from the Seatbelt Use Act.

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

3. The proposed rules provide as follows:

RULE I EXEMPTIONS FROM SEATBELT LAW (1) The provisions of section 61-13-103(1), MCA, forbidding operation of a motor vehicle unless each occupant of a designated seating position is wearing a seatbelt, do not apply to an occupant of a motor vehicle who must in the course of his or her official job duties make such frequent stops that the public interest is best served by allowing an exemption. An occupant of a motor vehicle meets this requirement for exemption if, while performing his or her official job duties, the occupant:

(a) normally and as a matter of routine operates or rides in a motor vehicle;

(b) normally and as a matter of routine makes ten or more stops per mile;

(c) must exit the vehicle at the required stops; and

(d) carries an exemption certificate issued by the department.

(2) The following occupants of a motor vehicle are exempt from the provisions of section 61-13-103(1), MCA, if they are engaged in their official duties and are carrying an exemption certificate:

(a) persons providing garbage service;

(b) persons delivering newspapers house-to-house;

(c) persons making rural mail delivery.

AUTH: 61-13-103(3), MCA IMP: 61-13-103(2)(f), MCA

RULE II APPLICATION FOR AND USE OF EXEMPTION CERTIFICATE (1) Persons who qualify for an exemption under Rule I may apply for an exemption certificate from the Department of Justice, Motor Vehicle Division, 303 Roberts, Helena, Montana. Application is made by completing and submitting an application on a form furnished by the department.

(2) If, upon review of the completed application, the department is satisfied that the applicant is eligible for an exemption, the department will issue an exemption certificate to the applicant.

(3) The exemption certificate must be carried in the motor vehicle being operated for official duties as proof of an

exemption and the certificate is valid only while the exempted person is engaged in official duties.

(4) The exemption certificate must be exhibited upon demand of a judge or a peace officer.

(5) An exemption certificate is valid for two years from the date of issuance. An application for renewal must be filed within 30 days after expiration or a completely new application for exemption will be required.

(6) The department must be notified within 30 days of any change in information upon which an exemption is based.

AUTH: 61-3-103(3), MCA IMP: 61-3-103(2)(f), MCA

4. The proposed rules are necessary to enable the department to provide reasonable, consistent, and fair exemptions from the Seatbelt Use Act for occupants of motor vehicles who make such frequent stops with motor vehicles in their official job duties that exemptions are warranted.

5. Interested persons may submit their data, views, or arguments concerning the proposed rule in writing to Kathy Seeley, Assistant Attorney General, 215 North Sanders, Helena, Montana 59620-1401, no later than December 12, 1987.

6. William Hutchison, Assistant Attorney General, has been designated to preside over and conduct the hearing.

MIKE GREELY
Attorney General

Certified to the Secretary of State November 2, 1987.

BEFORE THE MONTANA HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

In the matter of application of the Missoula Community Hospital, a Montana non-profit corporation, for a ruling under §49-2-401, MCA (1987), as to whether it may employ only males as orderlies.	) 8810003410)) NOTICE OF HEARING))

TO: The Missoula Community Hospital and all interested persons:

PLEASE TAKE NOTICE that on January 13, 1988 at 10:00 AM, at 1236 Sixth Avenue, Helena, Montana, the petition of the Missoula Community Hospital for a declaratory ruling that it may employ males only as orderlies, when one of their functions is to perform male bladder catherizations, without violating §49-2-303, MCA will be heard. You have the right to be represented by counsel at the hearing. A copy of the petition is attached to this notice. Janice Frankino Doggett, hearing examiner for the Commission will preside over and conduct the hearing.

Any person or organization may petition to intervene in this proceeding by petitioning to intervene and making a showing of their interest, for the purpose of generally addressing the application or expressing a particular point of view concerning it.

A prehearing conference on the application to settle hearing procedure will be conducted on January 5, 1988 at 10:00 AM.

DATED: November 2, 1987.

MONTANA HUMAN RIGHTS COMMISSION
MARGERY H. BROWN, CHAIR

By: Anne L. MacIntyre
ANNE L. MacINTYRE
ADMINISTRATOR
HUMAN RIGHTS DIVISION

BEFORE THE MONTANA HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

In the matter of application of the Missoula Community Hospital, a Montana non-profit corporation, for a ruling under §49-2-401, MCA (1987), as to whether it may employ only males as orderlies.	)	8810003410 PETITION FOR DECLARATORY RULING

1. Petitioner is Missoula Community Hospital, a Montana non-profit corporation doing business at 2827 Fort Missoula Road, Missoula, Montana as an acute care hospital.

2. Petitioner is one of two acute care hospitals located in Missoula, Montana serving a substantial portion of Western Montana. Twenty-four (24) of petitioner's one hundred fifteen (115) licensed beds are designated to constitute the "Special Care Unit" (hereinafter referred to as SCU). Patients requiring acute care as a result of spinal cord and brain stem injuries in addition to other broad categories of disability receive care and rehabilitation services in this unit.

3. Petitioner's nursing staff is composed principally of registered nurses (hereinafter referred to as L.P.N.s) utilized to supplement that care. In addition, attached to the SCU, Petitioner utilizes orderlies for the purpose of assisting nurses, and in particular for the purpose of accomplishing heavy lifting which nurses might deem themselves unable to safely accomplish, and bladder catheterization of male patients when health care considerations so require.

Hospital does not discriminate on any basis in the selection of R.N.s and L.P.N.s. However, there are few male R.N.s and L.P.N.s available in the labor pool from which Petitioner draws applicants for employment and therefore the R.N. and L.P.N. population at Missoula Community Hospital has historically been predominantly female.

R.N.s and L.P.N.s routinely perform most bladder catheterizations upon both male and female patients. However, in many cases the physicians and nursing staff deem it medically necessary for male attendants to perform male bladder catheterizations. In some of these selected cases, the patient's injury status is such that bladder catheterization performed by a female nurse might provoke major sexual arousal in the patient which the medical staff deems deleterious to the patient's recovery process and potentially harmful to the nurse. In other cases where selected injured patients are cognitively intact the medical staff often feels that their emotional well-being is better served by assistance from a male orderly.

There are insufficient male nurses on the staff to enable Petitioner to schedule a male nurse to be available on

each shift to perform male bladder catheterizations. It is not economically feasible to staff each shift with both male and female orderlies. Petitioner, in order to deliver adequate, effective and economical health care to its patients, particularly those patients in SCU, requests that male sex be deemed a bona fide occupational qualification for the position of orderly in its hospital.

Petitioner would be affected by the issuance of a designation of male sex as a bona fide occupational qualification for the position of orderly in a positive way by enabling it to economically and efficiently deliver the best health care to its patients.

4. Petitioner seeks a declaratory ruling pursuant to 49-2-401, MCA and 24.9.249, ARM to provide that the reasonable demands of the position of orderly at Missoula Community Hospital require that the employee be of the male sex.

5. Petitioner requests that the Commission rule that it may limit the position of orderly to males without violation of 49-2-303, MCA.

6. As Petitioner has a larger proportionate number of SCU beds, it knows of no other parties who are directly affected in exactly the same way it is. However, St. Vincent's Hospital in Billings, Great Falls Deaconess Hospital and Columbus Hospital in Great Falls all maintain in-patient acute care rehabilitation beds and may be to a certain extent similarly affected.

Dated this 4th day of September, 1987.

MISSOULA COMMUNITY HOSPITAL
2827 Fort Missoula Road
Missoula, MT 59801

By: s/Grant Winn,
Executive Director

BEFORE THE BOARD OF LAND COMMISSIONERS
AND THE DEPARTMENT OF STATE LANDS
OF THE STATE OF MONTANA

In the Matter of the ADOPTION OF RULES FOR REMINING UNDER THE MONTANA STRIP AND UNDERGROUND MINE RECLAMATION ACT AND AMENDMENT OF ARM 26.4.301.	NOTICE OF PROPOSED ADOPTION OF RULES FOR REMINING AND AMENDMENT OF ARM 26.4.301 NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On January 14, 1988 the Department of State Lands proposes to adopt rules regulating remining under the Montana Strip and Underground Mine Reclamation Act (Title 82, Ch. 4, Part 2, MCA) and to amend ARM 26.4.301.

2. The proposed rules provide as follows:

RULE I REMINING: APPLICABILITY (1) Rules II through X shall apply only to operations which process coal mine waste materials generated from previously mined areas. AUTH, Sec. 82-4-204, 205, MCA; AUTH Extension, Sec. 4, Ch. 70, L. 1987, Eff. 10/1/87; IMP, Sec. 82-4-202, 203, MCA.

RULE II REMINING: GENERAL PERFORMANCE STANDARDS (1) Any remining shall be conducted to maximize the recoverability of the mineral resource, while using the best appropriate technology currently available to improve environmental integrity, maximizing the potential future land use, and assuring that disturbance to the land from future mining operations can be minimized. Remining operations must comply with coal mining application requirements and performance standards that the department determines to be applicable to the specific operation in addition to the requirements of Rules III through X. AUTH, Sec. 82-4-204, 205, MCA; AUTH Extension, Sec. 4, Ch. 70, L. 1987, Eff. 10/1/87; IMP, Sec. 82-4-202, 203, MCA.

RULE III REMINING: SPECIAL APPLICATION REQUIREMENTS (1) Applications for remining must address the requirements of subchapter 3, Rules I through X and must comply with the public notice requirements of ARM 26.4.401.

(2) Each plan submitted with the application must contain descriptions, including appropriate maps and cross sections of the proposed disposal methods, sites, and structures for placing any spoil and waste generated by the process. Each plan must describe the geotechnical investigation, design, construction, operation and maintenance, and removal of any structures and be prepared in accordance with ARM 26.4.520.

(3) Dams impounding coal mine waste must be designed and constructed to comply with ARM 26.4.508 and ARM 26.4.603, and

with the requirements of the mine safety and health administration, 30 CFR 77.216-1 and 2. The plan must also contain the results of geotechnical investigations of the proposed dam or embankment area which were used to determine the structural competence of the foundation which will support the proposed dam or embankment structure and the impounded material. The geotechnical investigation must be planned and supervised by an engineer or an engineering geologist, according to the following:

(a) The number, location, and depth of borings and test pits must be determined using current prudent engineering practice for the size of the dam or embankment, quantity of material to be impounded, and subsurface conditions.

(b) The character of the overburden and bedrock in the impoundment area, the proposed abutment sites, and any adverse geotechnical conditions which may affect the particular dam, embankment, or impoundment site must be considered.

(c) All springs, seepage, and groundwater flow observed or anticipated during wet periods in the area of the proposed dam or embankment must be identified on each plan.

(d) Consideration must be given to the possibility of mudflows, rock-debris falls, or other landslides into the dam or embankment, or impounded material.

(e) If the structure is 20 feet or higher or impounds more than 20 acre-feet, it must meet the requirements of ARM 26.4.639(18). In addition, each stability analysis must include, but not be limited to, strength parameters, pore pressures, and long-term seepage conditions. The plan must also contain a description of each engineering design assumption and calculation with a discussion of each alternative considered in selecting the specific design parameters and construction method.

(4) The combination of principal and emergency spillways must be able to safely pass 100-year 24-hour design precipitation events. Spillways and outlet works must be designed to provide adequate protection against erosion and corrosion. Inlets must be protected against blockage.

(5) Runoff from areas above the dam or embankment that may cause instability or erosion of the impounding structure must be diverted into stabilized diversion channels designed to meet the requirements of ARM 26.4.635.

(6) Impounding structures constructed of or impounding coal mine waste must be designed so that at least 90 percent of the water stored during the design precipitation event can be removed within 10 days.

(7) The application must document the previous mining history of the site. AUTH, Sec. 82-4-204, 205, MCA; AUTH Extension, Sec. 4, Ch. 70, L. 1987, Eff. 10/1/87; IMP, Sec. 82-4-203, 222, MCA.

RULE IV REMINING: COAL MINE WASTE DISPOSAL (1) All coal mine waste must be placed in new or existing disposal sites within a permitted area, which are approved for this

purpose. Coal mine waste must be placed in a controlled manner to:

(a) minimize adverse effects of leachate and surface water runoff on surface and groundwater quality and quantity;

(b) ensure mass stability and prevent mass movement during and after construction;

(c) ensure that the dams and embankments, impoundments, refuse piles and other associated disposal facilities can be reclaimed and revegetated in a manner that is compatible with the natural surroundings and the approved postmining land use;

(d) prevent a public hazard;

(e) prevent combustion;

(f) comply with ARM 26.4.520.

(2) Coal mine waste material from activities outside the permit area may be disposed of within the permit area only if approved by the department. Approval must be based on a showing that such disposal will be in accordance with the standards of this section and ARM 26.4.505 through ARM 26.4.510.

(3) No coal mine waste may be removed from a permitted disposal site without a removal plan approved by the department. Consideration must be given to potential hazards to persons living or working in the vicinity of the permitted area. AUTH, Sec. 82-4-204, 205, MCA; AUTH Extension, Sec. 4, Ch. 70, L. 1987, Eff. 10/1/87; IMP, Sec. 82-4-203,231, MCA.

RULE V REMINING: DISPOSAL DESIGN (1) The dams, embankments, impoundments, refuse piles and associated disposal facilities must be designed using current, prudent engineering practices and must meet, at a minimum, the following design criteria. A qualified registered professional engineer, experienced in the design of similar earth and waste structures, must certify the design of the dams, embankments, impoundments, refuse piles and associated disposal facilities.

(a) The dams, embankments and refuse piles must be designed to attain a long-term static safety factor of 1.5. The foundation and abutments must be stable under all conditions of construction.

(b) If the disposal site contains springs, natural or man-made water sources, or wet weather seeps, the design must be in compliance with ARM 26.4.520.

(c) Uncontrolled surface drainage may not be diverted over the outslope of refuse piles. Runoff from the areas above refuse piles and runoff from refuse piles must be diverted into stabilized diversion channels designed to meet the requirements of ARM 26.4.634 to safely pass runoff from a 100-year 24-hour precipitation event. Runoff from undisturbed areas may be commingled with runoff from the refuse pile.

(d) Underdrains shall comply with the requirements of ARM 26.4.520.

(e) The department may set additional site-specific criteria in order to assure safety and stability.

(f) A qualified registered professional engineer must supervise construction and provide certified as-built designs of the dams, embankments, impoundments, refuse piles and associated disposal facilities to the department within 30 days of construction.

(2) Slope protection must be provided to minimize surface erosion at the site. All disturbed areas, including diversion channels must be revegetated, or otherwise protected and stabilized, upon completion of construction.

(3) All vegetative and organic materials must be removed from the disposal site prior to placement of the coal mine waste if necessary to ensure the stability of the dams, embankments, refuse piles and associated disposal facilities. Soil, if present, must be removed, segregated and stored or redistributed in accordance with ARM 26.4.701 and ARM 26.4.702. If approved by the department, organic material may be used as mulch, or may be included in the soil to control erosion, promote growth of vegetation or to increase the moisture retention of the soil.

(4) The final configuration of the refuse pile must be suitable for the approved postmining land use, and shall comply with the requirements of subchapter 5.

(5) No permanent impoundments may be constructed on the refuse pile. Small depressions may be constructed as needed to retain moisture, minimize erosion, enhance wildlife habitat or assist revegetation, if the stability of the pile is maintained.

(6) The refuse pile must be covered with 8 feet of the best available nontoxic, noncombustible material, in a manner that does not impede drainage from the underdrains. Less than 8 feet may be used if, given the chemical and physical characteristics of the refuse material, the requirements of Rule VIII(2) and ARM 26.4.501, 703, and 724-735 can be met. AUTH, Sec. 82-4-204, 205, MCA; AUTH Extension, Sec. 4, Ch. 70, L. 1987, Eff. 10/1/87; IMP, Sec. 82-4-203, 231, 232, MCA.

RULE VI REMINING: INSPECTIONS OF REFUSE PILES (1) A qualified registered professional engineer, or other qualified professional specialist under the direction of the professional engineer, must inspect the refuse pile during construction. The professional engineer or specialist must be experienced in the construction of similar earth and waste structures. Inspections must comply with the following:

(a) Such inspections must be made at least quarterly throughout construction and additional inspections must be made during critical construction periods if a danger of harm exists to the public health and safety or the environment. Critical construction periods shall include at a minimum:

(i) Preparation of foundations including the removal of all organic material and soil;

(ii) Placement of underdrains and protective filter

systems;

(iii) Installation of final surface drainage systems; and

(iv) Placement and compaction of coal mine waste materials.

(b) Inspections must continue until the refuse pile has been finally graded and revegetated or until a later time as required by the department. AUTH, Sec. 82-4-204, 205, MCA; AUTH Extension, Sec. 4, Ch. 70, L. 1987, Eff. 10/1/87; IMP, Sec. 82-4-203, 231, MCA.

RULE VII REMINING: REFUSE PILE INSPECTION REPORTS (1) The qualified registered professional engineer must provide a certified report to the department promptly after each inspection documenting that the refuse pile has been constructed and maintained as designed and in accordance with the approved plan. The report must address appearances of instability, structural weakness, and other hazardous conditions.

(2) The certified report on the drainage system and protective filters must include color photographs taken during and after construction, but before underdrains are covered with coal mine waste. If the underdrain system is constructed in phases, each phase must be certified separately. The photographs accompanying each certified report must be adequate in size and number, with enough terrain or other physical features of the site shown to provide a relative scale to the photographs and to specifically and clearly identify the site, to document compliance.

(3) A copy of each inspection report must be retained at or near the minesite. AUTH, Sec. 82-4-204, 205, MCA; AUTH Extension, Sec. 4, Ch. 70, L. 1987, Eff. 10/1/87; IMP, Sec. 82-4-203, 231, MCA.

RULE VIII REMINING: RECLAMATION PERFORMANCE STANDARDS (1) Remining must meet the performance standards set forth in subchapters 5 through 8, except as noted below.

(2) Preexisting highwalls must be eliminated to the maximum extent practical using all reasonably available spoil. A variance may be granted by the department if the applicant can document that there is insufficient spoil to completely eliminate the highwall, that an alternative plan is compatible with the concept of approximate original contour and with the proposed postmining land use, and that any associated spoil can be reclaimed in accordance with ARM 26.4.502 and ARM 26.4.520, such that the reclamation plan is compatible with the postmining land use.

(3) The best available material onsite must be used for the top 8 feet of surface materials unless it can be demonstrated in compliance with ARM 26.4.501, that a lesser thickness of quality material will result in effective reclamation which maintains or improves on the preexisting site conditions and maximizes potential future land use.

(4) The site must be seeded with a mixture of native or native and introduced species most suited to the quality of the surface materials which make up the rooting medium. The mixture of species used must meet the functional requirements set forth in subchapter 7 for vegetative communities.

(5) Success of revegetation must be measured on the basis of unmined reference areas, unless it can be documented that reference areas are not applicable because of site-specific and premine conditions. If reference areas are not used, an alternative approach must be used.

(6) In order to be eligible for bond release, the postmining vegetative community must:

(a) control excessive erosion;

(b) provide diverse, effective, permanent vegetative cover of a seasonal variety compatible with the revegetative goals for the site no less effective than the ground cover existing before redisturbance;

(c) maximize potential future land use;

(d) be compatible with the land use patterns in the surrounding area;

(e) meet the time criteria set forth in subchapter 11; and

(f) comply with ARM 26.4.751.

(7) The best technology and available materials must be used to create a suitable medium for revegetating and stabilizing all disturbance areas.

(8) Effluent limitations must be based on the application of best professional judgment of the best technology economically achievable on a case-by-case basis under section 402(a)(1) of the Clean Water Act (33 U.S.C.A. <1342). Effluent limitations will be established based upon preapplication values. In no case may subsequent discharges exceed the established preapplication values. AUTH, Sec. 82-4-204, 205, MCA; AUTH Extension, Sec. 4, Ch. 70, L. 1987, Eff. 10/1/87; IMP, Sec. 82-4-203, 231, 232, 233, MCA.

RULE IX REMINING: BONDING (1) Bond shall be submitted consistent with subchapter 11, except as noted below.

(2) The standard applied by the department in determining the amount of performance bond shall be the estimated cost to the department if it had to reclaim the area consistent with the approved plan to the point where eligibility for abandoned mine land status (Rule X) is not affected.

(3) In no case may bond be less than $10,000 total or $200 per acre. AUTH, Sec. 82-4-204, 205, MCA; AUTH Extension, Sec. 4, Ch. 70, L. 1987, Eff. 10/1/87; IMP, Sec. 82-4-203, 223, 232, 235, MCA.

RULE X REMINING: ELIGIBILITY FOR ABANDONED MINE LAND STATUS (1) Areas within a remining permit area which are not directly disturbed by remining activities remain eligible for abandoned mine land funding if the proposed operation

does not affect the cost of reclamation and this is documented in the application.

(2) Areas to be directly disturbed may adopt any existing reclamation plans (on file with the department) for the site which are in compliance with the performance standards of this subchapter and may remain eligible for abandoned mine reclamation. Eligibility must be a site-specific decision and the operator must document that the effect of the proposed activity reduces the overall site reclamation costs to the department. AUTH, Sec. 82-4-204, 205, MCA; AUTH Extension, Sec. 4, Ch. 70, L. 1987, Eff. 10/1/87; IMP, Sec. 82-4-203, 239, MCA.

3. It is proposed that ARM 26.4.301 be amended as follows:

26.4.301 DEFINITIONS The following definitions apply to all terms used in the Strip and Underground Mine Reclamation Act and the rules adopted thereunder:

(1) through (48) same as existing rule.

(49) "Previously mined area" means land on which coal mining operations were previously conducted except those lands upon which such operations were conducted pursuant to a permit issued under the Montana Strip and Underground Mine Reclamation Act.

(50) through (87) same as existing rule but renumbered.

4. These rules are proposed to effectuate The Montana Strip and Underground Mine Reclamation Act as amended by Section 1, Chapter 70, of the Session Laws of Montana for 1987. This amendment expanded the definition of strip mining, for purposes of said Act only, to include remining of previously mined areas. ARM 26.4.301 is amended to define the term "previously mined area".

5. Interested parties may submit their data, views or arguments concerning the proposed rules in writing to Dennis Hemmer, Commissioner, Department of State Lands, Capitol Station, Helena, MT 59620 no later than December 10, 1987.

6. If a person who is directly affected by the proposed adoption or 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 Dennis Hemmer, Commissioner, Department of State Lands, Capitol Station, Helena, MT 59620 no later than December 10, 1987.

7. If the Commissioner receives requests for a public hearing on the proposed adoption from either 10% or 25%, whichever is less, of the persons who are directly affected by the proposed adoption and amendment, or from the Administrative Code Committee of the Legislature, or from a governmental subdivision or agency, or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of any such hearing will be published in the Montana Administrative Register. Ten percent of persons directly affected has been determined to be one (1) person based on

the approximately 17 persons, agencies or organizations involved in either coal mining or remining or coal mine reclamation in Montana.

8. The authority of the department to make the proposed rules and amendments is based on Section 82-4-205, MCA, and Section 4, Chapter 70, Laws 1987, and the rules implement Section 1, Chapter 70, Laws 1987, and Sections 82-4-202, 221, 222, 223, 231, 232, 233, 235, and 239, MCA.

Dennis Hemmer
Commissioner of State Lands

Certified to Secretary of State October 29, 1987

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rule I relating to Clarification of Exception to Tax Levy Limit for the Property Assessment Division.	NOTICE OF PUBLIC HEARING on the PROPOSED ADOPTION of Rule I relating to Clarification of Exception to Tax Levy Limit for the Property Assessment Division.

TO: All Interested Persons:

1. On December 2, 1987, at 9:00 a.m., a public hearing will be held in the Fourth Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the adoption of rule I, relating to Clarification of Exception to Tax Levy Limit.

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

3. The rule as proposed to be adopted provides as follows:

RULE I CLARIFICATION OF EXCEPTION TO TAX LEVY LIMIT (1) A taxing unit may levy property taxes to exceed a taxpayer's 1986 property tax liability if total taxable valuation decreases by five percent (5%) or more. If the decrease equals or exceeds five percent (5%) of the previous year's value, then the cap on an individual taxpayer's liability may be exceeded. The exception is not continuing in nature. A five percent (5%) decrease must occur each year for the 1986 cap to be exceeded. In no event may the increased property taxes levied exceed the revenue limit established in 15-10-412(7), MCA. AUTH, Sec. 15-1-201 MCA; IMP, Secs. 15-10-401, 15-10-402, 15-10-411 and 15-10-412 MCA.

4. Rule I complies with the recent Attorney General's Opinion 42 A.G. Op. 21. That opinion was issued in response to several questions prepared by local Montana officials. While the opinion was being prepared and also after it was issued, the Department of Revenue requested that the Attorney General adopt an alternative interpretation of SB 71. That interpretation would have considered the exception from the I-105 individual tax limit to be continuing for every year following a year in which a county's valuation decreased by 5% or more. At the Department's request, the Legislature's Revenue Oversight Committee also asked the Attorney General to reconsider the opinion to adopt this "continuing exception" interpretation. The Attorney General declined to revise the opinion. Given this history, the adoption of this rule is necessary for the Department to acknowledge acceptance of the Attorney General's interpretation and to eliminate any public confusion as to which interpretation applies.

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

Cleo Anderson
Department of Revenue
Office of Legal Affairs
Mitchell Building
Helena, Montana 59620

no later than December 10, 1987.

6. David W. Woodgerd, Chief Legal Counsel, Department of Revenue, Office of Legal Affairs, has been designated to preside over and conduct the hearing.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 11/2/87.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rules I through VII relating to Airline Regulations for Corporation License Tax.	NOTICE OF PUBLIC HEARING on the PROPOSED ADOPTION of Rules I through VII relating to Airline Regulations for Corporation License Tax.

TO: All Interested Persons:

1. On December 4, 1987, at 9:00 a.m. , a public hearing will be held in the Fourth Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the adoption of rules I through VII, relating to Airline Regulations for Corporation License Tax.

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

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

RULE I GENERAL STATEMENT Where an airline has income for sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to Title 15, Chapter 31, Part 3 except as modified by this regulation. AUTH, Secs.15-1-201, 15-31-313 and 15-31-501 MCA; IMP, Secs. 15-1-601, 15-31-301 through 15-31-312 MCA.

RULE II APPORTIONMENT OF BUSINESS INCOME (1) General definitions. The following definitions are applicable to the terms used in the apportionment factor description.

(a) "Value" of owned real and tangible personal property shall mean its original cost. (See ARM 42.26.235).

(b) "Cost of aircraft by type" means the average original cost or value of aircraft by type which are ready for flight.

(c) "Original cost" means the initial federal tax basis of the property plus the value of capital improvements to such property, except that, for this purpose, it shall be assumed that Safe Harbor Leases are not true leases and do not affect the original initial federal tax basis of the property.

(d) "Average value" of property means the amount determined by averaging the values at the beginning and ending of the income year, but the department may require the averaging of monthly values during the income year if such averaging is necessary to reflect properly the average value of the airline's property. (See ARM 42.26.237).

(e) The "value" of rented real and tangible personal property means the product of eight (8) times the net annual rental rate. (See ARM 42.26.236).

(f) "Net annual rental rate" means the annual rental rate paid by the taxpayer.

(g) "Property used during the income year" includes property which is available for use in the taxpayer's trade or business during the income year.

(h) "Aircraft ready for flight" means aircraft owned or acquired through rental or lease (but not interchange) which are in the possession of the taxpayer and are available for service on the taxpayer routes.

(i) "Revenue service" means the use of aircraft ready for flight for the production of revenue.

(j) "Transportation revenue" means revenue earned by transporting passengers, freight and mail as well as revenue earned from liquor sales, pet crate rentals, etc.

(k) "Departures" means for purposes of these regulations all takeoffs, whether they be regularly scheduled or charter flights, that occur during revenue service. AUTH, Secs. 15-1-201, 15-31-313 and 15-31-501 MCA; IMP, Secs. 15-1-601, 15-31-302, 15-31-305 and 15-31-312 MCA.

RULE III PROPERTY FACTOR (1) Property valuation. Owned aircraft shall be valued at its original cost and rented aircraft shall be valued at eight (8) times the net annual rental rate in accordance with ARM 42.26.235 through 42.26.237. The use of the taxpayer's owned or rented aircraft in an interchange program with another air carrier will not constitute a rental of such aircraft by the airline to the other participating airline. Such aircraft shall be accounted for in the property factor of the owner. Parts and other expendables, including parts for use in contract overhaul work, will be valued at cost.

(2) The denominator of the property factor shall be the average value of all of the taxpayer's real and tangible personal property owned or rented and used during the income year. The numerator of the property factor shall be the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the income year.

(3) In determining the numerator of the property factor, all property except aircraft ready for flight shall be included in the numerator of the property factor in accordance with ARM 42.26.234. Aircraft ready for flight shall be included in the numerator of the property factor in the ratio calculated as follows: departures of aircraft from locations in this state weighted as to the cost and value of aircraft by type compared to total departures similarly weighted. AUTH, Secs. 15-1-201, 15-31-313 and 15-31-501 MCA; IMP, Secs. 15-1-601, 15-31-306, 15-31-307 and 15-31-312 MCA.

RULE IV THE PAYROLL FACTOR (1) The denominator of the payroll factor is the total compensation paid everywhere by the taxpayer during the income year as provided in ARM 42.26.243. The numerator of the payroll factor is the total amount paid in this state during the income year by the taxpayer for compensation. With respect to non-flight personnel, compensation paid to such employees shall be included in the numerator as provided in ARM 42.26.244. With respect to flight personnel (the air crew aboard an aircraft assisting in the operations of the aircraft or the welfare of passengers while in the air), compensation paid to such employees shall be included in the ratio that departures of aircraft from locations in this state, weighted as to the cost and value of aircraft by type compared to total

departures similarly weighted, multiplied by the total flight personnel compensation. AUTH, Secs. 15-1-201-,15-31-313 and 15-31-501 MCA; IMP, Secs. 15-1-601, 15-31-308, 15-31-309 and 15-31-312 MCA.

RULE V SALES (TRANSPORTATION REVENUE) FACTOR (1) The transportation revenue derived from transactions and activities in the regular course of the trade or business of the taxpayer and miscellaneous sales of merchandise, etc., are included in the denominator of the revenue factor. (See ARM 42.26.253) Passive income items such as interest, rental income, dividends, etc., will not be included in the denominator nor will the proceeds or net gains or losses from the sale of aircraft be included. The numerator of the revenue factor is the total revenue of the taxpayer in this state during the income year. The total revenue of the taxpayer in this state during the income year is the result of the following calculation: the ratio of departures of aircraft in this state weighted as to the cost and value of aircraft by type, as compared to total departures similarly weighted multiplied by the total transportation revenue. The product of this calculation is to be added to any non-flight revenues directly attributable to this state. AUTH, Secs. 15-1-210, 15-31-313 and 15-31-501 MCA; IMP, Secs. 15-1-601, 15-31-310, 15-31-311 through 15-31-312 MCA.

RULE VI RECORDS (1) The taxpayer must maintain the records necessary to arrive at departures by type of aircraft as used in these regulations. Such records are to be subject to review by the respective state taxing authorities or their agents. AUTH, Secs. 15-1-201, 15-31-313 and 15-31-501, MCA; IMP, Secs. 15-1-601 15-31-301 and 15-31-312 MCA.

RULE VII AIRLINE REGULATION EXAMPLES (1) Assume the following facts for an airline for the tax year:

(a) It has ten 747s ready for flight and in revenue service at an average per unit cost of $40,000,000 for nine (9) of the aircraft. It rents the remaining 747 from another airline for $9,000,000 per year. At eight times rents, the latter is valued at $72,000,000 for apportionment purposes. Total 747 valuation is, therefore, $432,000,000 for property factor denominator purposes.

(b) It has twenty 727s ready for flight and in revenue service at an average per unit cost of $20,000,000. Total 727 valuation is, therefore, $400,000,000 for property factor denominator purposes.

(c) It has nonflight tangible property (n.t.p.) valued at original cost of $200,000,000.

(d) It has the following annual payroll:

Flight personnel	$60,000,000
Nonflight personnel	40,000,000
Total	$100,000,000

(e) From its operations, it has total receipts of $50,000,000, business net income of $1,000,000 and no nonbusiness income.

(f) It has the following within State X:
(i) 10% of its 747 flight departures
.10 x 432,000,00 = $43,200,000);
(ii) (20% of its 727 flight departures
.20 x 400,000,000 = $80,000,000);
(iii) 5% of its nonflight tangible property
(n.t.p.) (.05 x 200,000,000 = $10,000,000); and
(iv) 15% of its nonflight personnel payroll
(.15 x 40,000,000 = $6,000,000).

(g) State X has a corporate tax rate of 10%. The airline's tax liability to State X would be determined as follows:

Property Factor:

Numerator			Denominator	
43,200,000	(747s)		432,000,000	(747s)
+ 80,000,000	(747s)	+	400,000,000	(747s)
+ 10,000,000	(n.t.p.)	+	200,000,000	(n.t.p.)
132,200,000		÷	1,032,000,000	= 12.9%

Sales Factor:

Numerator			Denominator	
43,200,000	(747s)		432,000,000	(747s)
+ 80,000,000	(747s)	+	400,000,000	(747s)
123,200,000		÷	832,000,000	= 14.8%

Payroll Factor:

Numerator			Denominator	
6,000,000	(nonflight)		40,000,000	(nonflight)
+ 8,880,000	(14.8%x60,000,000 flight)	+	60,000,000	(flight)
14,880,000		÷	100,000,000	= 14.88%

Average Ratio Equals (property, payroll and sales factors)

(12.9% + 14.8% + 14.88%) - 3 = 14.219%

Taxable Income in State X: .14219 x 1,000,000 = $142,190

Tax Liability to State X: .10 x $142,190 = $14,219.00

(2) Same facts except that paragraphs (a) and (b) are changed to read:
(a) It has the following within State Y:
(i) 6% of its 747 flight departures
(.06 x 432,000,000 = $25,920,00);
(ii) 31% of its 727 flight departures
(.31 x 400,000,000 = $124,000,000); and
(iii) 3% of its nonflight tangible property
($6,000,000) (iv) 7% of its nonflight personnel payroll
(.07 x 40,000,000 = $2,800,000)

(b) State Y has a corporate tax rate of 6½% The airline's tax liability to State Y would be determined as follows:

Property Factor:

Numerator			Denominator		
25,920,000	(747s)		432,000,000	(747s)	
+ 124,000,000	(747s)	+	400,000,000	(747s)	
+ 6,000,000	(n.t.p.)	+	200,000,000	(n.t.p.)	
155,920,000		+	1,032,000,000		= 15.1085%

Sales Factor:

Numerator			Denominator		
25,920,000	(747s)		432,000,000	(747s)	
+ 124,000,000	(747s)	+	400,000,000	(747s)	
149,920,000		+	832,000,000		= 18.0192%

Payroll Factor:

Numerator			Denominator		
2,800,000	(nonflight)		40,000,000	(nonflight)	
+ 10,811,400	(18.019%x60,000,000 flight)	+	60,000,000	(flight)	
13,611,400		+	100,000,000		= 13.6114%

Average Ratio Equals (property, payroll and sales factors)

(15.1085% + 18.0192% + 13.6114%) ÷ 3 = 15.5797%

Taxable Income in State Y: .155797 x 1,000,000 = $155,797

Tax Liability to State Y: .065 x $155,797 = $10,127

AUTH, Sec. 15-1-201, 15-31-313 and 15-31-501 MCA; IMP, Secs. 15-1-601, 15-31-301 through 15-31-312 MCA.

4. The Department is proposing rules I through VII for the following reasons:

These rules are necessary for the State of Montana to have an enforceable method of properly determining the share of income earned in Montana by multistate and multinational airlines. (Northwest Airlines v. Department of Revenue). With the exception of references to Montana rules or laws and the example in Rule VII, the content of these proposed rules follows exactly the airline income apportionment rules adopted by the Multistate Tax Commission (MTC). Montana is a member of the commission. By adopting the MTC approach, Montana can rely on an established and definite method of apportioning airline income. Adopting an approach consistent with other states should reduce the prospects for litigation with the airline industry over the long term. More consistency among the states will also provide the airline industry with greater tax certainty on which it can rely in planning its business operations.

Rule I is necessary to clarify that the proposed rules are applicable only to airlines that have income from sources both within and without the state. These rules are not applicable to any business other than an airline business and the rules are not applicable to an airline business operating solely within Montana.

Rule II is necessary to define certain terms used in the remaining rules.

Rule III is necessary to clarify how the property factor shall be computed for a multistate airline. Generally, this rule is very similar to the rules pertaining to property factor computation for other types of corporations having multistate activities. The provision of this rule that is different relates to the allocation of mobile property. This rule provides that such property is allocated based upon the number of departures in the state weighted by the cost, value and type of aircraft compared to the total departures similarly weighted. Since the primary revenue generating activity of an airline is to transport both people and cargo, using the number of departures in the state (weighted by cost, value and type of aircraft) to total departures similarly weighted fairly represents the presence of property in Montana for an airline.

Rule IV is necessary to clarify how the payroll factor shall be computed for a multistate airline. Generally this rule is very similar to the rules pertaining to payroll factor computation for other types of corporations having multistate activities. However, in a manner similar to rule III, mobile payroll shall be allocated based upon the number of departures in the state weighted by cost, value and type of aircraft compared to total departures similarly weighted. The reasoning to use this method for allocating mobile payroll would be the same as that set forth in rule III.

Rule V is necessary to clarify how the sales factor shall be computed for a multistate airline. Generally, this rule is very similar to the rules pertaining to sales factor computation for other types of corporations having multistate activities. However, in a manner similar to rules III and IV, transportation sales shall be allocated based upon the number of departures in the state weighted by the cost, value and type of aircraft compared to total departures similarly weighted. The reasoning to use transportation sales would be the same as that set forth in rule III.

Rule VI is necessary to clarify that the taxpayer will be required to maintain records necessary to implement these rules. A taxpayer's failure to maintain adequate records is not and should not be a basis for not complying with these rules.

Rule VII is necessary because it shows how rules II through IV shall be applied using specific examples. These examples should further clarify the prior rules and reduce or eliminate any misunderstanding or misinterpretations.

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

Cleo Anderson
Department of Revenue
Office of Legal Affairs
Mitchell Building
Helena, Montana 59620

no later than December 11, 1987.

6. Eric J. Fehlig, Department of Revenue, Office of Legal Affairs, has been designated to preside over and conduct the hearing.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 11/2/87.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 1.2.419 pertaining to scheduled dates for the Montana Administrative Register	))))	NOTICE OF PROPOSED AMENDMENT OF ARM 1.2.419 FILING, COMPILING, PRINTER PICKUP AND PUBLICATION FOR THE MONTANA ADMINISTRATIVE REGISTER

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On December 31, 1987, the Secretary of State proposes to amend the rule pertaining to the scheduled dates for the Montana Administrative Register.

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

1.2.419 FILING, COMPILING, PRINTER PICKUP AND PUBLICATION SCHEDULE FOR THE MONTANA ADMINISTRATIVE REGISTER (1) The scheduled filing dates, time deadlines, compiling dates, printer pickup dates and publication dates for material to be published in the Montana Administrative Register are listed below:

19878 Schedule

Filing	Compiling	Printer Pickup	Publication
January 54	January 65	January 76	January 1514
January 1918	January 2019	January 2120	January 2928
February 21	February 32	February 43	February 1311
February 1316	February 17	February 18	February 2625
~~March-2~~			
February 29	March 31	March 42	March 1210
March 1614	March 1715	March 1816	March 2624
April 64	April 75	April 86	April 1614
April 2018	April 2119	April 2220	April 3028
May 42	May 53	May 64	May 1412
May 1816	May 1917	May 2018	May 2026
~~June-1~~ May 31	June 21	June 32	June 119
June 1513	June 1614	June 1715	June 2523
July 65	July 76	July 87	July 1614
July 2018	July 2119	July 2220	July 3028
August 31	August 42	August 53	August 1311
August 1715	August 1816	August 1917	August 2725
	~~September-1~~	~~September-2~~	
August 3129	August 30	August 31	September 108
September 1412	September 1513	September 1614	September 2422
October 53	October 64	October 75	October 1513
October 1917	October 2018	October 2119	October 2927
~~November-2~~			
October 31	November 31	November 42	November 1210
November 1614	November 1715	November 1816	November 2723
	~~December-1~~	~~December-2~~	
November 3028	November 29	November 30	December 108
December 1412	December 1513	December 1614	December 2422

(2) remains the same.

AUTH: 2-4-312, MCA IMP: 2-4-312, MCA

3. The rule is proposed to be amended to set dates pertinent to the publication of the Montana Administrative Register during 1988.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to Kathy Lubke, Office of the Secretary of State, State Capitol, Helena, Montana, 59620 no later than December 12, 1987.

JIM WALTERMIRE
Secretary of State

Dated this 2nd day of November, 1987

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

In the matter of the amendment of Rules 46.2.210 and 46.2.212 pertaining to administrative fair hearings	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 46.2.210 AND 46.2.212 PERTAINING TO ADMINISTRATIVE FAIR HEARINGS

TO: All Interested Persons

1. On December 3, 1987, at 9:30 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana, to consider the proposed amendment of Rules 46.2.210 and 46.2.212 pertaining to administrative fair hearings.

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

46.2.210 PROPOSAL FOR DECISION BY HEARING OFFICER ~~(1)--The-hearing-officer--shall-make-a-proposal-for-decision-within:~~

~~(a)--thirty-(30)-days-of-the-request-for-a-hearing-if-the-benefits-which-are-the-subject-of-the-hearing-request-are-provided-under-the-food-stamp-program;-or~~

~~(b)--forty-five-(45)-days-of-the-request-for-a-hearing-if-the-benefits-which-are-the-subject-of--the-hearing-request-are-provided-under-a--program-other--than-the--food-stamp-program;-and~~

~~(c)--forty-five--(45)-days-if-the-hearing-involved-denial-or-termination-of-certification-or-licensure.~~

Subsections (2) through (3) remain the same in text but will be renumbered as (1) through (2).

AUTH: Sec. 53-2-201, 53-2-606, 53-4-111, 53-4-212, 53-6-111, 53-6-113 and 53-7-102 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 7/1/87
IMP: Sec. 53-2-201, 53-2-306, 53-4-112 and 53-6-111 MCA

46.2.212 JUDICIAL REVIEW (1) A party to an appeal who is aggrieved by a final decision may seek judicial review of that decision by filing a petition in district court within 30 days after receipt of notice of the final decision as provided in section 2-4-702 MCA.

~~(2)--A-final-decision-is--binding-on-the--department--and-its--units,--including--a-county--welfare--department,-and-the-department-or-a-subunit-of-the-department,--including-a-county-welfare--department,--may-not-seek-judicial--review-of-a-final-decision.~~

~~(3)--A-board-of--county-commissioners--may-seek--judicial-review-of--a-final-decision-if-it-was-a-party-to-the--original~~

~~hearing by virtue of the involvement of county funds in the benefits which were the subject of the hearing.~~

(42) If a provider seeks judicial review, venue shall be in the First Judicial District in and for the County of Lewis and Clark, State of Montana.

AUTH: Sec. 53-2-201, 53-2-606, 53-4-212, 53-6-113 and 53-7-102 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 7/1/87
IMP: Sec. 53-2-201 and 53-3-113 MCA

3. The proposed changes are necessary because of continued time constrictions and requests by recipients and providers for continuances which prevent the fair hearings officers from meeting the deadlines set by ARM 46.2.210. In addition, HB 225 has the effect of removing the Department Director from the Board of Social and Rehabilitation Appeals. Thus, it is necessary for the Department to seek judicial review in those instances it believes are appropriate.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than December 10, 1987.

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

Director, Social and Rehabilitation Services

Certified to the Secretary of State _____, 1987.

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

In the matter of the amendment of Rule 46.12.3803 pertaining to cost of living increases in medically needy income standards	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.12.3803 PERTAINING TO COST OF LIVING INCREASES IN MEDICALLY NEEDY INCOME STANDARDS

TO: All Interested Persons

1. On December 2, 1987, at 1:30 p.m., a public hearing will be held in Room 304 of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana, to consider the proposed amendment of Rule 46.12.3803 pertaining to cost of living increases in medically needy income standards.

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

46.12.3803 MEDICALLY NEEDY INCOME STANDARDS Subsections (1) and (2) remain the same.

(3) MEDICALLY NEEDY INCOME LEVELS FOR SSI and AFDC-RELATED INDIVIDUALS AND FAMILIES

~~Family Size~~	~~Monthly Income Level~~	~~Quarterly Income Level~~
~~1~~	~~$340.00~~	~~$1,020.00~~
~~2~~	~~383.00~~	~~1,149.00~~
~~3~~	~~408.00~~	~~1,224.00~~
~~4~~	~~433.00~~	~~1,299.00~~
~~5~~	~~507.00~~	~~1,521.00~~
~~6~~	~~580.00~~	~~1,740.00~~
~~7~~	~~654.00~~	~~1,962.00~~
~~8~~	~~727.00~~	~~2,181.00~~
~~9~~	~~762.00~~	~~2,286.00~~
~~10~~	~~795.00~~	~~2,385.00~~
~~11~~	~~826.00~~	~~2,478.00~~
~~12~~	~~854.00~~	~~2,562.00~~
~~13~~	~~882.00~~	~~2,646.00~~
~~14~~	~~907.00~~	~~2,721.00~~
~~15~~	~~930.00~~	~~2,790.00~~
~~16~~	~~951.00~~	~~2,853.00~~

Family Size	One Month Net Income Level	Two Month Net Income Level	Three Month Net Income Level
1	$354	$ 708	$1,062
2	383	766	1,149
3	408	816	1,224
4	433	866	1,299
5	507	1,014	1,521
6	580	1,160	1,740
7	654	1,308	1,962
8	727	1,454	2,181
9	762	1,524	2,286
10	795	1,590	2,385
11	826	1,652	2,478
12	854	1,708	2,562
13	882	1,764	2,646
14	907	1,814	2,721
15	930	1,860	2,790
16	951	1,902	2,853

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101, 53-6-131, and 53-6-141 MCA

3. This change is being made to ensure state policy coincides with federal cost of living adjustment increases for the Supplemental Security Income (SSI) program. The table has been expanded to include income levels of one, two or three months to accomodate an expanded range of retroactive eligibility determinations.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than December 10, 1987.

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

Gail Gray
Director, Social and Rehabilitation Services

Certified to the Secretary of State November 2, 1987.

BEFORE THE DEPARTMENT OF ADMINISTRATION

OF THE STATE OF MONTANA

In the matter of the amendment and adoption of Rules 2.13.101 and 2.13.102 and 2.13.103-2.13.107 pertaining to the use of the state's telecommunications systems and facilities	)))))	NOTICE OF THE ADOPTION OF AMENDMENTS TO RULES AND ADOPTION OF NEW RULES PERTAINING TO USE OF THE STATE'S TELECOMMUNICATIONS SYSTEMS AND FACILITIES

TO: All Interested Persons

1. On August 13, 1987, the Department of Administration published notice of a proposed adoption and amendment of rules concerning use of the state's telecommunications facilities at page 1229 of the 1987 Montana Administrative Register, issue number 15.

2. The department has adopted the rules with the following change:

2.13.106 NON-PROFIT ORGANIZATION USE OF THE STATE TELECOMMUNICATION SYSTEMS ALLOWED

(1) Same as proposed rule.

(2) Non-profit organizations must make written requests to the department of administration for access to its systems. These written requests must provide adequate detailed information for the department to determine if the non-profit organization meets any of the criteria defined above. Use of the state's telecommunication systems shall be authorized for organizations meeting the criteria based upon the technical requirements of the non-profit organizations' needs as indicated by the request and the potential impact on state agency use of the systems. In consultation with the appropriate agency, the department will approve or disapprove requests for access by non-profit organizations within 180 days of receipt of written requests. Non-profit organizations will be billed for use of the state's telecommunication systems under procedures and rates developed by the department.

3. At the public hearing, a representative from the Legislative Auditor's Office commented that the legislature has adopted its own rules by resolution (joint rules) and are not subject to these proposed rules.

LeRoy Schramm, representing the University System, presented a letter from Carrol Krause, Commissioner of Higher Education, and briefly outlined its contents. The first item concerns the definition of telecommunication systems. After review of the definition as written, it was ruled to leave the definition as proposed.

The Commissioner suggested a reimbursement be allowed for personal long distance calls. This suggestion is overruled. The department believes that the accountability and administration required are not feasible and that such a practice is not in concert with proper use of the state telecommunication systems, and other state services, facilities and property.

The Commissioner suggested that the requests by non-profit organizations be considered and authorized by the president of a university unit or the commissioner. This suggestion has merit and the department has made the change to Rule IV as noted in paragraph 2 above.

A letter was received from the Public Service Commission neither supporting nor opposing the rules but urging the department establish rates for non-profit organizations that are economically efficient and to be aware of the potential problems of duplication of facilities and uneconomic by-pass of the public network.

The adoption of the rules intends to clarify, establish and make consistent, policies and procedures that address the use of the state's telecommunication systems as recommended by the Office of the Legislative Auditor in its November 1986 audit. In the audit, the Auditor found a variety of usage practices by state agencies and personnel.

4. The authority for the rules is 2-17-302, MCA, and the rules implement 2-17-302, MCA.

Ellen Feaver

Director, Department of Administration

Certified to the Secretary of State October 19, 1987.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF MORTICIANS

In the matter of the amendment of rules pertaining to meetings, fees and the adoption of a new rule pertaining to mortuary licenses	)))))	NOTICE OF AMENDMENT OF 8. 30.401 BOARD MEETINGS, 8. 30.407 FEE SCHEDULE AND THE ADOPTION OF NEW RULE I. (8. 30.607) TRANSFER OR SALE OF MORTUARY LICENSE

TO: All Interested Persons:

1. On August 13, 1987, the Board of Morticians published a notice of proposed amendment and adoption of the above-stated rules at page 1251, 1987 Montana Administrative Register, issue number 15.

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

3. No comments or testimony were received.

BOARD OF MORTICIANS
WILLIAM B. BROWN, CHAIRMAN

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

Certified to the Secretary of State, November 2, 1987.

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

In the matter of the amendment) NOTICE OF AMENDMENT OF 8.58.
of rules pertaining to fees) 411 FEE SCHEDULE

TO: All Interested Persons:

1. On September 24, 1987, the Board of Realty Regulation published a notice of public hearing on the proposed amendment of the above-stated rule at page 1607, 1987 Montana Administrative Register, issue number 18.

2. The hearing was held on October 14, 1987, at 9:00 o'clock, a.m., in the downstairs conference room of the Department of Commerce building located at 1424 9th Avenue, Helena, Montana.

3. The Board has adopted the rule as proposed with the following changes: (new matter underlined, deleted matter interlined)

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

(6)	For each annual renewal of a resident broker's license	~~$65.00~~	$60.00
(7)	will remain the same.		
(8)	For each annual renewal of a non-resident broker's license	~~$65.00~~	$60.00
(9)	will remain the same.		
(10)	For each annual renewal of salesman's license	~~$35.00~~	$30.00

(11) through (20) will remain the same."

Auth: 37-51-203, MCA Imp: 37-51-207, MCA

4. The comments received are as follows along with the Board's responses thereto:

COMMENT: Representatives of the Montana Association of Realtors opposed the amendment on the grounds that it appeared to be unreasonable and unsupportable, the quantity and quality of services has declined, and the fees should be user oriented.

RESPONSE: The arguments of the Montana Association of Realtors are overruled for the most part. However, the proposed fees for renewal are now reduced somewhat. Records show that since 1982, fees have not produced income sufficient to cover expenses. The average annual deficiency of $30,000 could exist because of a cash reserve. The deficiency was allowed to continue to exist to reduce the cash reserve as the cash reserve was unreasonably large. The reserve is now reduced and it is necessary to set fees commensurate with expenses.

The Board's fiscal year 88 budget is $280,159. Records show that pre-amendment fees could produce $176,648. This is $103,511 less than budget. Records show that the amended fees

could produce $290,493, which is $10,334 greater than budget. This excess is reasonable to provide needed contingency funds and to provide a certain amount of cushion to compensate for a possible continuation in the decline of licensees.

Fees for address changes, inactive/reactivation of licenses, and other additional changes, all pay for the specific licensing function being performed. The Board depends on the renewal fee to generate income to perform all other duties in general--this distributes costs evenly to all licensees. The renewal income supports Board activities, maintenance of office staff, equipment, provides resources for the Board to perform auditing/investigating functions as required, and provides Board member travel and compensation as required.

The expenditure level of the Board of Realty Regulation has remained reasonably constant for the past three years, excluding the increase in FY 86 due to the purchase of the Department of Commerce computer system. Increased auditing/complaint investigation demands have increased, as well as the cost to perform these functions. Insofar as services declining, such cutbacks have been a necessary result of budget limitations.

5. No other comments or testimony were received.

BOARD OF REALTY REGULATION
JOHN DUDIS, CHAIRMAN

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

Certified to the Secretary of State, November 2, 1987.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rules I through X (42.25.1301 - 42.25.1310) relating to Tertiary Production for Natural Resource and Corporations Tax.	NOTICE OF THE ADOPTION of Rules I through X (42.25.1301 - 42.25.1310) relating to Tertiary Production for Natural Resource and Corporations Tax.

TO: All Interested Persons:

1. On August 27, 1987, the Department published notice of the proposed adoption of Rules I through X (42.25.1301 - 42.25.1310) relating to Tertiary Production for Natural Resource and Corporations Tax at page 1422 of the 1987 Montana Administrative Register, issue no. 16.

2. The Department has adopted these rules as proposed.

3. A public hearing was held on September 29, 1987, to consider the proposed adoption of these rules. Lynn Chenoweth of the Natural Resource and Corporation Tax Division appeared on behalf of the Department. No other persons appeared to comment on the rules. Shell Oil Company sent a letter to the Department relating to the rules. Although the company stated that the letter was not a "formal comment" on the rules, the Department is obligated under 2-4-305, MCA to ". . . consider fully written and oral submissions respecting the proposed rule."

COMMENT: The company stated they continue to support the 2½% severance tax on incremental oil recovery obtained by enhanced oil recovery methods through a tertiary recovery project. Shell, therefore, does not wish to take any position or do anything that would hinder the adoption of the rules as proposed. However, Shell is still of the opinion that the "incremental petroleum and other mineral or crude oil" that would be realized through the establishment of a tertiary recovery project in a particular oil field can be readily determined by using "sound engineering principles". In other words, Shell feels that the base production rate for continued primary or water flood performance can be readily established by using "sound engineering principles" and can be agreed upon by qualified petroleum engineers. The incremental enhanced oil recovery production would be anything above this forecasted rate. In establishing the base production rate, Shell would use a combination of several established methods for forecasting continued primary and water flood production. Some of these are: (a) Established decline curves; (b) Extrapolation of oil cut versus cumulative oil production; (c) Forecasts using numerical reservoir stimulations; and (d) Forecasts scaled from more mature analog fields. These methods would be applied after making an extensive study of the reservoir and its producing characteristics.

RESPONSE: The department believes the method proposed in the tertiary rule for determining base level is both valid and equitable. The rule is valid because it uses a specific application of a common industry practice of estimating future production by analyzing historical production data. The Department also tested the proposed method by analyzing data from 6 major oil fields. The method predicted future production for those fields within a 94% to 111% range of accuracy.

As stated by Shell Oil, there are numerous other methods of estimating future production, with each giving different results. However, the approach counseled by Shell would allow each producer to select its own method - or some combination of methods - to estimate incremental tertiary production. The result would be inconsistent and inequitable treatment of various producers.

The method proposed by the department will treat all taxpayers equally and yet will use the unique production history of each oil field.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 11/2/87.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rules I through X (42.34.101 - 42.34.110) relating to the Dangerous Drug Tax Act.	NOTICE OF THE ADOPTION of Rules I through X (42.34.101 - 42.34.110) relating to the Dangerous Drug Tax Act.

TO: All Interested Persons:

1. On August 27, 1987, the Department published notice of the proposed adoption of Rules I through X (42.34.101 - 42.34.110) relating to the Dangerous Drug Tax Act at page 1433 of the 1987 Montana Administrative Register, issue no. 16.

2. The Department has adopted these rules as proposed.

3. A public hearing was held on September 22, 1987, to consider the proposed adoption of these rules. Bob McGee and Charles Wowereit of the Income Tax Division appeared on behalf of the Department. No other persons appeared to comment on the proposal. No other comments or testimony were received.

4. Therefore, the rules are adopted as proposed.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 11/2/87.

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

In the matter of the amendment of Rule 46.12.526 pertaining to outpatient physical therapy services	)))	NOTICE OF THE AMENDMENT OF RULE 46.12.526 PERTAINING TO OUTPATIENT PHYSICAL THERAPY SERVICES

TO: All Interested Persons

1. On August 13, 1987, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.526 pertaining to outpatient physical therapy services at page 1329 of the 1987 Montana Administrative Register, issue number 15.

2. The Department has amended ARM 46.12.526 as proposed with the following changes:

46.12.526 OUTPATIENT PHYSICAL THERAPY SERVICES, REQUIREMENTS Subsections (1) through (9) remain as proposed.

~~(10) Outpatient physical therapy services provided through a home health care agency shall be part of the department's 200 100 visit limitation.~~

Subsection (11) remains as proposed but will be renumbered as subsection (10).

AUTH: Sec. 53-6-113 MCA; AUTH Extension, Sec. 4, Ch. 329, L. 1987, Eff. 10/1/87
IMP: Sec. 53-6-101 and 53-6-141 MCA

3. The Department has thoroughly considered all commentary received:

COMMENT: Why have physical therapy services provided by home health care agencies been removed from the limitation of outpatient physical therapy services?

RESPONSE: Home health care services are a separate and distinct service and have adequate controls such as a $400 monthly reimbursement cap and 200 visit per fiscal year limitation. Current program controls are sufficient to prevent excessive expenditures. Additional controls proposed by changes to subsection (10) are not necessary.

COMMENT: A staff person from Legislative Council suggested addition of an authority extension.

RESPONSE: The Department has complied with the suggestion.

Director, Social and Rehabilitation Services

Certified to the Secretary of State June 2, 1987.

VOLUME NO. 42 OPINION NO. 31

CONSTITUTIONS - Appointment of district judge;
COURTS, DISTRICT - Appointment of district judge;
ELECTIONS - Election of district judge following appointment and confirmation;
JUDGES - Appointment of district judge;
LEGISLATURE - Senate confirmation of district judge;
MONTANA CODE ANNOTATED - Section 3-1-1014;
MONTANA CONSTITUTION - Article VII, sections 8(1), 8(2);
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 52 (1986).

HELD: 1. An individual nominated by the governor while the state senate is not in session to fill a vacancy in the office of district judge serves until the end of the next legislative session. If confirmed at the next session, he or she continues to serve until the next general election for which the statutory filing deadline has not passed.

2. Where the tenure of an individual nominated by the governor to fill a vacancy in the office of district judge runs into a next term of office, this fact does not shorten the length of the next term. At the next general election for district judge a successor is elected to serve the remainder of the unexpired term of office.

21 October 1987

Hon. Jim Waltermire
Secretary of State
Room 225, State Capitol
Helena MT 59620

Dear Mr. Waltermire:

You have asked my opinion concerning the timing of judicial elections for district judges in the third and seventh judicial districts. As you note in your letter, the Governor made nominations to fill the vacancies on

those courts in July 1987. The terms of office were due to expire in January 1989, and the positions were therefore scheduled to appear on the ballot in November 1988.

Your first question concerns whether the two positions should appear on the 1988 ballot. There has been no opportunity for the Senate to confirm the nominees. Article VII, section 8 of the Montana Constitution provides for the election and confirmation of nominees to fill vacancies in the office of district court judge.

> (1) The governor shall nominate a replacement from nominees selected in the manner provided by law for any vacancy in the office of supreme court justice or district court judge. If the governor fails to nominate within thirty days after receipt of nominees, the chief justice or acting chief justice shall make the nomination. Each nomination shall be confirmed by the senate, but a nomination made while the senate is not in session shall be effective as an appointment until the end of the next session. If the nomination is not confirmed, the office shall be vacant and another selection and nomination shall be made.
>
> (2) If, at the first election after senate confirmation, and at the election before each succeeding term of office, any candidate other than the incumbent justice or district judge files for election to that office, the name of the incumbent shall be placed on the ballot. ... [Emphasis added.]

In 41 Op. Att'y Gen. No. 52 (1986), I concluded that Senate confirmation of a nominee to a district judgeship is a prerequisite to the placement of that office on the ballot for election. Moreover, I concluded that the "first election after senate confirmation" referred to in article VII, section 8(2) of the Montana Constitution, means the next general election after Senate confirmation for which the statutory filing deadline for judicial candidates has not passed.

Consistent with that opinion, the judicial positions in question should not appear on the November 1988 ballot if Senate confirmation of the nominees does not occur before the filing deadline for the 1988 primary election. In that case, the nominations will remain

effective as appointments through the end of the next legislative session. At the next session, if the nominations are not confirmed, other nominations must be made. Mont. Const. art. VII, § 8(1). If the nominations are confirmed, section 3-1-1014, MCA, provides that the nominees shall serve "until the next succeeding general election," i.e., the next general election after Senate confirmation for which the statutory filing deadline has not passed.

It is possible that the next legislative session will not convene until 1989. Under those circumstances the individuals nominated in July 1987 would serve through the 1989 legislative session, and, if confirmed, they would continue to serve until the next general election for which the statutory filing deadline has not passed.

Your second question is: What is the length of term for the two offices of district judge when they finally do appear on the ballot? Section 3-1-1014, MCA, provides that where an appointee confirmed by the Senate serves until the next general election, the candidate elected at the next election holds office for the remainder of the unexpired term of office. The phrase "term of office" refers to a fixed and definite period of time. State ex rel. Rusch v. Board of Commissioners, 121 Mont. 162, 166, 191 P.2d 670, 672 (1948). That phrase must not be confused with "tenure of office," which may include a period of time between the expiration of an officer's term and the qualification of his successor. See State ex rel. Olsen v. Swanberg, 130 Mont. 202, 211, 299 P.2d 446, 451 (1956).

The fixed term of office, in this case six years, is not affected by the holding over of an officer beyond the expiration of the term. The holdover merely shortens the tenure of the succeeding officer, who takes office for the unexpired balance of the new term. Opinion of Justices, 298 A.2d 118, 120 (N.H. 1972); State v. Johnson, 57 N.W.2d 531, 535 (Neb. 1953); Gilson v. Hefferman, 192 A.2d 577, 581 (N.J. 1963); Graham v. Lockhart, 91 P.2d 265, 267 (Ariz. 1939); Holbrook v. Board of Directors, 64 P.2d 430, 431 (Cal. 1937); State v. Amos, 133 So. 623, 625 (Fla. 1931). Accord 63A Am. Jur. 2d Public Officers and Employees § 169 (1984); 67 C.J.S. Officers § 73 (1978). The holdover does not postpone the beginning of the next six-year term of office. See Opinion of Justices, supra, 298 A.2d at 119.

THEREFORE, IT IS MY OPINION:

1. An individual nominated by the governor while the state senate is not in session to fill a vacancy in the office of district judge serves until the end of the next legislative session. If confirmed at the next session, he or she continues to serve until the next general election for which the statutory filing deadline has not passed.

2. Where the tenure of an individual nominated by the governor to fill a vacancy in the office of district judge runs into a next term of office, this fact does not shorten the length of the next term. At the next general election for district judge a successor is elected to serve the remainder of the unexpired term of office.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 32

COUNTIES - Duty to take, store, and sell abandoned vehicles and obligation to pay costs;
HIGHWAYS - Duty of county to take, store, and sell vehicles abandoned on public highways other than county roads and obligation to pay costs;
HIGHWAY PATROL - Duty of county to take, store, and sell abandoned vehicles taken into custody by the highway patrol and county's obligation to pay costs;
MOTOR VEHICLES - Duty of county and city police to take, store, and sell abandoned vehicles and obligation to pay costs;
POLICE - Duty of county and city police to take, store, and sell abandoned vehicles and obligation to pay costs;
SHERIFFS - Duty of county and city police to take, store, and sell abandoned vehicles and obligation to pay costs;
MONTANA CODE ANNOTATED - Sections 61-12-401 to 61-12-404, 61-12-407.

HELD: 1. The county sheriff is obligated to take, store, and sell abandoned vehicles taken into custody by the Montana Highway Patrol pursuant to section 61-12-401, MCA.

2. The county is obligated to pay all of the expenses connected with the removal, storage, and sale of vehicles taken into custody by the Montana Highway Patrol pursuant to section 61-12-401(1)(a), MCA, or by the sheriff pursuant to section 61-12-401(1)(b) or 61-12-401(3), MCA. The city police are obligated to pay all of the expenses connected with the removal, storage, and sale of vehicles taken into custody by the city police pursuant to sections 61-12-401(1)(c) or 61-12-401(3), MCA. Expenses associated with these responsibilities can be recovered from the proceeds of the sale of the abandoned vehicles, pursuant to section 61-12-407, MCA.

27 October 1987

J. Allen Bradshaw
Granite County Attorney
Granite County Courthouse
Philipsburg MT 59858

Dear Mr. Bradshaw:

You requested my opinion on:

1. Whether a county sheriff is obligated to take, store, and sell abandoned vehicles which have been taken into custody by the Highway Patrol pursuant to section 61-12-401, MCA.

2. Whether a county is obligated to pay all of the expenses related to towing, storing, and selling abandoned vehicles located on public highways other than a county road.

In 1967, the Montana Legislature enacted statutes to provide for the removal and disposal of abandoned motor vehicles. Those statutes have subsequently been codified in Title 61, chapter 12, part 4, MCA. The legislative history, while sketchy, suggests that the statutes were enacted to authorize law enforcement officers to remove or to arrange removal of abandoned vehicles. The original legislation pertained to city streets and public property. The law was amended in 1969, 1979, and 1987. The 1969 amendment allowed removal where the vehicle had been abandoned 48 hours or more. 1969 Mont. Laws, ch. 169, § 2. The 1979 amendment allowed the owner or person in possession of private property to request the sheriff or the city police to remove any abandoned vehicles from his property. 1979 Mont. Laws, ch. 445, § 1. The 1987 Legislature reduced the burden on the sheriff to "preserve" such abandoned vehicles while awaiting sale; now, the sheriff need only provide "storage" for the vehicles. 1987 Mont. Laws, ch. 88, § 6.

You indicate in your letter that section 61-12-401, MCA, appears to give the sheriff the discretion to refuse to

receive the vehicles and process them for sale. I disagree with that conclusion.

Section 61-12-401, MCA, authorizes the Montana Highway Patrol to take into custody abandoned vehicles found upon the right-of-way of any public highway other than a county road. The sheriff may take into custody vehicles abandoned on the right-of-way of any county road and the city police may take into custody any abandoned vehicle found upon a city street within the city. Section 61-12-401, MCA, does not require law enforcement agencies to take abandoned vehicles into custody. The language is permissive and states that an agency may do so. However, once a decision is made to take the vehicle into custody, sections 61-12-402 to 407, MCA, apply; the language of those statutes is mandatory.

Section 61-12-402, MCA, requires the Montana Highway Patrol to furnish the sheriff a complete description of any vehicle removed at its direction. The description includes year, make, model, serial number, and license number if available. The sheriff is also to be provided with a statement of any costs incurred to that date in the removal, storage, and custody of the vehicle and with any available information concerning its ownership. § 61-12-402(1), MCA. At that point, with respect to abandoned vehicles, the duty and authority of the Montana Highway Patrol end. The sheriff and the city police then have the statutory obligation to make all reasonable attempts to locate the owner, lienholder, or person entitled to possession of any vehicle taken into custody pursuant to section 61-12-401, MCA. § 61-12-402(2), MCA. The statutes contemplate that the sheriff is responsible for handling the vehicles removed by the county or by the Montana Highway Patrol and that the city police are responsible for handling the vehicles removed by the city.

The statutes allow the sheriff or city police to declare the vehicle a junk vehicle or to release the vehicle to its rightful owner or possessor. §§ 61-12-402, 61-12-403, MCA. If the owner does not claim the vehicle and it is not declared a junk vehicle, the statute provides that the sheriff or the city police shall sell it at a public auction. § 61-12-404, MCA. Since the sheriff and city police have the duty to dispose of the vehicle, they can recover the costs for the removal, storage, and custody of the vehicle from the proceeds of

any sale. § 61-12-407, MCA. Section 61-12-407(2), MCA, provides:

> With the return of sale, the sheriff shall transmit to the county treasurer or the city police shall transmit to the city treasurer the balance of the proceeds of the sale after deducting the costs incurred in the sale and the costs and expenses incurred in the removal, storage, and custody of the vehicle. [Emphasis added.]

That balance is then deposited by the county treasurer into the county road fund or by the city treasurer into the city street fund. § 61-12-407(3), MCA.

In summary, once the decision has been made to take a vehicle into custody, the sheriff or the city police then must follow the statutory procedures set forth to locate the owner, declare the vehicle a junk vehicle, or sell the vehicle at auction. Following a sale, the sheriff or city police may retain the costs incurred in the removal, storage, and custody of the vehicle. There is no statutory provision which allows the Montana Highway Patrol to dispose of vehicles or to recover the costs of removal, storage, and custody of vehicles abandoned on public right-of-ways of any highway other than a county road. The statutes place that responsibility with the sheriff and allow the county to recover costs from the owner or from the sale of the vehicle in that instance. The authority and duty of the Montana Highway Patrol end when the sheriff is given notification of the removed vehicle pursuant to section 61-12-402(1), MCA.

THEREFORE, IT IS MY OPINION:

1. The county sheriff is obligated to take, store, and sell abandoned vehicles taken into custody by the Montana Highway Patrol pursuant to section 61-12-401, MCA.

2. The county is obligated to pay all of the expenses connected with the removal, storage, and sale of vehicles taken into custody by the Montana Highway Patrol pursuant to section 61-12-401(1)(a), MCA, or by the sheriff

pursuant to section 61-12-401(1)(b) or 61-12-401(3), MCA. The city police are obligated to pay all of the expenses connected with the removal, storage, and sale of vehicles taken into custody by the city police pursuant to sections 61-12-401(1)(c) or 61-12-401(3), MCA. Expenses associated with these responsibilities can be recovered from the proceeds of the sale of the abandoned vehicles, pursuant to section 61-12-407, MCA.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 33

LAND USE - Applicability of Natural Streambed and Land Preservation Act to irrigation districts;
WATER AND WATERWAYS - Applicability of Natural Streambed and Land Preservation Act to irrigation districts;
MONTANA CODE ANNOTATED - Title 75, chapter 7, part 1; Title 87, chapter 5, part 5; sections 75-7-102, 75-7-103(4), 75-7-103(5), 87-5-502, 87-5-506, 87-5-507;
MONTANA LAWS OF 1987 - Chapter 551, section 1;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 62 (1986), 40 Op. Att'y Gen. No. 71 (1984), 39 Op. Att'y Gen. No. 2 (1981), 37 Op. Att'y Gen. No. 15 (1977).

HELD: An irrigation district is a "person" within the meaning of section 75-7-103(4), MCA, of the Natural Streambed and Land Preservation Act.

28 October 1987

Robert L. Deschamps III
Missoula County Attorney
Missoula County Courthouse
Missoula MT 59802

Dear Mr. Deschamps:

You have requested my opinion concerning the following question:

> Is an irrigation district created pursuant to sections 85-7-101 to 308, MCA, or earlier codifications a "person" under section 75-7-103(4), MCA, of the Natural Streambed and Land Preservation Act?

I conclude that an irrigation district is a "person" under, and is subject to regulation by, the Natural Streambed and Land Preservation Act, §§ 75-7-101 to 124, MCA (Streambed Preservation Act).

The purpose and general scope of the Streambed Preservation Act have been discussed in several prior opinions and need not be reiterated at length here. 41

Op. Att'y Gen. No. 62 (1986); 40 Op. Att'y Gen. No. 71 at 285 (1984); 39 Op. Att'y Gen. No. 2 at 9 (1981); 37 Op. Att'y Gen. No. 15 at 56 (1977). The Act seeks to protect the State's streams and adjacent property from damage (§ 75-7-102, MCA) and it extends to any "project" undertaken by a "person." The latter term is defined in section 75-7-103(4), MCA, as meaning "any natural person, corporation, firm, partnership, association, or other legal entity not covered under 87-5-502." Section 87-5-502, MCA, in turn, is part of the Stream Protection Act, §§ 87-5-501 to 509, MCA, and requires any "agency of state government, county, municipality, or other subdivision of the state of Montana" to give notice to the Department of Fish, Wildlife, and Parks of all construction projects "which may or will obstruct, damage, diminish, destroy, change, modify, or vary the natural existing shape and form of any stream or its banks or tributaries[.]" In 37 Op. Att'y Gen. No. 15 and 40 Op. Att'y Gen. No. 71, I held that the applicability of one statute or the other depended upon the entity controlling the involved project: If the entity is a public agency within the reach of section 87-5-502, MCA, the project is subject to the Stream Protection Act, and, if not, the Streambed Preservation Act governs. Because these acts have different notification and enforcement procedures, determination of which applies in a particular instance has practical and legal significance.

The definition of "person" in the Streambed Preservation Act makes unmistakably clear that it and the Stream Protection Act are intended to be complementary and that one applies when the other does not. Although under different circumstances the term "subdivision of the state of Montana" in section 87-5-502, MCA, might be deemed to include irrigation districts (Crow Creek Irrigation District v. Crittenden, 71 Mont. 66, 227 P. 63 (1924)), the Stream Protection Act expressly excludes from its regulatory scope "any irrigation district project or any other irrigation system." § 87-5-507, MCA. Sections 87-5-502 and 87-5-506, MCA, must be construed together, and it is accordingly anomalous to suggest that the term "subdivision of the state of Montana" in the former provision refers to an entity whose principal activity is specifically exempted from coverage. See Thaanum v. Bynum Irrigation District, 72 Mont. 221, 225, 232 P. 528, 530 (1925) ("[a] word or phrase may have different meanings as it is employed in

different connections ... and the particular meaning to be attached to it in a given statute or constitutional provision is to be measured and controlled by the connection in which it is employed, the evident purpose of the act, and the subject to which it relates"). Since an irrigation district falls outside the purview of the Stream Protection Act, my earlier opinions compel the conclusion that such an entity is a "person" under the Streambed Preservation Act.

This conclusion, finally, is not only consonant with 41 Op. Att'y Gen. No. 62, which held that irrigators must comply with the Streambed Preservation Act when undertaking a "project" as defined in the 1985 codified version of section 75-7-103(5), MCA, but is also consistent with recent legislative amendments to that provision, which generally exclude from "project" status "customary and historic maintenance and repair of existing irrigation facilities[.]" 1987 Mont. Laws, ch. 551, § 1. By implication, therefore, other forms of modifications to irrigation systems do constitute a "project." While 41 Op. Att'y Gen. No. 62 dealt with an individual irrigator and not an irrigation district, there exists no basis in the language or purpose of the Streambed Preservation Act to distinguish between individuals and districts; irrespective of who undertakes a particular project, its effects and the legislatively-perceived need for oversight remain.

THEREFORE, IT IS MY OPINION:

> An irrigation district is a "person" within the meaning of section 75-7-103(4), MCA, of the Natural Streambed and Land Preservation Act.

Very truly yours,

MIKE GREELY
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

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

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

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

Definitions:

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

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

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter

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

Statute Number and Department

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

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through June 30, 1987. This table includes those rules adopted during the period June 30, 1987 through September 30, 1987 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through June 30, 1987, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1987 Montana Administrative Register.

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