MONTANA ADMINISTRATIVE REGISTER

1987 ISSUE NO. 3
FEBRUARY 13, 1987
PAGES 128-192

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 3

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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

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

In the matter of the proposed amendments of 8.20.401 concerning traineeship requirements and standards, 8.20.402 concerning fees and the repeal of 8.20.406 concerning certified hearing aid audiologists	)))))	NOTICE OF PROPOSED AMENDMENTS OF 8.20.401 TRAINEESHIP REQUIREMENTS AND STANDARDS, 8.20.402 FEES, AND THE REPEAL OF 8.20.406 CERTIFIED HEARING AID AUDIOLOGISTS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On March 30, 1987, the Board of Hearing Aid Dispensers proposes to amend and repeal the above-stated rules.

2. The proposed amendment of 8.20.401 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-583, Administrative Rules of Montana)

"8.20.401 TRAINEESHIP REQUIREMENTS AND STANDARDS (1) through (2)(b) will remain the same.

~~(c)--The-number-of-trainees--shall-be-limited-to-no--more than---two--trainees-for-each-licensed--dispenser-at-any-given time.~~

(3) through (7) will remain the same."

Auth: 37-16-202, MCA Imp: 37-16-301, 405, MCA

3. The board moved to delete 8.20.401(2)(c) at the request of licensees as it is an extension of the law, and prevents free enterprise and job opportunities. This action was taken at the board meeting on December 2, 1986.

4. The proposed amendment of 8.20.402 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-584, Administrative Rules of Montana)

"8.20.402 FEES

(1) Application Fee (includes initial written and practical examination)	$125.00
Re-examination--written	40.00
Re-examination--practical (includes renewal of trainee license)	55.00
Original license (upon passing examinations)	~~80.00~~ 100.00
Renewal license	~~80.00~~ 125.00
Copies of law and rules	5.00

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

Auth: 37-1-134, 37-16-202, MCA Imp: 37-1-134, 37-16-202, 402, 405, 407, MCA

4. Proposed current level budget for FY 88 is $11,569 and FY 89 is $11,567. Revenue estimated with current fees

is $7,557. As of December 31, 1986, the board's special revenue fund balance is $5,102, which will be depleted prior to FY 88 year end. Therefore a fee increase is necessary under the provisions of 37-1-134, MCA.

5. The board is proposing to repeal 8.20.406 Certified Hearing Aid Audiologist which can be found on page 8-585, Administrative Rules of Montana. The board moved to repeal this rule at their meeting of February 11, 1987, based upon an Attorney General opinion that the rule is in direct conflict with this statute and purporting to authorize "certified hearing aid audiologist" is invalid. Also Medicare providers have had problems with claims payment from those individuals who sign "Certified Hearing Aid Audiologist" as Medicare only pays for services of an Audiologist and there has been some fraud in use of this term to Medicare.

6. Interested persons may submit their data, views or arguments concerning the proposed amendments and repeal in writing to the Board of Hearing Aid Dispensers, 1424 9th Avenue, Helena, Montana 59620-0407, no later than March 27, 1987.

7. If a person who is directly affected by the proposed amendments and repeal wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Board of Hearing Aid Dispensers, 1424 9th Avenue, Helena, Montana 59620-0407, no later than March 27, 1987.

8. If the board receives requests for a public hearing the proposed amendments and repeal from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments and repeal, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 7 based on the 70 licensees in Montana.

BOARD OF HEARING AID DISPENSERS
DUDLEY ANDERSON, CHAIRMAN

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

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

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the repeal of ARM 10.55.405A, Gifted and Talented	NOTICE OF PUBLIC HEARING ON THE PROPOSED REPEAL OF ARM 10.55.405A, GIFTED AND TALENTED

TO: All Interested Persons

1. On March 23, 1987, at 1:00 p.m., or as soon thereafter as it may be heard, a public hearing will be held in the Board of Regents Conference Room, 33 South Last Chance Gulch, Helena, Montana, in the matter of the repeal of ARM 10.55.405A, Gifted and Talented.

2. The rule proposed to be repealed can be found on pages 10-783 through 10-783.1 ARM.

3. The Board is proposing the repeal of this rule because it appears to be in conflict with present law.

4. Interested persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or argument may also be submitted to Ted Hazelbaker, Chairman, Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59620, no later than March 20, 1987.

5. Ted Hazelbaker, Chairman, and Claudette Morton, Executive Secretary to the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana, have been designated to preside over and conduct the hearing.

In the matter of the amendment of Definitions, Correspondence, Extension and Inservice Credits, Reinstatement, Certificates	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF ARM 10.57.102, DEFINITIONS, ARM 10.57.207, CORRESPONDENCE, EXTENSION AND INSERVICE CREDIT, ARM 10.57.208, REINSTATEMENT, ARM 10.57.401, CLASS 1 PROFESSIONAL TEACHING CERTIFICATE, ARM 10.57.402, CLASS 2 STANDARD TEACHING CERTIFICATE, ARM 10.57.403, CLASS 3 ADMINISTRATIVE CERTIFICATE

TO: All Interested Persons

1. On March 23, 1987, at 1:00 p.m., or as soon thereafter as it may be heard, a public hearing will be held in the Board of Regents Conference Room, 33 South Last Chance Gulch, Helena, Montana, in the matter of the amendment of ARM 10.57.102, Definitions; ARM 10.57.207, Correspondence, Extension and Inservice Credits, ARM 10.57.208, Reinstatement, ARM 10.57.401, Class 1 Professional Teaching Certificate, ARM 10.57.402, Class 2 Standard Teaching Certificate, and ARM 10.57.403, Class 3 Administrative Certificate.

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

10.57.102 DEFINITIONS (1) through (14) remain the same.
(15) Credits for renewal must be compatible with academic course work.
(a) The following will not be counted:
(i) Continuing education units - as opposed to continuing education credits;
(ii) Conferences that are statewide and part of the regular job;
(iii) Professional conferences that include as part of their agenda a business meeting.
(b) Pre and post conference workshops are acceptable if approved by the office of public instruction through the equivalency guidelines (see ARM 10.57.106).
~~(15)~~ (16) Remains the same.
~~(16)~~ (17) Remains the same.
~~(17)~~ (18) Remains the same.
~~(18)~~ (19) Remains the same.
~~(19)~~ (20) Remains the same.
~~(20)~~ (21) Remains the same.
AUTH: Sec. 20-4-102 MCA
IMP: Sec. 20-4-106 MCA

10.57.207 CORRESPONDENCE, EXTENSION AND INSERVICE CREDITS (1) through (3) Remain the same.
(4) Credits for renewal or reinstatement of a teaching or administrative certificate must supplement, strengthen and update the teacher's/administrator's basic preparation. Such credits should be those that:
(a) Would be approved by an accredited college as part of a teacher preparation or administrator preparation program, or;
(b) The college would allow on a new area of endorsement, or;
(c) Include new developments in education which were not part of the teacher's/administrator's original preparation (i.e., computer assisted instruction, mainstreaming, gifted and talented), or;
(4)(d) through (5) remain the same.
AUTH: Sec. 20-4-102 and 20-2-121(1) MCA
IMP: Sec. 20-4-102, 20-4-103, 20-4-106, 20-4-108 MCA

10.57.208 REINSTATEMENT (1) Lapsed certificates cannot be renewed but the holder may apply for reinstatement of the certificate provided requirements are met which are in force at the time reinstatement is requested. A minimum of 12 quarter (8 semester) credits of college work or the equivalent is required within the five-year period immediately preceding the ~~date of application~~ effective date of the certificate for reinstatement of the class 2 certificate. A minimum of 6 quarter (4 semester) credits or the equivalent within this period is required for reinstatement of class 1 or class 3 certificates (one year of teaching or administrative experience with a master's degree). In cases where this requirement has not been met, a class 5 certificate may be issued to meet the recent training requirement.
(2) If the period of lapse is 15 years or more, the

reinstatement requirements ~~may be obtained from the superintendent of public instruction. If the period of lapse is less than 15 years, the teacher may apply for a class 5 certificate to meet recency or reinstatement requirements.~~ for the class 2 certificate is 12 quarter credits no more than five years old plus additional credits based on the number of years of teaching experience. For the person seeking a class 1 or 3 certificate, the requirement is 6 quarter credits no more than five years old plus additional credits based on teaching experience.

No teaching or equivalent experience since the original training	+6 additional credits
1-5 years teaching or equivalent experience.	+4 additional credits
5-10 years teaching or equivalent experience.	+2 additional credits
Over 10 years teaching or equivalent experience.	+0 additional credits

If the individual seeking the class 2 certificate has 12 quarter credits within the preceding 15 years (6 quarter credits for those seeking the class 1 or 3, he/she may qualify for the class 5 provisional certificate, providing all other academic and non-academic requirements are met. The class 5 would allow three years of certified time in which to complete the balance of the required recent credits.

~~(3) The recent training requirements for any person desiring reinstatement of class 1 or class 3 certification shall be 6 quarter (4 semester) credits of college work earned within the five year period prior to making application for the certificate. In cases where this requirement has not been met, a class 5 certificate may be issued to meet the recent training requirement.~~

~~(4) For any person holding a master's degree, a year of successful teaching or administrative experience during the five year period prior to making application will be accepted in lieu of the recent training requirement for reinstatement of class 1 or class 3 certificate.~~

~~(5)~~ (3) Credits for renewal or reinstatement of a teaching or administrative certificate must supplement, strengthen and update the teacher's/administrator's basic preparation. Such credits should be those that:

(a) Would be approved by an accredited college as part of a teacher preparation or administrator preparation program, or;

(b) The college would allow on a new area of endorsement, or;

(c) Include new developments in education which were not part of the teacher's/administrator's original preparation (i.e., computer assisted instruction, mainstreaming, gifted and talented), or;

(d) Be a result of an approved equivalency program as per ARM 10.57.206~~,~~, or;

(e) Provide instruction in a language other than English.

~~(6)~~ (4) Courses previously taken may not be taken again for renewal purposes unless specifically approved. Requests for approval must be in writing with appropriate justification.

AUTH: Sec. 20-4-102, 20-2-121 MCA
IMP: Sec. 20-4-102, 20-4-103, 20-4-106, 20-4-108 MCA

3. The board is proposing these amendments to the rules to correct all redundancy in existing language, incorporate a reinstatment policy, which has been a long standing practice, into the rules on advice of legal counsel, and to ensure school administrators are current with their profession.

10.57.401 CLASS 1 PROFESSIONAL TEACHING CERTIFICATE (1) through (4) remain the same.

(5) Reinstatement: 6 quarter (4 semester) credits or the equivalent earned within the 5-year period preceding ~~application~~ the effective date of the certificate, or one year of experience with a master's degree. (See ~~guidelines~~ ARM 10.57.208 for reinstatement of certificates allowed to lapse 15 years or more.)

(6) through (7) remain the same.

AUTH: Sec. 20-4-102 MCA
IMP: Sec. 20-4-106, 20-4-108 MCA

10.57.402 CLASS 2 STANDARD TEACHING CERTIFICATE (1) through (3) remain the same.

(4) Reinstatement: 12 quarter (8 semester) credits or the equivalent earned within the 5-year period preceding ~~applications~~ the effective date of the certificate. (See ~~guidelines~~ ARM 10.57.208 for reinstatement of certificates allowed to lapse 15 years or more.)

(5) through (10) remain the same.

AUTH: Sec. 20-2-121(1), 20-4-102 MCA
IMP: Sec. 20-4-102, 20-4-103, 20-4-106, 20-4-108 MCA

10.57.403 CLASS 3 ADMINISTRATIVE CERTIFICATE (1) through (2) remain the same.

(3) Renewal: Verification of one year of successful experience or the equivalent in the area of endorsement. Effective September 1, 1992, six credits will be required for renewal of an administrative certificate. Renewal credits consist of college credit, extension course credits and continuing education credits. Also acceptable are staff development credits, inservice training credit and local school district professional development credit, as approved by the office of public instruction (see ARM 10.57.206).

(4) Reinstatement: 6 quarter (4 semester) credits or the equivalent earned within the 5-year period preceding the effective date of the certificate. Requirements must be met that are in force at the time of reinstatement. (See ~~guidelines~~ ARM 10.57.208 for reinstatement of certificates allowed to lapse 15 years or more.)

(5) through (8) remain the same.

AUTH: Sec. 20-4-102 MCA
IMP: Sec. 20-4-106, 20-4-106(1)(c), 20-4-108 MCA

3. The board is proposing these amendments to ensure school administrators are current with their profession.

4. Interested persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or argument may also be submitted to Ted Hazelbaker, Chairman, Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59620, no later than March 20, 1987.

5. Ted Hazelbaker, Chairman, and Claudette Morton, Executive Secretary to the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana, have been designated to preside over and conduct the hearing.

Ted Hazelbaker

TED HAZELBAKER, CHAIRMAN
BOARD OF PUBLIC EDUCATION

BY: Claudette Morton

Certified to the Secretary of State February 2, 1987.

BEFORE THE DEPARTMENT
OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the Matter of Proposed Adoption of New Rules and Amendment of Rules Regarding Standards and Procedures for Intrastate Rail Rate Regulation.	NOTICE OF PROPOSED ADOPTION OF NEW RULES AND AMENDMENT OF RULES REGARDING INTRASTATE RAIL RATE PROCEEDINGS NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On March 23, 1987 the Department of Public Service Regulation proposes to adopt new rules regarding standards and procedures for regulation of intrastate rail rates. The Department proposes to amend rules 38.4.120, 38.4.126 - 38.4.128, 38.4.141, 38.4.143 - 38.4.145, 38.4.147 - 38.4.152.

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

38.4.120 WAIVER OF MONIES DUE TO RAILROAD (1) If a railroad wishes to waive collection of amounts due pursuant to suspensions under ARM 38.4.117, petitions based on damages that involve tariff errors or misconstruction, or the erroneous application of demurrage charges, when such amounts are more than $2,000.00, a petition for appropriate authority may be filed by the railroad, with the commission, in the form of a Letter of Intent to Waive Insignificant Amounts. The petition should contain the following information:

(a), (b), (c) Remains the same.

(d) As applicable, ~~T~~the number of the investigation and suspension docket involved, the beginning and ending dates of the suspension period, and ~~any~~ other pertinent tariff information.

(e), (f), (2) Remains the same.

(3) As applicable, ~~T~~the protest shall identify the investigation and suspension docket number, shall clearly state the reasons for objection and shall certify that a copy has been served on all parties named in the Letter of Intent to Waive Insignificant Amounts.

(4), (5) Remains the same.

(6) If the amount to be waived is $2,000.00 or less, no petition need be filed prior to waiver of monies due. ~~, provided that~~ However, in the case of a waiver pursuant to ARM 38.4.117, this exemption may be invoked by the railroad only once for any person who uses the original rate during the suspension period. This exemption shall not in any way be construed as authorizing a railroad to consistently charge any person a rate for services which differs from the appropriate tariff then in effect. ~~However~~ In any event, a statement informing the commission of the investigation and suspension docket number, or as applicable, relevant tariff information, the action taken, the date of the action and the amount of monies due that were waived shall be submitted to the com-

rission within 30 days of the waiver. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

38.4.126 INTERMODAL COMPETITION (1), (2), (a), (b), (c), (d) Remains the same.

(3) Water carriage may also create intermodal competition. Water carriage is restricted to certain geographic areas and is generally used for commodities moving in bulk. The evidence required to demonstrate effective competition between rail and water alternatives is in many respects similar to that required for intramodal competition among rail carriers. Effective competition from water carriage may be deduced from the following types of evidence:

(a) the number of alternatives involving different carriers;

(b) the feasibility of each alternative as evidenced by:

(i) pertinent physical characteristics, for the product in question, of the transportation or routing associated with each alternative;

(ii) the access of both the shipper and receiver to each alternative; and

(c) the transportation costs of each alternative.

~~(3)~~ (4) Other types of evidence on the feasibility or nonfeasibility of motor and water carriage as an alternative to rail will also be considered. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

38.4.127 GEOGRAPHIC COMPETITION (1) Geographic competition is a restraint on rail pricing stemming from a shipper's or receiver's ability to get the product to which the rate applies from another source, or ship it to another destination. Because shippers and receivers can do this, the railroad must compete with the railroad serving the alternate source or destination. Geographic competition among rail carriers is nontrivial for commodities in which transportation costs account for a substantial portion of the delivered price.

~~(1)~~ (2) To establish the potential for geographic competition, evidence should be submitted concerning the following:

(a), (b), (c) Remains the same.

~~(2)~~ (3) To determine whether effective geographic competition actually exists, evidence showing the feasibility of each source or destination and the likelihood of competition should be presented. This evidence may be as follows:

(a), (b), (c), (d), (e), (f), (g) Remains the same.

(4) These guidelines are not intended to include all possibly pertinent evidence. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

38.4.128 PRODUCT COMPETITION (1) Product competition occurs when a receiver or shipper can use a substitute(s) for the product covered by the rail rate. In that case, the

railroad must compete with the railroad or other mode which carries that other product, and again, must keep its rate competitive if it wants the traffic. Evidence as to the existence of product competition should reflect the availability to the shipper or receiver of feasible substitutes and show that these substitutes can be obtained through the use of other carriers or modes without substantially greater cost, transportation or otherwise.

~~(1)~~ (2) Evidence as to the existence of product competition should reflect the availability to the shipper or receiver of feasible substitutes and show that these substitutes can be obtained through the use of other carriers or modes without substantially greater cost, transportation or otherwise. To demonstrate whether a feasible substitute exists, the following types of evidence, among others, may be submitted:

(a), (b), (c), (d) Remains the same.

(3) These guidelines are not intended to include all possibly pertinent evidence. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

38.4.141 CONTRACTS (1) A contract is an agreement, or an amendment, including written contract modifications signed by the parties, entered into by one or more rail carriers with one or more purchasers of rail service to provide specific services under specified rates and conditions.

(2) Rail carriers providing transportation subject to the jurisdiction of the commission, shall file with the commission an original and one copy of all contracts entered into with one or more purchasers of rail services. These contracts shall be accompanied by two copies of the contract tariff that contains a summary of the nonconfidential elements of the contract in the format specified in 49 CFR ~~1300.300-1300.315~~ 1312.41.

(3) A contract filed under this section shall:

(a) specify that the contract is made pursuant to 49 U.S.C. 10713, and

(b) be signed by duly authorized parties.

(4) An amendment is treated as a new contract. An amendment is lawful only if it is filed and approved in the same manner as a contract. To the extent terms affecting the lawfulness of the underlying contract are changed, remedies are revived and review is again available. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

38.4.143 FILING OF COMPLAINTS (1) Remains the same.

(2) A reply shall be filed by the 23rd day after the filing of the contract. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

38.4.144 COMMISSION DECISION UPON REVIEW OF CONTRACT (1), (a) Remains the same.

(b) in the case of agricultural contracts where the commission finds unreasonable discrimination by a carrier in ac-

cordance with 49 U.S.C. Sec. 10713(d)(2)(B), allow the carriers the option to either ~~order the carrier to~~ provide rates and services substantially similar to the contract at issue with such differences in terms and conditions as are justified by the evidence, or cancel the contract.

(2) Motions for reconsideration of a commission decision will be made in accordance with ARM 38.2.4806, subject to the following exception:

(a) A motion for reconsideration should be made at least two work days prior to the contract approval date as set forth in ARM 38.4.145. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

38.4.145 APPROVAL AND IMPLEMENTATION DATE OF CONTRACTS (1), (2), (a), (b), (c) Remains the same.

(3) Transportation or service performed under a contract or amendment may begin, without specific commission authorization, on or after the date the contract and contract summary or contract amendment and supplement are filed and before commission approval as defined in ARM 38.4.145(1) and (2), subject to the following conditions:

(a) The contract or contract amendment shall specifically state that the transportation or service may begin on the date of filing and that performance is subject to the conditions of this rule. The contract summary or supplement shall separately reflect the date of commencement of service under this provision under "duration of the contract," ARM 38.4.150(1)(g).

(b) If the rail equipment standards of ARM 38.4.148 are exceeded, prior relief shall be obtained from the commission and shall be specifically identified in the contract summary.

(c) If the commission disapproves or rejects the contract or amendment, the appropriate non-contract tariffs or the contract provisions otherwise in effect under previously approved contracts and amendments will be applicable.

(d) Before commission approval, the contract or amendment and transportation are subject to commission jurisdiction, and ARM 38.4.141 through ARM 38.4.152.

(e) Transportation or service may not begin under a contract or an amendment to a contract before the filing date of either the contract or the amendment, respectively. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

38.4.147 ENFORCEMENT (1) Remains the same.

(2) The commission may not require a rail carrier to violate the terms of a contract that has been approved under these rules. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

38.4.148 LIMITATION ON AGRICULTURAL EQUIPMENT AND RELIEF (1) A rail carrier may enter into contracts for the transportation of agricultural commodities (including forest

products ~~and~~ but not including wood pulp, wood chips, pulpwood or paper) that involve the use of carrier owned or leased equipment not in excess of 40 percent of the total number of the carrier's owned or leased equipment, by major car type, except as provided in (2) below.

(2), (3), (a), (b), (c) Remains the same. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

38.4.149 SPECIAL TARIFF RULES FOR CONTRACTS (1) Remains the same.

(2) All contracts and contract tariffs shall be filed with the commission at least 30 days, and not more than 60 days, before the date on which they are to become effective, except as otherwise authorized by ~~the commission~~ these rules.

(3) "Agricultural commodities," ~~as used in these rules, means unmanufactured agricultural products, and includes~~ "forest products," and "paper" as used in these rules, will be defined on a case-by-case basis.

(4), (5) Remains the same. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

38.4.150 CONTRACT AND CONTRACT TARIFF TITLE PAGE (1) The title page of every contract and amendment shall contain only the following information:

(a) In the upper right corner, the contract number (see ARM 38.4.151).

(b) In the center of the page, the issuing carrier's name, followed by the word "CONTRACT" in large print.

(c) Amendments to contracts shall also show, in the upper right corner, the amendment number as specified in ARM 38.4.151.

(d) Date of issue and date to be effective.

~~(1)~~ (2) The title page of every contract tariff and of every supplement shall show the following in the order named:

(a), (b), (c), (d), (e), (f), (g), (h) Remains the same. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

38.4.151 CONTRACT TARIFF NUMBERING SYSTEM (1) Remains the same.

(2) Any amendment to a contract shall be reflected in a corresponding supplement to the contract summary. If the change in the contract is only in confidential matter, a statement to that effect will be made in the supplement.

(3) At the carrier's option, the carrier's tariff publishing officers may reserve blocks of numbers if tariffs are issued from different departments. An index to the blocks of reserved numbers shall be filed with the commission.

(4) Contract amendments and contract summary supplements shall be sequentially numbered. AUTH: Sec.

69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

38.4.152 CONTRACT TARIFF CONTENT (1), (a), (b), (c), (d), (e) Remains the same.

(f) The number of cars, by major car type, owned or leased by the carrier(s) listed in (a) above, or the number of car days, by major car type, used in or dedicated to providing the transportation covered by the contract or by options to the contract. Also, the average number of bad-order cars shall be identified. In addition, if the commodity identified is an agricultural commodity (including forest products, but not including wood pulp, wood chips, pulpwood or paper) then the participating rail carrier(s) shall certify:

(i) that the equipment used does not exceed 40 percent of the capacity of the rail carrier's owned or leased cars by major car type, and

(ii) in the case of an agricultural shipper who originated an average of 1,000 cars or more per year during the prior three year period by major car type, that the equipment used does not exceed 40 percent of the rail carrier's owned or leased cars used on the average by that shipper during the previous three years.

~~(f) The number of cars, by major car type, owned or leased by the carrier(s) listed in (a) above, or the number of car days, by major car type, used in or dedicated to providing the transportation covered by the contract or by options to the contract. Also, the maximum number of cars to be used during any single (peak) month shall be specified. In addition, if the commodity identified is an agricultural commodity then the participating rail carrier(s) shall certify:~~

~~(i) that the equipment used does not exceed 40 percent of the capacity of the rail carrier's owned or leased cars by major car type, and~~

~~(ii) in the case of an agricultural shipper who originated an average of 1,000 cars or more per year during the prior three year period by major car type, that the equipment used does not exceed 40 percent of the rail carrier's owned or leased cars used on the average by that shipper during the previous three years.~~

(g) In the event a complaint is filed involving common carrier obligation and carrier furnished cars, the carrier(s) shall immediately submit to the commission and the complainant additional data on cars used to fulfill the challenged contract. Data shall include (by major car type used to fulfill the contract):

(i) total bad car orders;

(ii) assigned car obligations; and

(iii) free running cars.

(h) Rail car data need not be submitted if:

(i) The shipper furnishes the rail cars, unless the cars are leased from the carrier, or

(ii) The contract is restricted to certain services which do not entail car supply.

~~(g)~~ (i) If the commodity identified is an agricultural commodity the tariff shall identify ~~the~~ the base rate for the services provided, presented in the same units (tons, hundredweight, ton-mile, carload, trainload, etc.) as used in the contract. (If the contract utilizes existing tariff rates, appropriate tariff references shall be sufficient.) The tariff shall also state the movement type (e.g., single car, multiple car, unit train), the minimum annual volume, and a summary of escalation provisions.

~~(h)~~ (j) ~~Special features included in the contract. This item~~ If the commodity identified is an agricultural commodity, and to the extent that service requirements are placed in contracts for other commodities, the tariff shall identify the existence of, but not the terms of special features such as, but not limited to, ~~rate escalation clauses,~~ transit privileges, services or transit time commitments, guaranteed car supply, annual volume requirements, minimum percentage of traffic requirements, etc.

~~(i) If the commodity is identified as agricultural, the details of the escalation clause (if any) shall be provided.~~

(k) Copies of contract summaries shall be available at the commission's office. Copies of contract summaries shall also be available from carriers participating in the contract. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

3. The proposed rules provide as follows:

RULE I SAVINGS PROVISION (1) Any rate which was in effect on October 1, 1980, and was not challenged within 180 days of that date (or was challenged unsuccessfully) is conclusively presumed to be lawful pursuant to Public Law 96-448, Sec. 229 (Staggers Rail Act of 1980).

(2) The provision of (1), above, shall not apply to any rate under which the volume of traffic moved during the 12 month period prior to October 1, 1980, did not exceed 500 net tons and has increased tenfold within the 3 year period immediately preceding a challenge to the reasonableness of such rate. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

RULE II COMMON CARRIER RESPONSIBILITY (1) The terms of a contract approved by the commission determine completely the duties and service obligations of the parties to the contract with respect of the services provided under the contract. The contract does not affect the parties' responsibilities for any services which are not included in the contract.

(2) Service under a contract approved by the commission is deemed a separate and distinct class of service and the equipment used to fulfill the contract shall not be subject to car service decisions under these rules. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

RULE III FILING AND AVAILABILITY OF CONTRACT

(1) Contracts and contract summaries shall not be filed in the same packages with standard tariff filings.

(2) The confidential contract shall not be attached to the contract summary.

(3) The envelope or wrapper containing the contract and summary shall be marked "Confidential, Rail Contract."

(4) A contract and summary shall be accompanied by a transmittal letter identifying the submitted documents, and the name and telephone number of a contact person.

(5) The contract filed under these rules or specific terms not in the contract summary shall not be available for inspection by persons other than the parties to the contract and authorized commission personnel except by petition showing that the petitioner has standing, is affected by the contract and has a demonstrated need for access to additional contract information to perfect a formal complaint.

(a) To demonstrate that it is affected by the contract at issue, a petitioner shall identify the provisions under which it is seeking relief, and describe the circumstances which it believes place it in a position to be harmed by the contract, including:

(i) The nature and size of the business of the complainant;

(ii) The relevant commodities that it ships or receives;

(iii) The location of the relevant points of origin or destination, including whether it consigns or receives the contract commodity at each location, at which locations the complainant's facilities are located and what railroads serve each location; and

(iv) Any additional information specific to the particular kind of complaint.

(b) In addition, the petitioner shall show to a reasonable degree, why it believes the contract or kind of contract could actually or potentially cause injury for which statutory protection is available.

(c) Discovery requests will be initially decided by the commission. Petitions shall be filed at the same time the complaint is filed, but no later than 18 days from the filing of the contract and contract summary. Petitions shall specifically note on the front page "Petition for Discovery" and note the designated contract number. Complainant must certify that a copy of the petition and complaint has been sent to the contracting carrier(s) the same day as filed at the commission. Replies to the petition and complaint are due within five days of the filing of the discovery request and complaint and in no event later than the 23rd day following filing of the contract. The commission will rule on the discovery request no later than the 26th day following the filing of the contract. In the event that discovery is granted, the contracting carrier(s) shall provide the required information by the 31st day following the filing of the contract. A decision of the commission granting discovery shall operate to institute a proceeding to review the contract. Approval of the contract shall be postponed until the 60th day following the filing of

the contract, or until the commission issues a decision. Where discovery has been granted, petitioner's amended complaint (if any) will be due no later than 35 days following filing of the contract. The reply from the contracting carrier(s) will be due by the 40th day.

(d) In the order granting discovery pursuant to this rule the commission shall include the following language: Petitioner and carriers and their duly authorized agents agree to limit to the subject complaint proceeding, the use of contract information or other confidential commercial information which may be revealed in the contract, the complaint, or the reply (or where an investigation is initiated the amended complaint or the reply to the amended complaint). This agreement shall be a condition to the inspection of any contract by a complainant and shall operate similarly on a carrier in possession of confidential information which may be contained in a complaint. Any information pertaining to parties to the contract, or subject to the contract (including consignors, co-signees and carriers) or pertaining to the terms of the contract, or relating to the complainant's confidential commercial information shall be kept confidential. Neither the information nor the existence of the information shall be disclosed to third parties, except for consultants or agents who agree, in writing, to be bound by this regulation, information which is publicly available, and information which, after receipt, becomes publicly available through no fault of petitioner, or is acquired from a third party free of any restriction as to its disclosure. The petitioner or carrier must take all necessary steps to assure that the information will be kept confidential by its employees and agents. No copies of the contract terms are to be retained subsequent to the termination of the proceeding or the expiration of the commission jurisdiction. This protective order may be amended by mutual consent.

(6) A contract and its summary filed under (Rule IV) may be labeled "Nonconfidential." Such a designation will permit the general public to inspect the entire contract.

(7) The contract summary filed under these rules shall include the information specified in ARM 38.4.152. The contract summary shall be made available for inspection by the general public.

(8) The contract summary filed under these rules shall not be required to be posted in any stations, but shall be made available from carriers participating in the contract upon reasonable request. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

RULE IV WAIVER OF TARIFF FILING REQUIREMENTS

(1) Upon a railroad's request for special permission to depart from tariff filing requirements of this chapter, and for good cause shown, the commission may waive application of any tariff filing rule, except where precluded by statute. AUTH: Sec. 69-2-101, MCA; IMP, Secs. 69-1-102, 69-14-111 and 69-14-301, MCA

4. Rationale: The Public Service Commission is proposing these amendments and adoptions in order to refine its rules regarding intrastate rail rates. The Staggers Act of 1980, Public Law 96-448, requires all states desiring to retain jurisdiction over intrastate rail rates to receive certification from the Interstate Commerce Commission (ICC). The Commission received such certification on November 20, 1984. These amendments and adoptions incorporate standards and procedures consistent with the Interstate Commerce Act. They will affect tariff filing requirements, procedures for investigating and suspending rates, complaint requirements, standards regarding market dominance and rate reasonableness, rail service contracts and waivers of amounts due.

5. Interested parties may submit their data, views or arguments concerning the proposed amendments and adoptions in writing to Timothy R. Baker, Public Service Commission, 2701 Prospect Avenue, Helena, Montana 59620-2601, no later than March 16, 1987.

6. If a person who is directly affected by the proposed amendments and adoptions wishes to express his data, views and arguments orally, he must make written request for a public hearing and submit this request along with any written comments he has to Timothy R. Baker, Public Service Commission, 2701 Prospect Avenue, Helena, Montana 59620-2601, no later than March 16, 1987.

7. If the agency receives requests for a public hearing on the proposed amendments and adoptions from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment or adoption; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25 persons based on all rail carrier customers in the State of Montana.

8. The Montana Consumer Counsel, 34 West Sixth Avenue, Helena, Montana 59620 (Telephone 444-2771) is available and may be contacted to represent consumer interests in this matter.

CLYDE JARVIS, Chairman

CERTIFIED TO THE SECRETARY OF STATE FEBRUARY 2, 1987.

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

In the matter of the amendment of Rules 46.12.525, 46.12.526 and 46.12.527 pertaining to outpatient physical therapy services	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 46.12.525, 46.12.526 AND 46.12.527 PERTAINING TO OUTPATIENT PHYSICAL THERAPY SERVICES

TO: All Interested Persons

1. On March 5, 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 amendment of Rules 46.12.525, 46.12.526 and 46.12.527 pertaining to outpatient physical therapy services.

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

46.12.525 OUTPATIENT PHYSICAL THERAPY SERVICES, DEFINITION (1) ~~Outpatient--p~~"Physical therapy" means the evaluation, treatment, and instruction ~~of--human--beings~~ to detect, assess, prevent, correct, alleviate, and limit physical disability, bodily malfunction ~~and--pain,--injury,~~ and any bodily or mental disability. Treatment employs, for therapeutic effects, physical measures, activities and devices, for preventive and therapeutic purposes, exercises, rehabilitative procedures, massage, mobilization, and physical agents including but not limited to mechanical devices, heat, cold, light, water, electricity, and sound. Physical therapy also includes the administration, interpretation, and evaluation of tests and measurements of bodily functions and structures, the establishment and modification of treatment, and consultative, educational, and other advisory services, and instruction and supervision of supportive personnel.

(2) "Outpatient physical therapy" ~~applies--only--to~~ means physical therapy services provided ~~by~~ other than by a hospital.

(3) "Restorative therapy" means physical therapy services that are reasonable and medically necessary to the treatment of the individual's illness as provided in ARM 46.12.526.

(4) "Maintenance therapy" means repetitive services required to maintain functions which do not involve complex and sophisticated physical therapy procedures, or the judgment and skill of a qualified physical therapist.

(5) "Maintenance plan" means the initial evaluation, design and instruction of a plan of care by a licensed physical therapist appropriate to the objectives of a physician and the capacity of a patient.

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

46.12.526 OUTPATIENT PHYSICAL THERAPY SERVICES, REQUIREMENTS (1) These requirements are in addition to those contained in ARM 46.12.102 and 46.12.301 through 46.12.308.

(2) Only restorative therapy which is reasonable and necessary to the treatment of the recipient's illness or injury will be reimbursed by the Montana medicaid program.

(3) "Reasonable and necessary" means:

(a) The services must be considered under accepted standards of medical practice to be a specific and effective treatment for the patient's condition;

(b) Therapy services must be of such a level of complexity and sophistication or the recipient's condition is such that the services required can be safely and effectively performed only by a licensed physical therapist or under his direct supervision;

(c) Either there must be an expectation that the recipient's condition will improve significantly in a reasonable and predictable period of time based on the assessment made by a physician of the patient's restoration potential after any needed consultation with the licensed physical therapist, or the services must be necessary to the establishment of a safe and effective maintenance program required in connection with a specific disease.

(i) If an individual's expected restoration potential would be insignificant in relation to the extent and duration of physical therapy services required, the physical therapy would not be considered reasonable and necessary.

(ii) If at any point in the treatment of an illness it is determined that the expectations will not materialize, the services will no longer be considered reasonable and necessary and will not be reimbursed.

(d) The amount and frequency of the services must be within the recognized standards of physical therapy practices.

(4) Services which do not require the performance or supervision of a licensed physical therapist are not considered reasonable and necessary even if these services are performed by a physical therapist.

(5) The establishment of a maintenance plan is reimbursable under the program. Maintenance therapy is not reimbursable under the Montana medicaid program.

(a) Establishment of a maintenance program by a licensed physical therapist includes the initial evaluation of the patient's needs, a plan designed to be appropriate to the capacity and tolerance of the patient and which incorporates the treatment objectives of the physician, the instruction of others in carrying out the program, and physical therapy evaluations as required.

(~~2~~6) All outpatient physical therapy services must be provided by, or under direct supervision of, a licensed physical therapist~~.~~ who is in constant attendance.

(~~3~~7) Outpatient physical therapy service is limited to a maximum of 200 visits per fiscal year.

(~~4~~8) All outpatient physical therapy must be prescribed by a physician.

(a) Prescriptions must be obtained before outpatient physical therapy is provided.

(~~5~~b) Prescriptions for outpatient physical therapy ~~is valid for 90 days except physical therapy prescription for a nursing home resident is~~ are only valid for ~~30~~ 90 days.

(~~6~~c) Written physicians' ~~orders~~ prescriptions and physical therapy reports must be current and available upon request of the department or its designated representative.

(~~7~~9) Outpatient physical therapy will be subject to review by the designated review organization.

(~~8~~10) Outpatient ~~P~~physical therapy services provided through a home health care agency shall be part of the ~~agencies~~ department's 200 visit limitation.

(~~9~~11) A physical therapy assistant, student or aide may assist in the practice of physical therapy under direct supervision of the licensed physical therapist who is responsible for and participates in the patient's treatment program.

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

46.12.527 OUTPATIENT PHYSICAL THERAPY SERVICES, REIMBURSEMENT (1) The department will pay the lowest of the following for outpatient physical therapy services: ~~not also covered by medicare: the provider's actual (submitted) charge for the service or the department's fee schedule contained in this rule.~~

~~The department will pay the lowest of the following for outpatient physical therapy services which are also covered by medicare:~~

(a) the provider's actual (submitted) charge for the service;

(b) the amount allowable for the same service under medicare; or

(c) the department's fee schedule contained in this rule.

(2) Outpatient physical therapy ~~fee schedule:~~ services which are reimburseable under the Montana medicaid program are limited to the following:

~~A. B. 1.....19.97~~
~~Consultation.....33.28~~
~~Electrophysiological evaluation.....33.28~~
~~Electromyography.....66.55~~
~~Physical Therapy Evaluation.....33.28~~

~~Home Instruction.....33.28~~
~~Muscle Testing.....33.28~~
~~Hubbard Tub.....26.62~~
~~Hubbard Tub + 1 modality.....26.62~~
~~Hubbard Tub + 2 modalities.....30.61~~
~~Hubbard Tub + 3 modalities.....33.28~~
~~Isolation Hubbard Tub.....26.62~~
~~Whirlpool.....15.97~~
~~Whirlpool + 1 modality.....17.30~~
~~Whirlpool + 2 modalities.....26.62~~
~~Whirlpool + 3 modalities.....29.93~~
~~Gait Training.....26.62~~
~~Postural Drainage.....17.36~~
~~Therapeutic Exercise.....19.97~~
~~One Modality.....13.31~~
~~Two Modalities.....14.64~~
~~Three Modalities.....19.97~~
~~Four Modalities.....19.97~~
~~Five Modalities.....23.96~~

EVALUATION AND INSTRUCTION

9-99080	Physical therapy evaluation	33.28
9-97799	Home instruction	33.28
9-90600	Initial consultation	33.28

MODALITIES

ONE MODALITY 13.31

9-97010	Hot or cold packs
9-97012	Traction, mechanical
9-97014	Electrical stimulation (unattended)
9-97016	Vasopneumatic devices
9-97018	Paraffin bath
9-97020	Microwave
9-97022	Whirlpool
9-97024	Diathermy
9-97026	Infrared
9-97028	Ultraviolet
9-97039	Each additional modality (specify) ... 3.00

PROCEDURES

ONE PROCEDURE, initial 30 minutes, each visit .. 9.99

9-97110	Therapeutic exercises
9-97112	Neuromuscular reeducation
9-97114	Functional activities
9-97116	Gait training
9-97118	Electrical stimulation (manual)

9-97120	Iontophoresis	
9-97122	Traction, manual	
9-97124	Massage	
9-97126	Contrast baths	
9-97128	Ultrasound	
9-97145	Each additional 15 minutes	5.00

OTHER PROCEDURES

9-97139	Postural draining	17.30
9-97220	Isolation tub	26.62
9-97500	Orthotics training (dynamic bracing, splinting); upper extremities; initial 30 minutes	9.99
9-97501	Each additional 15 minutes	5.00
9-97520	Prosthetic training, initial 30 minutes, each visit	9.99
9-97521	Each additional 15 minutes	5.00
9-97530	Kinetic activities to increase coordination, strength or range of motion, one area (any two extremeties or trunk); initial 30 min. ...	9.99
9-97531	Each additional 15 minutes	5.00

ACTIVITIES OF DAILY LIVING (ADL) AND DIVERSIONAL ACTIVITIES

9-97540	Initial 30 minutes, each visit	10.00
9-97541	Each additional 15 minutes	5.00

WHIRLPOOL

9-97240	Initial 30 minutes, each visit	7.97
9-97241	Each additional 15 minutes	4.00
9-97039	Additional modalities (with whirlpool) (specify)	3.00

TESTS AND MEASUREMENTS

9-97700	Office visit, including one of the following tests or measurements, with report, initial 30 minutes, each visit	16.64
	a. Orthotic check-out	
	b. Prosthetic check-out	
	c. Activities of daily living check-out	
9-97701	Each additional 15 minutes	8.32
9-97720	Extremity testing for strength, dexterity or stamina; initial 30 minutes, each visit	16.64

9-97721	Each additional 15 minutes	8.32
9-97752	Muscle testing, torque curves during isometric and isokinetic exercise (e.g., by use of Cybex machine) ...	33.28

MUSCLE TESTING

9-95831	Manual, extremity or trunk	33.28
9-95832	Hand (with or without comparison with normal side)	33.28
9-95833	Total evaluation of body, excluding hands	33.28
9-95834	Total evaluation of body, including hands	33.28
9-95842	Muscle testing, electrical	33.28

ELECTROMYOGRAPHY

95860	One extremity and related para-spinal areas	66.55
95861	Two extremities and related para-spinal areas	66.55
95862	Three extremities and related para-spinal areas	66.55
95864	Four extremities and related para-spinal areas	66.55

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

3. The amendments are necessary to include: a) the definitions of restorative therapy, maintenance therapy and maintenance plans and to distinguish between physical therapy and outpatient therapy; b) the clarification of the term reasonable and medically necessary as it applies to outpatient physical therapy; and c) the reimburseable modalities and procedures, the fee schedule for services and the Health Care Financing (HCFA) Common Procedure Coding System (HCPCS) as required by HCFA.

These modifications to the rule are not intended to expand or reduce medical services and benefits currently available. The changes will offer a degree in specificity and uniformity in both requirements and services necessary for cost containment and budget restraints.

The adoption of HCPCS coding necessitated a new reimbursement scheme. The modality fee schedule allows $13.31 for the first modality and $3.00 for each modality thereafter. A comparison of the current fee schedule with the proposed fee schedule projects an annual budget impact of less than $400.

Some procedures will now be reimbursed in 15 minute increments with the initial increment of 30 minutes.

It is anticipated that the proposed rule will have minimal budgetary impact.

Copies of this proposed notice are available for public review at county human services offices and local welfare offices.

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 March 13, 1987.

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

Dave Lewis
Director, Social and Rehabilitation Services

Certified to the Secretary of State February 2, 1987.

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

In the matter of the adoption of amendments to federal agency regulations pertaining to the Food Stamp Program	)	NOTICE OF ADOPTION OF AMENDMENTS TO FEDERAL AGENCY REGULATIONS PERTAINING TO THE FOOD STAMP PROGRAM. NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. The Department of Social and Rehabilitation Services hereby gives notice of the adoption and incorporation by reference of amendments through December 31, 1986, to 7 CFR 271 through 276. 7 CFR 271 through 276 are presently incorporated by reference in Rule 46.11.101, Food Stamp Program. These amendments generally provide the requirements for the food stamp employment and training program and other changes to the food stamp program. A copy of 7 CFR 271 through 276, as amended through December 31, 1986, may be obtained from the Department of Social and Rehabilitation Services, Economic Assistance Division, P.O. Box 4210, 111 Sanders, Helena, Montana 59604.

2. The effective date for the adoption of this amendment is March 16, 1987.

3. If the Department receives requests for a public hearing under 2-4-315, MCA, on the proposed amendments from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; from the Administrative Code Committee of the Legislature, from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 5,804 persons based upon 58,038 food stamp recipients.

4. The authority of the Department to amend the rule is based on section 53-2-201, MCA and the rule implements section 53-2-306, MCA.

Dave Lewis
Director, Social and Rehabilitation Services

Certified to the Secretary of State February 2, 1987.

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

In the matter of the adoption of Rule I pertaining to the Food Stamp Employment and Training Program	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF RULE I PERTAINING TO THE FOOD STAMP EMPLOYMENT AND TRAINING PROGRAM

TO: All Interested Persons

1. On March 11, 1987, at 10:00 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 adoption of Rule I pertaining to the Food Stamp Employment and Training Program.

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

RULE I FOOD STAMP EMPLOYMENT AND TRAINING PROGRAM

(1) The department of social and rehabilitation services hereby adopts and incorporates by reference 7 CFR 271, 7 CFR 272, 7 CFR 273 and 7 CFR 277, as amended through December 31, 1986, which are the food stamp employment and training program regulations as adopted by the food and nutrition services, United States department of agriculture. These federal regulations set forth the food stamp employment and training program components, participation requirements, and penalties for non-compliance. A copy of 7 CFR 271, 7 CFR 272, 7 CFR 273 and 7 CFR 277, as amended through December 31, 1986, may be obtained from the Department of Social and Rehabilitation Services, 111 Sanders, Box 4210, Helena, Montana 59604.

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 53-2-306 MCA

3. The Food Security Act of 1985 (Pub. L. 99-198) requires that no later than April 1, 1987, every state agency shall implement an employment and training program designed by the state agency and approved by the Secretary of Agriculture. The intent of the new requirement is to ensure that able-bodied food stamp recipients are involved in meaningful work-related activities which will eventually lead to paid employment and a decreased dependency on assistance programs.

The Food Stamp Employment and Training Program final regulations were published on December 31, 1986, in the Federal Register, Volume 51, number 250 at page 47378 et seq. Due to the inordinately short time frame, incorporation by reference is the most reasonable and expeditious means of enacting these changes.

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 March 13, 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 February 2, 1987.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF DENTISTRY

In the matter of the amendments of 8.16.602 concerning dental hygienists and dental auxiliaries, 8.16.901 concerning prohibition, 8.16.902 concerning permits, 8.16.903 concerning qualifying standards, and 8.16.905 concerning facility standards	)))))))	NOTICE OF AMENDMENTS OF 8.16.602 ALLOWABLE FUNCTIONS FOR DENTAL HYGIENISTS AND DENTAL AUXILIARIES, 8.16.901 PROHIBITION, 8.16.902 PERMIT REQUIRED FOR ADMINISTRATION OR FACILITY, 8.16.903 MINIMUM QUALIFYING STANDARDS, AND 8.16.905 FACILITY STANDARDS

TO: All Interested Persons:

1. On October 16, 1986, the Board of Dentistry published a notice of amendments of the above-stated rules at page 1654, 1986 Montana Administrative Register, issue number 19.

2. The Board of Dentistry took the following comments under consideration at its board meeting on November 12, 1986:

COMMENT: The Legislative Council suggested that Sec. 3, Ch. 449, L. 1985 be included as an authority extension for ARM 8.16.902 and 8.16.903.

RESPONSE: The Board concurred and the authority extension has been added.

COMMENT: The Council also suggested more detailed statements of reasonable necessity be given for amending 8.16.902.

RESPONSE: The Board concurs. The amendment to 8.16.902(3) would be in harmony with the intent of the statute which is to provide standards for facilities at which general anesthesia is administered. A dentist certified for general anesthesia may be authorized to administer anesthesia in any certified facility.

ARM 8.16.902(4) and (5) comport with 37-4-401, MCA, which provides that the Board shall authorize the administration of local anesthetic agents by a licensed dental hygienist certified by the board to administer the agents under the direct supervision and authorization of a licensed dentist.

COMMENT: Dr. Douglas Smith, of Kalispell, contended that dentists should be CPR certified.

RESPONSE: The board decided against including CPR certification, because it would change the initial intent of the proposed rules to such an extent beyond and different from the intent of the rules as proposed and noticed.

COMMENT: Dr. Donald Roberts, of Billings, disagreed with ACLS certification for the monitoring person, because the requirements would be restrictive.

RESPONSE: It was the decision of the Board that ACLS certification is not and would not be restrictive.

3. No other comments or testimony were received.
4. The Board has amended the rules exactly as proposed.

BOARD OF DENTISTRY
JOHN T. NOONAN, D.D.S
CHAIRMAN

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

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

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

In the matter of the adoption of a new rule concerning continuing education	)))	NOTICE OF ADOPTION OF NEW RULE 8.58.415A CONTINUING EDUCATION

TO: All Interested Persons:

1. On September 25, 1986, the Board of Realty Regulation published a notice of adoption of the above-stated rule at page 1545, 1986 Montana Administrative Register, issue number 18.

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

3. No 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, February 2, 1987.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

Supplemental Notice in the Matter of ARM 10.64.354 - ARM 10.64.357, Minimum Standards for School Buses	)))	SUPPLEMENTAL NOTICE OF ADOPTION OF ARM 10.64.354 - ARM 10.64.357, MINIMUM STANDARDS FOR SCHOOL BUSES

TO: All Interested Persons

(1) In 1986 MAR, p. 1753, Notice of Proposed Adoption, Rule II, Bus Body, states the effective date of January 1, 1987, except "Stop Signal Arm," page 27 of the National Minimum Standards for School Buses, July 1, 1987. This rule was noticed for adoption in 1987 MAR, p. 104. The Stop Signal Arm rule will not be effective until July 1, 1987, to allow schools time to retrofit existing vehicles.

(2) The rule will read as follows:

10.64.355 BUS BODY (1) through (3) adopted as proposed.

(a) This incorporation will be effective Feburary 1, 1987, except "stop signal arm," page 27 of the National Minimum Standards for School Buses, will be effective July 1, 1987.

(3) Rule II, Bus Body, Rule III, Special Education Vehicle Standards, and Rule IV, LP Gas Motor Fuel Installation, noticed for proposed adoption in 1986 MAR, page 1752, state effective date of January 1, 1987. Because the notice for adoption was not published until 1987 MAR, page 102, effective dates of these new rules will be February 1, 1987.

Ted Hazelbaker

TED HAZELBAKER, CHAIRMAN
BOARD OF PUBLIC EDUCATION

BY: Clarabelle Morton

Certified to the Secretary of State February 2, 1987.

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

In the matter of the amendment of rules 16.8.704, 16.8.1101, 16.8.1102, 16.8.1109, 16.8.1113, and 16.8.1114, concerning testing and air quality permits	))))))	NOTICE OF AMENDMENT OF RULES (Air Quality)

To: All Interested Persons

1. On December 11, 1986, in MAR issue #23 on page 2000, the department published notice of proposed amendments of the above rules, concerning rule changes necessary for conformance with federal requirements and clarification of existing rules pertaining to testing requirements and permitting.

2. The department has amended the rules as proposed with changes only in rule 16.8.704(2) and (3), for the purpose of correcting "40 CFR Part 50" to "40 CFR Part 51":

16.8.704 TESTING REQUIREMENTS (1) Same as proposed.

(2) All sources subject to the requirements of 40 CFR Part 50 51 Appendix P must install, calibrate, maintain, and operate equipment for continuously monitoring and recording emissions. All subject sources must have installed all necessary equipment and shall have begun monitoring and recording emissions data in accordance with Appendix P by January 31, 1988.

(3) The board hereby adopts and incorporates by reference 40 CFR Part 50 51 Appendix P, which is a federal agency regulation setting forth the continuous emission monitoring requirements for existing major stationary sources. A copy of 40 CFR Part 50 51 Appendix P may be obtained from the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

16.8.1101 DEFINITIONS Same as proposed.

16.8.1102 WHEN PERMIT REQUIRED -- EXCLUSIONS
Same as proposed.

16.8.1109 CONDITIONS FOR ISSUANCE OF PERMIT
Same as proposed.

16.8.1113 MODIFICATION OF PERMIT Same as proposed.

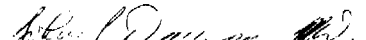
16.8.1114 TRANSFER OF PERMIT Same as proposed.

3. Comments were received (1) that the reference to 40 CFR Part 50 is improper and that the correct reference is 40 CFR Part 51; (2) that the word "federal" should be inserted

before the term "nonattainment" in rule 16.8.1109(8); (3) that rule 16.8.704 be limited to apply only to sources that emit a contaminant that could violate an existing board standard; and (4) that in rule 16.8.704 the term "director" [of the department] be retained and not deleted in favor of the word "department."

Response: The board acknowledged the need for correction in the reference to 40 CFR Part 50 and adopted the rules with this change. As to the remaining comments, the commentors agreed that the board should proceed to adopt the rules as proposed. However, the board directed the department to consider these comments, to consult as necessary with the respective commentors, and to report back with its recommendations at the board's next meeting. Depending upon the department's report, the board may initiate additional rulemaking incorporating one or more of the commentors' suggestions.

JOHN F. McGREGOR, M.D., Chairman,
BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES

by 
JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State February 2, 1987.

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

In the matter of the amendment of Rule 46.12.1005 pertaining to transportation and per diem	)))	NOTICE OF THE AMENDMENT OF RULE 46.12.1005 PERTAINING TO TRANSPORTATION AND PER DIEM

TO: All Interested Persons

1. On December 26, 1986, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.1005 pertaining to transportation and per diem at page 2057 of the 1986 Montana Administrative Register, issue number 24.

2. The Department has amended Rule 46.12.1005 as proposed with the following changes:

46.12.1005 TRANSPORTATION AND PER DIEM, REIMBURSEMENT

(1) The department will pay the ~~lowest~~ lower of the following for transportation and per diem not also covered by medicare; the provider's actual (submitted) charge for the service or the department's fee schedule contained in this rule.

(2) The department will pay the lowest of the following for transportation and per diem which are also covered by medicare: the provider's actual (submitted) charge for the service; the amount allowable for the same service under medicare; or the department's fee schedule contained in the rule.

A0170
~~0-A-0170~~ personal or non-commercial ground vehicle mileage ..... current rate for state employees

A0150
~~0-A-0150~~ regularly scheduled, air ..... usual & customary fee

A0110
~~0-A-0110~~ regularly scheduled, ground, including taxis and limousine service ..... usual & customary fee

A0180
~~0-A-0180~~ breakfast (12:01 a.m. to 10:00 a.m.) $2.75

A0190
~~0-A-0190~~ lunch (10:01 a.m. to 3:00 p.m.) $3.30

A0200
~~0-A-0200~~ dinner (3:01 p.m. to 12:00 a.m.) $6.60

A0210
~~0-A-0210~~ per diem, including lodging $22.44

Subsections (2) through (3)(a) remain as proposed in text but will be renumbered (3) through (4)(a).

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

3. The Department has thoroughly considered all commentary received:

COMMENT: A staff person from the Secretary of State's office recommended that the second paragraph be earmarked with a (2) and the remaining subsections renumbered correspondingly.

RESPONSE: The Department has made the recommended changes.

COMMENT: A Department staff person noted that the transportation codes were incorrect.

RESPONSE: The correct codes have been inserted into the rule.

Dave Lewis
Director, Social and Rehabilitation Services

Certified to the Secretary of State February 2, 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 medically needy income standards	)))	NOTICE OF THE AMENDMENT OF RULE 46.12.3803 PERTAINING TO MEDICALLY NEEDY INCOME STANDARDS

TO: All Interested Persons

1. On December 11, 1986, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.3803 pertaining to medically needy income standards at page 2004 of the 1986 Montana Administrative Register, issue number 23.

2. The Department has amended Rule 46.12.3803 as proposed.

3. No written comments or testimony were received.

Director, Social and Rehabilitation Services

Certified to the Secretary of State January 20, 1987.

VOLUME NO. 42 OPINION NO. 2

CHILD ABUSE - School staff members attending investigative interviews;
PRIVACY - School staff members attending investigative interviews of reportedly abused and neglected children;
SCHOOL DISTRICTS - Policy requiring school staff members to attend investigative interviews of reportedly abused and neglected children;
SOCIAL AND REHABILITATION SERVICES, DEPARTMENT OF - School staff members attending investigative interviews of reportedly abused and neglected children;
TEACHERS - Attending investigative interviews of reportedly abused and neglected children;
MONTANA CODE ANNOTATED - Title 41, chapter 3; sections 41-3-108, 41-3-201, 41-3-202, 41-3-205;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 49 (1986).

HELD: A school district policy requiring that an individual investigating a child abuse or neglect case have a school staff member present at the child's interview if the interview is conducted without parental notification, is prohibited.

19 January 1987

Scott B. Spencer
Deputy Lincoln County Attorney
Courthouse, 512 California Avenue
Libby MT 59923

Dear Mr. Spencer:

You have requested my opinion on the following issue:

> Whether a school district policy which requires that an individual investigating a child abuse or neglect case have a school staff member present at the child's interview if the interview is conducted without parental notification, is in conflict with section 41-3-205, MCA.

You have informed me that the school's stated reason for having a school staff person present at the interview is to protect the child.

I conclude that the presence of a school staff member at an investigative interview conducted to determine if a child has been neglected or abused is prohibited.

Title 41, chapter 3, of the Montana Code Annotated is the chapter on child abuse, neglect, and dependency. Pursuant to statute, a school teacher or employee who knows or has reasonable cause to suspect that a child known to him in his professional or official capacity is an abused or neglected child must report the matter promptly to the Department of Social and Rehabilitation Services or its local affiliate. § 41-3-201, MCA. Section 41-3-202, MCA, provides in part that upon receipt of a report that a child may be an abused or neglected child:

> (1) ... [A] social worker or the county attorney or a peace officer shall promptly conduct a thorough investigation into the home of the child involved or any other place where the child is present, into the circumstances surrounding the injury of the child, and into all other nonfinancial matters which in the discretion of the investigator are relevant to the investigation. ...
>
> (2) The social worker is responsible for assessing the family and planning for the child. If the child is treated at a medical facility, the social worker, county attorney, or peace officer shall, consistent with reasonable medical practice, have the right of access to the child for interviews, photographs, and securing physical evidence and have the right of access to relevant hospital and medical records pertaining to the child.
>
> (3) If from the investigation it appears that the child suffered abuse or neglect, the department shall provide protective services to the child and may provide protective

> services to any other child under the same care. The department will advise the county attorney of its investigation.
>
> (4) The investigating social worker, within 60 days of commencing an investigation, shall also furnish a written report to the department. The department shall maintain a record system containing child abuse and neglect cases.

A social worker, the county attorney, or a peace officer investigates reports of possible abuse or neglect. The statute provides for no involvement of school staff persons in the conduct of an investigation following such a report.

Further, the records resulting from the investigation, including any interview with the child, would be included in the written report of the investigating social worker and become part of the case record. § 41-3-202(4), MCA.

Abuse and neglect records are strictly confidential. Section 41-3-205, MCA, states:

> (1) The case records of the department of social and rehabilitation services and its local affiliate, the county welfare department, the county attorney, and the court concerning actions taken under this chapter and all records concerning reports of child abuse and neglect shall be kept confidential except as provided by this section. Any person who permits or encourages the unauthorized dissemination of their contents is guilty of a misdemeanor.
>
> (2) Records may be used by interagency interdisciplinary child protective teams as authorized under 41-3-108 for the purposes of assessing the needs of the child and family, formulating a treatment plan, and monitoring the plan. Members of the team are required to keep information about the subject individuals confidential.

> (3) Records may be disclosed to a court for in camera inspection if relevant to an issue before it. The court may permit public disclosure if it finds such disclosure to be necessary for the fair resolution of an issue before it.
>
> (4) Nothing in this section is intended to affect the confidentiality of criminal court records or records of law enforcement agencies.

The language is clear. It expressly limits disclosure of abuse and neglect records to an interagency interdisciplinary child protective team and to a court when relevant to an issue before it. School officials, teachers, and employees are not included in interagency interdisciplinary child protective teams. § 41-3-108, MCA. They would therefore have no access to the abuse and neglect records of the Department of Social and Rehabilitation Services, the county welfare department, the county attorney, or the court.

I held in 41 Op. Att'y Gen. No. 49 (1986) as follows:

> Absent a court order, section 41-3-205, MCA, prohibits the Department of Social and Rehabilitation Services from disclosing case records and reports of child abuse and neglect to: (1) the natural parents or parent, or other person having legal custody of a child who is the subject of a dependency and neglect action filed under section 41-3-401, MCA; (2) health care professionals who are treating a child suspected of being abused or neglected; (3) the noncustodial parent of a child who has been removed from the custodial parent following an incident of abuse or neglect; and (4) the natural parents or parent, or other person having legal custody of a child who has been abused or neglected while in the care of foster parents.

Allowing a member of the school staff to attend the actual interview of the child would clearly circumvent the statutory scheme limiting access to abuse or neglect records.

As I noted in 41 Op. Att'y Gen. No. 49 (1986):

> Strict disclosure limitations are enacted for a variety of reasons. Reports of child abuse often contain information about the most private aspects of personal and family life. The information may or may not be corroborated and can be very damaging to the integrity of the family unit if released indiscriminately. Confidentiality also encourages the public to report incidents of child abuse. Case workers and those providing information rely on the confidential nature of the case records. A further reason disclosure is limited is to alleviate the potential stigma to the abused or neglected child.

I conclude the school's desire to protect a child under its care would not justify setting aside these statutory and policy reasons for refusing to allow school staff members access to investigative interviews with children concerning possible abuse or neglect.

In conclusion, if school officials are concerned about protecting a child when parents are not notified of an investigative interview, they may have a school staff person accompany the child to the site of the interview. However, the school staff person has no statutory authority or practical justification for attending the interview and should not be present in the room where the interview takes place.

THEREFORE, IT IS MY OPINION:

> A school district policy requiring that an individual investigating a child abuse or neglect case have a school staff member present at the child's interview if the interview is conducted without parental notification, is prohibited.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 3

COURTS, CITY - Jurisdiction over traffic offenses involving use of bicycles;
COURTS, JUSTICE - Jurisdiction over traffic offenses involving use of bicycles;
JUVENILES - Traffic offenses involving use of bicycles;
TRAFFIC - Offenses involving use of bicycles;
MONTANA CODE ANNOTATED - Sections 3-6-103, 3-10-303(1), 3-11-102(1), 41-5-203(1), 61-1-123, 61-8-601(1), 61-8-711, 61-12-601, 61-12-602;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 87 (1986).

HELD: Section 61-12-601, MCA, does not apply to traffic offenses involving use of a bicycle, as defined in section 61-1-123, MCA, by a person under the age of 18 years.

27 January 1987

David N. Hull
Assistant City Attorney
City of Helena
City-County Administration Building
316 North Park
Helena MT 59623

Dear Mr. Hull:

You have requested my opinion concerning the following question:

> Whether section 61-12-601, MCA, applies to traffic offenses committed by a person under the age of 18 during the course of operating a bicycle as defined in section 61-1-123, MCA.

Because section 61-12-601, MCA, is concerned only with unlawful operation of a motor vehicle and is not otherwise extended to alleged traffic violations involving use of a bicycle, I conclude that it has no application.

The term "motor vehicle" is defined broadly in section 61-1-102, MCA, to include, inter alia, "every vehicle propelled by its own power and designed primarily to transport persons or property upon the highways of the state" but expressly excludes bicycles as defined in section 61-1-123, MCA. The latter section defines a bicycle as follows:

> (1) [E]very vehicle propelled solely by human power upon which any person may ride, having two tandem wheels and a seat height of more than 25 inches from the ground when the seat is raised to its highest position, except scooters and similar devices; or
>
> (2) every vehicle equipped with two or three wheels, foot pedals to permit muscular propulsion and an independent power source providing a maximum of 2 brake horsepower. If a combustion engine is used, the maximum piston or rotor displacement may not exceed 3.05 cubic inches (50 centimeters) regardless of the number of chambers in the power source. The power source must not be capable of propelling the device, unassisted, at a speed exceeding 30 miles an hour (48.28 kilometers an hour) on a level surface. The device must be equipped with a power drive system that functions directly or automatically only and does not require clutching or shifting by the operator after the drive system is engaged.

The use of bicycles, however, is generally subject to the same provisions of Title 61, chapters 7, 8, and 9, as motor vehicles. § 61-8-602, MCA. Violation of such provisions is a misdemeanor and subject to those penalties stated under section 61-8-711, MCA. See § 61-8-601(1), MCA.

Section 61-12-601, MCA, establishes the offense of unlawful operation of a motor vehicle by a person under the age of 18 and provides for concurrent jurisdiction over such offense among district, justice, municipal, and city courts. See State v. Gee, 43 St. Rptr. 1452, 723 P.2d 934 (1986); 41 Op. Att'y Gen. No. 87 (1986). By its explicit provisions, therefore, that section does not extend to offenses involving the unlawful operation of a bicycle and is not otherwise made applicable to

such conduct by another provision. A youth alleged to have violated a traffic regulation in Title 61, chapters 7, 8, or 9, should consequently be charged in justice, municipal, or city court with violation of the particular statute involved and not charged under section 61-12-601, MCA. See §§ 3-6-103, 3-10-303(1), 3-11-102(1), MCA; see also § 41-5-203(1), MCA; State ex rel. Maier v. City Court, 39 St. Rptr. 1560, 662 P.2d 276 (1982), on reh'g, 40 St. Rptr. 560, 662 P.2d 279 (1983).

THEREFORE, IT IS MY OPINION:

Section 61-12-601, MCA, does not apply to traffic offenses involving use of a bicycle, as defined in section 61-1-123, MCA, by a person under the age of 18 years.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 4

JUSTICES OF THE PEACE - Qualifications of temporary substitute justices;
MONTANA CODE ANNOTATED - Sections 3-10-202, 3-10-231(2).

HELD: In order to be eligible for the list of persons provided by a justice of the peace as temporary substitute justices, persons must meet the qualifications set forth in section 3-10-202(2), MCA.

28 January 1987

Margaret A. Tonon
Deputy County Attorney
Ravalli County Attorney's Office
Ravalli County Courthouse
Hamilton MT 59840

Dear Ms. Tonon:

You have requested my opinion concerning the following question:

> What are the qualifications needed in order to be eligible for the list of persons provided by a justice of the peace as temporary substitute justices pursuant to section 3-10-231(2), MCA?

Section 3-10-231(2), MCA, provides as follows:

> Within 30 days of taking office, a justice of the peace shall provide a list of persons who are qualified to hold court in his place during a temporary absence when no other justice or city judge is available. The county commissioners shall administer the oath of office to each person on this list within the ensuing 30 days or as soon thereafter as possible.

Your question, as you have explained it to me, is whether the phrase, "a list of persons who are qualified to hold court" used in section 3-10-231(2), MCA, means that the persons eligible for the list are subject to section 3-10-202, MCA, which sets forth the qualifications for elected or appointed justices of the peace. That statute states in pertinent part:

> Before the county clerk may file the oath, the elected or appointed justice must satisfy the clerk that he is either:
>
> (a) an attorney at law authorized to practice law in the state of Montana;
>
> (b) a person who has held the office of justice of the peace within the preceding 5 years; or
>
> (c) a person who has completed the orientation course of study held under the direction of the university of Montana law school. If a person is appointed after the course is offered, he must agree to take the course at the next offering and failure to do so will disqualify him.

§ 3-10-202(2), MCA. Your question arises because section 3-10-231(2), MCA, is a recent enactment, having been added to the existing statute by legislative amendment in 1985.

Since matters of judicial selection and qualifications are questions of state law, we must look to evidence of what the Legislature intended with its 1985 amendment. City of Missoula v. Shea, 202 Mont. 286, 298, 661 P.2d 410, 416 (1983); Stewart v. Bird, 100 Cal. App. 3d 215, 160 Cal. Rptr. 660 (1979); State v. George, 250 Ark. 968, 470 S.W.2d 593 (1971); People's National Bank v. Manos Brothers Inc., 226 S.C. 257, 84 S.E.2d 857 (1954). Because section 3-10-231(2), MCA, refers to "a list of persons who are qualified" and section 3-10-202, MCA, refers specifically to qualifications for justices of the peace, the intent appears clear.

> In construing the meaning of a statute, the intent of the framers, i.e., the legislature, is paramount. Section 93-401-16, R.C.M.1947.

> In determining legislative intent, resort must first be made to the plain meaning of the words used. Dunphy v. Anaconda Co., 151 Mont. 76, 438 P.2d 660, and Montana cases cited therein.

State ex rel. Cashmore v. Anderson, 160 Mont. 175, 184, 500 P.2d 921, 926 (1972).

The legislative history of this amendment (especially Exhibit G from the Senate Local Government Committee minutes of March 7, 1985) also shows clearly that it was the legislators' understanding and intent that the "qualified persons" spoken of in section 3-10-231(2), MCA, be subject to the qualifications listed in section 3-10-202, MCA. In addition, to be eligible for the list referred to in section 3-10-231(2), MCA, a person would have to meet the residency requirements of section 3-10-204, MCA.

THEREFORE, IT IS MY OPINION:

> In order to be eligible for the list of persons provided by a justice of the peace as temporary substitute justices, persons must meet the qualifications set forth in section 3-10-202(2), MCA.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 5

OIL AND GAS - Net proceeds not to be included within assessed value of lots in rural special improvement districts;
RURAL SPECIAL IMPROVEMENT DISTRICTS - Assessed value of lots not to include oil and gas net proceeds;
TAXATION AND REVENUE - Assessments for rural special improvement districts not to reflect oil and gas net proceeds;
MONTANA CODE ANNOTATED - Sections 7-12-2151, 7-12-2151(1)(b), 15-23-101(4), 15-23-501, 15-23-603, 15-23-607(4);
MONTANA LAWS OF 1985 - Chapter 657, section 2, chapter 665, section 10.

HELD: Oil and gas net proceeds and royalty interests should not be included within the assessed value of land benefited from a rural special improvement district for purposes of assessment of costs under section 7-12-2151(1)(b), MCA.

29 January 1987

Daniel L. Schwarz
Powder River County Attorney
Powder River County Courthouse
Broadus MT 59317

Dear Mr. Schwarz:

You have asked my opinion concerning the following question:

> Are net proceeds and royalties on oil and gas interests subject to rural special improvement district levies?

You have indicated to this office that a rural special improvement district has been created in your county on land which overlies the Belle Creek oil field. Statutes which establish how costs of rural improvements may be defrayed indicate four alternate manners of assessment.

The method which is relevant to your inquiry is set forth in section 7-12-2151(1)(b), MCA:

> Each lot, tract, or parcel of land assessed in the district may be assessed with that part of the whole cost of the improvement based upon the assessed value of the benefited lots or pieces of land within said district, if the board determines such assessment to be equitable in proportion to and not exceeding the benefits received from the improvement by the lot, tract, or parcel.

The question is whether oil and gas net proceeds should be included in the valuation of the property for purposes of assessment of costs.

The method of assessment of costs based on valuation of lots was added to section 7-12-2151 by the 1985 Legislature, 1985 Mont. Laws, ch. 665, § 10. The 1985 Legislature similarly amended the assessment of costs provision for nonrural special improvement districts. 1985 Mont. Laws, ch. 657, § 2. The legislative history of these acts does not reflect whether valuation of lots benefited should reflect mineral or oil and gas deposits. Implicit in the language of section 7-12-2151, MCA, is the recognition that the assessed value of the realty should be determinative of the allocation of improvement costs. The underlying rationale of this method of assessment of costs is that more valuable lots or land should bear a proportionately higher share of improvements provided.

Taxing statutes must be strictly construed in favor of the property owner. Burlington Northern, Inc. v. Flathead County, 176 Mont. 9, 575 P.2d 912 (1978); Swartz v. Berg, 147 Mont. 178, 411 P.2d 736 (1966). This axiom of construction has been particularly applied to the area of special assessments by local governments. See Leroy v. Rapid City, 193 N.W.2d 598 (S.D. 1972). The governing statute must be carefully scrutinized and, where any doubt exists as to a mode of assessment, the doubt should be resolved against the existence of the assessment power. 14 E. McQuillin, Municipal Corporations § 38.07, at 50-51 (3d ed. 1970). The statute here speaks of the "assessed value of the benefited lots." § 7-12-2151(1)(b), MCA. In the absence of an express legislative mandate that this

value of realty includes net proceeds from oil and gas, it is difficult to thus construe the statute.

As a general principle, it is true that "[m]inerals, being tangible substances, may be treated in law as corporeal property, and until separated from the soil are part of the realty within which they lie." Marnett Oil & Gas Co. v. Musey, 232 S.W. 867, 869 (Tex. 1921). However, a proceeds tax is a tax on minerals produced. When oil and gas have been produced, it is personal property. 1 H. Williams & C. Meyers, Oil and Gas Law § 212 (1985). See also Anderson v. Beech Aircraft Corp., 699 P.2d 1023, 1028 (Kan. 1985); Young v. Young, 709 P.2d 1254, 1257 (Wyo. 1985). "Courts are unanimous that royalty which has accrued from production and severance of petroleum products constitutes personal property." R. Hemingway, The Law of Oil and Gas § 2.5, at 53 (2d ed. 1983). Montana case law is in accord. Voyta v. Clonts, 134 Mont. 156, 328 P.2d 655 (1958) (oil remaining in the ground before recovery is part of land but becomes personal property when recovered); Rist v. Toole Co., 117 Mont. 426, 159 P.2d 340 (1945) (severed royalty interest is not separately taxable as real estate because once oil is recovered it becomes personal property). Cf. § 15-23-501, MCA ("and the annual net proceeds of all mines and mining claims shall be taxed as other personal property").

Thus the oil and gas net proceeds and royalty interests at issue are personal property for purposes of taxation. Personal property flowing, but severed, from a particular lot should not add to its valuation as realty.

The surface owner of property overlying oil and gas deposits is frequently not the owner of the underlying mineral interests. As a matter of course, the right of entry to search for subsurface minerals is often transferred, leased, or sold. Similarly, royalty interests to the sale of oil and gas deposits are often transferred. In either case, the proceeds of oil and gas are frequently realized by parties distinct from the surface owner.

The tax on oil and gas net proceeds is a tax upon the sale of product yielded from wells. § 15-23-603, MCA. By statute, the produced oil and gas is centrally assessed property, § 15-23-101(4), MCA, for which the

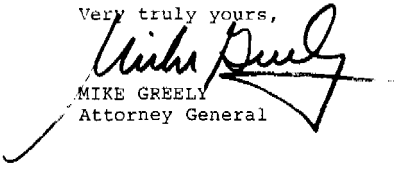
operator or producer is liable for the payment of taxes. § 15-23-607(4), MCA. The producer benefits from the sale and is taxed accordingly.

If one assumed net proceeds were included within the valuation of land for purposes of section 7-12-2151, MCA, the inequitable result would occur whereby a surface owner would bear a greater tax burden for proceeds realized by a second party. The valuation would reflect an asset not possessed by the taxed party.

THEREFORE, IT IS MY OPINION:

> Oil and gas net proceeds and royalty interests should not be included within the assessed value of land benefited from a rural special improvement district for purposes of assessment of costs under section 7-12-2151(1)(b), MCA.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 6

GAMBLING - Authority of towns to regulate bingo games;
MUNICIPAL GOVERNMENT - Authority of towns to regulate bingo games;
MONTANA CODE ANNOTATED - Sections 7-1-112(5), 23-5-142, 23-5-411, 23-5-412, 23-5-421;
OPINIONS OF THE ATTORNEY GENERAL - 35 Op. Att'y Gen. No. 86 (1974).

HELD: A town does not have authority under section 23-5-421, MCA, to regulate otherwise lawful bingo games conducted on premises which are not subject to licensure for the sale of liquor, beer, food, cigarettes, or other consumable product.

30 January 1987

Arnie A. Hove
City Attorney
P.O. Box 184
Circle MT 59215

Dear Mr. Hove:

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

> Does a town have authority under section 23-5-421, MCA, to regulate otherwise lawful bingo games conducted on premises which are not subject to licensure for the sale of liquor, beer, food, cigarettes or other consumable product?

I conclude that a town does not have such authority.

Under the Montana Bingo and Raffles Law, §§ 23-5-401 to 431, MCA, bingo games are permitted if various conditions are satisfied, including a limitation on the value of prizes and price of individual bingo cards. §§ 23-5-411, 23-5-412, MCA. County, city and town governments are, however, authorized under section

23-5-421(1), MCA, to impose licensing requirements under certain circumstances:

> Any city, town, or county may issue licenses for games of chance provided for in this part to be conducted on premises which have been licensed for the sale of liquor, beer, food, cigarettes, or any other consumable products. Within the cities or towns, such licenses may be issued by the city or town council or commission. Licenses for games conducted on premises outside the limits of any city or town may be issued by the county commissioners of the respective counties. When a license has been required by any city, town, or county, no game of chance as provided for in this part may be conducted on any premises which have been licensed for the sale of liquor, beer, food, cigarettes, or any other consumable product without such license having first been obtained.

The issue presented here is whether local governments have the power to regulate otherwise lawful bingo operations conducted on premises not required to be licensed for the sale of liquor, beer, food, cigarettes, or any other consumable product.

35 Op. Att'y Gen. No. 86 (1974) concluded that the predecessor provision to section 23-5-421, MCA, was not intended to limit the regulatory authority of local governments to premises of the kind specified in subsection 1. Nonetheless, subsequent to issuance of that opinion section 7-1-112(5), MCA, was adopted and states that local governments with self-government powers are not authorized "to regulate any form of gambling, lotteries, or gift enterprises" unless specifically permitted by law. Although section 7-1-112(5), MCA, addresses only those entities with self-government powers, there is no reason to conclude that local governments with general powers are intended to have greater authority. The Legislature's determination to limit local government power in gambling matters is further reflected in section 23-5-142, MCA, which provides that "[n]o ordinance regarding gambling or gambling houses may be passed by any city, or town, county, or other political subdivision of the state except in compliance with parts

3, 4, and 5 of this chapter." When sections 7-1-112(5) and 23-5-142, MCA, are read together, there can be no reasoned dispute that the authority of local governments to regulate bingo is restricted to that permitted under section 23-5-421, MCA. This interpretation of section 23-5-421, MCA, is also consistent with accepted canons of statutory construction. E.g., State ex rel. Jones v. Giles, 168 Mont. 130, 133, 541 P.2d 355, 357 (1975) ("[i]n determining legislative intent, an express mention of a certain power or authority implies the exclusion of nondescribed powers"); Reed v. Reed, 130 Mont. 409, 413, 304 P.2d 590, 592 (1956) (same). Consequently, to the extent 35 Op. Att'y Gen. No. 86 holds to the contrary, it is modified.

THEREFORE, IT IS MY OPINION:

A town does not have authority under section 23-5-421, MCA, to regulate otherwise lawful bingo games conducted on premises which are not subject to licensure for the sale of liquor, beer, food, cigarettes, or other consumable product.

Very truly yours,

MIKE GREELY
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

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

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

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

Definitions:

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

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

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter

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

Statute Number and Department

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

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 1986. This table includes those rules adopted during the period September 30, 1986 through December 31, 1986 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 1986, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1986 Montana Administrative Register.

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