MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 7

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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

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

In the matter of the adoption of a rule defining promotional or developmental stage	))))	NOTICE OF PUBLIC HEARING

TO: All Interested Persons

1. On May 21, 1987, at 9:00 a.m., a public hearing will be held in the conference room of the state auditor's office in the Mitchell Building at Helena, Montana, to consider the adoption of a rule pertaining to the registration of securities.

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

3. The proposed rule provides as follows:

RULE I DEFINITION OF PROMOTIONAL OR DEVELOPMENTAL STAGE (1) For the purposes of 30-10-206, MCA, a corporation in the "promotional or developmental stage" means a corporation which has no public market for its shares and has no significant earnings within the past five years (or shorter period of its existence).

(2) "Significant earnings" shall be deemed to exist if the corporation's earnings record over the last five years (or shorter period of its existence) demonstrates that for such period the corporation's net earnings per share is 30% of the public offering price per share (as adjusted for stock splits and stock dividends) or the corporation has earnings per share of 10% or more of the public offering price per share for any two consecutive years.

AUTH: 30-10-107, MCA & Sec. 2, Ch. 107, Montana Session Laws of 1987
IMP: 30-10-206, MCA & Sec. 1, Ch. 107, Montana Session Laws of 1987

4. The rule is proposed in order to implement Chapter 107, Montana Session Laws of 1987, which requires that certain securities be deposited in escrow while a corporation is in the developmental or promotional stage as a condition of registration under the securities act of Montana. The definition will provide notice to securities registration applicants regarding whether they must escrow their stock. Having a legal definition in place will give the commissioner a basis upon which to require the escrow of these shares.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted no later than May 15, 1987 to:

Robert R. Throssell
Chief Legal Counsel
State Auditor's Office
Room 209, Mitchell Building
Helena, MT 59620

6. Robert R. Throssell, State Auditor's Office, Room 209, Mitchell Building, Helena, MT 59620, has been designated to preside over and conduct the hearing.

7. The authority of the state auditor to make the proposed rule is based on section 30-10-107(1), MCA, and Sec. 2, Ch. 107, Montana Session Laws of 1987. The rule implements section 30-10-206, MCA, and Sec 1, Ch. 107, Montana Session Laws of 1987.

Andrea "Andy" Bennett
State Auditor and
Commissioner of Securities

Certified to the Secretary of State this 27 day of March, 1987.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF HORSE RACING

In the matter of the proposed amendments of 8.22.501 concerning definitions, 8.22.801 concerning general requirements, 8.22.804 concerning claiming	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENTS OF 8.22.501 DEFINITIONS, 8.22.801 GENERAL REQUIREMENTS, 8.22.804 CLAIMING

TO: All Interested Persons.

1. On Saturday, May 30, 1987, at 10:00 a.m., a public hearing will be held in the Fair Board Room at the State Fairgrounds, Great Falls, Montana, to consider the amendment of the above-stated rules.

2. The proposed amendment of 8.22.501 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-631 through 8-635, Administrative Rules of Montana)

"8.22.501 DEFINITIONS (1) through (46) will remain the same.

~~(47)--Winner-----for--purposes--of--eligibility--at--race meetings--whose-race-records-are-recorded-in-an-official-chart book-or-the-Daily-Racing-Form-is-a-horse-which,-at-the-time-of starting,-has-won-a-race-on-the-flat-in-any-country-at-a-track whose-racing-records-are-recorded-in-an-official-chart-or--the Daily-Racing-Form.~~

~~(48)~~(47) A winner - for purposes of eligibility ~~at--race meetings--whose-racing-records-are-not-recorded-in-an-official chart-book-or-the-Daily-Racing-Form~~ is a horse which at the time of starting, has won a race on the flat in any country.

~~(49)~~(48) . . ."

Auth: 23-4-104, MCA Imp: 23-4-101, MCA

3. This amendment is being proposed to make these subsections more compatible with 8.22.501 (23) which describes a maiden as being a horse which has not won on the flat in any country. This rule lessens the confusion for racing secretaries and trainers at entry time.

4. The amendment of 8.22.801 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-679 through 8-685.1, Administrative Rules of Montana)

"8.22.801 GENERAL REQUIREMENTS (1) through (9) will remain the same.

(10) All Montana bred horses shall be allowed a weight allowance of 5 pounds in all races except handicaps, and stakes, and races exclusive only to Montana breds.

(11) through (66) will remain the same."

Auth: 23-4-104, 202, MCA Imp: 23-4-104, 37-1-131, MCA

5. This amendment is being proposed to clarify that the weight allowance is not available to Montana bred horses in races limited to horses bred in the state. There is no reason for a preference when all horses entered enjoy the same Montana bred status. (See section 23-4-204, MCA)

6. The amendment of 8.22.804 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-687 through 8-690, Administrative Rules of Montana)

"8.22.804 CLAIMING (1) In claiming races any horse is subject to claim for its entered price by an owner registered in good faith for racing at that meeting or by a licensed authorized agent for the account of such owner, or by any licensed owner who does not, at the time, actually own a horse registered to race because of claim, misfortune or fire, and who has received a claim certificate issued by the board of stewards; or by any person whose application for an owners license has been approved and who has received a claim certificate by the board of stewards, which certificate shall in no event be issued until the expiration of three full days from the date of the receipt of the application for an owners license, provided however, that no person shall claim his own horse, or cause his horse to be claimed directly or indirectly for his own account.

(2) through (27) will remain the same.

(28) Any person desirous of entering racing in Montana by means of ARM 8.22.804(1)(c) may do so upon the fulfillment of the following conditions:

(a) A non-refundable deposit of $50.00 is made to the Montana board of horse racing to initiate investigation as to that ownerships suitability to hold a license. The fee of $50.00 will include new owner license fee of $20.00.

(b) An application has been made and held pending until all necessary investigation has been completed to the satisfaction of the stewards.

(c) The above right to claim shall be valid for only one horse unless the claimed horse is physically incapable of starting in Montana during the next thirty (30) days of being claimed, such ability to be determined by the board veterinarian.

(d) Such claim certificate shall be null and void if not exercised within the first forty-five (45) clear calendar days of being approved by the stewards. This may be extended upon application and approval by the stewards.

(e) The applicant must have the name of a licensed trainer who will be responsible for the care of the claimed horse.

(f) The application will be processed and will be returned by the board to the stewards for a final recommendation. Upon approval, the stewards may issue a claim certificate. When the certificate is exercised, a horse

owner's license will be issued. An owner's license is not issued prior to the claim as one of the qualifications for license is the ownership of a qualified race horse."

Auth: 23-4-104, 202, MCA Imp: 23-4-104, 37-1-131, MCA

7. This amendment is being proposed to facilitate the process by which an unlicensed person can claim a horse and expand the qualifications for eligibility to submit a claim.

8. Interested persons may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views, and arguments may also be submitted to the Montana Board of Horse Racing, 1424 9th Avenue, Helena, Montana, no later than May 30, 1987.

9. Geoffrey L. Brazier of Helena, Montana will preside over and conduct the hearing.

BOARD OF HORSE RACING
HAROLD GERKE, CHAIRMAN

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

Certified to the Secretary of State, April 6, 1987.

STATE OF MONTANA
DEPARTMENT OF COMMERCE

In the matter of the proposed repeal of rules 8.26.101 board organization, 8.26.201 & 8.26.202 procedural rules, 8.26.401 through 8.26.410 substantive rules	NOTICE OF PROPOSED REPEAL OF RULES 8.26.101 BOARD ORGANIZATION, 8.26.201 & 8.26.202 PROCEDURAL RULES, 8.26.401 through 8.26.410 SUBSTANTIVE RULES

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On May 18, 1987, the Department of Commerce proposes to repeal the above stated rules, which governed the board of massage therapists. The rules to be repealed are located at pages 8-817 through 8-822, Administrative Rules of Montana.

2. The rules are being repealed as the board of massage therapists was sunsetted by Sec. 7, Ch. 84, L. 1983, effective March 15, 1983. The board was reviewed through the sunset process and the recommendation from the audit committee to the legislature was to abolish the board.

3. Interested parties may submit their data, views or arguments concerning the proposed repeal in writing to Elois Johnson, Division of Business Regulation, Department of Commerce, 1424 9th Avenue, Helena, Montana 59620-0407, no later than May 14, 1987.

4. If a person who is directly affected by the proposed 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 written comments he has to Elois Johnson, Division of Business Regulation, Department of Commerce, 1424 9th Avenue, Helena, Montana 59620-0407, no later than May 14, 1987.

5. If the department receives requests for a public hearing on the proposed repeal from either 10% or 25, whichever is less from the Administrative Code Committee of the legislature; 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.

6. Due to an oversight, these rules were never repealed.

7. The authority to make the proposed repeal is based on section 37-33-204 (3), MCA.

DEPARTMENT OF COMMERCE

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

Certified to the Secretary of State, April 6, 1987.

STATE OF MONTANA
BEFORE THE DEPARTMENT OF COMMERCE

In the matter of the proposed adoption of a new rule for the administration of the 1987 Federal Community Development Block Grant Program	)))))	NOTICE OF PUBLIC HEARING ON A PROPOSED RULE PERTAINING TO THE ADMINISTRATION OF THE 1987 FEDERAL COMMUNITY DEVELOPMENT BLOCK GRANT (CDBG) PROGRAM

TO: All Interested Persons.

1. On May 6, 1987, at 1:30 p.m., a public hearing will be held in Room C-209, of the Cogswell Building, Helena, Montana, to consider the adoption by reference of rules governing the administration of the 1987 federal Community Development Block Grant (CDBG) program.

2. The proposed adoption will read as follows:

"I. INCORPORATION BY REFERENCE OF RULES FOR ADMINISTERING THE 1987 CDBG PROGRAM (1) The department of commerce herein adopts and incorporates by this reference the Montana Community Development Block Grant Program 1987 Application Guidelines and the Montana Community Development Block Grant Program, February, 1987 Grant Administration Manual published by it as rules for the administration of the CDBG program.

(2) The rules incorporated by reference in (1) above, relate to the following:

(a) the policies governing the program,
(b) requirements for applicants,
(c) procedures for evaluating applications,
(d) procedures for local project administration,
(e) environmental review of project activities,
(f) procurement of goods and services,
(g) financial management,
(h) protection of civil rights,
(i) fair labor standards,
(j) acquisition of property and relocation of persons displaced thereby, and
(k) administrative considerations specific to public facilities, housing and neighborhood revitalization and economic development projects.

(3) Copies of the regulations adopted by reference in subsection (1) of this rule may be obtained from the Department of Commerce, Local Government Assistance Division, Capitol Station, Helena, Montana 59620."

Auth: 90-1-103, MCA Imp: 90-1-103, MCA

3. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Local Government Assistance Division, Department of Commerce, Capitol Station, Helena, Montana 59620, no later than May 15, 1987.

4. Richard M. Weddle will preside over and conduct the hearing.

DEPARTMENT OF COMMERCE

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

Certified to the Secretary of State, April 6, 1987.

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS
OF THE STATE OF MONTANA

In the matter of Proposed Adoption of New Rules Establishing Fees for Preparation of Environmental Impact Statements.	))))))	NOTICE OF PROPOSED ADOPTION OF NEW RULES PROVIDING FOR COLLECTION OF FEES FOR COSTS ASSOCIATED WITH PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS. NO PUBLIC HEARING CONTEMPLATED.

TO: ALL INTERESTED PERSONS

1. On May 21, 1987, the Montana Department of Fish, Wildlife and Parks proposes to adopt new rules allowing the Department to charge fees for costs associated with preparation of environmental impact statements.

2. The proposed rules provide as follows:

Rule I WHEN FEES ASSESSED (1) When an application for a lease, permit, contract, license, or easement is expected to result in the department incurring expenses in excess of $2,500 to compile an environmental impact statement, the applicant is required to pay a fee in an amount which the department reasonably estimates, as set forth in this subchapter, will be expended to gather information and data necessary to compile an EIS.

(2) The department will determine within 30 days after a correct and complete application is filed whether it will be necessary to compile an environmental impact statement and assess a fee as prescribed by this subchapter.

AUTH: 75-1-202, MCA, IMP: 75-1-202, MCA

Rule II PRELIMINARY COST ESTIMATE OF EIS-ESTIMATE OF PROJECT COST (1) If it is determined that an environmental impact statement is necessary, the department will make a preliminary estimate of the costs to compile the statement. This estimate will include a summary of the data and information, including salaries, equipment costs, printing and dissemination costs, and any other expense associated with the collection of data and information for the EIS and the printing and dissemination of the EIS.

(2) If the preliminary estimated costs of acquiring the data and information to prepare an EIS total more than $2,500, the department will notify the applicant that a fee must be paid and will submit an itemized preliminary estimate of the cost of acquiring the data and information necessary to compile an EIS. The applicant will also be advised that a notarized and detailed estimate of the cost of the project being reviewed in the EIS must be submitted by the applicant within 15 days after receipt of the request. In addition, the applicant will be asked to describe the data and information available or being prepared by the applicant which can

possibly be used in the EIS. The applicant may indicate which of the department's estimated costs of acquiring data and information for the EIS would be duplicative or excessive.

(3) The estimated cost of a project submitted by the applicant as required by this rule will include, but is not limited to, an itemized list of the estimated construction, engineering, land acquisition, equipment, labor, materials, interest, inflationary, and contingency costs, showing various components and how those costs are calculated.

(4) Upon request, the applicant will be granted an extension of the 15 day time period for submission of an estimate of the project's cost and a critique of the department's preliminary EIS data and information accumulation cost assessment.

AUTH: 75-1-202, MCA, IMP: 75-1-202, MCA

Rule III FINAL FEE DETERMINATION (1) Within 15 days after receipt of the applicant's estimated cost of the project and its analysis of the department's preliminary estimate of the cost of acquiring information and data for the EIS, the department will notify the applicant of the fiscal amount of the fee to be assessed.

(2) The fee assessed will be based on the projected cost of acquiring all of the information and data needed for the EIS.

(3) If the applicant has gathered or is in the process of gathering information and data that can be used in the EIS, the department will only use that portion of the fee that is needed to verify the information and data.

(4) Any unused portion of the fee assessed may be returned to the applicant within a reasonable time after the information and data has been collected or the information and data submitted by the applicant has been verified, but in no event later than the deadline specified in Rule VI(3).

(5) The department may extend the 15 day time period provided for review of the applicant's submittal for a period not to exceed 45 days if it believes that the project cost estimate submitted is inaccurate or additional information must be obtained to verify the accuracy of the project cost estimate.

AUTH: 75-1-202, MCA, IMP: 75-1-202, MCA

Rule IV FEE MAXIMUMS The fee assessed shall not exceed the following limitations:

(1) 2% of any estimated cost up to $1 million, plus

(2) 1% of any estimated cost over $1 million and up to $20 million, plus

(3) 1/2 of 1% of any estimated cost over $20 million and up to $100 million, plus

(4) 1/4 of 1% of any estimated cost over $100 million dollars and up to $300 million dollars, plus

(5) 1/8 of 1% of any estimated cost in excess of $300 million.

AUTH: 75-1-202, MCA, IMP: 75-1-202, MCA

Rule V APPEAL TO COMMISSION (1) If an applicant for a lease, permit, contract, license, easement, or certificate believes that the fee assessed is excessive or does not conform to the requirements of this subchapter or section 75-1-203, MCA, the applicant may request a hearing before the commission pursuant to the contested case provisions of the Montana Administrative Procedure Act.

(2) If a hearing is held on the fee assessed as authorized by this rule, the department shall proceed with its analysis of the project wherever possible. The fact that a hearing has been requested is not grounds for delaying consideration of an application, except to the extent that the portion of the fee in question affects the ability of the department to collect the data and information necessary for the EIS.

AUTH: 75-1-202, MCA, IMP: 75-1-202, MCA

Rule VI USE OF FEE - ADDITIONAL FEE - ACCOUNTING AND REFUND (1) The fee assessed hereunder shall only be used to gather data and information necessary to compile an environmental impact statement. No fee may be assessed if the department intends only to compile a preliminary environmental review (PER).

(2) If the department collects a fee and later determines that additional data and information must be collected or that data and information supplied by the applicant and relied upon by the department is inaccurate or invalid, an additional fee may be assessed under the procedures outlined in Rule II and Rule III if the maximum fee has not been collected as provided in Rule IV.

(3) When the department has completed work on the EIS, a complete accounting of how the department spent the fee collected will be submitted to the applicant. If the cost of compiling an environmental impact statement is less than the fee collected, the remainder of the fee will be refunded to the applicant, without interest, within 45 days after work has been completed on the final EIS.

AUTH: 75-1-202, MCA, IMP: 75-1-202, MCA

Rule VII DEPARTMENT ASSISTANCE (1) The department will make every effort to assist the applicant in preparing an estimated cost of a project. Furthermore, the department will make appropriate personnel available to the applicant to discuss the department's estimated cost of compiling the information and data necessary for the EIS.

AUTH: 75-1-202, MCA, IMP: 75-1-202, MCA

3. The Department is proposing these rules because it inadvertently failed to provide for fees at the time the Legislature authorized them.

4. Interested persons may submit their data, views, or comments concerning the proposed rules to Eileen Shore, Montana Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620 by May 18, 1987.

4. Interested persons may submit their data, views, or comments concerning the proposed rules to Eileen Shore, Montana Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620 by May 18, 1987.

5. If a person who is directly affected by the proposed rules wishes to express data, views, or comments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request to Eileen Shore no later than May 18, 1987.

6. If the Department receives requests for a public hearing from 10% or 25, whichever is fewer, of the persons who will be directly affected by the proposed rules, by a governmental subdivision or agency, by the administrative code committee, or by an association having not fewer than 25 members who will be directly affected, a hearing will be scheduled. Notice of Hearing will be published in the Montana Administrative Register.

James W. Flynn, Director
Department of Fish, Wildlife
and Parks

Certified to Secretary of State April 6, 1987.

BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of Rule 12.6.703 pertaining to requirements for fire extinguishers on motorboats and vessels.	)	NOTICE OF PROPOSED AMENDMENT OF RULE 12.6.703 TO LIMIT THE REQUIREMENTS FOR FIRE EXTINGUISHERS ON SMALL MOTORBOATS AND VESSELS. NO PUBLIC HEARING CONTEMPLATED.

TO: ALL INTERESTED PERSONS

1. On June 1, 1987, the Fish and Game Commission proposes to amend Rule 12.6.703 to exempt certain small motorboats and vessels from the requirements for fire extinguishers.

2. The proposed amendment provides as follows:

12.6.703 FIRE EXTINGUISHERS (1) ~~Every~~ Motorboats or vessels on the waters of this state shall have the following fire extinguishing equipment:

(a) less than 26 feet in length if the motorboat or vessel carries passengers for hire or has any of the conditions listed in subsection (d) of this rule -- one B-I type approved hand portable fire extinguisher or a fixed fire extinguisher system;

(b) 26 feet to less than 40 feet in length -- two B-I type approved hand portable fire extinguishers; or at least one B-II type; when an approved fixed system is installed, one less B-I type is required;

(c) 40 feet to not more than 65 feet in length -- three B-I type approved portable fire extinguishers, or at least one B-I type plus one B-II type; when approved fixed system is installed, one less B-I type is required;

(d) fire extinguishers must be carried on all motorboats that have one or more of the following conditions that make the boat of closed construction:

(i) inboard engines; or

(ii) closed compartments under thwarts and seats wherein portable fuel tanks may be stored; or

(iii) double bottoms not sealed to the hull or which are not completely filled with flotation material; or

(iv) closed living spaces; or

(v) closed storage compartments in which combustible or flammable material is stored; or

(vi) permanently installed fuel tanks.

AUTH: Sec. 87-1-301, 87-1-303, 23-2-251, MCA
IMP: Sec. 23-2-521, MCA

The amendment must be reviewed and approved by the Department of Health and Environmental Sciences before becoming effective, as required by Section 87-1-303, MCA.

3. This rule is being proposed to more accurately reflect the language in Section 23-2-521(c), MCA.

4. Interested persons may submit their data, views, or comments concerning this amendment to Eileen Shore, Montana Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620 by May 18, 1987.

5. If a person who is directly affected by the proposed amendments wishes to express data, views, or comments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request to Eileen Shore no later than May 18, 1987.

6. If the Department receives requests for a public hearing from 10% or 25, whichever is fewer, of the persons who will be directly affected by the proposed amendment, by a governmental subdivision or agency, by the administrative code committee, or by an association having not fewer than 25 members who will be directly affected, a hearing will be scheduled. Notice of 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 water recreationists in the State of Montana.

James W. Flynn, Director
Department of Fish, Wildlife
and Parks

Certified to Secretary of State April 6, 1987.

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

In the matter of the amendment of Rule 46.12.3207 pertaining to eligibility determinations for medical assistance - transfer of resources	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.12.3207 PERTAINING TO ELIGIBILITY DETERMINATIONS FOR MEDICAL ASSISTANCE - TRANSFER OF RESOURCES

TO: All Interested Persons

1. On May 6, 1987, at 1:30 p.m., a public hearing will be held in room 107 of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of Rule 46.12.3207 pertaining to eligibility determinations for medical assistance.

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

46.12.3207 TRANSFER OF RESOURCES Subsections (1) and (1)(a) remain the same.

(i) In instances where the property transferred is the individual's home, ~~he~~ the individual, his spouse or a dependent relative must have actually been living in the home at the time of the transfer in order for the home to be considered his principal residence and, therefore, an excluded resource. For example, if ~~the~~ an unmarried individual was living in a nursing home at the time his home was transferred and there was no intent to return, the home would count as a non-excluded resource for eligibility.

Subsections (1)(b) through (1)(d) remain the same.

(e) Transfer of real or personal property means any transfer or renunciation of an individual's proportionate right or title to property. Transfers to joint tenancy or to tenancy in common are included in this definition.

(f) Incurred medical expenses are those which are not subject to payment by a third party.

(2) General rule:

(a) When an individual or his ~~eligible~~ spouse disposes of nonexcluded real or personal property for less than its fair market value within 24 months before the month of application or redetermination for medicaid, it is presumed that the transfer was made to establish eligibility unless the individual presents convincing evidence that the disposal was exclusively for some other purpose.

(b) The uncompensated value of the transferred nonexcluded ~~real or personal~~ property ~~which was transferred~~ shall be counted toward the general resource limitation for medicaid

eligibility ~~according to~~ until it is reduced by one or more of the following~~:~~ ~~whichever is applicable:~~

~~(i) until the individual secures the return of the transferred property, at which time eligibility will be re-evaluated;~~

~~(ii) until the individual receives further compensation, at which time eligibility will be re-evaluated;~~

~~(iii) until the individual pays for medical expenses equal to the sum of the uncompensated value of the property transferred and the value of other non-excluded resources less the applicable general resource limit;~~

~~(iv) when the uncompensated value of the property is less than $12,000, for a period of time which shall be measured from the month of application or redetermination and at a rate of one month for each $500 of the uncompensated value of the transferred property except that the period of time shall not cause the uncompensated value to be counted as a resource for more than 24 months from the date of transfer; or~~

~~(v) when the uncompensated value of the property is $12,000 or more, for a period of time which shall be measured from the month of transfer and at a rate of one month for each $500 of the uncompensated value of the transferred property.~~

(i) when the uncompensated value of the transferred property is less than $500, it shall be counted as a resource for one month;

(ii) all or part of the transferred property is returned;

(iii) the uncompensated amount is reduced by documented further consideration;

(iv) the uncompensated amount is reduced by $500 for each month that passes beginning with the month of transfer;

(v) the uncompensated amount is reduced by documented household medical expenses incurred beginning with the month of transfer.

~~(c) Under (b)(iii) above, medical expenses include only those:~~

~~(i) which are not subject to payment by a third party; and~~

~~(ii) in the case of applicants, which are incurred not more than three months prior to the month of application; or~~

~~(iii) in the case of recipients, which are incurred in the month of redetermination and after.~~

~~(d) Under (b)(iv) above, when the uncompensated value of the transferred property is less than $500, it shall be counted as a resource for one month.~~

~~(3) Applicability:~~

~~(a) The above rule applies to all applications and redeterminations for medicaid filed January 1, 1982 or later, except that:~~

~~(i) the above rule does not apply to property transferred prior to April 1, 1981.~~

Subsections (4) through (6)(a)(2)(E) remain the same in text but will be renumbered as (3) through (5)(a)(2)(E).

(6)~~(7)~~ Determination if transfer of real or personal property was completely for reasons other than to qualify:

(a) If the individual had some other purpose for transferring the real or personal property but establishing eligibility for ~~medicaid has~~ public assistance was also ~~been~~ a factor or likely result of ~~in~~ his decision to transfer, the presumption is not successfully rebutted.

AUTH: Sec. 53-2-201 and 53-2-601 MCA
IMP: Sec. 53-2-601 and 53-6-113 MCA

3. The proposed amendments are offered to better conform the Department's transfer of assets regulation with current federal transfer assets regulations. The changes will ensure equal treatments of all claimants, consistency between federal policies and the state rules, and ensure consistent application of the transfer of assets rule to all public assistance programs.

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 May 14, 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 April 6, 1987.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of amendment of rules pertaining to the grading of certified seed potatoes amending sections 4.12.3501 and 4.12.3503 ARM	)))))	NOTICE OF AMENDMENTS TO RULES PERTAINING TO THE GRADING OF CERTIFIED SEED POTATOES

TO: All Interested Persons.

1. On February 26, 1987, the Montana Department of Agriculture published a notice of amendment of the above stated rules at page 193, 1987 Montana Administrative Register, issue number 4.

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

3. No comments or testimony were received.

Ralph Peck
Deputy Director

Certified to the Secretary of State April 6, 1987.

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

In the matter of the adoption of an emergency rule pertaining to the registration of securities.	)))	NOTICE OF THE ADOPTION OF EMERGENCY RULES DEFINING PROMOTIONAL OR DEVELOPMENTAL STAGE.

TO: All Interested Persons.

1. Statement of reason for emergency. The state auditor and commissioner of securities finds it necessary to adopt this emergency rule defining "promotional or developmental stage." Chapter 107, Montana Session Laws of 1987 became effective on March 16, 1987. It requires that certain securities be deposited in escrow while a corporation is in the developmental or promotional stage as a condition of registration under the securities act of Montana. Requiring that the promoter place his shares in escrow at the beginning of the public offering, would mean that the promoter will not be able to sell his shares until the end of the escrow period. This protects the value of the investor's investment by insuring that the promoter stays with the company to make it work.

The definition of "promotional or developmental stage" is needed in order to implement Chapter 107, Montana Session Laws of 1987, as soon as possible. The definition will provide notice to securities registration applicants regarding whether they must escrow their stock. Having a legal definition in place will give the commissioner a basis upon which to require the escrow of these shares. Without the definition, applicants can argue with the commissioner's staff as to the meaning of "promotional or developmental stage."

If an applicant refuses to place its shares in escrow because there is no legal definition of "promotional or developmental stage" in place, the commissioner will be forced to bring a formal registration denial action against the applicant. Legal actions take time and resources which are better spent on preventative action. Therefore, the commissioner of securities believes that the welfare of Montana investors will be protected most effectively if promoters are made aware of the new escrow requirements immediately.

2. The text of the emergency rule is as follows:

RULE I DEFINITION OF PROMOTIONAL OR DEVELOPMENTAL STAGE (1) For the purposes of 30-10-206, MCA, a corporation in the "promotional or developmental stage" means a corporation which has no public market for its shares and has no significant earnings within the past 5 years (or shorter period of its existence).

(2) "Significant earnings" shall be deemed to exist if the corporation's earnings record over the last five years (or

shorter period of its existence) demonstrates that for such period the corporation's net earnings per share is 30% of the public offering price per share (as adjusted for stock splits and stock dividends) or the corporation has earnings per share of 10% or more of the public offering price per share for any two consecutive years.

AUTH: 30-10-107, MCA & Sec. 2, Ch. 107, Montana Session Laws of 1987
IMP: 30-10-206, MCA. & Sec. 1, Ch. 107, Montana Session Laws of 1987

The emergency action is effective March 27, 1987.

Andrea "Andy" Bennett
State Auditor and
Commissioner of Securities

Certified to the Secretary of State this 27th day of March, 1987.

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

In the matter of the 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 AMENDMENTS OF 8.20.401 TRAINEESHIP REQUIREMENTS AND STANDARDS, 8.20.402 FEES, AND THE REPEAL OF 8.20.406 CERTIFIED HEARING AID AUDIOLOGISTS

TO: All Interested Persons:

1. On February 13, 1987, the Board of Hearing Aid Dispensers published a notice of amendments and repeal of the above-stated rules at page 128, 1987 Montana Administrative Register, issue number 3.

2. The Board voted to adopt the amendments of 8.20.401 and 8.20.402 and voted to repeal 8.20.406 as proposed, but took the following comments under consideration regarding 8.20.401.

COMMENT: Douglas E. Rehder, Laura S. Davis, Paul J. Perry, Gene W. Bukowski, Chuck Rowland and James L. Going were not in favor of deleting (c) of this rule. All felt that limiting the number of trainees provided for better supervision.

RESPONSE: The Board has been advised that the rule constitutes an unlawful extension of legislative authority. This is why it has deleted the rule. If the rule is unlawful it doesn't matter whether better supervision would be afforded under it.

3. No other comments or testimony were received.

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, April 6, 1987.

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

In the matter of the amendment of Rules 46.12.555, 46.12.556 and 46.12.557 pertaining to personal care attendant services	))))	NOTICE OF THE AMENDMENT OF RULES 46.12.555, 46.12.556 and 46.12.557 PERTAINING TO PERSONAL CARE SERVICES

TO: All Interested Persons

1. On February 26, 1987, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.12.555, 46.12.556 and 46.12.557 pertaining to personal care attendant services at page 197 of the 1987 Montana Administrative Register, issue number 4.

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

46.12.555 PERSONAL CARE ~~ATTENDANT~~ SERVICES, DEFINITION

Subsections (1) through (3) remain as proposed.

(4) Personal care services can include the following SPECIALIZED services only if the services are provided by a licensed practical or registered nurse:

Subsections (4)(a) through (4)(f) remain as proposed.

(G) PROVISION OF THESE SPECIALIZED SERVICES MUST BE PRIOR AUTHORIZED BY THE DEPARTMENT.

Subsections (5) through (5)(d) remain as proposed.

(e) HOME AND OUTSIDE maintenance ~~outside the home~~.

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

46.12.556 PERSONAL CARE ~~ATTENDANT~~ SERVICES, REQUIREMENTS

Subsection (1) remains as proposed.

(2) Personal care services are ONLY available ~~only to a recipient~~ PERSONS who resides at home or in a licensed foster home or a licensed group home. Persons residing in licensed foster or group homes must have personal care services prior authorized by the department.

Subsection (3) remains as proposed.

(4) PERSONAL CARE SERVICES PROVIDED TO RECIPIENTS ARE SPECIFIED IN A PLAN OF CARE WHICH GOVERNS DELIVERY OF SERVICES. THE PLAN OF CARE FOR A RECIPIENT IS ORDERED BY A PHYSICIAN AND DEVELOPED BY A REGISTERED NURSE CHOSEN BY THE CONTRACT PROVIDER.

(5) ~~(4)~~ Personal care services must be prescribed at least annually by a physician and must be supervised AT LEAST EVERY SIXTY (60) DAYS by a registered nurse ~~in accordance with a plan of care~~.

~~(5) Providers of personal care services must comply with all contractual requirements outlined by the department.~~

(6) TO QUALIFY AS A CONTRACT PROVIDER OF PERSONAL CARE SERVICES, THE PROVIDER MUST MEET ALL THE FOLLOWING REQUIREMENTS:

(A) BE ENROLLED AS A MEDICAID QUALIFIED PROVIDER AND AGREE TO ABIDE BY ALL PERTINENT STATE MEDICAID REGULATIONS;

(B) MEET APPLICABLE STATE LICENSURE LAWS;

(C) PROVIDE REASONABLE ACCESS TO ANY MEDICAID RECIPIENT ELIGIBLE FOR PERSONAL CARE SERVICES;

(D) COMPLY WITH STATE UTILIZATION REQUIREMENTS;

(E) OPERATE EFFICIENTLY AND PROVIDE QUALITY SERVICES ON AN ECONOMICAL BASIS;

(F) AGREE IN WRITING TO A SPECIFIED AMOUNT OF REIMBURSEMENT;

(G) HAVE A QUALITY ASSURANCE PROGRAM OF STANDARDS AND PROCEDURES BASED ON ACCEPTABLE PROFESSIONAL STANDARDS;

(H) HAVE PROCEDURES FOR ACCEPTING, PROCESSING AND RESPONDING TO RECIPIENT GRIEVANCES.

(I) MAINTAIN FINANCIAL AND INTERNAL CONTROL SYSTEMS IN ACCORDANCE WITH GENERALLY ACCEPTED ACCOUNTING PRINCIPLES AND POLICIES APPLIED ON A CONSISTENT BASIS; AND

(J) EMPLOY ATTENDANTS WHO ARE LITERATE, ABLE TO COMMUNICATE WITH RECIPIENTS AND WILLING TO ACCEPT SPECIALIZED TRAINING AND SUPERVISION FROM A REGISTERED NURSE.

Subsections (6) through (7)(e) remain as proposed in text but will be renumbered as (7) through (8)(e).

(f) the recipient's physician requests termination of services; **or**

(g) the recipient's health and safety needs in the home cannot be adequately met by the provision of personal care services.; OR

(H) THE RECIPIENT NO LONGER HAS A MEDICAL NEED FOR PERSONAL CARE SERVICES.

(9) THE DEPARTMENT MAY TERMINATE OR REDUCE PERSONAL CARE SERVICES WHEN FUNDING FOR SERVICES IS UNAVAILABLE.

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

46.12.557 PERSONAL CARE SERVICES, REIMBURSEMENT Original subsections (1) through (4)(c) remain interlined as proposed.

(i) Personal care services are limited to 56 units per week per recipient. The department may authorize **hours** UNITS in excess of this limit. **Hours** UNITS in excess of the limit must be prior authorized by the department.

Subsections (2) through (2)(b) remain as proposed.

(3) THE DEPARTMENT WILL CONTRACT, EXCEPT AS PROVIDED FOR UNDER ARM 46.12.557(2) (b), WITH ONLY A PROVIDER OR PROVIDERS CHOSEN AFTER REQUEST FOR PROPOSALS AND COMPETITIVE CONSIDERATION OF THOSE SUBMITTING PROPOSALS. A PERSON RETAINED PERSONALLY BY A RECIPIENT TO DELIVER PERSONAL CARE SERVICES WILL NOT BE CONSIDERED A PROVIDER OF PERSONAL CARE SERVICES

FOR THE PURPOSES OF THIS RULE AND THEREFORE WILL NOT BE REIMBURSED BY THE DEPARTMENT.

Subsection (4) remains as proposed.

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

3. In response to various comments made by Department staff, the Department has: (a) added the provision for specialized attendant services to be authorized by the Department; (b) clarified that personal care services must be specified in a plan of care ordered by a physician and developed by a registered nurse; (c) added additional provisions for termination of services based on medical need and unavailability of funds; and (d) added additional requirements for contract providers of personal care services. The present personal care attendant services contract provider has agreed to these changes.

4. The Department has thoroughly considered the only public comment received.

COMMENT: One individual was concerned about removing the requirement for personal care providers to be literate and competent.

RESPONSE: The contract provider is responsible for employing all attendants and nurses who directly provide personal care services. A statement has been added to 46.12.556(6) to reinforce the requirement that the contract agency employ literate and competent attendants.

Dave Lewis
Director, Social and Rehabilitation Services

Certified to the Secretary of State April 6, 1987.

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

In the matter of the emergency amendment of Rules 46.13.402 and 46.13.502 pertaining to Low Income Energy Assistance Program (LIEAP) Supplemental Assistance	))))))	NOTICE OF EMERGENCY AMENDMENT OF RULES 46.13.402 AND 46.13.502 PERTAINING TO LOW INCOME ENERGY ASSISTANCE PROGRAM (LIEAP) SUPPLEMENTAL ASSISTANCE

TO: All Interested Persons

1. During the current (FY 87) LIEAP heating season, both caseload growth and the average cost per eligible household have exceeded projections. Since the demand for funds has exceeded appropriated amounts it has become necessary to adjust downward by 14%, as required by ARM 46.13.404, the maximum benefits. A failure to reduce the program in an ordered manner would cause imminent peril to the health and safety of claimants who would receive greater benefit reductions upon fund depletion. Individual notice of that action was mailed to all current recipients on March 20, 1987. The benefit matrix amounts are hereby reduced by 14%.

To ensure both that the claimants least able to provide for their winter heating costs have adequate help and that program funds are not overexpended, it has become necessary to amend ARM 46.13.502(1)(a). The amendments to ARM 46.13.502 are necessary to fully effectuate the necessary 14% reduction while preserving necessary levels of documented winter heating costs for the poorest of those served.

2. Rules 46.13.402 and 46.13.502 are amended as follows:

46.13.402 DETERMINING BENEFIT AWARD Subsections (1) through (3) remain the same.

(4) Pursuant to ARM 46.13.404(1)(a) and effective March 25, 1987, all household maximum benefit amounts of the benefit award matrices are reduced by 14% for the October 1, 1986, through April 30, 1987, winter heating season.

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

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

(a) The amount of assistance is the difference between the actual heating costs which exceed a combination of the LIEAP payment and 5% of the household's income which has been paid toward their home heating costs.

(b) ~~(a)~~ Application for supplemental assistance is voluntary. All documentation necessary to process the request for supplemental assistance, including proof of ~~client~~ household payment and amount requested, is the responsibility of the ~~client~~ household.

(c) ~~(b)~~ If they have not already done so, applicants for supplemental assistance must apply for the low income home weatherization assistance program at the time of application for supplemental assistance.

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

3. These emergency amendments are effective March 25, 1987.

Dave Lewis
Director, Social and Rehabilitation Services

Certified to the Secretary of State March 25, 1987.

VOLUME NO. 42 OPINION NO. 10

ALCOHOLIC BEVERAGES - Consumption of alcoholic beverages on licensed premises after closing time;
ALCOHOLIC BEVERAGES - Operation of poker game on licensed premises during closed hours;
GAMBLING - Operation of poker game on premises of establishment licensed to sell alcoholic beverages during hours when establishment is required to be closed;
ADMINISTRATIVE RULES OF MONTANA - Sections 42.12.123, 42.13.106;
MONTANA CODE ANNOTATED - Sections 16-3-304, 16-3-305, 23-5-311, 23-5-321, 23-5-322;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 67 (1977).

HELD: 1. When an establishment licensed to sell alcoholic beverages is operated in conjunction with the lawful conduct of a poker game, the part of the licensed premises where alcoholic beverages are sold is not required to be closed off during the hours of closure set forth in section 16-3-304, MCA.

2. Persons on the licensed premises, including the poker room, may not consume alcoholic beverages during the hours of closure, even if the beverages were purchased prior to the closing time.

18 March 1987

James A. Johnson
Shelby City Attorney
860 Oilfield Avenue
Shelby MT 59474

Dear Mr. Johnson:

You have asked my opinion on several questions which concern the request of a local bar owner to conduct a poker game between the hours of 2 a.m. and 8 a.m. on the licensed premises but in a separate room adjacent to the bar area.

The bar owner, who holds an all-beverage license, operates a poker game during bar hours in a room separated from the bar by a wall with windows and a door. The poker room has access to the outside, and the inside door may be locked to prevent persons in the poker room from entering the bar area. However, the rest rooms are located in the bar area, and persons in the poker room must enter the bar room in order to use the rest rooms.

The owner of the bar would like to conduct a poker game in his poker room after 2 a.m. and has inquired as to the circumstances under which he may lawfully do so. My review of the provisions of sections 16-3-304 and 16-3-305, MCA, as amended by the Legislature in 1985, leads me to conclude that, in the absence of local regulations to the contrary, the inquiring licensee may operate a poker game on the licensed premises between the hours of 2 a.m. and 8 a.m. without closing off the bar room; however, the licensee may not allow the consumption of alcoholic beverages on the licensed premises, including the poker room, during the hours of closure.

Section 16-3-304, MCA, sets the hours of closure for establishments licensed to sell alcoholic beverages and allows a city or town to further restrict the hours:

> Closing hours for licensed retail establishments. Except as provided in 16-3-305, all licensed establishments wherein alcoholic beverages are sold, offered for sale, or given away at retail shall be closed each day between 2 a.m. and 8 a.m.; provided, however, that when any municipal incorporation has by ordinance further restricted the hours of sale of alcoholic beverages, then the sale of alcoholic beverages is prohibited within the limits of any such city or town during the time such sale is prohibited by this code and in addition thereto during the hours that it is prohibited by such ordinance. During such hours all persons except the alcoholic beverage licensee and employees of such licensed establishment shall be excluded from the licensed premises.

Section 16-3-305, MCA, provides a limited exception to the exclusion requirement in situations where the licensed establishment is operated in conjunction with a lawful business:

> Sale of alcoholic beverages during closed hours unlawful -- lawful business need not be closed. During the hours when the licensed establishments where alcoholic beverages are sold at retail are required by this code to be closed, it shall be unlawful to sell, offer for sale, give away, consume, or allow the consumption of alcoholic beverages. When an establishment licensed to sell alcoholic beverages is operated in conjunction with a hotel, restaurant, bus depot, railway terminal, grocery store, pharmacy, or other lawful business other than that of the sale of alcoholic beverages, then such other lawful business need not be closed.

Section 16-3-305, MCA, assumed its present form in 1985 when the Legislature enacted SB 357, entitled "An Act Removing The Requirement That A Business Operated On The Same Premises As An Establishment Licensed To Sell Alcoholic Beverages Close Off From 2 A.M. To 8 A.M. The Part Where Alcoholic Beverages Are Sold." Among other changes, the legislation specifically removed a provision from the prior version of section 16-3-305, MCA, which required closure of that part of a licensed establishment where beer or liquor is sold whenever some other lawful business operated in conjunction with the licensed establishment remained open after 2 a.m. This change is significant since in State v. Perez, 126 Mont. 15, 243 P.2d 309 (1952), the Montana Supreme Court held that former sections 16-3-304 and 16-3-305, MCA, were violated when a licensee, who conducted a restaurant in conjunction with his liquor establishment, allowed patrons to dine and dance in the bar room after 2 a.m., even if no liquor was sold. The Court viewed the statutory terms "closed" and "excluded" as requiring the licensee to prevent admission to the liquor establishment, i.e., the bar room, particularly where the restaurant business could be conducted without using the bar room.

Interpreting the earlier version of these statutes, the Montana Department of Revenue adopted a rule in 1975

(§ 42.12.123, ARM) which required the licensee to close off the facilities and equipment of the licensed premises from any on-premises gambling activities during the hours of closure. This administrative rule required absolute closure of the bar room for all purposes. The rule was amended, effective February 15, 1985, to require only that the licensee restrict persons from gaining access to alcoholic beverages located in a room or service area which was used for the purpose of selling or serving alcoholic beverages. See 1985 MAR, p. 167. Following the enactment of SB 357, the Department completely repealed section 42.12.123, ARM, effective August 16, 1985. See 1985 MAR, p. 1155.

Several canons of statutory construction are relevant to your inquiry concerning the effect of SB 357. First, the intention of the Legislature controls the proper interpretation of a statute. Montana Department of Revenue v. American Smelting & Refining Co., 173 Mont. 316, 567 P.2d 901 (1977). Second, in construing an amendatory act, such as SB 357, the Legislature will be presumed to have intended to make some change in the existing law. Pilgeram v. Haas, 118 Mont. 431, 167 P.2d 339 (1946). Third, the title of an act is presumed to indicate the Legislature's intent. Lastly, great deference must be shown to the interpretation given a statute by the agency charged with its administration. Department of Revenue v. Puget Sound Power & Light Co., 179 Mont. 255, 587 P.2d 1282 (1978).

I am guided by these rules of statutory construction to the conclusion that the 1985 amendments to sections 16-3-304 and 16-3-305, MCA, removed any requirement that the local bar owner close off the bar room or restrict access to alcoholic beverages during closed hours in order to conduct another lawful business on the same premises. Since poker is an authorized card game under the provisions of section 23-5-311, MCA, and may be licensed and regulated by local governing bodies pursuant to sections 23-5-321 and 23-5-322, MCA, I conclude that the operation of a poker game is a lawful business for purposes of section 16-3-305, MCA. While I have previously held that a city may restrict by ordinance the hours of licensed gambling (37 Op. Att'y Gen. No. 67 at 271A (1977)), state law does not prohibit poker games during the hours of closure. In the absence of a local regulation to the contrary, a bar owner may

lawfully conduct a poker game on the licensed premises between 2 a.m. and 8 a.m.

However, the plain and unambiguous language of section 16-3-305, MCA, absolutely forbids the consumption of alcoholic beverages on the licensed premises during the hours when the licensed establishment is required to be closed. It is clear that the statute does not permit the consumption of alcoholic beverages in the poker room or anywhere else on the licensed premises after 2 a.m., even if the beverages were purchased prior to 2 a.m.

Finally, I call your attention to section 42.13.106, ARM, which provides that a licensee may not change the manner of operation of the licensed premises without the prior written consent of the Department of Revenue. If the local bar owner intends to conduct an all-night poker game, he must comply with the requirements of this administrative rule.

THEREFORE, IT IS MY OPINION:

1. When an establishment licensed to sell alcoholic beverages is operated in conjunction with the lawful conduct of a poker game, the part of the licensed premises where alcoholic beverages are sold is not required to be closed off during the hours of closure set forth in section 16-3-304, MCA.

2. Persons on the licensed premises, including the poker room, may not consume alcoholic beverages during the hours of closure, even if the beverages were purchased prior to the closing time.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 11

INDIANS - Applicability of personal property and motor vehicle taxes to interest jointly held by member and nonmember;
MOTOR VEHICLES - Applicability of motor vehicle taxes or fees to interest jointly held by nonmember and member of an Indian tribe;
PROPERTY, PERSONAL - Applicability of personal property taxes to interest jointly held by nonmember and member of an Indian tribe;
TAXATION AND REVENUE - Applicability of personal property and motor vehicle taxes to interest jointly held by nonmember and member of an Indian tribe;
MONTANA CODE ANNOTATED - Sections 61-3-303, 61-3-312, 61-3-422, 61-3-501 to 61-3-542;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 90 (1986), 39 Op. Att'y Gen. No. 45 (1981); 37 Op. Att'y Gen. No. 122 (1978).

HELD: The interest of a nonmember in motor vehicles, mobile homes, or personal property, whose tax situs is within the exterior boundaries of the Blackfeet Indian Reservation and which is held in joint tenancy or tenancy in common with a member of the Blackfeet Tribe, is subject to those state taxes generally applicable to such property.

19 March 1987

James C. Nelson
Glacier County Attorney
Glacier County Courthouse
Cut Bank MT 59427

Dear Mr. Nelson:

You have requested my opinion concerning the following question:

> Should motor vehicles, mobile homes, and other taxable personal property, whose tax situs is

> within the exterior boundaries of the Blackfeet Indian Reservation and which is owned in joint tenancy or in tenancy in common by a tribal member and a nonmember, be assessed and taxed at the full value of the nonmember's interest in such property?

I conclude that the nonmember's interest should be assessed at its full value.

Many forms of personal property, including mobile homes, are subject to annual ad valorem taxation. See §§ 15-6-101 to 146, MCA. Some motor vehicles are similarly taxed on an ad valorem basis, while others are subject to scheduled annual fees based on the vehicle's age and, in certain instances, weight. See §§ 61-3-501 to 542, MCA. It is well established that property taxes in Montana are the personal liability of the property owner and that "the property is resorted to for the purpose of ascertaining the amount of the tax and for the purpose of enforcing its payment where the owner makes default." O'Brien v. Ross, 144 Mont. 115, 121, 394 P.2d 1013, 1016 (1964); accord Calkins v. Smith, 106 Mont. 453, 457, 78 P.2d 74, 76 (1938); Christofferson v. Chouteau County, 105 Mont. 577, 583, 74 P.2d 427, 430 (1937); see 41 Op. Att'y Gen. No. 90 (1986) ("[a] tax lien attaches to the taxpayer's property which has been assessed and to any other personal property in his possession"). Although the taxation of most motor vehicles differs from that applicable to other forms of personal property, registration and reregistration requirements--which include payment of the motor vehicle fees--are imposed upon the vehicle's owner. See, e.g., §§ 61-3-303, 61-3-312, 61-3-422, MCA. Thus, the incidence of the involved taxes or fees falls on the property owner. An individual with a joint tenant or tenant-in-common interest has a right to the enjoyment of the entire property and must accordingly be viewed, along with his cotenants, as possessing an undivided ownership interest in the whole thereof. E.g., First Westside National Bank v. Llera, 176 Mont. 481, 485, 580 P.2d 100, 103-04 (1978); Hennigh v. Hennigh, 131 Mont. 372, 377, 309 P.2d 1022, 1025 (1957); Lindley v. Davis, 7 Mont. 206, 217-18, 14 P. 717, 722 (1887).

It is equally well established that states may not, absent express federal authorization, tax property whose tax situs is located within the exterior boundaries of

an Indian reservation and which is owned by a member of the tribe inhabiting such reservation. E.g., Montana v. Blackfeet Tribe, 105 S. Ct. 2399, 2403 (1985); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 475-76 (1975); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 170-71 (1973). Because no explicit federal authorization exists for imposing taxes on members of the Blackfeet Tribe as to the types of property at issue here, a tribal member's interest therein is immune from such taxation. See 39 Op. Att'y Gen. No. 45 at 176 (1981); 37 Op. Att'y Gen. No. 122 at 526 (1978); Assiniboine & Sioux Tribes v. Montana, 568 F. Supp. 269, 271 (D. Mont. 1983); Valandra v. Viedt, 259 N.W.2d 510, 512 (S.D. 1977).

The question becomes whether the tribal member's exemption is vicariously shared by a nonmember co-owner. A state's authority to impose otherwise lawful taxes on nonmembers engaging in on-reservation conduct has, under modern authority, been held subject to "a particularized inquiry" into the involved state, federal, and tribal interests. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980); accord Three Affiliated Tribes v. Wold Engineering, 106 S. Ct. 2305, 2309-10 (1986); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983); Ramah Navajo School Board v. Board of Revenue, 458 U.S. 832, 837-38 (1982). As a general matter, state taxation jurisdiction will be preempted if it impermissibly interferes with a comprehensive federal statutory scheme or an established tradition of tribal self-governance. Rice v. Rehner, 463 U.S. 713, 719-20 (1983); Ramah, 458 U.S. at 838; White Mountain, 448 U.S. at 143-44; see Burlington Northern Railroad Company v. Department of Public Service Regulation, 43 St. Rptr. 1005, 1007-08, 720 P.2d 267, 269-70 (1986). The simple fact that a particular on-reservation activity may be validly taxed by a tribe does not, however, preclude state taxation of the same activity. Washington v. Confederated Tribes of Colville, 447 U.S. 134, 158 (1980); Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253, 1258 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977). Consequently, when the incidence of a state tax falls on a nonmember and the tax is supported by legitimate state interests, a persuasive argument can be made that preemption is not present in the absence of compelling contrary federal or tribal interests. See California State Board of Equalization v. Chemehuevi

Indian Tribe, 106 S. Ct. 289 (1985) (per curiam); Colville, 447 U.S. at 156-57.

Imposition of the property and motor vehicle taxes or fees at issue against a nonmember's interest is not precluded by federal statute. While the Ninth Circuit recently commented in Chemehuevi Indian Tribe v. California State Board of Equalization, 800 F.2d 1146, 1149 (1986), that "[t]he federal government has an interest as a consequence of the general federal goals of strengthening Indian governments and encouraging tribal economic development," taxation of a nonmember has no effect on federal concerns. The tribe's sovereignty interest does not negate state authority over nonmember activity. The state interest here is substantial since the revenue generated by the affected taxes is allocated for essential services, such as education, road maintenance, and law enforcement, which directly benefit all county residents, including members and nonmembers residing within the Blackfeet Reservation. Modern Indian law preemption analysis thus militates strongly in favor of the validity of the taxes when imposed solely on the nonmember's property interest.

THEREFORE, IT IS MY OPINION:

> The interest of a nonmember in motor vehicles, mobile homes, or personal property, whose tax situs is within the exterior boundaries of the Blackfeet Indian Reservation and which is held in joint tenancy or tenancy in common with a member of the Blackfeet Tribe, is subject to those state taxes generally applicable to such property.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 12

CITIES AND TOWNS - Prosecution of third offense DUI or per se violations by city attorney;
COUNTY ATTORNEYS - Responsibility to prosecute third offense DUI or per se violations;
COURTS, CITY - Third offense DUI or per se violations, jurisdiction, responsibility of city attorney to prosecute;
CRIMINAL LAW AND PROCEDURE - Prosecution of third offense DUI or per se violations by city attorney;
JURISDICTION - City court, third offense DUI or per se violations;
MOTOR VEHICLES - Prosecution of third offense DUI or per se violations by city attorney;
TRAFFIC - Prosecution of third offense DUI or per se violations by city attorney;
MONTANA CODE ANNOTATED - Sections 1-2-102, 3-11-102, 3-11-103, 3-11-301, 3-11-302, 7-4-2716, 7-4-4604, 46-2-203, 61-8-401, 61-8-406, 61-8-408, 61-8-714, 61-8-722;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 42 (1977); 37 Op. Att'y Gen. No. 62 (1977).

HELD: 1. The Red Lodge city attorney does not have the authority to prosecute third offense DUI or per se violations under sections 61-8-401 and 61-8-406, MCA.

2. The City of Red Lodge may adopt an ordinance pursuant to section 61-8-401(5), MCA, which would empower the city attorney to prosecute third offense DUI or per se violations under the city ordinance.

31 March 1987

Michael G. Alterowitz
Carbon County Attorney
Carbon County Courthouse
Red Lodge MT 59068

Dear Mr. Alterowitz:

You have requested my opinion on the following questions:

1. Whether the Red Lodge city attorney has the authority to prosecute third offenses under sections 61-8-401 and 61-8-406, MCA, when the offenses occur within the city or town, in view of the maximum penalties provided which exceed a $500 fine, six months in jail, or both.

2. Whether the City of Red Lodge may adopt an ordinance pursuant to section 61-8-401(5), MCA, which would empower the city attorney to prosecute third offense DUI or per se violations under the city ordinance.

Answering your questions involves reviewing the statutes concerning city attorneys and city courts as well as sections 61-8-401, 61-8-406, 61-8-714, and 61-8-722, MCA.

"The city attorney must prosecute all cases for the violation of any ordinance ... both in the city court and on appeal therefrom to the district court." § 3-11-301, MCA. It is the duty of the city attorney to attend before the city court and other courts of the city and the district court and prosecute on behalf of the city. § 7-4-4604, MCA.

In a 1977 Attorney General's Opinion, I held that the city attorney had primary responsibility to prosecute offenses committed in the city limits and charged as violations of state law. 37 Op. Att'y Gen. No. 62 at 252 (1977). District Judge William Speare of the Thirteenth Judicial District, in and for Carbon County, in effect overruled that portion of my opinion in two cases, State v. Kirk S. Nelson, Cause No. DC 79-07, and State v. Ronald W. Nelson, Cause No. DC 79-06. The district judge noted in orders in each of the cases, dated May 19, 1980, as follows:

1. The City Court of Red Lodge, Montana has concurrent jurisdiction with the Justice Court of Carbon County, Montana to hear prosecutions for violations of state penal codes. 3-11-102

MCA 1979; Vol 37, No. 42, Attorney General Opinions, July 1, 1977.

2. Prosecutions for violation of city ordinances are conducted by the city attorney. 3-11-301, MCA 1979. The county attorney is required to prosecute all public offenses on behalf of the state. 7-4-2716, MCA 1979.

> Prosecutions for violations of local ordinances must be conducted in the name of the municipality, by its prosecuting officer. Criminal cases arising under state laws must be prosecuted in the name of the state and by the county attorney. State ex rel. Streit v. Justice Court of Chinook, 45 Mont. 375, 123 P. 405 (1912).

3. All cases prosecuted for violation of city ordinance shall be brought in the name of the city. Cases prosecuted under state penal code shall be prosecuted in the name of the State of Montana. 3-11-302, MCA 1979.

Pursuant to this reasoning, once a defendant was cited under state law, the responsibility for prosecution fell to the county attorney. I agree with the district court's reasoning and it correctly states the law as it existed prior to 1983.

The law was changed in 1983 when section 3-11-302(2), MCA, concerning city court procedure, was amended to provide:

> An action brought for violation of a state law within the city or town may be brought either in the name of the state of Montana as the plaintiff or in the name of the city or town as the plaintiff and must be brought against the accused as the defendant.

As a result of this amendment, an action brought for violation of a state law within the city or town may be brought in the name of the city or town, empowering the city attorney to prosecute violations of state law in city court. § 7-4-4604, MCA.

A third offense DUI conviction has a maximum possible penalty of a $1000 fine and a one-year jail sentence. § 61-8-714(3), MCA. A third conviction under the per se law, section 61-8-406, MCA, carries a maximum penalty of a $1000 fine and a six-month jail sentence. § 61-8-722(3), MCA. City court jurisdiction is limited to misdemeanors punishable by a fine not exceeding $500 or by imprisonment not exceeding 6 months or by both fine and imprisonment. §§ 3-11-102, 46-2-203, MCA. Therefore, third offense DUI and per se violations under state law may not be brought in the name of the city as plaintiff under section 3-11-302(2), MCA, because they may not be tried in city court. The county attorney is responsible for prosecuting them.

As discussed above, generally only an offense punishable by a maximum penalty of a $500 fine and a six-month jail sentence may be brought in city court. An exception to this rule exists where, pursuant to section 61-8-401(5), MCA, a municipality enacts sections 61-8-401(1) to (4), 61-8-406, 61-8-408, 61-8-714, and 61-8-722, MCA, as an ordinance. Under section 61-8-401(5), MCA, the municipality "is given jurisdiction of the enforcement of the ordinance and of the imposition of the fines and penalties therein provided." Section 3-11-103, MCA, provides in pertinent part: "[T]he city court has exclusive jurisdiction of: (1) proceedings for the violation of an ordinance of the city or town, both civil and criminal." These sections appear to conflict with the general statutory provisions regarding city court jurisdiction. Cf. §§ 3-11-102, 3-11-103(1), 46-2-203, 61-8-401(5), MCA. However, a more specific statutory provision will control a general one that is inconsistent with it. § 1-2-102, MCA. Therefore, if a city enacts sections 61-8-401(1) to (4), 61-8-406, 61-8-408, 61-8-714, and 61-8-722, MCA, as an ordinance, the city court has jurisdiction over a third offense DUI or per se violation charged under the ordinance, and the city attorney has the authority and responsibility to prosecute charges brought under the city ordinance.

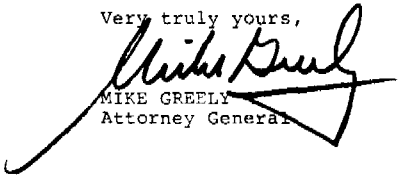
Gary Thomas, the Red Lodge city attorney, has informed me that Red Lodge has adopted no such ordinance. Therefore, the Red Lodge city attorney would have no authority to prosecute a third offense DUI or per se charge in the city of Red Lodge.

THEREFORE, IT IS MY OPINION:

1. The Red Lodge city attorney does not have the authority to prosecute third offense DUI or per se violations under sections 61-8-401 and 61-8-406, MCA.

2. The City of Red Lodge may adopt an ordinance pursuant to section 61-8-401(5), MCA, which would empower the city attorney to prosecute third offense DUI or per se violations under the city ordinance.

Very truly yours,



MIKE GREELY
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

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

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

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

Definitions:

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

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

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter

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

Statute Number and Department

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

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 1986. This table includes those rules adopted during the period December 31, 1986 through March 31, 1987 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through December 31, 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 or 1987 Montana Administrative Register.

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