RESERVE

MONTANA ADMINISTRATIVE REGISTER

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INDEX COPY

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 1

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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

Page Number

TABLE OF CONTENTS

NOTICE SECTION

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 2.21.810(2) and 2.21.814(8), relating to the Sick Leave Fund	)))	NOTICE OF THE PROPOSED AMENDMENT OF ARM 2.21.810(2) AND 2.21.814(8) RELATING TO THE SICK LEAVE FUND.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On February 29, 1988, the department of administration proposes to amend ARM 2.21.810(2) and 2.21.814(8) relating to the Sick Leave Fund.

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

2.21.810 STRUCTURE OF SICK LEAVE FUND (1) Remains the same.

(2) The sick leave advisory council shall meet ~~at least semiannually~~ as needed to review the operation of the sick leave fund and to make recommendations to the director of the department of administration regarding the fund.

(Auth. 2-18-604 and 2-18-618, MCA; Imp. 2-18-618, MCA)

2.21.814 ELIGIBILITY TO RECEIVE GRANTS FROM THE SICK LEAVE FUND (1) - (7) Remain the same.

(8) Participation in the sick leave fund does not prohibit an agency from terminating an employee for~~, as provided in 39-2-504, MCA,~~ "continued incapacity to perform."

(9) Remains the same.

(Auth. 2-18-604 and 2-18-618, MCA; Imp. 2-18-618, MCA)

3. ARM 2.21.810(2) requires the Sick Leave Fund Advisory Council to meet at least semi-annually. When this provision was adopted, the Sick Leave Fund was a new program and the need for Council meetings was not clear. It is now apparent that the Council should meet when there is business to conduct and not on an arbitrary schedule. The rule is proposed for amendment to achieve this purpose. Section 39-2-504, MCA, was repealed by the 1987 Legislature as part of HB 241, the Wrongful Discharge from Employment Act. ARM 2.21.814(8) is proposed for amendment to remove the citation which refers to the repealed statute.

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

Laurie Ekanger, Administrator
State Personnel Division
Department of Administration
Room 130, Mitchell Building
Helena, Montana 59620

no later than February 15, 1988.

5. If a person who is directly affected by the proposed amendment of these rules 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: Laurie Ekanger, Administrator, State Personnel Division, Department of Administration, Room 130, Mitchell Building, Helena, Montana 59620, no later than February 15, 1988.

6. If the agency receives requests for a public hearing on the proposed amendment 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 sub-division 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 at least 25 persons.

7. The authority of the agency to make the proposed amendment is based on 2-18-604 and 2-18-618, MCA, and the rules implement 2-18-618, MCA.

Ellen Feaver

Ellen Feaver, Director
Department of Administration

Certified to the Secretary of State January 4, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF CHIROPRACTORS

In the matter of the proposed amendment of a rule pertaining to unprofessional conduct, repeal of a rule pertaining to code of ethics, and the adoption of new rules pertaining to disciplinary actions and evaluations-consultations	)))))))	NOTICE OF PUBLIC HEARING FOR AMENDMENT OF 8.12.607 UNPROFESSIONAL CONDUCT, THE REPEAL OF 8.12.610 CODE OF ETHICS, AND ADOPTION OF NEW RULES I. DISCIPLINARY ACTIONS AND II. INDEPENDENT MEDICAL EVALUATIONS-CONSULTATIONS

TO: All Interested Persons:

The notice of proposed agency action published in the 1987 Montana Administrative Register, issue number 23, at page 2215 on December 10, 1987, is amended as follows because the Montana Chiropractic Association, an association having not less than 25 members who will be directly affected, has requested a public hearing.

1. On February 9, 1988, at 9:00 a.m., a public hearing will be held in the upstairs conference room of the Department of Commerce building at 1424 - 9th Avenue, Helena, Montana, to consider the amendment of the above-stated rules.

2. The amendments are the same as proposed in the original notice.

3. The rules are proposed for amendment for the reasons as stated in the original notice.

4. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, view or arguments may also be submitted to the Board of Chiropractors, Department of Commerce, 1424 - 9th Avenue, Helena, Montana 59620, no later than February 11, 1988.

5. Martin Jacobson, Staff Attorney, Department of Commerce, 1424 - 9th Avenue, Helena, Montana 59620 will preside over and conduct the hearing.

6. The authority of the board to make the proposed rule amendments is based on sections 37-12-201, 37-1-136, 37-12-322, MCA and the implementing sections are 37-12-321, 37-1-136, 37-12-323, MCA.

BOARD OF CHIROPRACTORS
DEBBIE SORENSON, D.C.
PRESIDENT

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

Certified to the Secretary of State, January 4, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF COSMETOLOGY

In the matter of the proposed) AMENDED NOTICE FOR PUBLIC
amendments of rules pertaining) HEARING
to schools, instructors, etc.)

TO: All Interested Persons:

1. On December 24, 1987, the Board of Cosmetology published a notice of public hearing. The time was inadvertently left out. The time for the public hearing is 9:00 a.m. The original notice can be found on page 2278, 1987 Montana Administrative Register, issue number 24.

BOARD OF COSMETOLOGY
DUDLEY WILLIAMS, PRESIDENT

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

Certified to the Secretary of State, January 4, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE STATE ELECTRICAL BOARD

In the matter of the proposed amendment of 8.18.402 and 8.18.407 and the adoption of new rules I. and II.	) NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT AND ADOPTION OF RULES PERTAINING TO APPLICATIONS, FEES, EXAMINATIONS AND CONTINUING EDUCATION

TO: All Interested Persons:

1. On February 5, 1988, at 9:00 a.m., a public hearing will be held in the conference room at 1218 East Sixth Avenue, Helena, Montana, to consider the amendment and adoption of the above-stated rules.

2. The proposed amendment of 8.18.402 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-547, Administrative Rules of Montana)

"8.18.402 APPLICATIONS (1) and (1)(a) will remain the same.

(1) Maintenance is hereby defined as ordinary and customary in-plant or on-site installations, modification, additions, or repairs which shall be limited to: relamping fixtures, replacing ballasts, trouble shooting motor controls, replacing motors, breakers, magnetic starters, in a kind for kind manner. ~~or connecting some specific item of specialized equipment from an existing branch circuit panel.~~ Also included are connection of specific items of specialized equipment that can be directly connected to an existing branch circuit panel by means of factory installed leads. However, if a new circuit is required to operate the equipment, or if the size of the supply conductors need be increased, this shall be considered new work."

Auth: 37-1-131, 37-68-201, MCA Imp: 37-68-103, MCA

REASON: The Board is proposing this amendment to clarify the duties of a maintenance electrician, and to have their definition of maintenance coincide with the definition adopted by the Building Codes Bureau, Electrical Safety Section.

3. The proposed amendment of 8.18.407 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-549, Administrative Rules of Montana)

"8.18.407 FEE SCHEDULE

(1) Examination fee ~~$35.00~~ $40.00

(2) through (6) will remain the same."

Auth: 37-1-131, 37-68-201, MCA Imp: 37-68-304, 37-68-305, 37-68-313, MCA

REASON: The Board is proposing this amendment because the contract signed by the Board and E.T.S. has set the fee at $40.00 for each examination.

4. The proposed new rules will read as follows:

"I. EXAMINATIONS (1) A person who has failed to pass any examination for which he has applied, may, upon the payment of the appropriate fee, take the next subsequent examination. However, if he fails the test a second time he may not take the test again within a six month period, and in addition, must:

(a) Demonstrate to the board by his sworn statement that he has conscientiously studied at least 20 hours on the areas of the examination that he failed to pass, since his latest failure to pass.

(b) Provide a list of the books or materials studied, specifying the name, author, edition (or latest copyright year), compiled with the help of a librarian, indicating when the materials were checked out. The list is to be dated and signed off by the librarian.

(c) Provide evidence of having attended at least one code seminar presented by the Electrical Safety Section of the State Building Codes Bureau, since his initial failure to pass.

(2) In the event an applicant fails to pass any examination three or more times, the following rules shall apply:

(a) He must wait at least one year from his last failure to be able to take the exam again.

(b) He must make reapplication to the board.

(c) He must demonstrate to the board by his sworn statement that he has conscientiously studied at least 40 hours on all the areas covered by the last exam, 30 hours of which shall have been devoted to those test areas wherein the applicant failed to achieve a passing score.

(d) He must provide a list of the books or materials studied, specifying the name, author, edition (or latest copyright year). This list to be compiled with the assistance of a librarian, who is to stamp the dates the various books are checked out, (or exhibited to the librarian if acquired in some manner other than checkout) and dated and signed off by the librarian when the list is completed.

(e) Provide evidence of having attended at least two code seminars presented by the Electrical Safety Section of the State Building Codes Bureau."

Auth: 37-1-131, 37-68-201, MCA Imp: 37-68-201(4)(1), MCA

REASON: The Board is concerned that the individuals who are failing the exam may not have the knowledge to pass the exam. Instead of repeated failures, the Board would like to see the applicant better his knowledge through study, literature and seminars. This will not only improve the electrician's knowledge, but it will also better protect the public health, safety and welfare. In the years 1986 and 1987, 62 master

electricians failed the examination. Out of that 62, only 24 finally obtained a passing score. For journeyman 38 failed and out of those only 14 finally obtained a passing score.

"II. CONTINUING EDUCATION (1) To receive credit for continuing education, the following requirements must be met:

(a) Courses or seminars must have prior approval of curriculum by the state electrical board.

(b) Instructors must be certified by the state electrical board prior to presentation of course or seminar.

(c) Representatives of the department or state electrical section shall be able to attend and monitor the courses of seminars without charge.

(d) Completion certificates for courses or seminars and the hours attended shall be attached to the application for license renewal to a maximum verification of 16 hours by 1990 and every 3 years thereafter.

(e) In general, courses or seminars must be on the national electrical code or advances in the electrical industry.

(f) Credit for courses or seminars will be given in a minimum of 4 hour increments.

(g) Request for approval of courses, seminars, and instructors must be made no later than the board meeting next preceding the seminar.

(h) The board must be notified of every time and place of the course or seminar in advance.

(i) In general, courses should be designed for advancing knowledge or skills of trained individuals; basic courses or apprentice type courses may not be approved.

(j) Attendance lists and the hours attended by each person shall be forwarded to the state electrical board by the instructor.

(k) Certificates required by (d) above shall be half sheet (8 1/2 x 5 1/4) and must contain the following:

(i) date of course;

(ii) location of course;

(iii) title of course including date of prior approval by the board;

(iv) name of instructor;

(v) name of sponsoring agency; and

(vi) name of person completing the course."

Auth: 37-1-131, 37-68-201, MCA AUTH Extension, Sec. 5, Ch. 245, L. 1987, Eff. 10/1/87 Imp: 37-68-103, MCA

REASON: The Board was given authority to adopt rules for implementing requirements for continuing education. This went into effect on October 1, 1987.

5. 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 State Electrical Board, 1218 East Sixth Avenue, Helena, Montana 59620, no later than February 11, 1988.

6. Raymond W. Brault will preside over and conduct the hearing.

STATE ELECTRICAL BOARD
JAMES L. LEWIS, CHAIRMAN

BY: _____
GEOFFREY L. BRAZIER, ATTORNEY
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, January 4, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF LANDSCAPE ARCHITECTS

In the matter of the proposed amendment of a rule pertaining to fees) NOTICE OF PROPOSED AMENDMENT OF 8.24.409 FEE SCHEDULE

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On February 13, 1988, the Board of Landscape Architects proposes to amend the above-stated rule.

2. The proposed amendment of 8.24.409 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-791, Administrative Rules of Montana)

"8.24.409 FEE SCHEDULE (1) and (2) will remain the same.

(3) Landscape Architects Fee Schedule:

Application		$ 75.00
Certificate		35.00
Examination	~~$250.00~~	380.00
Examination - Section 1	~~30.00~~	45.00
Section 2		45.00
Section 3	~~75.00~~	120.00
Section 4	~~100.00~~	90.00
Section 5		80.00
UNE Re-evaluation per sheet for performance problems		35.00
License renewal		90.00
Duplicate certificate		35.00
Stamps - Seals		25.00

(4) will remain the same."

Auth: 37-1-134, 37-66-202, MCA Imp: 37-1-134, 37-66-202, 37-66-305, MCA

REASON: Fees have been increased on the UNE (Uniform National Examination). The amended fee schedule sets examination fees commensurate with examination program area costs.

3. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Landscape Architects, 1424 9th Avenue, Helena, Montana 59620-0407, no later than February 11, 1988.

4. If a person who is directly affected by the proposed amendment 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 Landscape Architects, 1424 9th Avenue, Helena, Montana 59620-0407, no later than February 11, 1988.

5. If the board receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendment, 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 8 based on the 80 licensees in Montana.

BOARD OF LANDSCAPE ARCHITECTS
VALERIE TOOLEY, CHAIRMAN

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

Certified to the Secretary of State, January 4, 1988.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Advisory Group) NOTICE OF PROPOSED AMENDMENT OF RULE 10.58.101, ADVISORY GROUP

NO PUBLIC HEARING IS CONTEMPLATED.

TO: All Interested Persons

1. On February 14, 1988, the Board of Public Education proposes to amend rule 10.58.101, Advisory Group.

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

10.58.101 ADVISORY GROUP (1) The board of public education, in accordance with state law, shall appoint an advisory group, known as the certification ~~review--panel~~ standards and practices advisory council, to ~~continously review programs and implement the standards for state approval of teacher education programs leading to interstate reciprocity of teacher certification. Membership shall include professionals from all levels of education and other citizens concerned with teacher education.~~ study and make recommendations to the board of public education in the areas of teacher certification standards, administrator certification standards, specialist certification standards, feasibility of establishing standards of professional practices and ethical conduct, the status and efficacy of approved teacher education programs in Montana and policies related to the denial, suspension, and revocation of teaching certification and the appeals process. Membership shall include seven members:

(a) four teachers engaged in classroom teaching to include:

(i) one who teaches within kindergarten through grade 8;

(ii) one who teaches within grades 9 through 12 or at a designated postsecondary vocational-technical center;

(iii) one who is employed as a specialist; and

(iv) one additional teacher from (1)(a)(i), (1)(a)(ii) or (1)(a)(iii);

(b) one faculty member from an approved teacher education program offered by an accredited teacher education institution;

(c) one person employed as an administrator, with the certification required in 20-4-106(1)(c); and

(d) one school district trustee.

AUTH: Sec. 2-15-1522 MCA
IMP: Sec. 2-15-1522 MCA

3. The board is proposing this amendment to be consistent with new state law.

4. Interested persons may present their data, views or arguments either orally or in writing to Alan Nicholson, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59620, no later than February

14, 1988.

5. If a person who is directly affected by the proposed amendment wishes to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Alan Nicholson, Chairman of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59620, no later than February 14, 1988.

6. If the Board receives requests for a public hearing on the proposed amendment 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 2264 as there are 22637 persons currently certified in the state of Montana.

Alan Nicholson

ALAN NICHOLSON, CHAIRMAN
BOARD OF PUBLIC EDUCATION

BY: Claudia Wolfe

Certified to the Secretary of State December 23, 1987.

BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the adoption of rules establishing the procedures for wildlife habitat acquisition.) NOTICE OF PUBLIC HEARING

TO: All Interested Persons:

1. On the following dates, at the locations given, the Department of Fish, Wildlife and Parks will hold public hearings to consider the adoption of rules for the administration for wildlife habitat acquisition pursuant to 87-1-241, MCA:

(1) **Region 1**, February 10, 1988, 7:00 o'clock p.m., at Lone Pine State Park, 290 Lone Pine Road, Kalispell, Montana;

(2) **Region 2**, February 11, 1988, 7:00 o'clock p.m., at Department Headquarters, 3201 Spurgin Road, Missoula, Montana;

(3) **Region 3**, February 17, 1988, 7:00 o'clock p.m., at Department Headquarters, 1400 South 19th, Bozeman, Montana;

(4) **Region 4**, February 16, 1988, 7:00 o'clock p.m., at Department Headquarters, 4600 Giant Springs Road, Great Falls, Montana;

(5) **Region 5**, February 12, 1988, 7:00 o'clock p.m., at Department Headquarters, 1125 Lake Elmo Drive, Billings, Montana;

(6) **Region 6**, February 10, 1988, 7:00 o'clock p.m., at the Cottonwood Inn, Highway 2, Glasgow, Montana;

(7) **Region 7**, February 11, 1988, 7:00 o'clock p.m., at Miles Community College, 2600 Dickinson, Miles City, Montana.

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

3. The proposed rules provide as follows:

RULE I PURPOSE (1) The fish and game commission and the department of fish, wildlife and parks have the mandate for the protection, preservation and propagation of the fish and wildlife resources of the state and for the promotion of state parks and outdoor recreation. The acquisition of lands, by lease, easement or purchase, for wildlife habitat and recreational access are an integral part of this mandate.

AUTH: 87-1-241, MCA IMP: 87-1-241 and 87-1-242, MCA

RULE II STATEWIDE HABITAT ACQUISITION PLAN (1) The department will develop and adopt a plan for the acquisition of an interest in wildlife habitat that will be revised at a minimum of every three years. Emphasis in this plan will be those areas where important habitat is seriously threatened. The plan will assure that interests acquired in lands will be reasonably distributed around the state. The plan will require

the comprehensive analysis of the criteria contained in 87-1-241(1).
AUTH: 87-1-241, MCA IMP: 87-1-241 and 87-1-242, MCA

RULE III DETERMINATION OF INTEREST IN LAND (1) When a parcel of land is identified as a priority for acquisition according to criteria in the habitat acquisition plan, the management objectives for the parcel will be the primary determinant for the type of acquisition to be sought. If the management objectives can be met by acquisition of a lease or easement and agreement can be reached, then these options will be the first pursued. If agreement cannot be reached or if management objectives cannot be met by these options, then the acquisition of fee title will be pursued.
AUTH: 87-1-241, MCA IMP: 87-1-241 and 87-1-242, MCA

RULE IV MANAGEMENT OBJECTIVES AND PRELIMINARY MANAGEMENT PLANS (1) Following the initial negotiations on the property but prior to any final action, the department will identify management objectives for the proposed action and develop a preliminary management plan. This management plan will be prepared according to a standardized format adopted by the department and will include an analysis of the potential impacts to adjacent private land and proposed methods to address such impacts.
AUTH: 87-1-241, MCA IMP: 87-1-241 and 87-1-242, MCA

RULE V PUBLIC HEARING (1) After completion of the preliminary management plan, a public hearing will be held in at least one community near the proposed acquisition. The proposed acquisition and management plan will be sent to local sportsmen's clubs, county commissioners, adjacent landowners, and other interested parties prior to the public hearing.
AUTH: 87-1-241, MCA IMP: 87-1-241 and 87-1-242, MCA

RULE VI PRESENTATION OF PRELIMINARY MANAGEMENT PLAN AND PUBLIC INPUT (1) The preliminary management plan and related public concerns will be presented to the fish and game commission prior to its final action on any acquisition, and to the board of land commissioners if that body is required to make a decision on the proposal under 87-1-209.
AUTH: 87-1-241, MCA IMP: 87-1-241 and 87-1-242, MCA

RULE VII APPROVAL OF ACQUISITION AND FINAL MANAGEMENT PLAN (1) If the fish and game commission approves the acquisition and the board of land commissioners approves of the acquisition if required under 87-1-209, a finalized management plan for the area will be prepared by the department for commission approval. This plan will address, if appropriate, noxious weed control, compliance with federal aid regulations, if necessary, and MEPA compliance for significant management activities. It will also

contain a plan for monitoring and evaluating the results of the land management activities.

AUTH: 87-1-241, MCA IMP: 87-1-241 and 87-1-242, MCA

4. The Fish and Game Commission is required in 87-1-241, MCA, to establish by rule a policy for making wildlife habitat acquisitions pursuant to House Bill 526 that was passed and approved in the 1987 legislative session. The proposed rule establishes a procedure for the evaluation of potential wildlife habitat acquisitions of interest in land and for the acquisition of specific parcels of land. This procedure incorporates the specific requirement of 87-1-241, MCA, (Section 1 of House Bill 526) and of the Statement of Intent for House Bill 526.

5. Interested parties may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Arnold Olson, Administrator, Wildlife Division, Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620, no later than February 22, 1988.

6. Robert N. Lane and Eileen Shore have been designated to preside over and conduct the hearings.

7. The authority of the commission to make the proposed rule is based on 87-1-241, MCA, and the rule implements 87-1-241 and 87-1-242, MCA.

James W. Flynn, Secretary
Fish and Game Commission

Certified to the Secretary of State January 4, 1988.

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

In the matter of the adoption of rules for the administration of the pheasant enhancement program.) NOTICE OF PUBLIC HEARING

TO: All Interested Persons:

1. On the following dates, at the locations given, the Department of Fish, Wildlife and Parks will hold public hearings to consider the adoption of rules for the administration of the pheasant enhancement program pursuant to 87-1-249, MCA:

(1) **Region 1**, February 10, 1988, immediately following the hearing on habitat acquisition, which is scheduled at 7:00 o'clock p.m., at Lone Pine State Park, 290 Lone Pine Road, Kalispell, Montana;

(2) **Region 2**, February 11, 1988, immediately following the hearing on habitat acquisition, which is scheduled at 7:00 o'clock p.m., at Department Headquarters, 3201 Spurgin Road, Missoula, Montana;

(3) **Region 3**, February 17, 1988, immediately following the hearing on habitat acquisition, which is scheduled at 7:00 o'clock p.m., at Department Headquarters, 1400 South 19th, Bozeman, Montana;

(4) **Region 4**, February 16, 1988, immediately following the hearing on habitat acquisition, which is scheduled at 7:00 o'clock p.m., at Department Headquarters, 4600 Giant Springs Road, Great Falls, Montana;

(5) **Region 5**, February 12, 1988, immediately following the hearing on habitat acquisition, which is scheduled at 7:00 o'clock p.m., at Department Headquarters, 1125 Lake Elmo Drive, Billings, Montana;

(6) **Region 6**, February 10, 1988, immediately following the hearing on habitat acquisition, which is scheduled at 7:00 o'clock p.m., at the Cottonwood Inn, Highway 2, Glasgow, Montana;

(7) **Region 7**, February 11, 1988, immediately following the hearing on habitat acquisition, which is scheduled at 7:00 o'clock p.m., at Miles Community College, 2600 Dickinson, Miles City, Montana.

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

3. The proposed rules provide as follows:

RULE I DEPARTMENT AUTHORIZATION OF PROJECTS (1) The department may authorize organizations or individuals to participate in the ringneck pheasant enhancement program following the submission of a written application describing the proposed project on forms provided by the department and a review of that application. Applications must be received by

June 30 of the year in which release of the birds is contemplated. All applications must include the following information:

(a) name of the organization or individual applying;

(b) name of the person in charge of the organization's proposed pheasant enhancement project;

(c) number of members if the applicant is an organization;

(d) the applicant's current mailing address;

(e) the applicant's current telephone number;

(f) the legal description of the release site;

(g) clear evidence of either ownership of the release site or landowner permission if the release site is not owned by the applicant;

(h) a habitat map (specifying types and percentages) or SCS Conservation plan covering the land on which the birds are to be released;

(i) the number of acres at the release site.

(j) the number of birds to be released;

(k) any other information deemed relevant by the department which is included on the project application form.

AUTH: 87-1-249, MCA IMP: 87-1-246 through 87-1-249, MCA

RULE II REQUIREMENTS OF PROJECTS (1) The department will not authorize participation in the pheasant enhancement program unless the proposed project meets the following requirements:

(a) all birds must be at least 8 weeks of age at the time of release;

(b) all releases must be made before September 1;

(c) releases may not be made in Fergus, Richland or Roosevelt counties in order to provide a basis for evaluating the success of the program;

(d) all releases must be on land open to public hunting without the imposition of any monetary charge for such hunting privilege. Release sites may be subject to reasonable use limitations but no fee may be charged in connection with the privilege to hunt on any release site;

(e) all release sites should contain a minimum of 160 contiguous acres under the ownership of the applicant or the person authorizing release. Release sites as small as 80 contiguous acres will be considered on a case-by-case basis and may be authorized if the acreage involved would provide a viable habitat base for the number of birds proposed to be released;

(f) all release sites must contain at least 10% winter cover, 10% idle cover and 25% food sources to be considered for authorization;

(g) certification of the genetic strain must be available from the commercial source of the eggs or chicks and must be provided, upon request, to the department by the applicant;

(h) no single project may release more than 200 birds;

(i) banding of birds will be required in specified study areas and will be done by the department prior to release;

(j) all releases must be verified by a department employee at the time of release.

AUTH: 87-1-249, MCA IMP: 87-1-246 through 87-1-249, MCA

RULE III REPORTING REQUIREMENTS (1) Any authorized project releasing birds must, within 60 days of any release, file a written report with the department on forms to be provided by the department. All reports must include the following information:

(a) the number of eggs or chicks purchased or otherwise acquired;

(b) the number of birds released;

(c) the site of release;

(d) any other information deemed relevant by the department which is included on the project report form.

AUTH: 87-1-249, MCA IMP: 87-1-246 through 87-1-249, MCA

RULE IV PAYMENT BY DEPARTMENT (1) The department will pay authorized projects $3.00 per cock and $1.50 per hen for each bird released in compliance with all the provisions of Rule I through Rule III.

AUTH: 87-1-249, MCA IMP: 87-1-246 through 87-1-249, MCA

RULE V EFFECT OF RULE VIOLATIONS (1) Any person found guilty, pleading guilty or forfeiting bond for a violation of any of the ringneck pheasant enhancement program rules is disqualified from any further participation in the program.

AUTH: 87-1-249, MCA IMP: 87-1-246 through 87-1-249, MCA

4. The Department is required in 87-1-249, MCA, to adopt rules for the administration of the pheasant enhancement program established by Senate Bill 331, which was passed and approved in the 1987 legislative session. The proposed rules establish application procedures, program requirements, reporting requirements, terms of payment and the effect of violations consistent with the provisions of Senate Bill 331 and its statement of intent.

5. Interested parties may submit their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Arnold Olsen, Administrator, Wildlife Division, Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620, no later than February 22, 1988.

6. Robert N. Lane and Eileen Shore have been designated to preside over and conduct the hearings.

7. The authority of the department to make the proposed rules is contained in 87-1-249, MCA, and the rules implement 87-1-246 through 87-1-249, MCA.

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

Certified to the Secretary of State January 4, 1988.

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

In the matter of Proposed Adoption of New Rules Establishing Guidelines for the Sale of Excess Fish Eggs	) NOTICE OF PROPOSED ADOPTION) OF NEW RULES ESTABLISHING THE) PROCEDURE THE DEPARTMENT WILL) FOLLOW IN THE SALE OF FISH) EGGS. NO PUBLIC HEARING) CONTEMPLATED

TO: All Interested Persons:

1. On February 16, 1988, the Montana Department of Fish, Wildlife and Parks proposes to adopt new rules adopting a procedure for the sale of fish eggs produced from its brood stock but in excess of the department's needs.

2. The proposed rules provide as follows:

RULE I WHEN EGGS WILL BE SOLD (1) The department will offer to sell eggs from its brood stock only when the following conditions are met:

(a) The Department owns eggs that are surplus to its needs; and

(b) Eggs certified to be disease free under the procedures of ARM 12.7.501 are not available from private sources within the state.

AUTH: 87-4-601(e), MCA IMP: 87-4-601(e), MCA

RULE II SOURCE OF EGGS TO BE SOLD (1) The department will sell eggs only from its hatchery held stocks. Eggs from natural runs will not be sold.

AUTH: 87-4-601(e), MCA IMP: 87-4-601(e), MCA

RULE III BUYERS' LIST (1) Licensed commercial fish pond operators wishing to be notified of egg sales must file with the department their name and a phone number where they can be reached during normal business hours.

AUTH: 87-4-601(e), MCA IMP: 87-4-601(e), MCA

RULE IV SALES PROCEDURES (1) When the department determines that the conditions of Rule I have been met, it will notify all licensed commercial fish pond operator's on the buyer's list of the number of eggs available.

(2) The department will make no more than two attempts to notify by telephone each buyer on the buyer's list of the availability of surplus eggs.

(3) Following the phone call from the department, the potential buyer has four days within which to submit a bid.

(4) In order to be considered by the department, a bid must be accompanied by a deposit in the form of a certified check, money order or personal check for ten percent of the bid amount.

(5) If the high bidder declines the eggs or fails to meet other conditions of the sale, the ten percent deposit will be forfeited and the eggs will be offered to the next highest bidder, who will be offered the eggs at his bid price.
AUTH: 87-4-601(e), MCA IMP: 87-4-601(e), MCA

RULE V TRANSFER PROCEDURES (1) Eggs will be released to the operator or his representative upon receipt of bid amount at the state hatchery where the surplus occurs. The state hatchery will provide egg shipping cartons prior to actual transfer. The operator will be required to sign a surplus fish egg sale responsibility disclaimer, which will be provided by the department.
AUTH: 87-4-601(e), MCA IMP: 87-4-601(e), MCA

RULE VI METHODS OF PAYMENT (1) Payment is due at time of transfer. Payment can be made with a personal check, a certified check or a money order. Cash will not be accepted.
AUTH: 87-4-601(e), MCA IMP: 87-4-601(e), MCA

3. The Department is proposing these rules in order to implement 87-4-601(e), MCA, which was enacted by the 50th Legislature.

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 February 11, 1988.

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 February 11, 1988.

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.

7. The authority of the department to make the proposed rules is based on section 87-4-601(e), MCA, and the rule implements section 87-4-601(e), MCA.

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

Certified to the Secretary of State January 4, 1988.

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

In the matter of rules 12.8.202 through 12.8.213, comprising the public use regulations for the department's designated recreation areas.	)))))	NOTICE OF PROPOSED AMENDMENT OF RULES 12.8.202 THROUGH 12.8.213 COMPRISING THE PUBLIC USE REGULATIONS FOR THE DEPARTMENT'S DESIGNATED RECREATION AREAS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On March 14, 1988, the Department of Fish, Wildlife and Parks proposes to amend Rules 12.8.202 through 12.8.213, comprising the public use regulations for the department's designated recreation areas.

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

12.8.202 WEAPONS AND FIREWORKS (1) No person may discharge any firearm, fireworks, explosives, air or gas weapon, or arrow from a bow, on or over either land or water, from April 1 to the opening date of archery season each year, unless the designated area is otherwise posted. ~~Other~~ Areas, or portions of areas, ~~parts thereof,~~ may be closed to shooting when the director determines there is undue hazard to human life or property. In addition to any other penalties provided for violation, the participant may be expelled from the area. AUTH: 23-1-106, MCA IMP: 23-1-102, MCA

12.8.203 CONTROL OF ANIMALS (1) No person may permit an ~~a pet~~ animal to run at large in a designated public recreation area. Persons in possession of ~~pet~~ animals must restrain them and keep them under control ~~on a leash~~ in a manner which does not cause or permit a nuisance, ~~or any~~ annoyance, or ~~dangers~~ to others. From April 1 through September 15 of each year unless otherwise posted, tThe animal must be physically restrained or on a leash under 10 ~~may not exceed 15~~ feet in length ~~and must be~~ in hand or anchored at all times.

(2) ~~Pet~~ Aanimals are not ~~may not be kept in or~~ permitted in swimming beaches, sanitary facilities or areas or portions of ~~to enter areas or portions of~~ areas posted to exclude them. Persons in possession of ~~pet~~ animals who ~~cause or~~ permit said animals to create a nuisance or an annoyance to others or who do not restrain ~~pet~~ animals properly may be expelled from the area in addition to being subject to any other penalty provided.

(3) Persons bringing or allowing animals in designated recreation areas shall be responsible for proper removal and disposal of any waste produced by these animals.

(4) Ranging, grazing, watering or allowing livestock in designated recreation areas is prohibited except where specifically permitted or when authorized by lease, license or other written agreement with the department.

(5~~3~~) Unauthorized ~~a~~Animals including livestock may be impounded ~~owned or possessed by persons who are not staying in an area will be captured~~ and will not be returned to the owner or possessor until the costs of capture and holding the animal are reimbursed to the department. ~~This rule applies from April 1 through September 15 of each year unless the area is otherwise posted.~~

AUTH: 23-1-106, MCA IMP: 23-1-102, MCA

12.8.204 VEHICLES (1) This section applies to all vehicles, including, but not limited to: automobiles, trucks, motorcycles, mini-bikes, snowmobiles, dune buggies, all-terrain vehicles and trailers, campers, bicycles or any other such equipment.

(2~~1~~) No ~~motor~~ vehicle may be driven at a speed greater than the posted speed.

(3~~2~~) No wheeled motor vehicle may be driven off authorized roadways, ~~s~~, except onto parking areas provided.

~~(3) No person may park any vehicle, trailer, camper, or other vehicle except in designated parking areas, nor shall any person pitch a tent or otherwise set up camp other than in designated camping areas.~~

(4) No person may operate a vehicle on any road, trail, or area ~~over the snow equipment in any area~~ which is specifically posted against such use ~~operation~~.

(5) No motor vehicle may be operated in a public recreation area that fails to comply with the Title 61, MCA, Motor Vehicle Codes as they relate to driver licensing, vehicle equipment, ~~and~~ vehicle registration, and traffic regulation.

(6) In addition to any other penalty provided for violation, the participant may be expelled from the area.

AUTH: 23-1-106, MCA IMP: 23-1-102, MCA

12.8.205 CAMPING, DAY AND GROUP USE ~~(1) No person may camp overnight in a department administered recreation area without obtaining a single use overnight camping permit or having permanently and properly affixed to his vehicle a seasonal camping permit or Montana state golden year's pass issued by the director or under his authority, when such area has been signed and posted as fee camping area.~~

~~(2) The basic amount of fees for single use overnight camping permits or seasonal camping permits shall be as determined by the commission and posted by the director or his duly authorized agent.~~

(14) Camping at one or more campsites ~~No person or persons may maintain occupancy of camping facilities or space~~ in any one designated recreation area for a period longer than 14 days during any 30-day period ~~unless the area~~ is prohibited unless otherwise posted. In areas so posted, said occupancy will be

limited to 7 days during any 30-day period. Such 30-day periods shall run consecutively during the year commencing with the first day each person camps in a designated recreation area each year.

(~~2~~6) No person may set up camp in areas other than designated campgrounds, or ~~overnight~~ in any department-administered shelter building unless the shelter is posted as a camp shelter.

(~~3~~5) No person may leave a set-up camp, or trailer, camper, other vehicle, or equipment unattended for more than 48 hours unless the area is otherwise posted. Such vehicles and equipment may be impounded and will not be returned to the owner or possessor until the costs of towing and impoundment are reimbursed to the department.

(~~4~~3) No group of more than 30 persons may use a designated ~~department--administered~~ recreation area except with prior permission by the director or his agent. Groups may be assessed user fees ~~by-the-director-or-his-agent-as-determined by-the-commission~~ and may be required to surrender a deposit to defray additional or unusual department expenses caused by their use of recreation areas.

AUTH: 23-1-106, MCA IMP: 23-1-102, MCA

12.8.206 FIRES (1) No person may build or maintain a fire in any designated recreation area, except in established fireplaces and fire rings maintained for such purposes, or in portable camp stoves, unless otherwise posted. ~~--Exception: Certain-areas-may-be-posted-allowing-fires-to-be-built-in-other than-the-above-mentioned-places.~~

(2) No person may leave a fire unattended or leave a campsite~~ing--area~~ without completely extinguishing all fires prior to departure, ~~started-or-maintained-by-such-person.~~ AUTH: 23-1-106, MCA IMP: 23-1-102, MCA

12.8.207 PROPERTY DISTURBANCE (1) No person may destroy, deface, injure, remove, or otherwise damage any natural or improved property or willfully or negligently cut, destroy, or mutilate any tree, shrub, or plant, or any geological, historical, or archaeological feature, not including flowers, berries, cones, or fallen dead wood.

(2) No person may disturb or remove the topsoil cover or permit the disturbance or removal of topsoil cover. This prohibits digging for worms, burying of garbage, and allowing pets to dig holes.

(3) Gathering or cutting firewood for off site use is prohibited without prior written approval of the director or his agent.

(4) No person may design, construct, place or use any structure (including, but not limited to roads, trails, signs, or landscape features) within a designated recreation area, (including leased lands) without prior approval of the director or his agent. Unauthorized structures are subject to removal or impoundment.

AUTH: 23-1-106, MCA IMP: 23-1-102, MCA

12.8.208 DISORDERLY CONDUCT (1) Disorderly conduct, such as, but not limited to, quarreling, challenging to fight or fighting; using threatening, profane or abusive language; drunkenness; rendering vehicular or pedestrian traffic impassable; indecent exposure; public urination; operation of a motor vehicle in a manner as to create a nuisance or any annoyance or danger to others; loud or noisy behavior; is prohibited.

(2) Quiet hours shall be maintained in all recreation areas as posted. Portable generators may not be operated during these hours.

(3) It is prohibited to forcibly assault, oppose, impede, resist, intimidate or interfere with any official, employee or agent of the department engaged in the performance of his or her official duties or on account of the performance of his or her official duties.

(4) Failure to comply with a lawful order issued by a department employee acting pursuant to these rules shall be considered as interference with that employee while engaged in the performance of their official duties.

(5)~~(2)~~ In addition to any other penalty provided, the participants may be expelled from the area.

AUTH: 23-1-106, MCA IMP: 23-1-102, MCA

12.8.209 RESTRICTED AREAS & NIGHT CLOSURES (1) No person may enter upon any portion of any area that is posted as restricted to public passage.

(2) Designated ~~Public~~ recreation areas as posted will be closed nightly, except for emergency ingress and egress.

(3) Checkout time for campers using fee areas is 4:00 p.m. the following day unless otherwise ~~if not~~ posted. ~~or at such other time as posted in the area.~~

(4) Designated recreation areas where camping is not allowed are open from sunrise to ~~Checkout time for users not camping overnight is~~ sundown unless otherwise ~~in areas so~~ posted.

AUTH: 23-1-106, MCA IMP: 23-1-102, MCA

12.8.210 SANITATION AND LITTER WASTE DISPOSAL (1) No person may dump dead fish or animals or parts thereof, human excrement, refuse, rubbish, or wash water (except in receptacles provided for this purpose) nor pollute or litter in any other manner a public recreational area. Sewage wastes from self-contained trailers, campers, or other portable toilets shall be disposed of only in posted sanitary trailer dump stations. Wash water may be disposed of in sealed vault latrines.

(2) No household or commercial garbage or trash brought in as such from other property shall be disposed of in any designated public recreation area.

(3) The use of glass bottles and containers is not permitted at swimming beaches, or areas or portions of areas posted to exclude them.

(~~4~~3) In addition to any other penalty provided for violation, the participants may be expelled from the area.
AUTH: 23-1-106, MCA IMP: 23-1-102, MCA

12.8.211 LIVESTOCK & COMMERCIAL USE ~~(1) No person may permit livestock to graze in any area properly fenced to restrict the passage of livestock, unless the area is specifically leased to the owner of the livestock for grazing.~~

(1)~~(2)~~ No person may use these lands for any commercial purpose without first securing written permission from the director or his agent.

(2)~~(3)~~ No commercial signs may be posted without prior approval of the director or his agent.

(3)~~(4)~~ The director with approval of the commission, may adopt a schedule of fees and/or security deposits including the option of fee and/or security deposit waiver, for commercial use of department lands for a period not exceeding seven (7) days. Commercial use of department lands longer than seven (7) days requires prior approval of the commission.

(4)~~(5)~~ The director or his agent may specify the conditions and stipulations under which commercial use will be permitted on department lands.
AUTH: 23-1-106, MCA IMP: 23-1-102, MCA

12.8.212 BOATING AND SWIMMING (1) No boats may be launched from any boat trailer, car, truck, or other conveyance except at an established launching area, if such a facility is provided. Boats, boat trailers, trucks, or other conveyance may not be kept at a designated area unless the owner or possessor thereof is authorized to use the area under the provisions of these rules.

(2) Swimming areas when designated are limited by white and orange buoys. No person may swim beyond a ~~from such~~ designated swimming area where posted. ~~to any area beyond that which is so marked or limited.~~

~~(3)~~ No person may disturb, deface, remove, or relocate such buoys. ~~unless authorized by the director or his agent.~~

(3)~~(4)~~ No power boat may be operated or beached within a designated swimming area, nor shall it be operated with its motor in operation so that any portion of such boat approaches closer than 50~~20~~ feet to any swimmer in the water. The term "swimmer" as used herein shall not mean any water skier, then engaged in waterskiing and using said boat as a use of towing power. This regulation is applicable only in water areas which are within 100 feet of the nearest shoreline and shall not apply to emergency or life-saving situations.

(4)~~(5)~~ No operator of a power boat may tow any water skier so that such water skier is caused to approach within 50~~20~~ feet of any swimmer in the water. No water skier, while afloat on his water skis, may approach any swimmer in the water within

~~50~~20 feet or water ski within the bounds of any designated swimming area.

(5)~~(6)~~ No person may leave a boat or other water craft unattended while moored or attached to a public boat dock nor shall public boat docks be used for any other purpose than loading and unloading of boats or other water craft unless ~~otherwise as~~ posted.

AUTH: 23-1-106, MCA IMP: 23-1-102, MCA

12.8.213 RECREATION USE FEES (1) No person who fails to pay an authorized fee may enter a designated recreation area or set up camp in a designated recreation area. ~~All fee camping areas~~

(2)~~(1)~~ Where such fees are charged, fee requirements shall be prominently signed and posted. ~~as such, together with a statement as to the amount of fee charged.~~

(3)~~(2)~~ From and after the effective date of this rule, regulations relating to establishment of fees for recreational use of lands and waters owned and controlled by the state of Montana, acting by and through the fish and game commission, will be adopted on an annual and seasonal basis and therefore will not be considered or processed as subject to the Montana Administrative Procedure Act.

AUTH: 23-1-106, MCA IMP: 23-1-102, MCA

3. The amendments are proposed to standardize, reorganize and clarify the existing public use regulations for the Department's designated recreation areas.

4. Interested parties may submit their data, views or arguments concerning the proposed amendments, in writing to Mason Niblack, Parks Division, Assistant Administrator, Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620, no later than February 12, 1988.

5. If a person who is directly affected by the proposed amendments wishes to express data, views, and arguments orally or in writing at a public hearing, he must make a written request for a hearing and submit this request along with any written comments he has to Mason Niblack, Parks Division, Assistant Administrator, Department of Fish, Wildlife and parks, 1420 East Sixth Avenue, Helena, Montana 59620, no later than February 12, 1988.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendments; 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.

7. The authority of the department to make the proposed

amendments is based on section 23-1-106, MCA, and the rules implement section 23-1-102, MCA.

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

Certified to the Secretary of State January 4, 1988.

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

In the matter of the repeal of rules 12.6.201 through 12.6.204 comprising the department's field trial regulations.	))))	NOTICE OF PROPOSED REPEAL OF RULES 12.6.201 through 12.6.204 COMPRISING THE DEPARTMENT'S FIELD TRIAL REGULATIONS NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On March 1, 1988, the Department of Fish, Wildlife, and Parks proposes to repeal rules 12.6.201 through 12.6.204 comprising the department's field trial regulations.

2. The rules proposed to be repealed are on pages 12-309 and 12-310 of the Administrative Rules of Montana.

3. The agency proposes to repeal these rules because the provisions contained in the rules are now included in section 87-4-915, MCA.

4. Interested parties may submit their data, views or arguments concerning the proposed repeal in writing to Erv Kent, Enforcement Division Administrator, Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620, no later than February 12, 1988.

5. If a person who is directly affected by the proposed repeal wishes to express data, views, or comments orally or in writing at a public hearing, he must make a written request for a hearing and submit this request along with any written comments he has to Erv Kent, Enforcement Division Administrator, no later than February 12, 1988.

6. If the agency receives requests for a public hearing on the proposed repeal from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed repeal; 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.

7. The authority of the department to make the proposed repeal is based on section 87-4-913, MCA, and the rules implement section 87-4-915.

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

Certified to the Secretary of State January 4, 1988.

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

In the matter of the amendment of Rule 12.8.504 concerning the department's cultural resources coordinator.	NOTICE OF PROPOSED AMENDMENT OF RULE 12.8.504 CONCERNING THE DEPARTMENT'S CULTURAL RESOURCE COORDINATOR NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On March 1, 1988, the Department of Fish, Wildlife and Parks proposes to amend rule 12.8.504 which concerns the department's cultural resources coordinator.

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

12.8.504 RESPONSIBILITY FOR COMPLIANCE (1) The ~~parks division administrator~~ bureau chief, design and construction bureau, field services division, is cultural resources coordinator and, subject to the director's approval, is responsible for coordinating department communication with the SHPO and for the satisfactory completion of the procedures required by this part.

(2) will remain the same.

AUTH: 22-3-424 IMP: 22-3-421 through 22-3-442

3. The department's cultural resources coordinator is being changed because of internal reorganization within the department.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment, in writing to Dick Mayer, Design and Construction Bureau Chief, Field Services Division, Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620, no later than February 12, 1988.

5. If a person who is directly affected by the proposed rules wishes to express his data, views, or comments orally or in writing at a public hearing, he must make a written request for a hearing and submit this request along with any written comments he has to Dick Mayer, Design and Construction Bureau Chief, no later than February 12, 1988.

6. If the agency receives requests for a public hearing on the proposed amendment 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.

7. The authority of the agency to make the proposed amendment is based on section 22-3-424, MCA, and the rule implements sections 22-3-421 through 22-3-442, MCA.

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

Certified to the Secretary of State January 4, 1988.

BEFORE THE DEPARTMENT OF HIGHWAYS
OF THE STATE OF MONTANA

In the matter of the adoption of a Rule certifying drivers of special vehicle combinations.	))))	NOTICE OF PROPOSED ADOPTION OF A RULE CERTIFYING DRIVERS OF SPECIAL VEHICLE COMBINATIONS NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On February 14, 1988, the Department of Highways proposes to adopt a rule for certification of drivers of special vehicle combinations.

2. The proposed rule provides as follows:

RULE I SPECIAL VEHICLE COMBINATION DRIVER CERTIFICATION

(1) The operating company must keep physical records of all training. These records may be audited at any time upon request by the department of highways.

(2) The certification by the operating company will consist of the following:

(a) Each driver must complete an initial one-time road test consisting of at least 200 miles or 4 hours of driving a special vehicle combination. The road test must include driving the special vehicle combination under actual driving circumstances to include mountain driving and entering and exiting interchanges when applicable.

(b) Each company must provide its drivers with a documented annual review of the following:

(i) Federal Motor Carrier Safety Regulations as required in section 391.25.

(ii) State laws and regulations pertaining to the operation of special vehicle combinations (triples), including under adverse weather conditions.

(iii) The above certification is to be noted on the drivers "Violation and Review Record" (ATA Form CO680 or comparable) by the carrier.

(3) The operating company will provide the driver with a certification card, which the driver shall carry at all times when operating a special vehicle combination. The certification card shall be issued at the completion of the annual certification. The certification card shall be valid from January 1 through December 31 of each year. This certification card shall be available for display by the driver when requested by any employee of the department of highways or the Montana highway patrol.

(a) Blank certification cards are available from the G.V.W. division of the department of highways.

Auth.: 61-10-129, MCA; Imp: 61-10-124(6), MCA.

3. The department is proposing this rule because it is required by ARM 18.8.517 and provided by section 61-10-129, MCA.

4. Interested parties may submit their data, views, or arguments concerning the proposed rule in writing to Jesse Munro, Administrator of the Gross Vehicle Weight Division, Department of Highways, 2701 Prospect Avenue, Helena, MT 59620 no later than February 12, 1988.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Jesse Munro, Administrator of the Gross Vehicle Weight Division, Department of Highways, 2701 Prospect Avenue, Helena, MT 59620, no later than February 12, 1988.

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

Gary J. Wicks
Director of Highways

By: Gary J. Wicks

Certified to the Secretary of State December 29, 1987

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

In the matter of the amendment of rule 24.12.204 establishing qualifications for daycare providers for the New Horizons Program	)))))))	NOTICE OF PROPOSED AMENDMENT OF RULE 24.12.204, ESTABLISHING QUALIFICATIONS OF DAYCARE PROVIDERS FOR THE NEW HORIZONS PROGRAM. NO PUBLIC HEARING CONTEMPLATED.

TO: All Interested Persons:

1. On February 16, 1988, the Department of Labor and Industry proposes to amend rule 24.12.204 which establishes the qualifications for daycare providers.

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

24.12.204 DAYCARE PROVIDERS (1) The client is responsible for selecting the daycare provider.

~~-(2) Any daycare facility or daycare center as defined in 53-4-501, MCA which is selected must be licensed or in the process of application for license.~~

~~(3) Any family daycare home or group daycare home as defined in 53-4-501, MCA must be registered or in the process to be registered.~~

~~(4) A client may select a daycare provider who is not required by law either to be registered or licensed.~~

(2) The client must select a daycare provider who is licensed or registered as provided in 53-4-501, MCA or in the process of application to be licensed or registered.

(3) Payment must be made direct to the daycare provider by the displaced homemaker program.

Auth. 39-7-603, MCA; IMP. 39-7-605, MCA

3. A licensed or registered daycare provider carries liability insurance to cover medical costs for a child who is injured in an accident while in the provider's care. This is especially important for former AFDC recipients just beginning a job and unlikely to have the money to pay medical costs. There is a better assurance of good daycare with licensed or registered daycare providers, since they are required to provide care which meets at least minimum standards of safety and mental and physical well-being for the child.

4. Interested parties may submit their data, views or arguments concerning the proposed amendments in writing to the Administrator, Employment Policy Division, Department of Labor and Industry, P.O. Box 1728, Helena, Montana, 59624, no later than February 11, 1988.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to the Administrator, Employment Policy Division, Department of Labor and Industry, P.O. Box 1728, Helena, Montana, 59624.

6. If the agency receives requests for a public hearing on the proposed amendment 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 18 persons based on the highest number of AFDC recipients which could be served, given the amount of funding provided, plus the number of Displaced Homemakers Centers program operators.

7. The authority for the agency to make the proposed amendment is based on section 39-7-603 MCA, and the rule implements section 39-7-605, MCA.

Mary M. Hartman

MARY M. HARTMAN
Commissioner
Department of Labor & Industry

Certified to the Secretary of State January 4, 1988

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

In the matter of the repeal of Rule 46.12.201 pertaining to eligibility requirements for medical assistance	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED REPEAL OF RULE 46.12.201 PERTAINING TO ELIGIBILITY REQUIREMENTS FOR MEDICAL ASSISTANCE

TO: All Interested Persons

1. On February 4, 1988, at 9:00 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 repeal of Rule 46.12.201 pertaining to eligibility requirements for medical assistance.

2. Rule 46.12.201 as proposed to be repealed is on page 46-1111 of the Administrative Rules of Montana.

AUTH: Sec. 53-6-113 MCA; AUTH Extension, Sec. 2, Ch. 77, L. 1985, Eff. 10/1/85; Sec. 4, Ch. 329, L. 1987, Eff. 10/1/87
IMP: Sec. 53-6-101, 53-6-131 and 53-6-141 MCA

3. The Department proposes to repeal ARM 46.12.201 because the first sentence is contained in statute so is unnecessary as a rule and the second sentence is incomprehensible and not legally supportable.

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 February 11, 1988.

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

Ted Doy
Director, Social and Rehabilitation Services

Certified to the Secretary of State January 4, 1988.

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

In the matter of the amendment of Rules 46.12.541 and 46.12.542 pertaining to hearing aids	)	NOTICE OF PUBLIC HEAPING IN THE MATTER OF THE PROPOSED AMENDMENT OF RULES 46.12.541 AND 46.12.542 PERTAINING TO HEARING AIDS

TO: All Interested Persons

1. On February 3, 1988, 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 46.12.541 and 46.12.542 pertaining to hearing aids.

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

46.12.541 HEARING AID SERVICES, REQUIREMENTS Subsections (1) through (3) remain the same.

~~(4)--Medicaid-recipients-must-be-physician-referred-for-a-hearing-aid--evaluation-(HAE)--by-a-licensed-audiologist-prior-to-the-fitting-and-purchase-of-a-hearing-aid.~~

~~(5)--Where-travel--and-recipient--immobility-prohibit-the-audiological-HAE,--a-recipient-must-receive-a-medical-examination-from-a-physician-and--the-physician-must-certify-the-need-for-a-hearing-aid.~~

~~(6)--Medicaid-payment-for-a-hearing-aid--purchase-following-the-original-aid--purchase-will--be-allowed--only-when-replacement-is-medically-necessary-due-to-a-marked-change-in-the-client's-hearing-loss.~~

~~(7)--Medicaid--payment--for--hearing--aid--purchase--will-include-the-cost-of-the--hearing-aid--(model-and-serial-number-and-ear-fit)-and-ear-mold,-the-fitting,--adjusting,-two-return-office-calls,-aid-orientation,-and-counseling.~~

~~(8)--Hearing-aid-rentals--are-limited-to-a--maximum-of-30-days.~~

~~(9)--All-hearing--aid-purchases--and-rentals--will-be-reviewed-and-approved-by-the-designated-review-organization.~~

(4) A hearing aid may be provided for under the medicaid program if:

(a) the recipient has been referred for medical reasons by a physician for an audiological examination;

(b) the examination by a licensed audiologist results in a determination that a hearing aid or aids are needed; and

(c) the audiological examination results show that there is a pure tone loss of at least forty (40) decibels plus or minus five (5) decibels over the frequency at 500, 1,000, 2,000 and 3,000 hertz in the best ear.

(5) The audiologist's report will be prepared in accordance with the format described in the audiologists' provider manual. The audiologist shall indicate in the report whether in his or her professional opinion a hearing aid is required for the recipient. The report shall also indicate the type of hearing aid required by the recipient and whether monaural or binaural hearing aids are required.

(6) A claim for coverage of a hearing aid must be approved by the department or its designee prior to the provision of the service. Prior approval must be in writing from the department. Copies of the physician's referral and audiologist's report must be submitted with the claim.

(7) Reimbursement for hearing aid rentals is limited to a maximum of thirty (30) days.

AUTH: Sec. 53-6-113 MCA; AUTH Extension, Sec. 2, Ch. 77, L. 1985, Eff. 10/1/85; Sec. 4, Ch. 329, L. 1987, Eff. 10/1/87
IMP: Sec. 53-6-101 and 53-6-141 MCA

46.12.542 HEARING AID SERVICES, REIMBURSEMENT (1) The department will pay the ~~lowest~~ lower of the following for hearing aid services: ~~not-also-covered-by-medicare:~~

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

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

~~The-department-will-pay-the-lowest--of-the--following-for hearing-aid--services-which-are-also-covered-by-medicaid:--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-this-rule:~~

(2) ~~Hearing--aid--fee--schedule:~~ Medicaid payment for hearing aid purchase or rental will cover only the following items in the amounts indicated:

List of Services	Fee
Purchase of instrument	~~Wholesale-cost-&-$302.50 dispensing-fee~~ Manufacturer's invoice plus a dispensing fee of $200.00 for a monaural (single) hearing aid and $300.00 for binaural (two hearing aids, one for each ear) hearing aids.

"Hearing aid rental ... $1.71 per day" through "Bone ossilator ... aid" remain the same.

Ear mold ~~replacement~~	$18.15

Hearing aid batteries ..... ~~$9.00/silver-oxide-standard package---$6.05/all---other standard package~~ $1.00 per cell

(3) The dispensing fee consists of the initial ordering, the fitting, the orientation, the counseling, two return visits for the services listed, and the insurance for loss or damages covered under an extended warranty.

AUTH: Sec. 53-6-113 MCA; AUTH Extension, Sec. 2, Ch. 77, L. 1985, Eff. 10/1/85; Sec. 4, Ch. 329, L. 1987, Eff. 10/1/87
IMP: Sec. 53-6-101 and 53-6-141 MCA

3. The proposed rule changes are intended to contain costs, control utilization and clarify several aspects of the rules. The proposal will clarify the division of responsibility between the physician and the audiologist in providing hearing aid services. The amendment will define the minimum amount of hearing loss required before a hearing aid will be determined to be necessary. The dispensing fees are to be changed to two hundred dollars for a monaural aid and to three hundred dollars for a binaural hearing aid. This fee change is intended to clarify policy on dispensing fees for monaural and binaural hearing aids.

Some of the amendments were derived from changes suggested by representatives of the Audiologist's Association and the Hearing Aid Dispenser's Association.

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 February 11, 1988.

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 January 4, 1988.

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

In the matter of the adoption of rules I through VII and amendment of Rule 46.8.102 pertaining to the reporting and handling of incidents relating to recipients of developmental disability services	)))))))	NOTICE OF PUBLIC HEARING IN THE MATTER OF THE PROPOSED ADOPTION OF RULES I THROUGH VII AND AMENDMENT OF RULE 46.8.102 PERTAINING TO THE REPORTING AND HANDLING OF INCIDENTS RELATING TO RECIPIENTS OF DEVELOPMENTAL DISABILITY SERVICES

TO: All Interested Persons

1. On February 4, 1988, 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 rules I through VII and amendment of Rule 46.8.102 pertaining to the reporting and handling of incidents relating to recipients of developmental disability services.

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

46.8.102 DEFINITIONS For purposes of this chapter, the following definitions apply:

Subsections (1) through (10) remain the same.

(11) "Client abuse" means any action causing or threatening physical or mental harm to a client including neglect, physical abuse, sexual abuse, withholding of basic necessities, the use of unapproved aversive procedures, and the misuse of personal items or monies.

Subsections (11) and (12) remain the same in text but will be renumbered (12) and (13).

(14) "Division staff" means the area managers and training and contract managers of the developmental disabilities division of the department of social and rehabilitation services.

Subsections (13) through (15) remain the same in text but will be renumbered (15) through (17).

(18) "Incidents" means acts or omissions not otherwise permitted which result or may result in physical or emotional harm to a person or which intentionally deprive a person of acknowledged rights. The following are included within this definition:

(a) death of a client;

(b) harm or illness of a client requiring hospitalization;

(c) harm of a staff member due to actions of a client;

(d) medical treatment of a client;
(e) suicide attempts by a client;
(f) a placement in a long-term care facility without approval of the client's individual habilitation planning team;
(g) alleged unlawful activities affecting a client;
(h) client abuse;
(i) client's rights violations;
(j) an unaccounted for absence of the client; or
(k) any behavior requiring the use of an emergency procedure as provided for in ARM 46.8.1201 et seq.

Subsections (16) through (25) remain the same in text but will be renumbered (19) through (28).

AUTH: Sec. 53-20-204 MCA; AUTH Extension, Sec. 1, Ch. 426, L. 1987, Eff. 10/1/87; Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87
IMP: Sec. 53-20-203, 53-20-204 and 53-20-205 MCA

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

RULE I INCIDENT REPORTING AND HANDLING, PURPOSE (1) These rules govern the reporting and handling of incidents which harm or could result in harm to developmentally disabled persons who are recipients of services funded by the developmental disabilities program of the department of social and rehabilitation services.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-205 MCA

RULE II INCIDENT REPORTING AND HANDLING, POLICY (1) A provider must have a policy of incident reporting and handling.

(2) An incident handling and reporting policy must assure that incident handling and reporting is conducted as provided for in this rule, provides for the confidentiality of client identity and information, meets any standards, if applicable, for group home licensing at ARM 11.18.199 et seq., meets any applicable program standards provided at ARM 46.8.901 et seq., and meets any applicable aversive procedure standards provided at ARM 46.8.1201 et seq.

(3) An incident handling and reporting policy must:

(a) classify incidents according to the seriousness of the harm or threatened harm to the client or others;

(b) provide for emergency procedures for contacting provider staff and others responsible for making any necessary decisions;

(c) provide guidance as to appropriate emergency procedures to be utilized;

(d) provide for the preservation of information or items that may be needed in reporting or investigating an incident; and

(e) provide for a system of tracking and discovering patterns of incidents.

(4) The policy must provide staff training and orientation on a continuing and consistent basis regarding these rules, the rules on aversive procedures at ARM 46.8.1201 et seq., the provider's policy on client abuse and rights violations and measures necessary to protect the rights and interests of clients who are considered to be "at risk".

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-205 MCA

RULE III INCIDENT REPORTING AND HANDLING, REPORTING (1) An incident involving a client of developmental disabilities services must be reported in writing and submitted in the format requested by the department to the department of family services' case manager and to the responsible division staff on the first working day following the incident.

(2) An incident report will include the client's name and address, the time and date of the incident, a description of the incident, the names of staff and other persons present and responding to the incident, and the response of the staff and others to the incident.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-205 MCA

RULE IV INCIDENT REPORTING AND HANDLING, DEATH, SUICIDE ATTEMPT, UNACCOUNTED FOR ABSENCE, EMERGENCY HOSPITALIZATION OR INCARCERATION (1) The provider must notify the following persons upon the death, suicide attempt, unaccounted for absence, emergency hospitalization, placement in a long term care facility without I.H.P. team approval or incarceration of a client:

(a) the case manager or designee;
(b) the division staff;
(c) the guardian, if any; and
(d) a designated advocate, if any.

(2) Notice must be given as follows:

(a) to the guardian and case manager or their designees as soon as possible but no later than two hours after the incident becomes known; and

(b) to division staff and an advocate within 24 hours of the incident.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-205 MCA

RULE V INCIDENT REPORTING AND HANDLING, INVESTIGATIONS (1) The department or the department in cooperation with the department of family services may conduct an investigation into any incident, reported or unreported, which involves or appears to involve a person receiving developmental disabilities services.

(2) The department will have access to the site and facilities relating to the incident and to any staff or clients who may have knowledge of the matter.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-205 MCA

RULE VI INCIDENT REPORTING AND HANDLING, CONFIDENTIALITY (1) Incident reports and investigations are confidential.

(2) An incident report is available to the department, the department of family services and the provider for use relating to their responsibilities for the care and protection of the client and the provision of services to the client.

(3) An incident report or information contained therein may be made available to other governmental entities if those entities are responsible for the care and protection of the client and the provision of services to the client and the receipt of the incident report or information is necessary to the conduct of those responsibilities.

(4) Information in an incident report concerning a client is available to the client, to a legal guardian of the client, or to an advocate designated by the client or legal guardian.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-205 MCA

RULE VII INCIDENT REPORTING AND HANDLING, CLIENT ABUSE OR CLIENT PROBLEM BEHAVIOR (1) In a situation where the provisions of either 41-3-101 MCA et seq. relating to child abuse or 53-5-501 et seq. MCA relating to elder abuse are determined to be applicable, the requirements of these rules may be followed only to the extent that they are not in conflict with the provisions of those laws and rules adopted to effectuate those laws.

(2) Problem behaviors of clients resulting in either harm to self, others or property or the threat of harm to self, others or property must be handled in accord with the aversive procedures rules at ARM 46.8.1201 et seq.

AUTH: Sec. 53-20-204 MCA
IMP: Sec. 53-20-205 MCA

4. These rules implement requirements for the reporting and handling of incidents relating to persons receiving developmental disabilities services. The requirements provide for reporting to persons directly responsible for assuring the well-being of a client of developmental disabilities services. Other requirements provide for the implementation of reporting, handling and training policies by the providers of services, the protection of confidential information, and investigations of incidents. These rules concern incidents affecting the physical and mental well-being and the rights of persons receiving services.

5. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than February 11, 1988.

6. 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 January 4, 1987.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF CHIROPRACTORS

In the matter of the amendment of a rule pertaining to examinations) NOTICE OF AMENDMENT OF 8.12.603 EXAMINATION

TO: All Interested Persons:

1. On November 27, 1987, the Board of Chiropractors published a notice of proposed amendment of the above-stated rule at page 2122, 1987 Montana Administrative Register, issue number 22.

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

3. No comments or testimony were received.

BOARD OF CHIROPRACTORS
DEBBIE SORENSON, D.C.,
PRESIDENT

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

Certified to the Secretary of State, January 4, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF MEDICAL EXAMINERS

In the matter of the amendment) NOTICE OF AMENDMENT OF 8.
of a rule pertaining to fees) 28.420 FEE SCHEDULE

TO: All Interested Persons:

1. On November 27, 1987, the Board of Medical Examiners published a notice of proposed amendment of the above-stated rule at page 2127, 1987 Montana Administrative Register, issue number 22.

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

3. No comments or testimony were received.

BOARD OF MEDICAL EXAMINERS
THOMAS J. MALEE, M.D.
PRESIDENT

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

Certified to the Secretary of State, January 4, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF OUTFITTERS

In the matter of the transfer, amendment and adoption of rules pertaining to outfitters	NOTICE OF TRANSFER AND AMENDMENT OF 8.39.401 THROUGH 8.39.417 AND THE ADOPTION OF NEW RULES I. (8.39.101) BOARD ORGANIZATION, II. (8.39.201) PROCEDURAL RULES, AND III. (8.39.202) PUBLIC PARTICIPATION RULES, CONCERNING OUTFITTERS

TO: All Interested Persons:

1. On October 29, 1987, the Board of Outfitters published a notice of proposed transfer, amendment and adoption of the above-stated rules at page 1870, 1987 Montana Administrative Register, issue number 20.

2. The Board transferred, amended and adopted the rules as proposed with the following changes.

"8.39.403 OUTFITTER EQUIPMENT AND SUPPLIES (1) An outfitter shall own or control under written ~~leave~~ lease the following equipment:

(a) through (2) will remain the same."

Auth: 37-47-201, MCA Imp: 37-47-201, 37-47-302, 37-47-304, MCA

"8.39.413 LICENSE REVOCATION (1) Any outfitter or professional guide's license is subject to revocation for any violation of any of these regulations or for violation of any section of ~~Title 87, Chapter, Part 1 MCA~~ Title 37, chapter 47, MCA. Upon revocation or denial of any outfitter's license, said revocation shall include the privilege of holding a guide's license.

(2) will remain the same."

Auth: 37-47-201, MCA Imp: 37-47-341, MCA

3. Comments were received as follows:

COMMENT: Under number 3. of the proposed notice the Board stated that references to "department" would be changed to "Board". The staff of the Administrative Code Committee suggested that the Board might want to add the words "department regional office" and "director" to that statement.

RESPONSE: The Board concurs and these changes will be made when replacement pages are completed.

COMMENT: The staff of the Administrative Code Committee also made the comment that the implementing sections cited on the rules when administered by the Department of Fish, Wildlife and Parks were wrong. The Department of Commerce also cited wrong implementing sections on the rules to be amended in the proposed notice.

RESPONSE: The Board concurred and these citations will be corrected as follows: (8.39.403 is shown above)

"8.39.402 OUTFITTER STANDARDS" Auth: 37-47-201, MCA Imp: 37-47-302, 37-47-305, MCA

"8.39.408 RECORDS" Auth: 37-47-201, MCA Imp: 37-47-301, MCA

"8.39.412 LICENSING OF GUIDES AND ENDORSEMENT OF GUIDE" Auth: 37-47-201, MCA Imp: 37-47-304, 37-47-307, 37-47-309, MCA

"8.39.417 DEFINITION OF HUNTING SUCCESS FOR ADVERTISING" Auth: 37-47-201, MCA Imp: 37-47-201, 37-47-301, 37-47-302, MCA

4. The implementing sections on all other rules that were transferred from the Department of Fish, Wildlife and Parks were wrong and will be corrected when replacement pages are completed.

4. No other comments or testimony were received.

BOARD OF OUTFITTERS
RONALD CURTISS, CHAIRMAN

BY: Geoffrey L. Brazier
GEOFFREY L. BRAZIER
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, January 4, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF MILK CONTROL

In the matter of the Emergency Amendment of Rule 8.86.301 (6)(g) as it relates to the Class I price formula	))))	ORDER REPEALING AN EMERGENCY AMENDMENT TO RULE 8.86.301(6)(g) PRICING RULES

It appearing that the discriminatory practices by some retail grocery stores that were the cause of Meadow Gold Dairies, Inc. filing a Petition for Emergency Amendment to ARM Rule 8.86.301(6)(g), Pricing Rules, dated November 24, 1987, have not only not escalated, but have abated and appear to have stabilized, and the emergency conditions which were made to appear in the said Petition no longer exist, at least to the extent originally represented and do not presently threaten to escalate or constitute an imminent peril to the public health, safety and welfare of the people.

It further appearing that the Petitioner inadvertently conveyed to the Board a request for some relief which it did not intend, being proposed amendments to delete references to "delivery" price and the "wholesale grocer's dock" from the provisions of Arm 8.86.301(6)(g)(i)(C) and (C)(I); and

It further appearing as a result of preparations to defend Civil Cause No. DV-87-874 in the Montana Eighteenth Judicial District Court in Gallatin County that a fully informed decision on the merits of amending ARM 8.86.301(6)(g) will involve price considerations which this Board refuses to undertake without being fully and properly informed at a public hearing or hearings on those subjects and for those purposes, and a hearing on all petitions received to amend ARM Rule 8.86.301(6)(g) having been scheduled for January 25, 1988; and

Country Classic Dairies, Inc., the Plaintiff in said cause No. DV-87-874, having orally agreed through one of its attorneys of record to move to dismiss said case if and when the Board's Order Promulgating an Emergency Amendment to Rule 8.86.301(6)(g) dated November 30, 1987 is repealed.

NOW, THEREFORE, IT IS HEREBY ORDERED that this Board's Order, dated November 30, 1987, Promulgating an Emergency Amendment to Rule 8.86.301(6)(g) is repealed in its entirety effective immediately this day.

DATED DECEMBER 21, 1987.

MONTANA BOARD OF MILK CONTROL
CURTIS C. COOK, CHAIRMAN

BY: William E. Ross
WILLIAM E. ROSS, Bureau Chief

Certified to the Secretary of State December 21, 1987.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE LOCAL GOVERNMENT ASSISTANCE DIVISION

In the matter of the repeal of rules concerning the minimum contents of local subdivision regulations adopted under the Montana Subdivision and Platting Act	)	NOTICE OF REPEAL OF 8.94.101; 8.94.201; 8.94.601 through 8.94.605; 8.94.1001 through 8.94.1008; 8.94.1401; 8.94.1801 through 8.94.1803; 8.94.2201; and 8.94.2601 BY LEGISLATIVE ACTION

TO: All Interested Persons:

1. On October 15, 1987, the Local Government Assistance Division published a notice of proposed repeal of the above-stated rules at page 1742, 1987 Montana Administrative Register, issue number 19.

2. The Division has repealed the rules exactly as proposed because the 1981 legislature, in Section 1, Chapter 236, Laws of 1981, deleted from section 76-3-504, MCA, the Department of Commerce's authority to adopt.

3. No comments or testimony were received.

LOCAL GOVERNMENT ASSISTANCE DIVISION

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

Certified to the Secretary of State, January 4, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE MONTANA STATE LOTTERY

In the matter of the amendment) NOTICE OF AMENDMENT OF 8.
of a rule pertaining to prizes) 127.1201 PRIZES

TO: All Interested Persons:

1. On August 13, 1987, the Montana State Lottery published a notice of proposed amendment of the above-stated rule at page 1279, 1987 Montana Administrative Register, issue number 15.

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

3. No comments or testimony were received.

MONTANA STATE LOTTERY
SPENCER HEGSTAD, CHAIRMAN

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

Certified to the Secretary of State, January 4, 1988.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the adoption of ARM 10.57.301, Endorsement Information, and ARM 10.57.403, Class 3 Administrative Certificate	NOTICE OF AMENDMENT OF ARM 10.57.301, ENDORSEMENT INFORMATION, AND ARM 10.57.403, CLASS 3 ADMINISTRATIVE CERTIFICATE

TO: All Interested Persons

1. On November 27, 1987, the Board of Public Education published notice of proposed amendments concerning Endorsement Information and Class 3 Administrative Certificates on page 2131 of the 1987 Montana Administrative Register, issue number 22.

2. The Board has amended the rules as proposed.

3. There was no hearing on ARM 10.57.301 and ARM 10.57.403. No written comments were received prior to December 28, 1987, the date on which the Board closed the hearing record.

4. The amendment of ARM 10.57.301, Endorsement Information, and ARM 10.57.403, Class 3 Administrative Certificate, were proposed for the purpose of consistency with other rules currently being enforced and language clarification.

Alan Nicholson
ALAN NICHOLSON, CHAIRMAN
BOARD OF PUBLIC EDUCATION

BY: Carrietta Hutton

Certified to the Secretary of State January 4, 1988

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

In the matter of the amendment of rules 16.44.102, 16.44.104, 16.44.109, 16.44.118, 16.44.202, 16.44.322, 16.44.351, 16.44.504, 16.44.508, 16.44.610, 16.44.802, 16.44.803, 16.44.804, 16.44.805, 16.44.806, 16.44.807, 16.44.808, 16.44.809, 16.44.810, 16.44.812, 16.44.813, 16.44.814, 16.44.822, & the adoption of NEW RULES I-XIV	NOTICE OF THE ADOPTION AND AMENDMENT OF RULES (Hazardous Waste Mgt)

To: All Interested Persons

1. On October 29, 1987, at page 1881, issue number 20 of the 1987 Montana Administrative Register, the department published notice of proposed adoption and amendment of the above-captioned rules implementing federal regulatory changes pertaining to closure and post-closure requirements and to access to public records; these rules also implement state legislative changes pertaining to transfer facilities and commercial transfer facilities holding hazardous wastes for 10 days or less.

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

16.44.102 INCORPORATIONS BY REFERENCE Same as proposed.

16.44.104 PERMITTING REQUIREMENTS: EXISTING AND NEW HWM FACILITIES Same as proposed.

16.44.109 CONDITIONS OF PERMITS Same as proposed.

16.44.118 MINOR MODIFICATIONS OF PERMITS Same as proposed.

16.44.202 DEFINITIONS Same as proposed.

16.44.322 CHARACTERISTIC OF CORROSIVITY (1) A waste exhibits the characteristic of corrosivity if a representative sample of the waste has either of the following properties:

(a) it is aqueous and has a pH less than or equal to 2 or greater than or equal to 12.5, as determined by a pH meter using the test method specified in "Test Methods for ~~the Evaluation of~~ Evaluating Solid Waste, Physical/Chemical Methods", second edition, AS AMENDED BY UPDATE I (APRIL 1984) AND UPDATE II (APRIL 1985);

(b) it is a liquid and corrodes steel (SAE 1020) at a rate greater than 6.35 mm (0.250 inch) per year at a test temperature of 55° C. (130° F.) as determined by the test method specified in "Test Methods for ~~the--Evaluation--of~~ Evaluating

Solid Waste, Physical/Chemical Methods", second edition, AS AMENDED BY UPDATE I (APRIL 1984) AND UPDATE II (APRIL 1985).

(c) The department hereby adopts and incorporates herein by reference "Test Methods for ~~the-Evaluation-of~~ Evaluating Solid Waste, Physical/Chemical Methods", second edition AS AMENDED BY UPDATE I (APRIL 1984) AND UPDATE II (APRIL 1985), which is published by EPA, AND WHICH~~,---"Test-Methods--for-the Evaluation-of--Evaluating-Solid--Waste,-Physical/Chemical-Methods",--second-edition,-is-a-like-publication-setting~~ SETS forth EPA's standard test methods for determination of, among other things, hazard waste characteristics of solid waste. A copy of ~~"Test--Methods--for--the--Evaluation-of-Evaluating-Solid-Waste, Physical/Chemical-Methods",--second--edition,~~ THIS PUBLICATION may be obtained from the Solid and Hazardous Waste Bureau, Department of Health and Environmental Sciences, Helena, Montana 59620.

(2) Same as existing rule.

16.44.331 REPRESENTATIVE SAMPLING METHODS; EP TOXICITY TEST PROCEDURES; CHEMICAL ANALYSIS TEST METHODS; AND TESTING METHODS (1) For the purposes of this chapter, the department hereby adopts and incorporates herein by reference the following (the correct CFR edition is listed in ARM 16.44.102):

(a)-(d) Same as existing rule.

(e) "Test Methods for ~~the-Evaluation-of~~ Evaluating Solid Waste, Physical/Chemical Methods", second edition AS AMENDED BY UPDATE I (APRIL 1984) AND UPDATE II (APRIL 1985), ~~which-is~~ an EPA publication setting forth standard sampling, extraction, and analytical test methods for the national hazardous waste program.

(2) A copy of Appendix I, Appendix II, Appendix III, and Appendix X of 40 CFR Part 261 and "Test Methods for ~~the-Evaluation-of~~ Evaluating Solid Waste, Physical/Chemical Methods", second edition AS AMENDED BY UPDATE I (APRIL 1984) AND UPDATE II (APRIL 1985), may be obtained from the Solid and Hazardous Waste Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620.

(3) Same as proposed.

16.44.504 APPLICABILITY OF FACILITY REQUIREMENTS Same as proposed.

16.44.508 RECORDKEEPING Same as proposed.

NEW RULE I (to be codified as 16.44.524) TRAINING OF TRANSFER FACILITY PERSONNEL Same as proposed.

NEW RULE II (to be codified as 16.44.525) TRANSFER FACILITY SECURITY REQUIREMENTS Same as proposed.

NEW RULE III (to be codified as 16.44.526) EMERGENCY PREPAREDNESS, PREVENTION, AND RESPONSE AT TRANSFER FACILITIES Same as proposed.

NEW RULE IV (to be codified as 16.44.527) TRANSFER FACILITY CONTAINER HANDLING REQUIREMENTS

(1)-(2) Same as proposed.

(3) Loading docks, temporary container storage areas, and ALL areas where transfer of hazardous wastes occurs must have a base or floor which is smooth, free of cracks or gaps, and sufficiently impervious to contain leaks or spills until the spilled material is detected and removed. Temporary storage areas must be designed with a containment system having sufficient capacity to contain, at a minimum, ~~three~~ ONE AND ONE-HALF (1½) times the volume of the largest container which will be stored there. Any leaks or spills which do occur must be promptly cleaned up by the transfer facility operator.

(4) Containers of ignitable or reactive waste must be handled and stored in a manner so as to prevent accidental ignition or reaction of the waste. Specifically, such waste containers must be separated and protected from sources of ignition or reaction (e.g., open flames, sparks, cigarette ~~smoke~~ SMOKING, cutting and welding activities, hot surfaces, frictional heat, spontaneous ignition, and radiant heat). "NO SMOKING" signs must be conspicuously placed wherever there is or may be a hazard from ignitable or reactive wastes.

NEW RULE V (to be codified as 16.44.528) COMMERCIAL TRANSFER FACILITY ANNUAL REPORT (1) The owner or operator of a commercial transfer facility as defined in ARM 16.44.202 shall prepare and submit a written annual report to the department by March 1 of each year. The report must cover transfer facility activities during the previous calendar year, and must include the following information:

(a)-(b) Same as proposed.

~~(c) the EPA identification number of each hazardous waste generator whose wastes were handled at the transfer facility during the year;~~

~~(d) a description and the quantity of each hazardous waste the commercial transfer facility handled during the year, listed by name of each generator who was the source of the hazardous waste;~~

~~(e) the name and EPA identification number of each hazardous waste management facility receiving the wastes described in subsection (1)(d) of this rule, and the listing of hazardous wastes shipped to each facility; and~~

(c) A SUMMARY OF ALL HAZARDOUS WASTES WHICH THE COMMERCIAL TRANSFER FACILITY HANDLED DURING THE REPORT YEAR, ORGANIZED BY EPA HAZARDOUS WASTE NUMBER AND SHOWING QUANTITATIVE WASTE TOTALS FOR EACH WASTE TYPE;

(d) A WRITTEN SUMMARY OF EACH HAZARDOUS WASTE LEAK, SPILL, FIRE, OR SIMILAR INCIDENT WHICH OCCURRED IN THE REPORT YEAR, INCLUDING WHAT RESPONSE ACTIONS WERE TAKEN, WHAT WAS IDENTIFIED AS THE CAUSE OF THE INCIDENT, AND A LEGIBLE COPY OF THE PERTINENT WASTE MANIFESTS(S) FOR THE HAZARDOUS WASTES INVOLVED IN THE INCIDENT; AND

~~(f)~~(e) Same as proposed.

16.44.610 CHANGES DURING TEMPORARY PERMITTING (INTERIM STATUS) Same as proposed.

16.44.802 APPLICABILITY OF FINANCIAL REQUIREMENTS Same as proposed.

16.44.803 DEFINITIONS Same as proposed.

16.44.804 COST ESTIMATE FOR FACILITY CLOSURE Same as proposed.

16.44.805 COST ESTIMATE FOR POST-CLOSURE CARE Same as proposed.

16.44.806 CLOSURE AND/OR POST-CLOSURE TRUST FUND Same as proposed.

16.44.807 SURETY BOND GUARANTEEING PAYMENT INTO A CLOSURE AND/OR POST-CLOSURE TRUST FUND Same as proposed.

16.44.808 SURETY BOND GUARANTEEING PERFORMANCE OF CLOSURE AND/OR POST-CLOSURE Same as proposed.

16.44.809 CLOSURE AND/OR POST-CLOSURE LETTER OF CREDIT Same as proposed.

16.44.810 CLOSURE AND/OR POST-CLOSURE INSURANCE Same as proposed.

16.44.812 USE OF MULTIPLE FINANCIAL MECHANISMS Same as proposed.

16.44.813 USE OF A FINANCIAL MECHANISM FOR MULTIPLE FACILITIES Same as proposed.

16.44.814 RELEASE OF OWNER OR OPERATOR Same as proposed.

16.44.822 PERIOD OF COVERAGE Same as proposed.

NEW RULE VI (to be codified as 16.44.1001) PURPOSE Same as proposed.

NEW RULE VII (to be codified as 16.44.1002) DEFINITIONS Same as proposed.

NEW RULE VIII (to be codified as 16.44.1006) RECORDS AVAILABLE AUTOMATICALLY Same as proposed.

NEW RULE IX (to be codified as 16.44.1007) FORM OF REQUEST Same as proposed.

NEW RULE X (to be codified as 16.44.1008) PRIVILEGED BUSINESS INFORMATION Same as proposed.

NEW RULE XI (to be codified as 16.44.1012) DEPARTMENT DECISION TO ANSWER REQUEST Same as proposed.

NEW RULE XII (to be codified as 16.44.1013) APPEAL Same as proposed.

NEW RULE XIII (to be codified as 16.44.1017) FEES FOR SEARCHING AND COPYING (1) The fees for copying records shall be ~~25¢~~ 20¢ per page.

(2) Same as proposed.

NEW RULE XIV (to be codified as 16.44.1018) ATTORNEYS FEES Same as proposed.

3. The following comments and response section includes a synopsis of the comments received, the source in parenthesis, the department's response, and the department's action. "MEIC" stands for the Montana Environmental Information Center; "SRM" stands for Special Resource Management; "NPRC" stands for Northern Plains Resource Council; and "DHES" stands for the Department of Health and Environmental Sciences.

New Rule I

Comments: The rule should require refresher training on a more frequent basis than annually. (MEIC)

Annual training is sufficient. (SRM)

Response: Although House bill 789 specifically amended the Montana Hazardous Waste Act to provide for additional regulatory control over transfer facilities, DHES is limited, as indicated in the Statement of Intent, in its rulemaking to the scope and stringency of the federal regulations applicable to longer term hazardous waste storage facilities. That is, DHES may not adopt rules that are more restrictive or more encompassing than those for long-term storage facilities. The requirement for annual refresher training in New Rule I is taken directly from 40 CFR 265.16(c). To require training more frequently than annually would involve adoption of a rule that is more stringent. This is impermissible.

DHES Action: Adopt New Rule I as proposed.

New Rule II

Comments: The rule pertaining to transfer facility security requirements should require entry alarm systems and security patrols after business hours. (NPRC)

Strike section (2) which provides a waiver provision. (MEIC)

Adopt New Rule II as currently written. (SRM)

Response: Section (2) paraphrases sections (a)(1) and (2) of 40 CFR 265.14 of the federal storage facility regulations. Refer to the DHES response to New Rule I above regarding stringency. Insofar as the requested waiver, DHES envisions situations where transporters may need to allow customers

into storage and transfer areas of a transfer facility as a part of their normal business. In some cases, the transporter will be able to make the demonstration of safety provided for in section (2).

DHES Action: Adopt New Rule II as proposed.

New Rule III

Comments: The rule should require transfer facilities where ignitable wastes may be handled to coordinate response with local fire departments. (MEIC)

Require immediate reporting of all spills. (MEIC)

Don't change the spill reporting requirements. (SRM)

Response: New Rule III, in conjunction with ARM 16.44.511 and 16.44.512, requires prompt response to spills, discharges, or any emergency situations. However, immediate reporting is only required for spills or leaks which pose a threat to human safety and health or to environmental resources. Routine leak/spill responses to minor problems are covered under New Rule IV. New Rule III incorporates by reference 40 CFR 265.37 (a regulation within 40 CFR Part 265, Subpart C). This rule requires that attempts be made to coordinate response with local authorities such as fire departments. However, in the rare event where a fire department might not wish to participate in the facility's contingency pre-planning, the transfer facility must be allowed to develop its plans independently.

DHES Action: Adopt New Rule III as proposed.

New Rule IV

Comments: Container-handling procedures should be more clearly specified in this rule. Transfer facilities should be required to have underliners to protect further against soil and groundwater contamination. (NPRC)

The rules should be rewritten to clarify that containers should first be inspected at the generator site before loading onto a transportation vehicle. Containers should not be sent back to the generator for repackaging but should be repackaged at the transfer facility. (MEIC)

Delete the second sentence of section (2); opening and repackaging of containers may be necessary for transfer facility operations. In section (3), change the wording "three times the volume of the largest container which will be stored there" to "one and one-half (1½) times . . . ." Don't make the changes suggested by NPRC. (SRM)

Response: First as to section (1), shippers (generators) of hazardous wastes are required by Subchapter 4 of Chapter 44, to package wastes in sound containers which meet Department of Transportation (DOT) specifications. If generators utilize previously used drums for shipping wastes, the DOT regulations (see 49 CFR 173.28(p)) specify that the generator must inspect each container immediately prior to loading on the transportation vehicle. This is a generator, not a transporter, responsibility.

Regarding section (2), the duties, responsibilities, and

privileges of generators, transporters, and waste management facilities are fairly clearly reflected in the hazardous waste rules. A transporter's role is merely to professionally and safely move waste materials from the generator's location to that of the treatment, storage, or disposal facility designated on the waste manifest. A transporter, therefore, should not open, sample, treat, or repackage hazardous waste containers without the express permission of the generator. Where leakage is noted, immediate corrective action (e.g., placing the leaking drum into an overpack drum) should be taken, but the waste generator should be contacted before final repackaging, marking, and labeling is performed for further transportation. Because a transfer facility is specifically defined under an exemption to the storage facility requirements, the operator of the transfer facility has a limited role in handling the wastes while in transit. Precise container-handling procedures are purposefully left to the transfer facility operator, however, within the limitations specified in sections (1)-(4).

Insofar as section (4), this section was written to preclude the handling and transfer of containers in a dirt or gravel parking lot. All storage and transfer must be on smooth, impervious, cleanable surfaces, and any spillage or leakage which may occur must be promptly cleaned up. Underliners are not required because leakage or spillage which might occur should be safely contained by the design of the transfer/storage facility and promptly removed by the operator. An underliner requirement would be outside the scope of DHES rulemaking authority (see the response under New Rule I above). Since it is highly unlikely that containers will evidence corrosion and leakage in the short time that storage is allowed at a transfer facility, and because it would be very unusual to have handling damage occur to more than one container simultaneously, DHES concurs with SRM's suggestion that a minimum containment capacity of 1½ times the volume of the largest container be employed.

DHES Action: At the end of line 1, section (3), after the word "and", insert the word "all". In line 7, section (3), delete the words "three times" and substitute "one and one-half (1½) times".

New Rule V

Comments: Add the requirement for a description of each spill, fire, explosion, or other release to annual reporting requirements. (MEIC)

Add the submittal of training records to the annual reporting requirements. (NPRC)

For various reasons stated, the entire Rule V should be deleted. Do not implement the suggestions provided by NPRC and MEIC. (SRM)

Response: Annual submittal of training records is not considered necessary since DHES inspectors will routinely review these records during inspections; also, this requirement would violate the "no more stringent" requirement of HB-789 (see the Response under New Rule I above). DHES agrees with

the MEIC suggestion to add a requirement for annual reporting of all releases and emergency incidents. There is a similar requirement for storage facilities in 40 CFR 265.77(a) and 40 CFR 265.56(j).

Contrary to SRM's assertions, an annual reporting requirement is clearly within the scope of DHES rulemaking authority under HB-789. However, DHES is sensitive to SRM's concerns on client relationships and has reevaluated its need for specific identification of generators and waste management facilities as a part of the transfer facility annual report. A reporting of hazardous waste types and quantities is sufficient for the department's information needs. The annual reports required to be submitted by waste generators (refer to ARM 16.44.417) identify both the transporter and the designated receiving facility for each hazardous waste shipped.

DHES Action: Delete proposed subsections (1)(c), (d), and (e) in their entirety. Insert new subsections (c) and (d).

ARM 16.44.202(32)

Comment: Add the wording "unless subject to the provisions of rule 16.44.415" to the end of the final closure definition. (Exxon)

Response: We have utilized the wording "activities subject to subchapters 1, 6, and 7, of this chapter" to limit the scope of hazardous waste management activities which will no longer be conducted after closure. This language was purposefully added to make the definition less clumsy than the federal definition at 40 CFR 260.10. The meaning is the same in either case.

DHES Action: Adopt the definition as proposed.

ARM 16.44.202(90)

Comment: Add language to clarify that the 10-day limit applies just to the time that wastes are held at the transfer facility, not to actual time in transit. (SRM)

Response: The transfer facility definition amendment proposed is designed to conform the rule definition with language from HB-789. DHES is confident that the proposed language is clear as to application of the 10-day limit and does not wish to alter the definition as developed by the Legislature. For the record, DHES wishes to emphasize that the maximum time for holding by the transfer facility is 10 days, and the maximum time for shipping from the generator to the designated treatment, storage, or disposal facility is 35 days (refer to ARM 16.44.418).

DHES Action: Adopt the definition as proposed.

ARM 16.44.322

Comment: Clarify the incorporation by reference of SW-846 by referencing Updates I and II. (Exxon)

Response: DHES agrees that this clarification is appropriate.

DHES Action: Insert language specifying Updates I and II to the SW-846 references in both ARM 16.44.322 and 16.44.351.

New Rule XIII

Comment: Reduce copying fees from $.25 per page to $.08 per page. (MEIC)

Response: As implied by the title of New Rule XIII, the $.20 per-page fee must cover all of the department's costs in searching, copying, and mailing documents, not just the costs of maintaining a copying machine. Upon re-evaluation, DHES has concluded that a $.20 per-page fee is the minimum charge that will typically offset these costs. This fee is certainly competitive with federal agency copying fees set forth in 40 CFR 2.120.

DHES Action: Adopt the rule as proposed.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State January 4, 1988.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the Matter of the Repeal of Rule 23.3.133 on Chauffeur's Licenses and the Adoption of New Rules Concerning Licensing of Commercial Motor Vehicle Operators.	))))))	NOTICE OF REPEAL OF RULE 23.3.133 AND ADOPTION OF NEW RULES ON LICENSING OF COMMERCIAL MOTOR VEHICLE OPERATORS

TO: All Interested Persons.

1. On August 27, 1987, the department of justice published notice of public hearing on the proposed repeal of Rule 23.3.133 and adoption of new rules concerning the licensing of commercial motor vehicle operators at page 1399 of the Montana Administrative Register, issue number 16.

2. On October 7, 1987, at 10 a.m., in the auditorium of the Scott Hart Building, 303 Roberts, Helena, Montana, a public hearing was held on the proposed repeal and adoption.

3. The department has repealed Rule 23.3.133 and adopted the following rules as proposed: Rule (I) 23.3.501, SCOPE OF SUBCHAPTER; DUTIES OF OWNER-OPERATORS; Rule (VIII) 23.3.508, APPLICATION FOR ENDORSEMENT; Rule (X) 23.3.510, ONE LICENSE AFFIDAVIT; Rule (XI) 23.3.511, SCHEDULING EXAMINATIONS; Rule (XII) 23.3.512, WRITTEN TESTS FOR ENDORSEMENTS; Rule (XV) 23.3.515, DRIVING EXAMINATION FOR CLASS A ENDORSEMENT; Rule (XVI) 23.3.516, DRIVING EXAMINATION FOR CLASS B ENDORSEMENT; Rule (XVII) 23.3.517, INSTRUCTION PERMITS; Rule (XVIII) 23.3.518, TEMPORARY LICENSES; Rule (XIX) 23.3.519, EXCHANGING OR CONVERTING A CHAUFFEUR'S LICENSE TO AN ENDORSEMENT; Rule (XX) 23.3.520, REPORTING VIOLATIONS OF COMMERCIAL VEHICLE OPERATORS; Rule (XXI) 23.3.521, EMERGENCY OPERATION OF COMMERCIAL MOTOR VEHICLES; Rule (XXII) 23.3.522, APPLICABILITY OF EXISTING RULES.

4. The department has adopted Rule (II) 23.3.502 as proposed with the following changes:

23.3.502 DEFINITIONS (1) to (4) remain as proposed.

(5) "Commercial motor vehicle" means a vehicle with a GVWR of 26,001 lbs. or more, a school bus, or any other bus capable of hauling more than 15 passengers including the driver, or a vehicle used to transport hazardous materials if the vehicle transports such materials in a quantity requiring the display of hazardous materials placards under federal hazardous materials regulations, i.e., the vehicle has a GVWR of 10,001 lbs. or more. Any vehicle registered as a "farm vehicle" and paying the 16% gross vehicle weight fee is not considered a commercial motor vehicle. A recreational vehicle or R.V. is not considered a commercial motor vehicle unless it is used for commercial purposes.

(6) "Driver's license" or "Class C license" means a license to operate normal passenger cars, light trucks, and other vehicles which are not commercial motor vehicles.

(7) Remains as proposed.

(8)(a) Remains as proposed.

(b) "Class B" authorizes driving any single vehicle in excess of 26,001 lbs. GVWR, or any such vehicle towing a vehicle not in excess of 10,000 lbs. GVWR, a school bus, or any other bus capable of carrying more than 15 passengers including the driver, and all vehicles authorized to be driven with a regular driver's license.

(9) to (16) remain the same.

AUTH: 61-5-112, 61-5-117, 61-5-125, MCA. IMP: 20-10-103, 61-5-102, 61-5-104 to 108, 61-5-110 to 117, 61-5-121, 61-5-305, 61-5-306, MCA.

5. The department has adopted Rule (III) 23.3.503, as proposed with the following change:

23.3.503 ELIGIBILITY FOR TYPE 1 ENDORSEMENT

(1) Remains as proposed.

(2) A person is ineligible to receive a type 1 endorsement if:

(a) the person has less than 12 months experience operating a commercial motor vehicle; unless he or she presents a certificate of employment/experience from an employer licensed or authorized to do business in interstate commerce;

(2)(b) to (3) remain as proposed.

AUTH: 61-5-112, 61-5-117, 61-5-125, MCA. IMP: 61-5-104, 61-5-105, 61-5-110 to 112, 61-5-201, MCA.

6. The department has adopted Rule (IV) 23.3.504 as proposed with the following change:

23.3.504 PHYSICAL QUALIFICATIONS FOR TYPE 1 ENDORSEMENTS

(1) to (2)(i) remain as proposed.

(j) first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 50 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard Z24.5-1951;

(2)(k) and (l) remain as proposed.

AUTH: 61-5-112, 61-5-117, 61-5-125, MCA. IMP: 61-5-104, 61-5-105, 61-5-110 to 112, MCA.

7. The department has adopted Rule (V) 23.3.505 as proposed with the following changes:

23.3.505 ELIGIBILITY FOR TYPE 2 ENDORSEMENT (1) A person is eligible to receive a type 2 endorsement if the person:

(a) is at least 18 years of age, ~~except that~~ (i) however, a person who is at least 16 years of age and has a minimum of 12 months driving experience may be issued a type 2 endorsement with a "B" classification, restricted to ~~operating~~ hauling goods and property only within a 200 mile radius of his/her home or place of employment;

(ii) A person who possesses the above "underage" endorsement may have the restrictions imposed due to age removed on or after his/her 18th birthday by completing a driving examination for the type and class of endorsement desired.

(1)(b) to (3) remain as proposed.

AUTH: 61-5-112, 61-5-117, 61-5-125, MCA. IMP: 61-5-104, 61-5-105, 61-5-110 to 112, 61-5-201, MCA.

8. The department has adopted Rule (VI) 23.3.506 as proposed with the following change:

23.3.506 PHYSICAL QUALIFICATIONS FOR TYPE 2 ENDORSEMENTS (1)(a) to (i) remain as proposed.

(j) first perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than ~~40~~ 50 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard Z24.5-1951;

(1)(k) to (1) remain as proposed.

AUTH: 61-5-112, 61-5-117, 61-5-125, MCA. IMP: 61-5-104, 61-5-105, 61-5-110 to 112, MCA.

9. The department has adopted Rule (VII) 23.3.507 as proposed with the following change:

23.3.507 MEDICAL STATEMENT REQUIRED FOR TYPE 2 ENDORSEMENT (1) An applicant for a type 2 endorsement must complete a medical statement on a form supplied by the department unless he/she presents a current medical certificate. The statement includes:

(1)(a) to (3) remain the same.

AUTH: 61-5-112, 61-5-117, 61-5-125, MCA. IMP: 61-5-101, 61-5-102, 61-5-104, 61-5-105, 61-5-106, 61-5-107, 61-5-110, 61-5-111, 61-5-112, 61-5-113, 61-5-117, 61-5-201, 61-5-206, 61-5-207, 61-5-303, 61-5-305, MCA.

10. The department has adopted Rule (IX) 23.3.509 as proposed with the following change:

23.3.509 CERTIFICATE OF EMPLOYMENT

(1)(a) to (c) remain as proposed.

(d) the name and title of the person making the certification; and the name of the company which employs the certifier;

(1)(e) to (j) remain as proposed.

AUTH: 61-5-112, 61-5-117, 61-5-125, MCA. IMP: 61-5-102, 61-5-104, 61-5-105, 61-5-106, 61-5-107, 61-5-110, 61-5-111, 61-5-112, 61-5-113, 61-5-117, MCA.

11. The department has adopted Rule (XIII) 23.3.513 as proposed with the following changes:

23.3.513 DISQUALIFICATION OF VEHICLES FOR EXAMINATIONS

(1) Remains as proposed.

(2) An examination will be denied if:

(a) the vehicle is loaded with any hazardous material;

(b) the vehicle is improperly or illegally loaded;

(c) the vehicle has defective brakes, determined as follows:

(i) absence of braking action upon application of the service brakes;

(ii) observably missing, loose, or broken mechanical components;

(iii) audible air leak at brake chamber;

(iv) unbalanced steering axle braking, observable during operation when the vehicle or a component of the vehicle swerves noticeably upon application of the service brake;

(v) no brakes on the vehicle or combination of vehicles are applied upon activation of the parking brake system;

~~(vi) damage to brake hose, including damage extending through the outer ply, a bulge or swelling when under pressure, an audible leak at other than a proper connection, improper joins, or hoses that are cracked, broken, or crimped;~~

~~(vii) damage to brake tubing including audible leaks at other than proper connections or tubing that is cracked, damaged by heat, broken, or crimped;~~

(viii) a low pressure warning device that is missing or inoperative at 55 PSI and below;

~~(ix)~~ (vii) any hydraulic brake system which has:

(A) no pedal reserve with engine running, except by pumping pedal;

~~(B) seeping or swelling of brake hose(s) under application of pressure;~~

~~(C) any observably leaking hydraulic fluid;~~

~~(D) hydraulic hose(s) abraded or chafed through outer cover-to-fabric layer, or fluid lines with leaking connections, or restricted, crimped, cracked, or broken areas;~~

~~(E)~~ (B) a brake failure or low fluid warning light on;

(d) the vehicle has any frame member that is:

(i) cracked, loose, or broken so as to adversely affect support of functional components such as steering gear, fifth wheel, engine, transmission, suspension, or body parts;

(ii) cracked, loose, sagging, or broken, permitting shifting of the body onto moving parts or other condition indicating imminent collapse of the frame;

~~(iii) cracked to the degree of 1½ inches in the web, extending toward the bottom flange, extending from the web, around the radius and into the bottom flange, or ½ inch or longer in the bottom flange;~~

(e) the vehicle exhibits any condition, including loading, that causes the body, frame, or load to be in contact with a tire or any part of a wheel assembly;

(f) the vehicle's tires are:

(i) worn to the point that any part of the breaker strip or casing ply is showing in the tread area;

~~(ii) cut on the sidewall to the extent that ply cord is showing;~~

(iii) labeled "not for highway use";

~~(iv) both bias and radial types on the same axle;~~

~~(v) exhibiting a visually observable bump, bulge, or knot related to tread or sidewall separation;~~

~~(vi)~~ (iii) flat, or noticeably leaking;

(g) the vehicle's wheels and rims: are bent, broken, cracked, improperly seated, or sprung, or have mismatched lock or side rings;

~~(i) are bent, broken, cracked, improperly seated, or sprung, or have mismatched lock or side rings;~~

~~(ii) have any circumferential rim crack except at the valve hole;~~

~~(iii) have any crack between hand, stud, or other hole (disc wheels);~~

~~(iv) have two or more cracks, more than 1 inch long across spoke or hub section (spoke wheels);~~

~~(v) have cracks at three or more spokes (tubeless demountable adapter);~~

~~(vi) have ineffective fasteners (both spoke and disc wheels) as follows: for 10 fastener positions, 3 anywhere, 2 adjacent, for 8 fastener positions or less (including spoke wheels), 2 anywhere;~~

~~(vii) have cracks in welds, or welded repairs to aluminum wheels on a steering axle, or other than disc to rim attachment welds in steel disc wheel(s) mounted on the power unit steering axle;~~

(h) the vehicle is not currently registered;

(i) the vehicle is not currently insured, or does not have a valid insurance certificate;

(j) the vehicle is not in running condition sufficient to complete the driving test.

AUTH: 61-5-112, 61-5-117, 61-5-125, MCA. IMP: 61-5-110, 61-5-112, MCA.

12. The department has adopted Rule (XIV) 23.3.514 as proposed with the following changes:

23.3.514 GENERAL RULES FOR DRIVING EXAMINATIONS FOR CLASS A AND B ENDORSEMENTS

(1) to (7) remain as proposed.

(8) The applicant for a class A or B endorsement, as a portion of the examination, will demonstrate to the examiner a "pre-trip" inspection of his vehicle and will be graded on the conduct of the inspection. The inspection includes:

(a) service brakes, including trailer brake connections, if any;

(b) parking (hand brake);

(c) steering mechanism;

(d) lighting devices and reflectors;

(e) tires and wheels;

(f) horn;

(g) windshield wiper(s);

(h) rear vision mirror(s);

(i) coupling devices, if any;

(j) security of load, if any;, and security of trailer doors, if any;

(k) emergency equipment required for the type of vehicle used;

(l) a visual check of the vehicle and load, if any, for loose equipment or cargo that could become detached during operation and cause a traffic hazard.

(m) oil, water, belts, and fuel;

(n) engine starting;

(o) instrument functions;

(p) adjustment of side mirrors and condition of windows and mirrors;

(q) fluid leaks;

(r) foot and hand brake operation with vehicle in motion.

AUTH: 61-5-112, 61-5-117, 61-5-125, MCA. IMP: 61-5-110, 61-5-112, MCA.

13. The department has thoroughly considered all commentary received:

COMMENT: Valencia Lane, Legislative Council, questioned the department's authority to adopt Rule 23.3.505(1)(a)(i) allowing persons at least 16 years old and having a minimum of 12 months driving experience to be issued a type 2 endorsement with a "B" classification restricted to hauling goods and property within a 200 mile radius of his/her home or place of employment.

RESPONSE: The provision remains in the rule. State law does not prohibit issuance of a restricted "Class B" type 2 endorsement to a minor. Section 61-5-112, MCA, provides that

the department "shall appropriately examine each applicant according to the class of endorsement applied for and may impose such rules for the classification, examination, and use thereof as it considers necessary for the safety and welfare of the traveling public." Further, serious policy considerations support issuance of such endorsements. Rural farmers and ranchers often rely on their minor children to drive vehicles which fall within the definition of "commercial motor vehicle," and the absence of this rule would exclude them from driving the vehicles. The rule was amended to clearly limit minors driving such vehicles to hauling goods or property only.

COMMENT: Valencia Lane, Legislative Council, also questioned the authority of the department to adopt Rule 23.3.521 EMERGENCY OPERATION OF COMMERCIAL VEHICLES.

RESPONSE: The rule has been adopted. In times of emergency, administrative personnel may be required to operate commercial motor vehicles without an endorsement. The department believes adequate authority for the rule is found in sections 61-5-112 and 61-5-117, MCA.

COMMENT: The separate "tank endorsement" requirement should be deleted.

RESPONSE: The department's information at the time of drafting these rules was that a separate tank endorsement will be required by federal regulation and, further, the basic classification plan adopted by the American Association of Motor Vehicle Administrators (AAMVA) includes a separate tank endorsement. These rules are interim rules and will be revised to comply with federal regulations when the federal regulations are finalized, i.e., if the federal regulations don't require a separate endorsement, the requirement will be deleted from the rules.

COMMENT: A current CVSA sticker or vehicle examination report noting no defects or corrected defects should be sufficient to meet the requirements of Rule 23.3.513.

RESPONSE: The department has amended Rule 23.3.513 to provide for a simpler visual inspection to reveal unsafe vehicles. Even though a vehicle may have a current CVSA sticker or vehicle examination report, a defect may have developed since the sticker or report was obtained. A means for evaluating and rejecting an unsafe vehicle is necessary.

COMMENT: Concern regarding the application of the rules to school bus drivers was expressed by several persons.

RESPONSE: As a result of the concerns expressed, the definitional rule, Rule 23.3.502, was amended to clearly require that any school bus driver must have at least a Class B

type 2 endorsement, even if the school bus carries fewer than 15 people. More stringent or additional qualifications for bus drivers are authorized under ARM 23.3.501 and may be imposed by the schools or the Office of Public Instruction. A separate classification for bus drivers has been debated within the department, the AAMVA, and other states. However, the intent of the federal act and the state law is to classify driver licenses concern the driving task. The consensus is that the driving task of a bus driver does not differ greatly from that of a driver of a single truck and, therefore, no separate class is required for bus drivers.

COMMENT: The department should consider making an exemption from the type 1 endorsement requirement for school bus drivers or loggers who incidentally cross a state line.

RESPONSE: Any operation of any commercial motor vehicle across state lines requires a type 1 endorsement to meet federal law. Montana has no authority to alter the requirements of current federal law.

COMMENT: Rule 23.3.503(2)(a) which provides that a person is ineligible to receive a type 1 endorsement if he/she has less than 12 months experience operating a commercial motor vehicle is too restrictive.

RESPONSE: The department has amended Rule 23.3.503(2)(a) to make persons eligible for a type 1 endorsement if they have 12 months experience or a certificate of employment.

COMMENT: Confusion was expressed concerning Rule 23.3.503(1)(a). Some persons thought that the exception allowing a person who is 16 to 18 years old and has 12 months driving experience to be issued a type 2 endorsement with a B classification restricted to operating within a 200 mile radius applied to persons over 18.

RESPONSE: The exception applies only to persons age 16 to 18. The organization of Rule 23.3.503(1)(a) has been altered slightly to clarify the provision.

COMMENT: Rule 23.3.519 does not adequately explain what persons already possessing chauffeur's licenses will be required to do to comply with the new rules.

RESPONSE: Rule 23.3.519 alone does not completely explain the requirements, but, when read in conjunction with rules 23.3.503 to 506, the necessary information is provided.

COMMENT: Concern was expressed concerning the subjectivity of some of the rules and the professional standards of the examiners.

RESPONSE: The department strove to make the rules as objective as possible. However, some decisions will obviously have to be made by the examiner. The department has extensively trained the examiners who will examine applicants for Class A licenses. To a lesser degree, all examiners have been trained in the handling and operation of large vehicles. While the training does not make the examiners professional truck drivers, the department is confident that the examiners' basic knowledge of the operating characteristics of a large vehicle is sufficient to provide a fair and impartial examination.

COMMENT: If a school bus driver/applicant must take the test in a bus, persons taking the examination will have to borrow a bus from the school and that will interfere with school operation.

RESPONSE: The examination can be taken in any commercial motor vehicle suitable to the endorsement applied for. Therefore, the examination for a Class B endorsement could be taken in a bus or any other vehicle having a GVWR in excess of 26,000 pounds. Additionally, the department plans to offer Class B endorsement examinations at each examination station which should minimize costs and disruption of school operations if a school bus is used to take an examination.

COMMENT: An expanded allowance for emergency operations by supervisors should be considered. For example, if a school bus breaks down on a run, the students are transferred to another bus, and a mechanic and a supervisor are left to fix the bus, the supervisor should be able to drive the repaired bus back to town even though he has no commercial motor vehicle operator's endorsement.

RESPONSE: The federal act and state law deal with the type of vehicle driven, not the use to which it is put. Anyone operating a commercial motor vehicle is required to have the appropriate endorsement. The emergency exclusion in Rule 23.3.521 applies only to serious or life-threatening emergencies.

COMMENT: The applicability of the rules to persons driving engines for volunteer fire departments was questioned.

RESPONSE: Again, the federal act and state law concern the type of vehicle driven rather than the use to which it is put. If the vehicle fits the definition of commercial motor vehicle, the driver must have a proper endorsement.

COMMENT: The physical qualifications for a type 1 endorsement should be brought into line with the school bus driver physical so school bus drivers won't have to comply with two sets of requirements.

RESPONSE: The physical qualifications for the type 1 endorsements are mandated by federal standards and apply to all commercial motor vehicle operators applying for a type 1 endorsement. The department cannot alter the physical qualifications.

COMMENT: Several persons commented on their lack of notice of the hearing.

RESPONSE: The hearing was held on October 7, 1987. Notice of the public hearing was published in the Montana Administrative Register on August 27, 1987. The department complied with all notice requirements of the Montana Administrative Procedure Act.

By: _____
MIKE GREELY
Attorney General

Certified to the Secretary of State January 7, 1988.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the Matter of the Repeal of Rules 23.3.301, 23.3.302, 23.3.303, 23.3.304, 23.3.305, 23.3.306, 23.3.307, 23.3.311, 23.3.412, 23.3.413, 23.3.414, and 23.3.415, Highway Patrol Qualifications and Procedures.)	NOTICE OF REPEAL OF OUTDATED AND UNNECESSARY RULES CONCERNING THE HIGHWAY PATROL

TO: All Interested Persons.

1. On October 15, 1987, the department of justice published notice of the proposed repeal of ARM 23.3.301, 23.3.302, 23.3.303, 23.3.304, 23.3.305, 23.3.306, 23.3.307, 23.3.311, 23.3.412, 23.3.413, 23.3.414, and 23.3.415 relating to highway patrol qualifications and procedures at page 1748 of the 1987 Montana Administrative Register, issue number 19.

2. The department has repealed the rules as proposed.

3. The department received no written or oral comments concerning the repeal.

4. The authority of the department to repeal the rules is based on section 44-1-103, MCA. Rules 23.3.301, 23.3.302, 23.3.303, 23.3.304, 23.3.305, 23.3.306, 23.3.307, and 23.3.311 implemented sections 44-1-102, 44-1-303(2), and 44-1-401, MCA. Rules 23.3.413 and 23.3.415 implemented section 44-1-102, MCA. Rule 23.3.412 implemented sections 61-8-705 and 61-12-401, MCA. Rule 23.3.414 implemented section 61-8-402, MCA.

By: Mike Greely
MIKE GREELY
Attorney General

Certified to the Secretary of State, January 4, 1988.

BEFORE THE DEPARTMENT OF STATE LANDS
OF THE STATE OF MONTANA

In the Matter of the Amendment of Rules 26.2.401, 26.3.129, 26.3.137, 26.3.140, 26.3.144, 26.3.145, 26.3.146, 26.3.147, 26.3.148, 26.3.149, and Rule I (26.3.165).	)))))))))	NOTICE OF ADOPTION AND AMENDMENTS RELATING TO SURFACE LEASING OF STATE LANDS

TO: All Interested Persons:

1. On August 13, 1987, the Department of State Lands published notice of public hearing on the proposed amendments and adoption of rules relating to surface leasing of state lands at page 1281 of the 1987 Montana Administrative Register, issue number 15.

2. The agency, through the Board of Land Commissioners, has adopted, without change, the following rules or amended rules: 26.2.401, 26.3.129, 26.3.137, 26.3.140, 26.3.145, 26.3.148, 26.3.149, and Rule I (26.3.165).

3. The agency, through the Board of Land Commissioners, has adopted the proposed amendments with the following changes:

26.3.144 RENEWAL OF LEASE OR LICENSE AND PREFERENCE RIGHT (1) and (2) remain the same.

(3) Remains the same as proposed amendment.

(a) For leases or licenses issued before 1987, a lessee or licensee who has ONLY subleased prior to April 7, 1987 under the lease or license may exercise the preference right at renewal if he has not subleased for more than 30% of the term of the lease at the time of renewal. If such lessee or licensee subleases at any time after April 7, 1987, the OTHER provisions of ~~(3)(a)~~ THIS RULE apply.

(3)(b) through (3)(c) same as proposed amendment.

(d) For leases or licenses issued before 1987 that have not been subleased prior to April 7, 1987, then the provisions of PARAGRAPH (3) ~~(a)~~ OF THIS RULE apply.

(3)(e) through (3)(g) same as proposed amendment.

(4) through (9) remain the same. (Sec. 77-1-209, MCA; AUTH. EXTENSION, Sec. 2, Ch. 687, L. 1985, Eff. 10/1/85 and Sec. 7 Ch. 488, L. 1985, Eff. 10/1/85; IMP, Secs. 77-6-205, 77-2-333, MCA, AUTH. EXTENSION, Sec. 5 Ch. 383, L. 1987; IMP. Secs. 2, 3, and 4, Ch. 383, L. 1987 Eff. 4/7/87)

26.3.146 SUBLEASING (1) Remains the same.

(2) The sublessee may only compensate the lessee based upon a $/A.U.M. rate for grazing lands, or a crop share or cash basis on agricultural land depending upon the terms of the state lease. IN OTHER WORDS, THE LESSEE MAY ONLY BE COMPENSATED UPON THE SAME UNIT OF MEASUREMENT AS THE LESSEE'S

RENTAL TO THE STATE IS BASED. Such rate may not exceed the rate charged by the state for such lease. Failure to comply with this provision may be grounds for cancellation of the lease pursuant to ARM 26.3.148.

~~(2)~~ (3) The subleasing of state land may result in loss of preference right to meet the high bid offered for the lease or license at renewal, as provided in ARM 26.3.144, AND sections 77-6-208 AND 77-6-212, ~~and section 4, Ch. 383, L. 1987.~~ In addition, pursuant to the same rules and statutes, subleasing may cause the loss of the lease.

(3) and (4) remain the same, but will be renumbered.

(6) remains the same as proposed amendment.

(7) If livestock are present on state land, there will be a ~~conclusive~~ presumption that the livestock either belong to the lessee or licensee, or that such livestock were placed on the state land with the lessee's or licensee's permission. (Sec. 77-1-209 MCA; IMP, 77-6-113, 77-6-208, 77-6-210, 77-6-212 MCA)

26.3.147 PASTURING AGREEMENTS (1) and (2) remain the same as proposed amendment.

~~(2)~~ (3) The lessee or licensee in addition to the lease OR LICENSE rental rate may charge a management fee when there is an approved pasturing agreement, but may not charge a management fee which exceeds the minimum grazing rental AS SET FORTH IN SECTION 77-6-506, MCA, for ~~that~~ A lease or license OF THE SAME TYPE AND A.U.M. CAPACITY. ~~as set forth in section 77-6-507, MCA.~~ IN ADDITION, THE MANAGEMENT FEE MAY ONLY REFLECT THE A.U.M.'S UTILIZED BY THE SUBLESSEE'S LIVESTOCK. All such management fees shall be based upon a per A.U.M. basis. No other basis for payment of management fees will be approved by the department. THE OWNER OF THE LIVESTOCK MAY PAY FOR VETERINARIAN OR ARTIFICIAL INSEMINATION COSTS, AND SUCH COSTS SHALL NOT BE CONSIDERED PART OF THE MANAGEMENT FEES. ~~more for the combined grazing and management fees than 2 times the grazing rate charged by the state for the lease or license.~~ THERE MUST BE A SEPARATE PASTURING AGREEMENT FOR EACH SUBLESSEE. The pasturing agreement shall be on a form furnished by the department and shall state the rate charged for grazing on an A.U.M. basis and the amount of the management fee if any. The agreement must be signed by the lessee or licensee and sublessee, and be notarized and approved by the department. The department may charge a filing fee for such agreement. Failure to obtain an approved pasturing agreement may result in cancellation of the lease under ARM 26.3.~~146~~ 148.

(4) A pasturing agreement will not be approved if the lessee or licensee employs hired help that have retained a personal interest in MORE THAN 1/3 OF the livestock being grazed on the state land. Such an arrangement shall be considered a sublease.

(5) ALL PASTURING AGREEMENTS MUST HAVE A TERM WITHIN MARCH 1 AND FEBRUARY 28 (OR 29 ON LEAP YEAR) OF THE FOLLOWING YEAR. PASTURING AGREEMENTS MAY LAST ANY DURATION LESS THAN ONE YEAR, BUT MAY NOT LAST MORE THAN ONE YEAR. EACH LEASE OR

LICENSE MUST HAVE A SEPARATE PASTURING AGREEMENT. (Sec. 77-1-209, MCA; IMP, Sec. 77-6-208 MCA, AUTH EXTENSION, Sec. 5, Ch. 383, L. 1987; IMP. ~~Sec. 4, Ch. 383, L. 1987~~ SEC. 77-6-212, MCA)

4. The Department of State Lands has fully considered all written and oral submissions respecting the proposed rules and makes the following responses:

1. Written and oral comments were received from Aetna Life Insurance Company, and from Aetna's legal counsel, Kutak, Rock and Campbell. The substance of the oral comment was that Chapter 383, Laws of 1987 (hereinafter referred to as HB 804) was "bad law" and did not allow enough flexibility to Aetna and other lenders who had acquired state leases through foreclosure and assignments. The result of this lack of flexibility is to cause Aetna to do the ranching itself or to "dump" the property. This, in turn, will result in a reluctance of lenders to mortgage farm and ranching operations with state lands, because they cannot manage the state land themselves and must sublease. Consequently, Montana's agricultural and ranching communities will be hurt, and there will be lower rentals to the state.

Aetna's written comments asked for a partial exemption from the provisions of 26.3.144(3) for lenders who have filed mortgages pursuant to section 77-6-401 et seq., MCA; and a limited exemption from 26.3.144(3) for lenders who have foreclosed on mortgages and taken assignments of state leases, because this procedure is in apparent conflict with sections 25-13-901, et seq., MCA, which require such lenders to lease the property back to the immediately preceding owner.

These proposals are overruled. The department and board can not rewrite section 77-6-212, MCA, to provide exemptions where the legislature did not so provide. Therefore, rule 26.3.144(3) must conform with the legislation, and there can be no exemption for lenders. Aetna's concerns with the claimed conflict between sections 77-6-401, et seq., MCA, and sections 25-13-901, et seq., MCA, are provided for. Section 25-13-902(5), MCA, specifically exempts school trust lands.

2. Bill Miller of Doane-Western commented. Doane-Western manages ranch and agricultural operations for out of state and absentee landowners, many of whom have state leases. Such leases are often necessary to form an economical farm or ranch unit. Mr. Miller stated that HB 804 causes Doane-Western a problem because they must sublease state lands for their clients. Now those leases will be lost or they will lose the preference right, because his clients are generally not capable of direct management. Mr. Miller wanted to include a provision to exempt out-of-state and absentee owners from the reach of HB 804, so ranching and agricultural units can be kept together.

This proposal is overruled. The department and the board may not amend legislation through rule-making.

3. The Montana Association of Grazing Districts (MAGD)

commented on several of the proposed amendments. Concerning 26.3.137(5), they stated: 1) that the proposal was not addressed in HB 804, 2) it would require a separate grazing lease, 3) there would be some delay before approval is granted to allow the grazing, and 4) changes should be made to the new lease forms to reflect this change in the rules.

This proposal is overruled in part and granted in part. Despite the fact this concern is not addressed in HB 804, the board still has a constitutional and a statutory mandate to manage the trust lands so as to receive full market value (Art. X, Sections 4 and 11 of the Montana Constitution, and section 77-1-202, MCA). Providing that the state receives income for grazing under the circumstances set forth in this proposed amendment is a reasonable and necessary exercise of this mandate. Such grazing will not require a separate lease but will be part of the existing or future leases. There will be no delay, because there need not be contact with the department prior to such grazing. Although such contact will be preferable, the department need only be contacted so that the lease may be properly billed. The billing will be at the next convenient billing date, and will be done on a case-by-case basis, depending on the A.U.M.s harvested. The new lease forms will be changed to reflect this new rule.

MAGD also stated that the proposed amendments to ARM 26.3.144 should only go into effect when the rules are effective.

This proposal is overruled because HB 804 specifically stated that it was effective upon passage and approval, which was April 7, 1987.

MAGD commented that proposed 26.3.146(7) provides no flexibility and is not covered by HB 804.

As stated above, the board does not need authority to amend rules exclusively from HB 804. There are other grants of authority. Even though the proposed rule does not provide flexibility, it must be noted that section 77-6-208, MCA, has been amended so that the department need not necessarily cancel the lease for failure to report a sublease or failing to receive departmental approval for such subleasing. The cancellation is now only discretionary, and if it appears that the cattle are on the state land through no fault of the lessee, then the department will not cancel for subleasing, or consider the situation to be subleasing. The proposed rule is more important for another reason. Lessees must be accountable for actions that transpire on their state leases. This includes straying cattle or unrepaired fences. Several times in the last few years, certain range improvement plans have been devastated by overgrazing. The lessees in these cases have used the excuse that their neighbor's, or their own, livestock have escaped and done the damage. This rule

makes it clear that any livestock on any portion of state lands, whether the livestock belong to the neighbors or to the lessee, are the full responsibility of the lessee. This rule is made necessary due to the millions of acres of grazing and agricultural land owned by the state, and the very few field inspectors the department is able to employ. It is physically impossible to continuously monitor the leases. This must be the responsibility of the lessee. The board, however, does recognize that a "conclusive" presumption is too harsh. Therefore, the presumption will be left, but it will not be "conclusive." In other words, a lessee may rebut the presumption with appropriate evidence. Therefore, the comment is granted to this extent.

MAGD also commented that 26.3.147(3) may be confusing.

This comment is well taken. The language will be changed to make clear that the management fee may not exceed the minimum A.U.M. rental established each year by section 77-6-507, MCA, for a lease of that type and A.U.M. capacity.

MAGD commented that proposed amendment 26.3.147(4) was not addressed in HB 804, nor did it seem reasonable to make a distinction based on the difference between a hired man and a neighbor.

These concerns are overruled except as noted below. As stated above, HB 804 is not the only basis of authority for the board to adopt rules. Also, the distinction of a hired man also owning an interest in the cattle is reasonable and necessary. If such an arrangement were allowed, it would provide an incentive for subterfuge, as a way to evade the spirit of HB 804, as well as the Jerke and Skillman cases. These cases are based upon the premise that the person who both owns the livestock and manages such livestock should also be the lessee, or the preference right is lost. If a hired person also owns the livestock on the state land, it becomes a sublease for all practical purposes. This is especially true under the new rules which allow a management fee. A lessee could charge the sublessee for management and then turn around and pay the management fee to him in return for his taking care of the property. To avoid the question arising in the future, and to avoid the possibility of litigation on this point, the board and the department finds it necessary to adopt this rule. The board has, however, modified the hired man prohibition of pasturing agreements. The board recognizes that there may be instances where a hired man may have a few cattle which run in common with the lessee's livestock. In this instance, where less than 1/3 of the total livestock on the lease belong to the hired man, the relationship is deemed to be that of hired help rather than a subterfuge for a sublease.

4. Several parties commented that there is an apparent error in proposed 26.3.144(3)(a) and (3)(d) because of the citation to (3)(a). These comments are correct, and the

proposed rule is further amended to properly reflect the intent of the proposed rule.

5. The Montana Stockgrowers Association, Inc. (MSAI) commented through their attorney, Ron Waterman.

The first such comment which needs to be addressed concerns proposed rule 26.3.137(5). In substance, the comment urges that the rule only be applied to leases issued after the effective date of the rule, because there has been a longstanding practice of grazing harvested agricultural land, and an alteration of existing leases would be unconstitutional.

This comment is overruled. It is the department's and board's constitutional duty to receive fair market value for all trust assets. The grazing of stubble, unharvested or damaged crops or hayland is such an asset. The existing leases did not specifically allow such grazing, nor did they specifically prohibit such a practice. In the past, if possible, the department would charge for such grazing. Merely because many lessees conducted this practice in the past does not make it part of the contract. The new rule will now merely require what was an implied portion of the lease. That is, the lessee must pay for all uses of the trust land.

MSAI has also commented that the proposed amendments to 26.3.144 are more restrictive than HB 804. In particular, Mr. Waterman asserts that the new rule attempts to make HB 804 retroactive, in apparent conflict with Section 8 of HB 804.

This consideration is overruled. Prior to the passage of the bill, the department was faced with trying to administer subleasing of state lands in light of the Jerke and Skillman decisions. As a result, 26.3.144 and its predecessor 26.3.108, were promulgated to provide that a lessee could sublease up to 1/3 of the lease for up to 30% of the lease term without losing the preference right. While HB 804 does not affect subleasing prior to its enactment, such subleasing is still subject to the requirements of Jerke and Skillman and 26.3.144 as it read prior to these amendments, therefore, a way had to be found to integrate the old rules and the new statute. Otherwise, a lessee could sublease two years prior to April 7, 1987 and two years after April 7, 1987 and retain the preference right, whereas, a lessee who subleased three years prior to April 7, 1987, or over 2 years after this date would lose the preference right. More importantly, it may allow a violation of the spirit of Skillman and Jerke. As a result, the department proposed the amendments to 26.3.144 (3), not as an attempt to make HB 804 retroactive, but as an attempt to have the old rules remain congruent with HB 804's provisions, while not allowing inequities. It was, therefore, necessary to write 26.3.144(3) as it has been proposed.

MSAI's next comment urges resistance to proposed rule ARM 26.3.146(7), because the rule is not required by HB 804, and it increases the burden of state lessees by making them insurers to the state that no unauthorized animals will enter upon state land. This objection is overruled for the reasons set forth in the response to one of MAGD's comments. Essentially, the board has the power to adopt rules other than the power granted under HB 804. Also, there is a strong public policy for the presumption, although it is no longer "conclusive." The board and the department have the duty to manage state lands. Given the size of the holdings of the state versus the available resources for such management, it has been found necessary to make this presumption. The lessee is in a much better position to insure against the unauthorized entry on state land than is the state. If the lessee is properly managing the land, it is not unreasonable to assume that all livestock on the state lease are there with his consent or negligence. The presumption is now rebuttable with proper evidence. If the lessee is not properly managing the land, then this proposed rule may force him to begin doing so. Being responsible for all livestock on one's state lease is an element of good range management within the meaning of section 77-6-113, MCA.

MSAI's next comments concerns proposed 26.3.147(1), and urges the proposal be amended to eliminate the requirement of "physical control", or to more fully define the term.

This comment is overruled. The term "physical control" is found in HB 804 and the rule merely uses the same language. While 26.3.147(1) could be deleted, it does not make sense to do so, because this provision is necessary for the rest of the rule to be coherent. It is not possible, at least at this time, to fully define every term of a statute in anticipation of every event which may arise. By necessity, certain decisions have to be made on a case-by-case basis. Trying to define "physical control" is one of those circumstances, until the department has more experience in this area.

MSAI's final comment concerns proposed 26.3.147(4), the "hired help" provision, and urges the rejection of this provision.

This comment is partially accepted for the same reasons as set forth above in response to the same comment from MAGD.

6. Jock Anderson, of the Gough, Shanahan, Johnson and Waterman law firm in Helena also commented. Mr. Anderson's comment was to the effect that "the extent of management employed by John Steffen ought to be acceptable to the Department . . ." . Mr. Anderson's main concern seemed to be that a pasturing agreement did not require the lessee to perform day-to-day care of the livestock. In effect, Mr. Anderson wants HB 804 to allow the degree of Mr. Steffen's management to be sufficient for the granting of a pasturing

agreement. He goes on to state that, "It seems to me that the department is on questionable legal ground if it is unilaterally altering an existing contract under the guise of rule-making."

With due respect, these comments must be overruled. It must be emphasized that the rules regarding physical control and management merely repeat what is in HB 804, and the legislature has the authority to make laws concerning the school trust lands, so long as such laws conform to the Constitution. The statute says "personally retains management and physical control of the land and livestock." This strongly indicates that the degree of management necessary is more than the management which was performed by the lessee in the Steffen case, in order for the relationship to be characterized as a pasturing agreement. In other words, it seems apparent that the legislature intended that the lessee perform the day-to-day management of the cattle. This includes labor (or "physical control"). The details of what this means will have to be worked out on a case-by-case basis. This may be unfortunate, but the department can not go beyond what the legislature has intended. Simply put, the lessee is responsible for the land at all times and for the livestock from the time they are put on the state land until they are taken off of the state land. This is necessary, because the department has seen many examples of mismanagement of the livestock, which has caused a devastation of the state land. There are some limited areas where the owner may make decisions regarding the livestock, and the arrangement would still be consistent with a pasturing agreement. For instance, questions about veterinarian services, or costs associated with the administration of artificial insemination, are rightly in the province of the owner, and will not jeopardize the preference right. This concern is reflected in the changes to ARM 26.3.147(3).

In response to Mr. Anderson's comment that the rules may be unconstitutional, the department can only respond by saying that the rule simply restates the legislation. The legislature has made the decision regarding pasturing agreements, and has made HB 804 applicable to all state leases after April 7, 1987, regardless of when the lease was issued.

7. John Steffen participated in a hearing on the rules and commented as follows: 1) He is troubled that the lessee must remain in control of the land and livestock pursuant to 26.4.147(1); 2) there needs to be more guidance as to what constitutes management of the livestock as opposed to management of the land; 3) does a pasturing agreement require day-to-day control of the cattle by the lessee? and 4) why "pasturing agreements" are considered a type of "sublease " under the definition ARM 26.3.129(22).

Many of Mr. Steffen's comments are answered in previous responses. It is the legislature's decision to require that

the lessee remain in physical control of the land and livestock. This can not be changed through rules. The legislature has provided guidance as to the management of the livestock, see section 77-6-212(5), MCA. It is impossible to devise a rule which will cover every situation. Therefore, it is extremely difficult or impossible, at least at this time, to be more specific than the legislature has been. Perhaps some experience in this area will generate the need for further rules. In any event, it seems clear that the legislature intended the lessee to be responsible for the day-to-day management of the livestock during the term of the pasturing agreement. It was necessary to make it clear that a pasturing agreement is a type of sublease. This forces the lessee to abide by the subleasing requirements of notifying the department and receiving departmental approval for such arrangements. Also, pasturing agreements were specifically included as subleasing in the original rules adopted in 1981. This portion of the definition was inadvertently left out when the rules were revised in January, 1987. Also, this makes it clear that pasturing agreements must be strictly construed so that the lessee does not perform an activity that will be construed as a sublease, and therefore, lose the preference right or the lease. Therefore, it is necessary to change the definition to appear as it did prior to January, 1987.

8. The Department of State Lands commented to the rules with several proposed changes. One, there should be a rule requiring the lessee to keep the land free of trash and other unsightly, unhealthy and unsafe conditions. Two, it was suggested that pasturing agreements may only run from March 1 to February 28 of the following year, and there must be a separate pasturing agreement for each lease. Three, the management fee may only be charged for the A.U.M.'s utilized by the sublessee's livestock. Four, there must be a separate pasturing agreement for each sublessee.

These proposals are adopted except for the rule requiring the lease be kept free of trash and other unsightly, unhealthy and unsafe conditions. The board felt that this rule should not be adopted from a comment, but should be subject to the full notice provisions and comment period provided under the Administrative Procedure Act. It is necessary at this time to provide that pasturing agreements may only run from March 1 to February 28 of the following year because of the confusion that would otherwise result. For instance, if a pasturing agreement was from July of one year to June of the next, then the arrangement would potentially encompass two grazing seasons, and the use of double the yearly A.U.M.s. Because of this potential confusion, the proposed new rule was adopted as 26.3.147(5). It was also necessary to provide that a separate pasturing agreement is necessary for each lease or license because each such lease or license is a separate contract between the lessee and the state. It was also necessary to provide that the management fee only applied to the sublessee's livestock,

because in many instances a lessee will run his own livestock in common with the sublessee's livestock on state land. It is also necessary to provide that there be a separate pasturing agreement for each sublessee, because in many instances a lessee will have livestock owned by several sublessees, running in common on state land. This is necessary so that the department will have the information concerning all ownership of livestock on state land.

Dennis Hemmer, Commissioner
Department of State Lands

Certified to the Secretary of State December 24, 1987.

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of rule 32.3.104 for the purpose of including Contagious Equine Metritis and Vesicular Stomatitis	))))	NOTICE OF AMENDMENT OF ARM 32.3.104 SUBJECT DISEASES OR CONDITIONS

TO: All Interested Persons:

1. On August 13, 1987, the Board of Livestock, through the Department of Livestock published notice of the proposed amendment of ARM 32.3.104 at pages 1293 and 1294, of the 1987 Montana Administrative Register, Issue Number 15.
2. The Board has adopted the rules exactly as proposed with the following changes:

32.3.104 SUBJECT DISEASES OR CONDITIONS

(1) Diseases or conditions requiring quarantine under department rules are:

Brucellosis,
Tuberculosis,
Scabies,
Anthrax,
Rabies,
Pseudorabies,
New Castle Disease,
Contagious Equine Metritis,
Vesicular Stomatitis,
Foot rot in sheep, Pediculosis in sheep, ; and any other domestic and exotic dangerous diseases.

(2) remains the same

(3) remains the same

3. No comments or testimony were received.

NANCY ESPY, Chairman
Board of Livestock

BY:
Les Graham, Executive Secretary
To the Board of Livestock

Certified to the Secretary of State January 4, 1988.

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of rule 32.3.216 for the purpose of adding Equine Quarantine Stations	)))))	NOTICE OF AMENDMENT OF ARM 32.3.216 INVOLVING HORSES, MULES AND ASSES

TO: All Interested Persons:

1. On August 13, 1987, the Board of Livestock, through the Department of Livestock published notice of the proposed amendment of ARM 32.3.216 at pages 1288, 1289 and 1290 of the 1987 Montana Administrative Register, Issue Number 15.
2. The Board has amended and adopted the rules exactly as proposed.
3. No comments or testimony were received.

NANCY ESPY, Chairman
Board of Livestock

BY: Les Graham
Les Graham, Executive Secretary
To the Board of Livestock

Certified to the Secretary of State January 4, 1988

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of rules 32.3.401, 32.3.410, 32.3.412, 32.3.425, 32.3.426 and 32.3.431 for the purpose of controlling "Brucellosis"	))))	NOTICE OF AMENDMENT OF ARM 32.3.401, 32.3.410, 32.3.412, 32.3.425, 32.3.426 and 32.3.431 "BRUCELLOSIS"

TO: All Interested Persons:

1. On August 13, 1987, the Board of Livestock through the Department of Livestock, published notice of the proposed amendments of rules ARM 32.3.401, 32.3.410, 32.3.412, 32.3.425, 32.3.426 and 32.3.431 at pages 1295, 1296, 1297 and 1298, of the 1987 Montana Administrative Register, Issue Number 15.

2. The Board of Livestock acting through the Department of Livestock has amended the following rules exactly as proposed:

32.3.401 DEFINITIONS

32.3.410 QUARANTINE OF HERDS, HANDLING OF REACTORS AND SUSPECTS, EXCEPTIONS TO PROVISIONS OF QUARANTINE

32.3.412 MEMORANDUM OF UNDERSTANDING

32.3.426(A) NONPARTURIENT FEMALES, CALVES AND BULLS

32.3.431 REMOVAL OF HERD QUARANTINE, RETEST AND RECORD KEEPING AFTER QUARANTINE REMOVAL

3. The Board of Livestock, acting through the Department of Livestock has adopted the following rule as proposed with the following changes:

32.3.425 MOVEMENT AND DISPOSITION OF ANIMALS OTHER THAN REACTORS IN A QUARANTINED HERD

(1) remains the same through (d)

~~(e) A permit may be issued for the movement of calves, of either sex, 6 months of age and under, from negative dams, within 10 days after a negative official test of the dam for brucellosis, to any destination with no requirement that such calves be slaughtered.~~

~~(e) A permit may be issued for the movement of calves, of either sex, 6 months of age and under, from negative dams, within 10 days after a negative official test of the dam for brucellosis, to any destination with no requirement that such calves be slaughtered.~~

~~(f)~~ (e) ANIMALS DETERMINED TO BE SUSPECT OR EXPOSED ANIMALS AS A RESULT OF AN OFFICIAL TEST FOR BRUCELLOSIS PERFORMED AT A LICENSED LIVESTOCK MARKET SHALL BE:

(i), (ii) and (iii) remains the same

4. No comments or testimony were received.

Nancy Espy

NANCY ESPY, Chairman
Board of Livestock

BY: Les Graham

Les Graham, Executive Secretary
To the Board of Livestock

Certified to the Secretary of State January 4, 1988.

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of rules 32.3.1203, 32.3.1204 and 32.3.1207 for the purpose of updating rabies procedures	))))	NOTICE OF AMENDMENT OF RULES 32.3.1203, 32.3.1204, AND 32.3.1207 "RABIES"

TO: All Interested Persons:

1. On October 29, 1987 the Board of Livestock, through the Department of Livestock published notice of the proposed amendment of ARM 32.3.1203, 32.3.1204 and 32.3.1207 at pages 1930 and 1931, 1987 Montana Administrative Register, Issue Number 20.

2. The Board has amended the following rules exactly as proposed:

32.3.1204 ISOLATION OF BITING ANIMALS

32.3.1207 LABORATORY EXAMINATION REQUIRED

3. The Board has amended Rule 32.3.1203 as proposed with the following changes:

32.3.1203 ISOLATION OF RABID OR SUSPECTED RABID ANIMALS

(1) remains the same as proposed

(2) A list of those scientifically acceptable procedures recognized by the National Association of State Public Health Veterinarians, Inc. (NASPHV) under subsection (1) may be obtained for a fee from the Bureau of Communicable Disease Control, New York State Department of Health, Empire State Plaza, Corning Tower, Room 651, Albany, New York 12237.

AUTH: 81-2-102, MCA IMP: 81-2-102, MCA

4. No comments or testimony were received.

NANCY ESPY, Chairman
Board of Livestock

BY:
Les Graham, Executive Secretary
To the Board of Livestock

Certified to the Secretary of State January 4, 1988.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rule I through VIII (42.11.401 through 42.11.420) relating to Purchasing & Distribution of Liquor & Table Wine Products.	NOTICE OF THE ADOPTION of Rule I through VIII (42.11.401 through 42.11.420) relating to Purchasing & Distribution of Liquor & Table Wine Products.

TO: All Interested Persons:

1. On October 29, 1987, the Department published notice of the proposed adoption of Rules I through VIII (42.11.401 through 42.11.420) relating to purchasing & distribution of liquor & table wines at pages 1932 thru 1940 of the 1987 Montana Administrative Register, issue no. 20.

2. The Department has adopted these rules with a minor change to rule II by adding a new subsection (3):

RULE II POLICY (1) through (2) will remain the same. (3) ANY INTERESTED PARTY MAY CONTEST A DECISION MADE TO LIST, NOT LIST OR DELIST A PRODUCT IN ACCORDANCE WITH THE PROVISIONS FOR CONTESTED CASES IN THE MONTANA ADMINISTRATIVE PROCEDURE ACT.

3. A public hearing was held on November 23, 1987, to consider the proposed adoption of these rules. Several persons appeared to present testimony regarding the proposed adoptions. Testimony/comments and responses are as follows:

COMMENT: Phil Strope, Don Larson, Bob Lemm, Mike Lemm, and Bob Olson stated their concern that the most popular items sold by taverns are out of stock in state stores more often than necessary. Statistics based on prior sales may mislead the division about real demand since purchasers will substitute other products when they can't find what they want in a store.

RESPONSE: These rules are not intended to address the distribution level of products at each state store. They do address what products the division will purchase, the quantity that will be maintained at the warehouse, the availability of products, and how that availability will be noticed. The availability standard for the most popular products exceeds the 97% overall service level required in state law by warehousing sufficient supply to have no more than 3% backorders in any month for each regular product. Although not a component of these rules, it is division policy that state stores maintain at least six weeks supply at all times of each product carried in a store; furthermore, in recognition that statistics may not reveal the true picture at all times, the division has published an exclusive toll free telephone line direct to the division so that tavern owners can easily identify product problems and get quick response.

COMMENT: Phil Strope asked that the minimum sales standards for regular products in Rule V (1) have the latitude for including good judgment in projecting probable sales rather than having to adhere to narrow statistics that may exclude some high demand products.

RESPONSE: The standard in Rule V (1) is a benchmark used as an aid to judgment and decision-making rather than as an absolute trigger that causes automatic actions. The standard is estimated to include, approximately, the top 400 products sold in Montana. For listing new test market products, the standard is used to judge whether or not a proposed product will likely meet the standard within 18 months of introduction to the system (Rule IV (2)(c)). For products that have been available for more than 18 months, the standard is used to determine whether availability should be narrowed to selected stores where demand remains relatively high, maintained only at the warehouse to respond to scattered small volume requests, or delisted altogether because of virtually no demand (Rule VII).

COMMENT: Bob Olson asked that the rules establish a fixed set of test market stores into which new products must be introduced in amounts that the division determines for the test period.

RESPONSE: Previous practice established the 20 largest stores as test market stores with an initial distribution of one case per store unless a store manager or agent asked for more to be distributed initially. These rules allow for the number of test market stores and the amount of the initial distribution to vary according to what the liquor vendor/representative proposes and the division and, ultimately, the store managers/agents accept. The approach in the rules is intended to be market oriented. The liquor vendors/representatives know best their ability to make local taverns and store managers/agents aware of a new product and should therefore be the ones to identify the scope of the initial distribution. If the division is persuaded that the proposed initial distribution is realistic, the rules call for it to stock the warehouse initially with sufficient supply to meet the demand the proposer believes will be generated. These rules are not intended to address the subject of how much will be actually distributed to stores initially; however, it is division policy to inform store managers/agents in locales targeted as test markets for a particular new product about how much product is proposed for each store initially and to solicit each store manager's/agent's initial order he/she is willing to accept based on his/her perception of potential demand by customers who frequent the store.

COMMENT: Marie Durkee expressed the opinion that the purchasing function should be separate from the distribution function and that each should be under separate chiefs.

RESPONSE: These rules are not intended to address the organization of the division; however, it is the policy of the division to separate the management of the purchasing function from the distribution function. Coordination of the two functions is maintained through joint meetings and joint development of policies and rules.

COMMENT: Phil Strope expressed concern that the requirements for new product proposals from liquor vendors/representatives may require information that is not available.

RESPONSE: An earlier draft of these rules that was circulated for informal comment did require considerable detailed information in order for a proposal to even be considered by the division. These rules considerably modified the requirements based on comments received informally. The rules only require that the proposal include an information that the vendor/representative has to demonstrate that listing requirements can be met. Therefore, proposals will not be denied consideration for lack of information that is not available.

COMMENT: Phil Strope stated that in a monopoly situation the liquor system cannot be operated strictly from a profit point of view as might be done in an open competitive system and that the rules must be implemented to allow more products to be available than a narrow profit evaluation might suggest.

RESPONSE: These rules support the position that the system must make a wide array of products available to Montanans. Although profitability is one consideration in determining the manner in which products will be made available, it will not limit a product's being made available one way or another if it can be brought into the state and marketed at a saleable price. The effect of these rules should be to give Montanans a wider choice than they'd get in an open competitive system that has the same market volume that this state has. This is the intent of the policy stated in Rule II (1).

COMMENT: Phil Strope expressed the concern that the division might restrict the quantity of popular items while less popular items were being sold on closeout.

RESPONSE: This is not the practice of the division and the new rules do not support or allow such a practice. The rules require no more than 3% backorders for regular products in any month without regard to sale status of closeout sale items. Such a practice is further prevented due to the division's policy of maintaining a toll-free phone number exclusively for licensees to use should they experience problems with product availability in a store.

As noted above, these rules are being further modified as a result of these comments to be sure that any interested party is

availed all administrative means to assure division adherence to its stated policy. Rule II is modified to include a new subsection that provides a public hearing in accordance with the provisions of the Montana Administrative Procedure Act for any interested party to appeal to the Director of the Department of Revenue a decision about a product made at the division level.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 1/4/88.

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

In the matter of the repeal of Rule 46.12.315 pertaining to a prohibition of certain provider fee increases	))))	NOTICE OF THE REPEAL OF RULE 46.12.315 PERTAINING TO A PROHIBITION OF CERTAIN PROVIDER FEE INCREASES

TO: All Interested Persons

1. On November 27, 1987, the Department of Social and Rehabilitation Services published notice of the proposed repeal of Rule 46.12.315 pertaining to a prohibition of certain provider fee increases at page 2142 of the 1987 Montana Administrative Register, issue number 22.

2. The Department has repealed Rule 46.12.315 as proposed.

3. The Department has thoroughly considered all commentary received:

COMMENT: A staff person from Legislative Council requested that the original statement of reasonable necessity be supplemented by reference to the specific legislation that necessitated this repeal.

RESPONSE: The Department proposed this rule repeal after other rule amendments were enacted to implement sections of House Bill 2 of the 1987 legislature. This legislation mandated that the Department amend its rules allowing provider fee increases for certain services. The Legislative mandate directly conflicted with existing rule requirements at ARM 46.12.315 which necessitated this repeal.

Director, Social and Rehabilitation Services

Certified to the Secretary of State _____, 1988.

VOLUME NO. 42 OPINION NO. 46

STATE DEBTS - Whether unfunded liability in industrial insurance expendable trust fund constitutes "state debt" within scope of article VIII, section 8, Montana Constitution;
WORKERS' COMPENSATION - Whether unfunded liability in industrial insurance expendable trust fund constitutes "state debt" within scope of article VIII, section 8, Montana Constitution;
MONTANA CODE ANNOTATED - Title 39, chapter 71; sections 39-71-726, 39-71-740, 39-71-2101, 39-71-2201, 39-71-2301, 39-71-2304, 39-71-2321, 39-71-2501 to 39-71-2504, 39-71-2909;
MONTANA CONSTITUTION - Article VIII, section 8;
MONTANA LAWS OF 1915 - Chapter 96;
MONTANA LAWS OF 1987 - Chapters 464, 664.

HELD: Unfunded liability in the industrial insurance expendable trust fund is not a "state debt" within the scope of article VIII, section 8 of the Montana Constitution.

17 December 1987

The Honorable Robert L. Marks
Montana House of Representatives
302 Lump Gulch
Clancy MT 59634

Dear Representative Marks:

You have requested my opinion concerning the following questions:

1. Does unfunded liability in the Industrial Insurance Expendable Trust Fund constitute a "state debt" within the scope of Article VIII, section 8 of the Montana Constitution?

2. Does the State of Montana have responsibility to provide workers' compensation benefits to individuals insured by the State Compensation

Insurance Fund, irrespective of whether the Industrial Insurance Expendable Trust Fund is solvent?

I answer the first question negatively and determine that no response is appropriate at this time with respect to the second question.

The Montana Workers' Compensation Act, §§ 39-71-101 to 2914, MCA, permits employers to elect one of three methods for providing payments of benefits to injured employees: self-insurance, insurance purchased through a private carrier, and insurance purchased through the State Compensation Insurance Fund (State Fund). See §§ 39-71-2101, 39-71-2201, 39-71-2301, MCA. The State Fund is engaged in the business of insurance but is also a governmental entity whose operation is wholly circumscribed by statute. Birkenbuel v. Montana State Compensation Insurance Fund, 41 St. Rptr. 1647, 1652, 687 P.2d 700, 704 (1984). Most importantly for present purposes, the State Fund is required to establish premium levels which will make its insurance program "neither more nor less than self-supporting." § 39-71-2304(2), MCA. The program, therefore, is intended in theory to operate on the basis of contributions by those employers opting for State Fund coverage and income earned from such contributions.

All employer contributions are deposited into the Industrial Insurance Expendable Trust Fund (trust fund). § 39-71-2321, MCA. To be actuarially sound, the trust fund's corpus must be sufficient to pay the future costs of all liability incurred as of a particular time; when the corpus is not adequate to pay those future costs, a funding deficiency or "unfunded liability" arises. See Office of Legislative Auditor, Report to the Legislature: Department of Labor and Industry 17-18 (Mar. 1987). Determination of whether unfunded liability exists is necessarily premised on various actuarial assumptions and accordingly represents an estimate of a fund's future adequacy to satisfy potential claims against it. The existence of an unfunded liability, however, does not mean currently accruing benefit-payment obligations cannot be met.

During the 1987 legislative session the Legislative Auditor submitted an analysis which indicated that, as of June 30, 1986, the trust fund had accumulated an

$81 million funding deficiency. He also stated that, without significant modifications to benefit or contribution levels, the trust fund would experience a continued growth in the amount of unfunded liability and would be unable to meet currently accruing benefit obligations by July 1990. Addressing this imbalance in the fund, the Legislature enacted a four-year workers' compensation payroll tax (1987 Mont. Laws, ch. 664 (codified in §§ 39-71-2501 to 2504 (temporary), MCA)) and made other modifications in the Act generally designed to reduce benefit expenditures (1987 Mont. Laws, ch. 464). The State Fund remains both authorized and required under section 39-71-2304, MCA, to set premium rates at a level which will maintain the trust fund's ability to pay the future costs of all presently incurred liability.

Your first question asks whether the unfunded liability in the trust fund constitutes a "state debt" within the meaning of article VIII, section 8 of the Montana Constitution. In relevant part that provision reads: "No state debt shall be created unless authorized by a two-thirds vote of the members of each house of the legislature or a majority of the electors voting thereon." I conclude for two reasons that no "state debt" has been created.

My earlier review underscores the critical fact that, to the extent unfunded liability may exist, it has arisen not by conscious act of the Legislature but from a combination of circumstances which resulted in a mismatch between liability incurred and trust fund deposits. There is, in this respect, no reasoned contention that the Act itself created a "state debt" within the meaning of article VIII, section 8 of the Constitution. As codified from 1915 to the present, the statute has contemplated that the State Fund or its predecessor entities would assure through appropriate contribution levels that the fund would be adequate, at any particular time, to satisfy the future costs of all presently incurred liability. See 1915 Mont. Laws, ch. 96, § 40. Whatever the precise scope of the constitutional provision, it plainly does not extend to the unanticipated consequences of otherwise validly adopted legislation. Cf. Rochlin v. State, 112 Ariz. 171, 540 P.2d 643 (1975) (unfunded liability in state pension fund was not "debt" within scope of Arizona constitutional provisions).

Second, while unfunded liability must be avoided to ensure the continued, statutorily mandated self-sufficiency of the State Fund, no claim has been made that the trust fund's corpus will be inadequate to satisfy those benefit-payment obligations which will accrue during this biennium. See, e.g., Graham v. Board of Examiners, 116 Mont. 584, 593, 155 P.2d 956, 957 (1945) ("[i]t has repeatedly been held by this court that there is no debt or liability created [under article XIII, section 2 of the 1889 Constitution] when there is cash on hand or revenue provided by the legislature for the biennium to meet the appropriation"); State ex rel. Rankin v. State Board of Examiners, 59 Mont. 557, 568, 197 P.2d 988, 992 (1921) (same). Although a claimant's entitlement to a specific amount of benefits or to reimbursement of medical expenses is determined at the time of his injury and is contractual in nature (Buckman v. Montana Deaconess Hospital, 43 St. Rptr. 2216, 2221-22, 730 P.2d 380, 384-85 (1986)), the actual obligation to tender a portion of the benefits or expenses most typically arises on a biweekly basis. § 39-71-740, MCA; see, e.g., Polich v. Whalen's O.K. Tire Warehouse, 38 St. Rptr. 1572, 1574, 634 P.2d 1162, 1165 (1981); Laukaitas v. Sisters of Charity of Leavenworth, 135 Mont. 469, 474, 342 P.2d 752, 754-55 (1959); cf. Brurud v. Judge Moving & Storage Co., 172 Mont. 249, 255, 563 P.2d 558, 561 (1977) (distinguishing award of lump sum advance from lump sum settlement). The State Fund's obligation to make such payments, moreover, is contingent upon, inter alia, the claimant's survival (§ 39-71-726, MCA) and the absence of an intervening order which modifies or eliminates such duty (§ 39-71-2909, MCA). The unfunded liability at issue here thus reflects the potential of future financial deficiency and not a present inability to pay currently accrued obligations or those which will arise prior to fiscal year 1990. Consequently, even if the term "state debt" in article VIII, section 8 of the Constitution did encompass the State Fund's inability to satisfy its legally-due obligations, no such debt has yet occurred or will likely occur this biennium, and it is speculative to assume that it will arise in later bienniums.

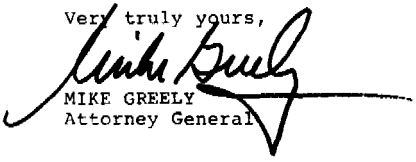
Your other question hypothesizes an inability of the State Fund to pay currently accruing obligations in future bienniums. It is my practice to decline to respond to questions which present wholly abstract

issues. If the trust fund does become, or is assured of becoming, insolvent and if a bona fide dispute exists as to the State's responsibility upon such insolvency, an opinion request would be appropriate.

THEREFORE, IT IS MY OPINION:

Unfunded liability in the industrial insurance expendable trust fund is not a "state debt" within the scope of article VIII, section 8 of the Montana Constitution.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 47

ELECTIONS - Voter qualifications for irrigation districts; weighted voting not violative of "one man, one vote";
IRRIGATION DISTRICTS - Voter qualifications for irrigation districts; weighted voting not violative of "one man, one vote";
MONTANA CODE ANNOTATED - Title 85, chapter 7; sections 13-1-111, 85-7-1710;
MONTANA CONSTITUTION - Article IV, section 2.

HELD: 1. In order to vote in an irrigation district election under Title 85, chapter 7, part 17, MCA, an individual must be: (1) a landowner in the irrigation district; (2) a citizen of the United States; (3) 18 years of age or older; and (4) a resident of the State of Montana and the county in which he offers to vote for at least 30 days.

2. The voting procedure in Title 85, chapter 7, MCA, which awards one vote for every forty (40) acres of land or major fraction thereof, is not in violation of the "one man, one vote" requirement of the United States Constitution.

24 December 1987

Edwin V. Swanson, Chairman
Valley County Board
of Commissioners
P.O. Box 311
Glasgow MT 59230

Dear Mr. Swanson:

I have condensed your inquiry into the following two questions:

1. What are the qualifications for a person to vote in an irrigation district election held pursuant to section 85-7-1710, MCA?

2. Is section 85-7-1710(2), MCA, which allows one vote for every 40 acres or major fraction thereof, violative of the "one man, one vote" decisions of the United States Supreme Court?

I will first address the issue of weighted voting. As you note, Montana law provides that in irrigation district elections, landholders receive one vote for every 40 acres of land or major fraction thereof which they own. § 85-7-1710(2), MCA. In the case of Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973), the United States Supreme Court considered a similar question. The claimants in that case charged that a provision in the California irrigation district law which apportioned votes according to the assessed valuation of the land in the district created an invidious discrimination against them. The Court rejected this argument. In upholding the weighted voting scheme, the Court found that where the tax burden fell unequally according to the size of the land holdings, it was not unreasonable for the votes to be weighted according to the size of the land holdings. Id. at 734.

In reaffirming its decision in Salyer while scrutinizing a similar voting arrangement in Arizona, the United States Supreme Court said:

> As in the Salyer case, we conclude that the voting scheme for the District [one vote per acre of land] is constitutional because it bears a reasonable relationship to its statutory objectives. ... Arizona could rationally make the weight of their vote dependent upon the number of acres they own, since that number reasonably reflects the relative risks they incurred as landowners and the distribution of the benefits and the burdens of the Districts' water operations.

Ball v. James, 451 U.S. 355 at 371 (1981).

By reason of these United States Supreme Court opinions upholding similar voting schemes in irrigation district elections, it is clear that Montana's weighting of votes according to the size of land holdings in irrigation

district elections does not violate the "one man, one vote" requirement of the United States Constitution.

Your other question concerns the qualifications of voters in an irrigation district election. Section 85-7-1710, MCA, restricts the voting right in irrigation districts to landowners. The following individual landowners, in the words of the statute, are entitled to vote:

> (a) all individuals having the qualifications of electors under the constitution and general election laws of the state, except that no registration of electors may be required[.]

§ 85-7-1710(1), MCA. The voting qualifications for individuals in subsection (a) are those specified in the Constitution and general election laws. The Constitution, in article IV, section 2, provides that a qualified elector must be at least 18 years of age and a citizen of the United States. The elector must also meet the registration and residency requirements established by law.

Section 13-1-111, MCA, is the section in the general election laws which establishes the qualifications for voting. The affirmative requirements, with the exception of registration, are, in the words of the statute:

> (b) He must be 18 years of age or older.
>
> (c) He must be a resident of the state of Montana and of the county in which he offers to vote for at least 30 days.
>
> (d) He must be a citizen of the United States.

§ 13-1-111, MCA. The rules for determining residence are set forth in section 13-1-112, MCA, and it is not necessary to repeat them here. They would, however, be applicable in determining whether an individual qualifies as a resident of the state and county as required in section 13-1-111(c), MCA. As quoted earlier, section 85-7-1710(1)(a), MCA, waives any registration of electors for irrigation district elections.

THEREFORE, IT IS MY OPINION:

1. In order to vote in an irrigation district election under Title 85, chapter 7, part 17, MCA, an individual must be: (1) a landowner in the irrigation district; (2) a citizen of the United States; (3) 18 years of age or older; and (4) a resident of the State of Montana and the county in which he offers to vote for at least 30 days.

2. The voting procedure in Title 85, chapter 7, MCA, which awards one vote for every forty (40) acres of land or major fraction thereof, is not in violation of the "one man, one vote" requirement of the United States Constitution.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 48

COUNTY ATTORNEYS - Appointment and subsequent election;
COUNTY OFFICERS AND EMPLOYEES - Appointment and subsequent election of county attorney;
ELECTIONS - Appointment and subsequent election of county attorney;
ELECTIONS - Appointment in case of tie vote;
MONTANA CODE ANNOTATED - Sections 7-4-2206(2), 7-4-2206(3), 13-16-506;
OPINIONS OF THE ATTORNEY GENERAL - 36 Op. Att'y Gen. No. 107 (1976).

HELD: 1. The term of an individual appointed to fill a vacancy in the office of county attorney, due to a tie vote, extends until the next general election.

2. After an appointment to fill a vacancy in the office of county attorney, the successor chosen at the next election holds office for the remainder of the unexpired term which was originally determined to be vacant.

28 December 1987

Don Peterson, Chairman
Board of County Commissioners
Lake County Courthouse
106 Fourth Avenue East
Polson MT 59860-2185

Gentlemen:

You have asked my opinion on two questions which I have phrased as follows:

1. If there is a tie vote in an election for county attorney, and the county commissioners appoint one of the candidates who tied to fill the office, does the appointee serve until the next general election?

2. At the next general election for county attorney, is the successor elected to serve a full four-year term?

According to your opinion request, the office of county attorney was on the 1986 ballot and, due to a tie vote, the county commissioners appointed one of the candidates who tied to fill the office. Section 13-16-506, MCA, authorizes this procedure "to fill the office as in other cases of vacancy." (Emphasis added.) According to the underlined language, a tie vote is treated as a vacancy in office, to be filled by appointment.

Section 7-4-2206(2), MCA, addresses the length of term of one appointed to a vacant county office.

> Vacancies in all county offices, except that of county commissioner, shall be filled by appointment by the board of county commissioners. Except for the justice of the peace, the appointee shall hold his office, if elective, until the next general election unless otherwise provided in subsections (3) or (4), and if not elective, the appointee serves at the pleasure of the commissioners. [Emphasis added.]

Thus, the term of one appointed in 1986 to fill a vacancy in the office of county attorney, due to a tie vote, extends until the election of a successor at the next general election in 1988.

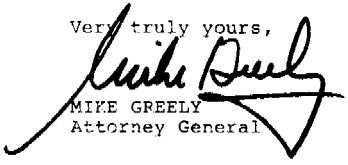
Your second question is answered by referring to section 7-4-2206(3), MCA. That section provides that where, as here, the vacancy occurred 75 or more days before the general election held during the second year of the term, an individual shall be elected to complete the term at that general election. More precise guidance is offered in Bailey v. Knight, 118 Mont. 594, 168 P.2d 843 (1946), in which the Montana Supreme Court concluded that after an appointment, when a successor is chosen at the next election, the term of the elected officer is the remainder of the unexpired term originally determined to be vacant. See also 36 Op. Att'y Gen. No. 107 at 556 (1976).

THEREFORE, IT IS MY OPINION:

1. The term of an individual appointed to fill a vacancy in the office of county attorney, due to a tie vote, extends until the next general election.

2. After an appointment to fill a vacancy in the office of county attorney, the successor chosen at the next election holds office for the remainder of the unexpired term which was originally determined to be vacant.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 47 OPINION NO. 49

EDUCATION - Teacher tenure and benefits;
EDUCATIONAL INSTITUTIONS - Teacher tenure and benefits;
LABOR RELATIONS - Teacher tenure and benefits;
SALARIES - Tenured teachers;
SCHOOL BOARDS - Teacher tenure and benefits;
SCHOOL DISTRICTS - Teacher tenure and benefits;
TEACHERS - Tenure and benefits;
MONTANA CODE ANNOTATED - Sections 20-3-107, 20-3-210, 20-4-203, 20-4-204.

HELD: Employment "at the same salary" provided to tenured teachers pursuant to section 20-4-203, MCA, means employment at the same basic pay but does not include fringe benefits. This opinion does not affect the providing of fringe benefits by a collective bargaining agreement.

29 December 1987

Robert M. McCarthy
Butte-Silver Bow County Attorney
Butte-Silver Bow County Courthouse
Butte MT 59701

Dear Mr. McCarthy:

You have requested my opinion on the following questions:

1. Does the phrase "at the same salary" in section 20-4-203, MCA, include health and welfare plans, leave allowances and accruals, and other fringe benefits?

2. Should a tenured administrator returned to the classroom due to a reduction in force continue to receive nonsalary economic benefits previously enjoyed in his/her position as a tenured administrator?

Section 20-4-203, MCA, the basic teacher tenure statute, states:

> Whenever a teacher has been elected by the offer and acceptance of a contract for the fourth consecutive year of employment by a district in a position requiring teacher certification except as a district superintendent or specialist, the teacher shall be deemed to be reelected from year to year thereafter as a tenure teacher at the same salary and in the same or a comparable position of employment as that provided by the last executed contract with such teacher unless the trustees resolve by majority vote of their membership to terminate the services of the teacher in accordance with the provisions of 20-4-204. [Emphasis added.]

"Salary" is generally defined by courts as fixed compensation paid regularly for services. See 38 Words and Phrases Salary (1967 & Supp. 1987). Courts have applied both restrictive and broad interpretations of the term, but "salary" has often been held to exclude fringe benefits. See, e.g., Hall v. City of Lincoln, 330 N.W.2d 471 (Neb. 1983) ("salary" includes only basic pay without consideration of extra compensation for overtime, college credits, holiday service and so on); Hilligoss v. LaDow, 368 N.E.2d 1365 (Ind. Ct. App. 1977) (health insurance benefits were not part of "salary" of first-class policeman under pension provisions); Brasher v. Chenille, 251 So. 2d 824 (La. Ct. App. 1971) (under statute governing liability for dismissal of laborer, "salary" includes only the fixed compensation paid at stated intervals, not such other remunerations as bonuses, living expenses, or retirement plan contributions); Swartwout v. City of New York, 369 N.Y.S.2d 865 (N.Y. App. Div. 1975) (pension fund and union health and welfare fund contributions made by employer not included in "salary"); Central Dauphin Ed. Ass'n v. Central Dauphin School Dist., 367 A.2d 385 (Pa. Commw. Ct. 1976) (fringe benefits are not part of "salary" for teachers on sabbatical leave); Taylor v. McGuire, 420 N.Y.S.2d 248 (N.Y. Sup. Ct. 1979) ("salary" means employee's base pay as opposed to "compensation" which includes earned sick leave benefits, vacation time, and other "fringe benefits").

The phrase "at the same salary" in section 20-4-203, MCA, has not been construed by the Montana Supreme Court. However, pursuant to sections 20-3-107 and

20-3-210, MCA, the Montana Superintendent of Public Instruction has construed that language. In a contested case involving a tenured teacher, the State Superintendent found that fringe benefits, such as health insurance benefits, are not included in the term "salary" or as a part of the "comparable position" protected by the tenure statute. Trustee, Missoula County High School District v. Wilbur, No. OSPI 79-84 (State Superintendent issued, July 24, 1985), aff'd on other grounds, Wilbur v. Argenbright, No. EDV 85-803 (Montana First Judicial District, Nov. 11, 1986). In statutory construction problems, great deference must be shown to interpretations given the statute by the officers or agency charged with its administration. Montana Power Company v. Cremer, 182 Mont. 277, 280, 596 P.2d 483, 485 (1979).

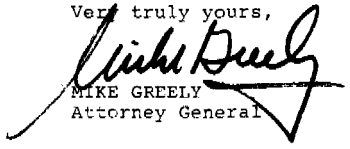
The legislative history of section 20-4-203, MCA, provides no guidance concerning the intended definition of "salary" in the term "at the same salary." I therefore adopt the interpretation of "salary" set forth by several courts and adopted by the State Superintendent. I conclude that the term "at the same salary" means at the same basic pay, but does not include other fringe benefits. My conclusion is based upon an interpretation of the statute. The entitlement to fringe benefits may be affected by the existence of a collective bargaining agreement.

Your second question specifically concerns "nonsalary" benefits. Section 20-4-203, MCA, guarantees a tenured teacher employment at the same salary in a comparable position unless the teacher is terminated in accordance with section 20-4-204, MCA. As I concluded in answering your first question, fringe benefits are not included in the term "at the same salary." An argument could be made that certain "nonsalary benefits" are integral to "a comparable position." I believe a determination of what is a comparable position must be made on a case-by-case basis and is not appropriate for an Attorney General's Opinion. In asking this question, you cited Sorlie v. School District No. 2, 40 St. Rptr. 1070, 667 P.2d 400 (1983), as the case from which the question arose. In Sorlie, the Montana Supreme Court held that reassignment of a teacher from an administrative position to a teaching position without reduction in salary was not contrary to the tenure law. Nothing in Sorlie changes my view.

THEREFORE, IT IS MY OPINION:

Employment "at the same salary" provided to tenured teachers pursuant to section 20-4-203, MCA, means employment at the same basic pay but does not include fringe benefits. This opinion does not affect the providing of fringe benefits by a collective bargaining agreement.

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, 1987. This table includes those rules adopted during the period September 30, 1987 through December 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 September 30, 1987, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1987 or 1988 Montana Administrative Register.

ADMINISTRATION, Department of, Title 2

I-V and other rules - Use of State's Telecommunications Systems and Facilities, - Approval of Installations, Modifications or Removal of Telecommunications Systems - Use of Systems, p. 1229, 2086

2.5.201 and other rules - Purchasing - Definitions - Department Responsibilities - Delegation of Purchasing Authority - Competitive Sealed Bids and Proposals - Small Purchases of Supplies and Services, p. 799, 2144

2.5.201 and other rules - Contracting for Supplies and Services, p. 1151, 1961

2.21.605 and other rules - Holidays for State Employees, p. 1848, 2369

2.21.804 and other rules - Sick Leave Fund, p. 733, 1202

2.21.6706 and other rules - Employee Incentive Award Program, p. 505, 1337

(Public Employees' Retirement Board)

I-III and other rules - Salary and Service Credits for Retirement Systems - Qualifying Out-of-state Service in PERS - Purchasing Military Service in the Sheriffs' Retirement System - Granting Full Service Credit for Temporary Service Reductions, p. 617, 1338

(Teachers' Retirement Board)

I-IX and other rules - Teachers' Retirement System,

Sanitary Standards - Salons - Licenses, p. 2278
(Board of Horse Racing)
8.22.1804 Twin Trifecta, p. 739, 1619
(Board of Landscape Architects)
8.24.405 and other rule - Examinations - Renewals, p. 2124
(Board of Medical Examiners)
8.28.420 Fee Schedule, p. 2127
(Board of Morticians)
I and other rules - Transfer or Sale of Mortuary License - Board Meetings and Fee Schedule, p. 1251, 2088
(Board of Nursing)
I and other rules - Verification of License to Another State - Application for Recognition - Certificate of Nurse-Midwifery - Renewals, p. 1253, 1620
(Board of Nursing Home Administrators)
8.34.403 and other rules - Board Meetings - Public Information - Examinations - Continuing Education - Fee Schedule - Reinstatement, p. 223, 1206
8.34.414 Examinations, p. 2129
(Board of Optometrists)
8.36.409 and other rules - Fee Schedule - Therapeutic Pharmaceutical Agents, p. 1718, 2234
(Board of Outfitters)
8.39.401 and other rules - Board Organization - Procedural Rules - Public Participation - Outfitters Standards and Requirements, p. 1870
(Board of Pharmacy)
8.40.404 and other rule - Examination Fee - Rescheduling of Dangerous Drugs, p. 2294
(Board of Physical Therapy Examiners)
8.42.403 Fees, p. 2220
(Board of Professional Engineers and Land Surveyors)
8.48.1105 Fee Schedule, p. 810, 1555
(Board of Private Security Patrolmen and Investigators)
8.50.423 and other rules - Definitions - Temporary Employment Without Identification Card - Resident Manager and Qualifying Agents - Identification Pocket Card - Insurance Requirements - Termination of Business - Fee Schedule - Assessment, p. 629, 1779
(Board of Psychologists)
8.52.401 and other rules - Psychology - Applications - Examination - Reciprocity - Licensing - Fees - Standards - Unprofessional Conduct - Ethical Practice, p. 2296
(Board of Realty Regulation)
8.58.411 Fee Schedule, p. 1256, 1607, 2089
8.58.411 Fee Schedule - Late Renewals, p. 1720, 2236
8.58.415A Continuing Education, p. 634, 1780

Teacher or Specialist Certificate - Considerations Governing Acceptance of Appeal - Hearing on Appeal, p. 515, 1211

(Montana State Library Commission)

10.101.101 and other rules - Montana Library Services Advisory Council - Library Services and Construction Act (LSCA) Grants, p. 302, 1622

10.101.203 and other rules - Organizational and Procedural Rules - General Policy and Public Library Development, p. 283, 741, 1624

FAMILY SERVICES, Department of, Title 11

I-III Designation of Local Services Areas and Local Youth Services Advisory Councils, p. 1382, 1784

I-VIII Confidentiality of Case Records Containing Reports of Child Abuse and Neglect, p. 949, 1980, 2378

I-VIII Temporary Rules - Youth Placement Committees, p. 1163, 1556

I-VIII Youth Placement Committees, p. 1169, 1625

I-XIII Procedures for Rulemaking - Declaratory Rulings - Contested Case Hearings, p. 1374, 1782, 2378

I-XXVI Licensing Requirements for Youth Detention Facilities, p. 2037, 2379

11.7.501 Foster Care Review Committees, p. 1879

11.12.101 and other rule - Substitute Care Placement Budgets, p. 2133

46.5.922 Child Day Care Centers, p. 1175

FISH, WILDLIFE AND PARKS, Department of, Title 12

I-VIII Rules Regulating Fishing Contests, p. 959, 1627

12.6.701 Personal Flotation Devices and Life Preservers, p. 308, 1072

12.6.703 Limit the Requirements For Fire Extinguishers on Small Motorboats and Vessels, p. 363, 1073

12.6.901 Establishing a No Wake Speed on Portions of Harrison Lake, p. 242, 1557

12.6.901 Prohibiting Motor or Engine Operated Vessels on the Bighorn River from Afterbay Dam to the Bighorn Access Area, p. 244, 1480

12.6.901 Water Safety Regulations - Closing Crystal Lake in Fergus County to Motor-Propelled Water Craft and to Establish a No-Wake Speed Limit on Portions of Lake Kookanusa on Cripple Horse Bay, p. 955, 2242

HEALTH AND ENVIRONMENTAL SCIENCES, Department of, Title 16

I Licensing and Certification of Hospitals - Hospital Protocols for Organ Procurement,

p. 1384, 1786

I-XLIX and other rules - Control Measures to Prevent the Spread of Communicable Diseases, p. 816, 964, 2147

16.6.301 and other rules - Records and Statistics - Birth Certificates - Marriage Applications - Death and Fetal Death Certificates, p. 997, 1481

16.8.820 Air Quality Standards for Sulfur Dioxide, p. 742, 815, 1482

16.8.937 and other rules - Air Quality Models - Fuel Burning Equipment - New Source Performance Standards - Emission Standards for Hazardous Air Pollutants - Lewis & Clark County Clean Air Ordinance, p. 2135

16.32.101 and other rules - Review of Certificates of Need for Health Care Facilities, p. 641, 1074

16.35.102 and other rules - End-stage Renal Disease - Application Procedures - Benefit Periods - Non-financial Eligibility Requirements - Eligible Services and Supplies - Non-eligible Services - Conditions on Paying Claims, p. 1387, 1790

16.44.102 and other rules - Hazardous Waste Management - Federal Regulatory Changes Pertaining to Closure and Post-closure Requirements - Access to Public Records - Transfer Facilities - Commercial Transfer Facilities Holding Hazardous Wastes for Ten Days or Less, p. 1881

HIGHWAYS, Department of, Title 18

I Special Vehicle Combinations, p. 747, 1484

I Display of Monthly or Quarterly GVW Fee Receipts, p. 1000, 1483

INSTITUTIONS, Department of, Title 20

20.2.201 Contested Cases, General Authority, p. 2341

20.3.202 and other rules - Certification and Evaluation of Alcohol Programs, p. 1906, 2383

JUSTICE, Department of, Title 23

I-II Exemption from the Seatbelt Use Act, p. 2058

I-XIX Implementation of the Victims Compensation Act by the Crime Victims Unit and Division of Crime Control, p. 1391, 1793

23.3.118 and other rule - Vision Tests - Vision Standards for Driver Licenses, p. 1002, 1611

23.3.133 and other rules - Licensing of Commercial Motor Vehicle Operators, p. 1399

23.3.301 and other rules - Highway Patrol Qualifications and Procedures, p. 1748

23.4.101 and other rules - Alcohol Analysis, p. 2138

LABOR AND INDUSTRY, Department of, Title 24

I-VIII New Horizons Program, p. 1005, 1486
24.16.9007 Annual Adoption of Prevailing Rate of Wages, p. 1177, 1633
(Human Rights Commission)
Notice of Hearing and Petition for Declaratory Ruling - In the Matter of Application of the Missoula Community Hospital, as to Whether it May Employ Only Males as Orderlies, p. 2060
24.9.210 and other rules - Procedures for Investigation and Conciliation of Complaints Filed with the Commission - Pre-hearing Procedures, p. 431, 1088
24.9.1107 Age Discrimination in Housing, p. 1094
(Workers' Compensation Division)
I Temporary Rule - Impairment Rating Panel, p. 660, 1084
I Temporary Rule - Distribution of Benefits from the Uninsured Employers Fund, p. 662, 1083
I Distribution of Benefits from the Uninsured Employers Fund, p. 1532, 1991
I Impairment Rating Dispute Procedure, p. 1534, 1985
I Security Deposits of Plan Number Two Insurers, p. 1549, 1992
I Time Limits for Administrative Review and Contested Case Hearings, p. 668, 1212
I Rates for Hospital Services, p. 1918, 2388
I-II Temporary Rules - Rehabilitation, p. 664, 1086
I-IV Rehabilitation, p. 1536, 1988
24.29.702A and other rules - Self-Insurers, p. 1549, 1920, 2385

STATE LANDS, Department of, Title 26

I and other rules - Federal Farm Compliance Program - Fee Schedule - Definitions - Rental Rates - Lease and License Reports and Renewal - Assignments - Subleasing - Pasturing Agreements - Cancellation of Lease or License - Mortgages and Pledges, p. 1281
I-X and other rule - Remining Under the Montana Strip and Underground Mine Reclamation Act, p. 2063

LIEUTENANT GOVERNOR, Title 30

(Statehood Centennial Office)
30.3.102 and other rule - Changing of Royalties for Exclusive Licenses - Fees for Project Licenses, p. 2222

LIVESTOCK, Department of, Title 32

I Establishment of a State Meat and Poultry Inspection Program, p. 2342
32.3.104 Subject Diseases or Conditions, p. 1293
32.3.216 Equine Quarantine Stations, p. 1288
32.3.219 Protecting Montana Swine Industry Against Importation of Disease, p. 1291, 1994
32.3.220 Importation of Bovine Semen, p. 2345
32.3.401 and other rules - Clarifying Authority for Control of Brucellosis - Affected Herd Owner Rights and Obligations, p. 1295
32.3.1203 and other rules - Updating Rabies Procedures, p. 1930

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

(Board of Natural Resources and Conservation)
I-XXII Procedures and Policy for the Reclamation and Development Grants Program, p. 2347
36.12.101 and other rules - Definitions - Forms - Application and Special Fees - Issuance of Interim Permits, p. 857, 1560
36.20.101 and other rules - Weather Modification Regulation, p. 863, 1561
(Board of Water Well Contractors)
36.21.415 and other rules - Fee Schedule - Monitoring Well Constructor Licenses, p. 1180, 1635
(Board of Oil and Gas Conservation)
36.22.501 and other rule - Location Limitations - Plugging and Abandonment Procedures of Seismic Shot Holes, p. 520, 1095

PUBLIC SERVICE REGULATION, Department of, Title 38

I Allowing All Motor Carriers Registered with the Montana Public Service Commission to Purchase a Temporary Vehicle Trip Permit in Lieu of a Vehicle Identification Stamp, p. 2224
I-IV Ratemaking Treatment of Contribution in Aid of Construction, p. 2356
38.3.704 and other rule - Filing by Motor Carriers of Proof of Insurance, p. 874, 1345
38.5.1801 and other rules - Prohibiting the Nonessential Use of Natural Gas for Outdoor Lighting, p. 1616, 2161
38.5.2502 Responsibility for the Expense of Maintaining Water Utility Service Pipes from the Water Main to the Consumer's Property Line, p. 1614, 2162

REVENUE, Department of, Title 42

I Clarification of Exception to Tax Levy Limit for

SECRETARY OF STATE, Title 44

SOCIAL AND REHABILITATION SERVICES, Department of, Title 46

CROSS REFERENCE TABLE

Montana Code Annotated to Administrative Rules of Montana

July - December 1987, Registers

MCA	Rule or A.G.'s Opinion	Register Page No.
1-1-216	Opinion No. 22	1511
1-1-216	Rules I - XI (Administration)	1848
1-2-112, 113	Opinion No. 30	1995
1-4-101	Opinion No. 35	2176
2-2-101, 103	Opinion No. 44	2409
2-2-104, 105	Opinion No. 44	2409
2-3-103	Rule I (Commerce-Psychologists)	2305
2-3-103	Rule III (Commerce-Outfitters)	1870
2-3-201, 203	Opinion No. 42	2398
2-4-201	Rules I - XIII (Family Services)	1374
2-4-201	Rules I, II (Commerce-Outfitters)	1870
2-4-201	1.2.331, 341	1299
2-4-201	2.52.310, 348	1618
2-4-201	11.1.101, 102, 201, 203, 205, 207 209 - 212, 214, 215, 220	1782
2-4-201	26.2.401	1281
2-4-306	1.2.331, 341	1299
2-4-306	1.2.421, 423	1956
2-4-312	1.2.419	2080
2-4-313	1.2.421, 423	1956
2-4-321 - 323	1.2.331, 341	1299
2-4-501	Declaratory Ruling (Labor & Industry-Human Rights)	1701
2-4-501	Rule II (Family Services)	1374
2-4-501	11.1.102	1783
2-4-601 - 631	24.29.215	1212
2-4-621	Declaratory-Ruling (Labor & Industry-Human Rights)	1576
2-4-702	24.29.215	1212
2-16-117	Opinion No. 22	1511
2-17-302	Rules I - V (Administration)	1230
2-17-302	2.13.101, 102	1229
2-17-302	2.13.102 - 107	2086
2-18-102	Rules I - XI (Administration)	1848
2-18-603	Opinion No. 22	1511
2-18-603, 604	Rules I - XI (Administration)	1848
2-18-702	Opinion No. 37	2189

MCA	Rule or A.G.'s Opinion	Register Page No.
3-1-1014	Opinion No. 31	2094
3-5-404	Opinion No. 20	1354
3-10-303	Opinion No. 34	2173
3-11-102	Opinion No. 34	2173
3-11-103	Opinion No. 34	2173
Title 7, Ch. 4, Pt. 24	Opinion No. 23	1566
Title 7, Ch. 12, Pts. 21, 41	Opinion No. 21	1497
Title 7, Ch. 15, Pt. 21	Opinion No. 20	1354
7-1-114	Opinion No. 21	1497
7-1-4111, 4121	Opinion No. 26	1817
7-2-2205	Opinion No. 19	1348
7-3-401 - 442	Opinion No. 20	1354
7-4-102	Opinion No. 22	1511
7-4-2401	Opinion No. 23	1566
7-4-2402	Opinion No. 23	1566
7-4-2716, 2717	Opinion No. 45	2412
7-6-201, 202	Opinion No. 25	1691
7-6-206, 207	Opinion No. 25	1691
7-6-213	Opinion No. 25	1691
7-6-2501, 2531	Opinion No. 21	1497
7-6-4431, 4452	Opinion No. 21	1497
7-8-2102	Opinion No. 20	1354
7-12-1133	Opinion No. 21	1497
7-12-4611	Opinion No. 21	1497
7-13-2406	Opinion No. 21	1497
7-14-232	Opinion No. 21	1497
7-15-2101, 2102	Opinion No. 20	1354
7-15-2105, 2107	Opinion No. 20	1354
7-15-2111 - 2113	Opinion No. 20	1354
7-15-4403, 4406	Opinion No. 20	1354
7-15-4456	Opinion No. 20	1354
7-16-2105	Opinion No. 20	1354
7-16-2202	Opinion No. 20	1354
7-16-2321	Opinion No. 20	1354
7-22-2222	Opinion No. 21	1497
7-32-2201	Opinion No. 20	1354
7-34-2201	Opinion No. 20	1354
7-34-2301	Opinion No. 20	1354
8-7-802	4.5.110	1860
10-1-604	Opinion No. 26	1817
13-1-111	Opinion No. 19	1348
13-2-401 - 404	Opinion No. 19	1348
13-19-105	44.9.202, 203, 309, 312	1753
13-19-205	44.9.202, 203, 309, 312	1753

MCA	Rule or A.G.'s Opinion	Register Page No.
Title 15, Ch. 6, Pt. 1	Opinion No. 21	1497
15-1-101	Opinion No. 43	2404
15-1-201	Opinion No. 43	2404
15-1-201	Temporary Rule I (Revenue)	1563
15-1-201	Temporary Rules I - VI (Revenue)	1010
15-1-201	Temporary Rules I - VII (Revenue)	1489
15-1-201	Temporary Rules I - XI (Revenue)	1106
15-1-201	Rule I (Revenue)	1198
15-1-201	Rule I (Revenue)	1200
15-1-201	Rule I (Revenue)	1450
15-1-201	Rule I (Revenue)	2071
15-1-201	Rules I - VI (Revenue)	1031
15-1-201	Rules I - VII (Revenue)	2073
15-1-201	Rules I - X (Revenue)	1422
15-1-201	Rules I - XIII (Revenue)	1014
15-1-201	42.25.1005 (Temporary Amendment)	1010
15-1-201	42.25.1005 (Temporary Amendment)	1489
15-1-201	42.25.1005	1031
15-1-201	42.31.2141	1438
15-1-402	Opinion No. 25	1691
15-1-503	Rule IV (Revenue)	1434
15-1-601	Rules I - VII (Revenue)	2073
15-6-138, 140	Opinion No. 21	1497
15-7-122	Opinion No. 21	1497
15-8-101	Opinion No. 23	1566
15-8-101	Opinion No. 43	2404
15-8-102	Opinion No. 23	1566
15-8-202	Temporary Rules I - XI (Revenue)	1106
15-8-202	Rules I - XIII (Revenue)	1014
15-8-601	Opinion No. 27	1820
15-10-401, 402	Rule I (Revenue)	2071
15-10-411	Opinion No. 30	1995
15-10-411	Rule I (Revenue)	2071
15-10-412	Opinion No. 30	1995
15-10-412	Rule I (Revenue)	2071
15-16-402	Opinion No. 27	1820
15-30-107	Rule I (Revenue)	1750
15-30-107	42.2.401	2390
15-30-108	42.17.105	1953
15-30-111	Rule I (Revenue)	1190
15-30-121	Rule I (Revenue)	1188
15-30-121	42.15.427	1642
15-30-127	Rule I (Revenue)	1750
15-30-127	42.2.401	2390

MCA	Rule or A.G.'s Opinion		Register Page No.
15-30-131	Rule I	(Revenue)	1190
15-30-131	Rule I	(Revenue)	1943
15-30-201	Rule I	(Revenue)	1194
15-30-201	42.17.103		1430
15-30-202	Rule I	(Revenue)	1194
15-30-202	42.17.105		1029
15-30-202	42.17.105		1564
15-30-202	42.17.105		1953
15-30-203 - 208	Rule I	(Revenue)	1194
15-30-208	Rule II	(Revenue)	1194
15-30-209	Rule I	(Revenue)	1194
15-30-301	42.15.311		1430
15-30-305	Rule I	(Revenue)	1186
15-30-305	Rule I	(Revenue)	1188
15-30-305	Rule I	(Revenue)	1190
15-30-305	Rule I	(Revenue)	1192
15-30-305	Rule I	(Revenue)	1750
15-30-305	Rule I	(Revenue)	1943
15-30-305	Rules I - III	(Revenue)	1194
15-30-305	42.2.401		2390
15-30-305	42.15.311		1430
15-30-305	42.17.105		1029
15-30-305	42.17.105		1564
15-30-305	42.17.105		1953
15-30-305	42.17.107		1430
15-31-117	Rule I	(Revenue)	1750
15-31-117	42.2.401		2390
15-31-118	Rule I	(Revenue)	1750
15-31-118	42.2.401		2390
15-31-121	Rule I	(Revenue)	1951
15-31-121	Rule X	(Revenue)	1948
15-31-301	Rules I, VI, VII	(Revenue)	2073
15-31-302	Rules I, II, VII	(Revenue)	2073
15-31-303, 304	Rules I, VII	(Revenue)	2073
15-31-305	Rules I, II, VII	(Revenue)	2073
15-31-306, 307	Rules I, III, VII (Revenue)		2073
15-31-308, 309	Rules I, IV, VII	(Revenue)	2073
15-31-310, 311	Rules I, V, VII	(Revenue)	2073
15-31-312, 313	Rules I - VII	(Revenue)	2073
15-31-322	Rules I, II, VI, VII (Revenue)		1945
15-31-323	Rule III	(Revenue)	1945
15-31-324	Rules IV, V	(Revenue)	1946
15-31-325	Rule VIII	(Revenue)	1947
15-31-326	Rules VI, IX	(Revenue)	1946
15-31-501	Rule I	(Revenue)	1951
15-31-501	Rules I - V	(Revenue)	1450
15-31-501	Rules I - VII	(Revenue)	2073
15-31-501	Rules I - XI	(Revenue)	1945
15-31-501	42.2.401		2390

MCA	Rule or A.G.'s Opinion	Register Page No.
15-31-505	Rule VI (Revenue)	1946
15-36-101	Rules I - X (Revenue)	1422
15-36-101	Temporary Rule II (Revenue)	1011
15-36-101	Rule II (Revenue)	1032
15-36-121	Temporary Rule I (Revenue)	1563
15-36-121	Temporary Rules I - VI (Revenue)	1490
15-36-121	Temporary Rules I, III - VI (Revenue)	1010
15-36-121	Rule I (Revenue)	1198
15-36-121	Rule I (Revenue)	1200
15-36-121	Rules I, III - VI (Revenue)	1031
15-36-121	42.25.1005 (Temporary Amendment)	1010
15-36-121	42.25.1005 (Temporary Amendment)	1490
15-36-121	42.25.1005	1031
15-50-207	42.31.2141	1438
15-50-301, 304	42.31.2141	1438
15-70-104	Rule I (Revenue)	1008
15-70-104	Rule I (Revenue)	1196
15-70-104	42.28.122	1651
15-70-104	42.28.406	1565
15-70-304	Rule I (Revenue)	1196
15-70-304	42.28.122	1651
15-70-321	Rule I (Revenue)	1008
15-70-321, 322	42.28.406	1565
16-1-103, 104	Rules I - VIII (Revenue)	1932
16-1-302, 303	Rules I - VIII (Revenue)	1932
16-1-303	42.11.201, 205, 211 - 215, 217, 232, 242 - 245, 251, 252	1441
16-1-303	42.12.128, 323	1491
16-2-101	Rules I - IV (Revenue)	1183
16-3-103	42.11.201, 205, 211 - 215, 217, 232, 242 - 245, 251, 252	1441
16-3-103	42.12.128, 323	1491
16-3-241	42.12.128, 323	1491
16-4-204	42.12.128, 323	1491
16-4-301	42.12.128, 323	1491
17-5-1605	8.97.709	1070
17-6-103	Opinion No. 25	1691
17-6-204	Opinion No. 25	1691
17-6-308	8.97.409	1609
17-6-324	8.97.409	1609
17-6-1504	8.97.512	1070
17-7-502	Opinion No. 30	1995

MCA	Rule or A.G.'s Opinion	Register Page No.
18-1-102	Opinion No. 35	2176
18-1-113	2.5.402, 403	1152
18-1-114	2.5.201, 402, 403	1151
18-1-201	2.5.502	1154
18-2-402	24.16.9007	1177
18-2-431	24.16.9007	1177
18-2-431	24.16.9007	1633
18-4-113	2.5.201, 403	1961
18-4-113	2.5.201 - 603	2144
18-4-221	2.5.201 - 603	2144
18-4-221	2.5.201, 301, 402, 403, 502, 503, 601 - 604	1151
18-4-221	2.5.201, 403	1961
18-4-222	2.5.301	1152
18-4-241	2.5.402	1152
18-4-303	2.5.503, 601	1154
18-4-304	2.5.503, 602	1154
18-4-305	2.5.603	1156
18-4-306	2.5.604	1157
18-4-308	2.5.402	1152
18-4-312	2.5.502	1154
Title 19, Ch. 4	Rule I (Administration-Teachers' Retirement)	1600
Title 19, Ch. 4, Pt. 4	2.44.401, 402, 405	1603
Title 19, Ch. 4, Pt. 8	2.44.509	1605
19-3-304	2.43.320, 406, 429, 430	1338
19-3-308	2.43.320, 406, 429	1338
19-3-512	2.43.430	1338
19-4-101	Rules VI, VIII, IX (Administration-Teachers' Retirement)	1600
19-4-101	2.44.507	2277
19-4-201	Rules I - IX (Administration-Teachers' Retirement)	1600
19-4-201	2.44.303, 401, 402, 404, 405, 407, 505 - 507, 509, 510	1603
19-4-201	2.44.507	2277
19-4-203	Rule II (Administration-Teachers' Retirement)	1600
19-4-205	2.44.303	1603
19-4-208	Rules VII, VIII (Administration-Teachers' Retirement)	1600
19-4-302	Rules IV, V (Administration-Teachers' Retirement)	1600
19-4-302	2.44.303	1603
19-4-401	2.44.404	1604
19-4-404	2.44.402	1603
19-4-408	2.44.407	1604

MCA	Rule or A.G.'s Opinion	Register Page No.
19-4-602	2.44.507	2277
19-4-605	2.44.507	2277
19-4-703	2.44.506	1605
19-4-804	2.44.510	1606
19-4-1001	2.44.505	1605
19-4-1002	2.44.507	1605
19-4-1101	Rule III (Administration-Teachers' Retirement)	1600
19-6-201, 204	2.43.320, 406, 429	1338
19-7-201	2.43.320, 406, 429, 431	1338
19-7-203	2.43.320, 406, 429	1338
19-7-310	2.43.431	1338
19-8-201, 204	2.43.320, 406, 429	1338
19-9-201, 204	2.43.320, 406, 429	1338
19-13-202, 205	2.43.320, 406, 429	1338
20-3-107	Rules I - III (Sup't. Public Instruction)	2333
20-3-107	10.6.101, 103, 104, 106, 108, 119 - 122, 127	2331
20-3-211	Rules I - III (Sup't. of Public Instruction)	2333
20-4-102	10.57.301	2131
20-4-102	10.57.601	1211
20-4-103	10.57.301	2131
20-4-106	10.57.301, 403	2131
20-4-108	10.57.403	2131
20-6-621	Opinion No. 29	1829
20-7-301	10.6.101	2331
20-7-301	10.43.101, 201 - 204, 301, 302, 401	1743
20-8-121	Rule I (Board of Public Education)	1372
20-8-121	10.61.207	2146
20-9-204	Opinion No. 44	2409
20-9-220	Rules I - IX (Sup't. of Public Instruction)	1745
20-9-212, 213	Opinion No. 25	1691
20-9-401, 406	Opinion No. 29	1829
20-9-421	Opinion No. 29	1829
20-9-428	Opinion No. 19	1348
20-9-451 - 456	Opinion No. 29	1829
20-10-103	Rules I, II (Justice)	1399
20-15-101, 103	Opinion No. 29	1829
20-15-301, 309	Opinion No. 29	1829
20-15-311	Opinion No. 21	1497
20-15-311	Opinion No. 29	1829
20-15-312	Opinion No. 21	1497
20-15-403, 404	Opinion No. 29	1829
20-16-101	10.43.101, 201 - 204, 301, 302, 401	1743

MCA	Rule or A.G.'s Opinion	Register Page No.
22-1-103	10.101.101	1622
22-2-305	Opinion No. 42	2398
22-3-101	Opinion No. 42	2398
23-1-106	12.6.901	955
23-1-106	12.6.901	1557
23-2-501	12.6.901	955
23-2-721	8.72.101	1159
23-5-602	42.7.102 (Emergency Amendment)	1067
23-5-602	8.124.103	1973
23-5-602	8.124.201	1974
23-5-603	8.124.218	1274
23-5-605	Emergency Rules I - III (Revenue)	1068
23-5-605	Rules I, IV - VIII (Commerce-Video Gaming)	1261
23-5-605	Rules II, III (Commerce-Video Gaming)	1259
23-5-605	8.124.206, 207	1974
23-5-605	42.7.102, 229 (Emergency Amendment)	1067
23-5-605	8.124.101 - 103, 105, 107, 122 - 127, 201 - 205, 216 - 224, 227 - 229	1258
23-5-605	8.124.106	1974
23-5-605	8.124.127, 202, 206, 207, 209	1972
23-5-605	8.124.204, 205, 208, 216, 221, 222	1975
23-5-606	Rule IV (Commerce-Video Gaming)	1271
23-5-606	8.124.201 - 205, 216, 219 - 221	1265
23-5-606	8.124.202	1972
23-5-606	8.124.204, 208, 216	1975
23-5-607	8.124.102	1973
23-5-607	8.124.202	1972
23-5-607	8.124.202 - 205, 216	1265
23-5-607	8.124.204, 216	1975
23-5-608	8.124.205, 216	1975
23-5-608	8.124.216	1273
23-5-609	Rules II, III, VIII (Commerce - Video Gaming)	1269
23-5-609	8.124.206, 207	1974
23-5-609	8.124.102, 103	1973
23-5-609	8.124.201, 202, 206, 207, 209	1972
23-5-609	8.124.202, 229	1265
23-5-609	8.124.205, 208, 216, 221	1975
23-5-610	8.124.102	1973
23-5-610	8.124.106, 126	1260
23-5-611	Rule I (Commerce-Video Gaming)	1261
23-5-611	8.124.122, 125, 227	1261
23-5-612	Rule I (Commerce-Video Gaming)	1261
23-5-612	8.124.102	1973

MCA	Rule or A.G.'s Opinion	Register Page No.
23-5-612	8.124.103, 105, 107, 122, 123, 125	1259
23-5-613	8.124.124, 216, 223, 224, 227	1262
23-5-613	8.124.216	1975
23-5-617	Rule I (Commerce-Video Gaming)	1259
23-5-617	8.124.108	1974
23-5-625, 626	8.124.214	1975
23-5-635	Rule I (Commerce-Video Gaming)	1259
23-5-635	8.124.108	1974
23-5-1007	8.127.1201	1279
30-7-604	24.12.201, 203, 205, 208	1486
30-7-605	24.12.201 - 204, 206, 208	1486
30-9-403	44.6.105	1554
32-1-105	Opinion No. 25	1691
32-1-107, 108	Opinion No. 25	1691
32-1-203	8.87.203	1529
32-1-204	Rule I (Commerce-Banking Board)	1529
32-1-204	8.87.501	1970
32-6-202	8.80.501	1527
32-6-202	8.80.501	1968
32-6-401	8.80.501	1527
32-6-401	8.80.501	1968
Title 33, Ch. 27	Rules I - VII (State Auditor)	1864
33-1-313	Rules I - IV (State Auditor)	940
33-1-313	Rules I - IV (State Auditor)	1371
33-2-705	Rules I - IX (State Auditor)	1868
33-2-705	6.6.2705	2373
33-15-304	Rules I - IV (State Auditor)	1371
33-18-201	Rules I - IV (State Auditor)	1371
33-18-203	Rule VII (State Auditor)	1238
33-21-102	Rule VIII (State Auditor)	1246
33-21-201	Rule V (State Auditor)	1241
33-22-502	Rules I - IV (State Auditor)	940
33-22-502	Rules I - IV (State Auditor)	1371
33-27-104	Rules I - VII (State Auditor)	1864
33-31-101 - 405	Rules I - IV, X (State Auditor)	1238
33-31-103	Rules I - X (State Auditor)	1238
33-31-202	Rules VIII, IX (State Auditor)	1246
33-31-301	Rules VI - IX (State Auditor)	1241
33-31-301	6.6.2506	1771
33-31-303	Rule IX (State Auditor)	1247
33-31-312	Rule VI (State Auditor)	1238
33-31-312	Rule VII (State Auditor)	1244
34-43-202	Rules I - III (DNRC)	1180

MCA	Rule or A.G.'s Opinion	Register Page No.
37-1-131	Rule I (Commerce-Nursing)	1254
37-1-131	Rules II - V (Commerce-Psychologists)	2305
37-1-131	8.32.306, 407, 411	1253
37-1-131	8.61.1601	1723
37-1-131	8.14.603, 604, 606, 802, 803, 805, 806, 808, 810, 813, 815, 901 - 903, 905 - 907, 909, 1003, 1004, 1104 - 1108, 1201, 1202, 1206, 1208 - 1210, 1212, 1214 - 1216	2278
37-1-131	8.52.602, 604, 606, 608, 609, 611	2296
37-1-134	Rule I (Commerce-Nursing)	1254
37-1-134	8.14.601, 1010	2278
37-1-134	8.24.406	2125
37-1-134	8.30.407	1251
37-1-134	8.32.306, 407, 411	1253
37-1-134	8.40.404	2294
37-1-134	8.52.616	2304
37-1-134	8.61.404, 1203	1721
37-1-201	8.40.404	2294
37-3-203	8.28.420	2127
37-3-308, 313	8.28.420	2127
37-7-201	8.40.404	2294
37-7-302	8.40.404	2294
37-8-202	Rule I (Commerce-Nursing)	1254
37-8-202	8.32.306, 407, 411	1253
37-8-431	Rule I (Commerce-Nursing)	1254
37-8-431	8.32.306, 407, 411	1253
37-9-203	8.34.414	2129
37-10-134	8.36.409	1718
37-10-202	Rules I - IV (Commerce-Optometrists)	1718
37-10-202	8.36.409	1718
37-10-304	Rules I - IV (Commerce-Optometrists)	1718
37-12-201	8.12.603	2122
37-12-304	8.12.603	2122
37-17-104	Rule II (Commerce-Psychologists)	2305
37-17-104	8.52.602, 603	2296
37-17-201	8.52.402	2296
37-17-202	Rules II - V (Commerce-Psychologists)	2305
37-17-202	8.52.401, 402, 602 - 613, 616, 620, 621	2296

MCA	Rule or A.G.'s Opinion	Register Page No.
37-17-301	Rule II (Commerce-Psychologists)	2305
37-17-302	Rule III (Commerce-Psychologists)	2306
37-17-302	8.52.605, 606, 616, 620	2298
37-17-303	8.52.604, 608, 616, 621	2297
37-17-304	8.52.609	2302
37-17-305	8.52.610	2303
37-17-306	8.52.611, 616	2303
37-17-307	8.52.616	2304
37-17-311	Rule IV (Commerce-Psychologists)	2308
37-17-311	8.52.613	2305
37-19-201	8.30.407	1251
37-19-202	Rule I (Commerce-Morticians)	1251
37-19-202	8.30.401	1251
37-19-301, 304	8.30.407	1251
37-19-306	8.30.407	1251
37-19-403	Rule I (Commerce-Morticians)	1251
37-19-403	8.30.407	1251
37-22-102	8.61.402, 601, 1202	1721
37-22-201	8.61.402 - 404, 601, 1202	1721
37-22-301	8.61.402	1721
37-22-302	8.61.404	1721
37-23-101, 103	8.61.1601	1723
37-23-201	8.61.601, 604, 1601, 1604	1722
37-23-205	8.61.1601	1723
37-23-206	8.61.1203	1723
37-23-211	8.61.604, 1604	1722
37-31-101	8.14.810	2281
37-31-203	8.14.601, 603, 604, 606, 802, 803, 805, 806, 808, 810, 813 - 815, 1201, 1202, 1206, 1208 - 1210, 1212, 1214 - 1216	2278
37-31-204	8.14.1201, 1202, 1206, 1208 - 1210, 1212, 1214 - 1216	2289
37-31-302	8.14.601, 808, 814	2278
37-31-303	8.14.802, 805, 808	2280
37-31-304	8.14.603, 606, 803, 805, 806, 814, 901, 903, 1004, 1010, 1104 - 1108	2278
37-31-305	8.14.814, 1010	2282
37-31-306	8.14.805, 806, 814, 901, 903, 1004, 1104 - 1108	2281
37-31-307	8.14.803, 814	2280
37-31-308	8.14.802, 805	2280
37-31-311	8.14.601, 603, 604, 606, 803	2278
37-31-321	8.14.808, 814	2281
37-31-322	8.14.604, 813 - 815	2279
37-31-323	8.14.606, 814	2279

MCA	Rule or A.G.'s Opinion	Register Page No.
37-32-201	8.14.901 - 903, 905 - 907, 909, 1001, 1003, 1004, 1010, 1104 - 1108	2283
37-32-302	8.14.902, 903, 905 - 907, 909, 1001, 1003	2284
37-32-303	8.14.1001	2293
37-43-302	Rule III (DNRC)	1181
37-43-202	36.21.415	1180
37-43-303	Rule II (DNRC)	1181
37-43-303	36.21.415	1180
37-43-305	Rule II (DNRC)	1181
37-43-305	36.21.415	1180
37-47-201	Rules II, III (Commerce-Outfitters)	1870
37-47-201	8.39.402, 403, 408, 412, 417	1870
37-47-302	8.39.417	1872
37-47-341	8.39.417	1872
37-47-403, 404	8.39.403, 408, 412	1871
37-51-203	8.58.411	1720
37-51-203, 207	8.58.411	1256
37-51-203, 207	8.58.411	1607
37-51-203, 207	8.58.411	2089
37-51-310	8.58.411	1720
37-60-308	8.50.424	1779
37-66-202	8.24.405, 406	2124
37-66-305	8.24.405	2124
37-66-307	8.24.406	2125
39-7-601	24.12.201	1486
39-7-602	24.12.203	1487
39-7-603	24.12.202 - 208	1486
39-7-606	24.12.201, 202, 203	1486
39-31-305	Opinion No. 37	2189
39-71-203	Temporary Rule I (Labor & Industry-Workers' Comp.)	1072
39-71-203	Temporary Rule I (Labor & Industry-Workers' Comp.)	1084
39-71-203	Rule I (Labor & Industry-Workers' Comp.)	1549
39-71-203	Rule I (Labor & Industry-Workers' Comp.)	1918
39-71-203	Rule I (Labor & Industry-Workers' Comp.)	1928
39-71-203	24.29.215	1212
39-71-203	24.29.702A - 702I, 702L, 702M	1920
39-71-203	24.29.702A - 702I, 702L, 702M	2385
39-71-203	24.29.1415	1985
39-71-203	24.29.1425	2388
39-71-203	24.29.1701, 1702, 1705, 1710	1988
39-71-203	24.29.2801	1991
39-71-203	24.29.4001	1992

MCA	Rule or A.G.'s Opinion	Register Page No.
39-71-403	Rule I (Labor & Industry-Workers' Comp.)	1547
39-71-403	Rule I (Labor & Industry-Workers' Comp.)	1928
39-71-403	24.29.702A - 702M	1540
39-71-403	24.29.702A - 702I, 702L, 702M	1920
39-71-403	24.29.702A - 702I, 702L, 702M	2385
39-71-503	24.29.2801	1991
39-71-704	Rule I (Labor & Industry-Workers' Comp.)	1918
39-71-704	24.29.1425	2388
39-71-711	24.29.1415	1985
39-71-1011, 1012	Rule IV (Labor & Industry-Workers' Comp.)	1536
39-71-1011, 1012	24.29.1705	1988
39-71-1014	Rule I (Labor & Industry-Workers' Comp.)	1536
39-71-1014	24.29.1701	1988
39-71-1015	Rule I (Labor & Industry-Workers' Comp.)	1536
39-71-1015	24.29.1701, 1702	1988
39-71-1016 - 1019	Rule II (Labor & Industry-Workers' Comp.)	1536
39-71-1016 - 1019	24.29.1702	1988
39-71-1023	Rule I (Labor & Industry-Workers' Comp.)	1536
39-71-1023	24.29.1701	1988
39-71-1025	Rule III (Labor & Industry-Workers' Comp.)	1536
39-71-1025	24.29.1710	1988
39-71-2101	24.29.702A, 702E - 702H	1920
39-71-2101	Rule I (Labor & Industry-Workers' Comp.)	1547
39-71-2101	Rule I (Labor & Industry-Workers' Comp.)	1928
39-71-2101	24.29.702A - 702M	1540
39-71-2101	24.29.702A - 702I, 702L, 702M	2385
39-71-2101	24.29.702M	1928
39-71-2102	Rule I (Labor & Industry-Workers' Comp.)	1547
39-71-2102	Rule I (Labor & Industry-Workers' Comp.)	1928
39-71-2102	24.29.702A - 702M	1540
39-71-2102	24.29.702A, 702E - 702H	1920
39-71-2102	24.29.702A - 702I, 702L, 702M	2385
39-71-2102	24.29.702M	1928
39-71-2103	Rule I (Labor & Industry-Workers' Comp.)	1547
39-71-2103	Rule I (Labor & Industry-Workers' Comp.)	1928

MCA	Rule or A.G.'s Opinion	Register Page No.
39-71-2103	24.29.702A - 702M	1540
39-71-2103	24.29.702A, 702E - 702H	1920
39-71-2103	24.29.702A - 702I, 702L, 702M	2385
39-71-2103	24.29.702M	1928
39-71-2104	Rule I (Labor & Industry-Workers' Comp.)	1547
39-71-2104	Rule I (Labor & Industry-Workers' Comp.)	1928
39-71-2104	24.29.702A - 702M	1540
39-71-2104	24.29.702A - 702I, 702L, 702M	2385
39-71-2104	24.29.702I	1927
39-71-2104	24.29.702M	1928
39-71-2105	Rule I (Labor & Industry-Workers' Comp.)	1547
39-71-2105	Rule I (Labor & Industry-Workers' Comp.)	1928
39-71-2105	24.29.702A - 702M	1540
39-71-2105	24.29.702A - 702I, 702L, 702M	2385
39-71-2105	24.29.702L	1927
39-71-2105	24.29.702M	1928
39-71-2106	Rule I (Labor & Industry-Workers' Comp.)	1547
39-71-2106	Rule I (Labor & Industry-Workers' Comp.)	1928
39-71-2106	24.29.702A - 702M	1540
39-71-2106	24.29.702B - 702D	1921
39-71-2106	24.29.702A - 702I, 702L, 702M	2385
39-71-2106	24.29.702M	1928
39-71-2107	Rule I (Labor & Industry-Workers' Comp.)	1547
39-71-2107	Rule I (Labor & Industry-Workers' Comp.)	1928
39-71-2107	24.29.702A - 702M	1540
39-71-2107	24.29.702A - 702I, 702L, 702M	2385
39-71-2107	24.29.702B - 702D	1921
39-71-2107	24.29.702M	1928
39-71-2108	Rule I (Labor & Industry-Workers' Comp.)	1547
39-71-2108	Rule I (Labor & Industry-Workers' Comp.)	1928
39-71-2108	24.29.702A - 702M	1540
39-71-2108	24.29.702M	1928
39-71-2109	Rule I (Labor & Industry-Workers' Comp.)	1547
39-71-2109	Rule I (Labor & Industry-Workers' Comp.)	1928
39-71-2109	24.29.702A - 702M	1540
39-71-2109	24.29.702A - 702I, 702L, 702M	2385
39-71-2109	24.29.702M	1928
39-71-2206	Rule I (Labor & Industry-Workers' Comp.)	1549
39-71-2206	24.29.4001	1992

MCA	Rule or A.G.'s Opinion	Register Page No.
39-71-2501-2504	Opinion No. 30	1995
39-71-2901-2909	2.52.310, 348	1618
40-1-107	16.6.601	997
40-5-202	Rule I (Revenue)	1941
40-5-202	42.6.101 - 109	2391
40-5-214	Rule I (Revenue)	1941
40-5-214	42.6.101 - 109	2391
40-5-226	Rule I (Revenue)	1941
40-5-226	42.6.101 - 109 (Revenue)	2391
41-3-205	Rules I - VIII (Family Services)	949
41-3-205	11.6.102, 107, 109, 110	1981
41-3-208	Rules I - VIII (Family Services)	949
41-3-208	11.6.102, 107, 109, 110	1980
41-3-401	Opinion No. 45	2412
41-3-1115	11.7.501	1879
41-5-303	Rule XIV (Family Services)	2047
41-5-527 - 529	11.7.401, 402, 404, 406, 408, 410, 412	1625
41-5-802	Rules I - XXVI (Family Services)	2037
41-5-802	11.17.108, 113 - 115	2380
41-5-809	Rules I - XXVI (Family Services)	2037
41-5-809	11.17.108, 113 - 115	2380
44-1-103	23.3.301 - 307, 311, 412 - 415	1748
44-5-103	Rule I (Revenue)	1433
45-2-101	Opinion No. 34	2173
45-7-401	Opinion No. 44	2409
45-8-341, 342	Opinion No. 38	2193
49-2-101	Declaratory Ruling (Labor & Industry-Human Rights)	1576
49-2-204	24.9.204, 206 - 209, 222, 225, 226, 231	1088
49-2-303	Declaratory Ruling (Labor & Industry-Human Rights)	2060
49-2-305	Declaratory Ruling (Labor & Industry-Human Rights)	1576
49-2-306	Declaratory Ruling (Labor & Industry-Human Rights)	1576
49-2-401	Declaratory Ruling (Labor & Industry-Human Rights)	1576
49-2-501	24.9.204, 206 - 209	1088
49-2-504	24.9.222, 225, 226	1090
49-2-505	Declaratory Ruling (Labor & Industry-Human Rights)	1576
49-2-505	24.9.206, 225, 226, 231	1088
49-3-106	24.9.204, 206 - 209, 222, 225, 226, 231	1088

MCA	Rule or A.G.'s Opinion	Register Page No.
49-3-304	24.9.204, 206, 207, 209	1088
49-3-305	24.9.208, 209	1089
49-3-307	24.9.222, 225, 226	1090
49-3-308	24.9.206, 225, 226, 231	1088
50-1-202	Rule XLX (Health)	981
50-2-118	Rule XLX (Health)	981
50-5-103	Rule I (Health)	1384
50-5-103	Rule I (Health)	1786
50-5-204	Rule I (Health)	1384
50-5-204	Rule I (Health)	1786
50-5-404	Rule I (Health)	1384
50-5-404	Rule I (Health)	1786
50-15-102	16.6.301, 601, 901, 902	997
50-15-103	16.6.301, 601	997
50-15-109	16.6.301, 901, 902	997
50-15-112, 113	16.6.301	997
50-15-201, 202	16.6.301	997
50-15-301	16.6.601	997
50-15-405	16.6.901, 902	997
50-32-103	8.40.1215	2294
50-32-222, 224	8.40.1215	2294
50-37-104	8.70.1401	1735
50-60-103	8.70.101	1725
50-60-108	8.70.101	1725
50-60-109	8.70.101	1725
50-60-201	8.70.304	1728
50-60-202	8.70.202	1727
50-60-203	8.70.101, 105, 202, 303, 304, 401, 404	1725
50-60-301, 302	8.70.202	1727
50-60-401	8.70.501	1734
50-60-501, 504	8.70.304	1728
50-60-601	8.70.401	1731
50-60-603	8.70.401, 404	1731
50-60-604	8.70.404, 407	1731
50-60-607	8.70.407	1732
52-1-201	11.2.401	1784
52-1-203	11.2.403	1784
53-1-103	11.2.201, 203, 205, 207, 209 - 212, 214, 215, 220	1782
53-1-103	11.7.401, 402, 406, 408, 410, 412	1625
53-1-117	11.2.401, 403	1784
53-1-203	20.2.201	2341
53-2-114	46.25.728	1117
53-2-201	Rule I (SRS)	1758
53-2-201	Rules I - IV (SRS)	1331

MCA	Rule or A.G.'s Opinion	Register Page No.
53-2-201	46.2.210, 212	2082
53-2-201	46.2.212	2395
53-2-201	46.12.204, 501, 502	1334
53-2-201	46.12.204, 501, 502, 2010 - 2013	1688
53-2-201	46.12.302, 590 - 592, 599	1116
53-2-201	46.12.401, 402	2164
53-2-201	46.12.401, 402, 404	1062
53-2-201	46.13.301, 502	1757
53-2-201	46.13.302 - 304, 401, 403, 502	1454
53-2-201	46.13.401	1805
53-2-201	46.25.728	1117
53-2-212	46.2.212	2395
53-2-303	Opinion No. 45	2412
53-2-306	46.2.210	2082
53-2-306	46.12.401, 402	2164
53-2-306	46.12.401, 402, 404	1062
53-2-606	46.2.210, 212	2082
53-2-606	46.2.212	2395
53-2-801	46.12.401, 402	2164
53-2-801	46.12.401, 402, 404	1062
53-2-803	46.12.401, 402	2164
53-2-803	46.12.401, 402, 404	1062
53-2-803	46.25.728	1117
53-3-113	42.2.212	2082
53-3-205, 209	46.25.728	1117
53-3-311	46.25.728	1117
53-4-111	46.2.210	2082
53-4-111	46.12.401, 402	2164
53-4-111	46.12.401, 402, 404	1062
53-4-112	46.2.210	2082
53-4-112	46.12.401	2164
53-4-112	46.12.401, 402, 404	1062
53-4-212	46.2.210, 212	2082
53-4-212	46.10.321	1655
53-4-231	46.10.321	1300
53-4-231	46.10.321	1655
53-4-231	46.12.3401, 3403, 3804	1300
53-4-231	46.12.3401, 3403, 3404	1655
53-4-503, 504	46.5.922	1175
53-4-508	46.5.922	1175
53-6-101	Rules I - IV (SRS)	1331
53-6-101	46.12.102, 702, 703	1958
53-6-101	46.12.202, 605	2359
53-6-101	46.12.204, 501, 502	1334
53-6-101	46.12.302, 590 - 592, 599	1116
53-6-101	46.12.503	1304
53-6-101	46.12.503	1663
53-6-101	46.12.526	1329
53-6-101	46.12.526	2094
53-6-101	46.12.2010 - 2013	1688

MCA	Rule or A.G.'s Opinion	Register Page No.
53-6-101	46.12.3803	1346
53-6-101	46.12.3803	1764
53-6-101	46.12.3803	2084
53-6-103	46.12.501, 502	1688
53-6-111	46.2.210	2082
53-6-111	46.12.302, 590 - 592, 599	1116
53-6-111	46.12.315	2142
53-6-111	46.12.401, 402	2164
53-6-111	46.12.401, 402, 404	1062
53-6-113	Rules I, II (SRS)	1307
53-6-113	Rules I - IV (SRS)	1331
53-6-113	46.12.202, 605	2359
53-6-113	46.2.212	2395
53-6-113	46.10.321	1300
53-6-113	46.10.321	1655
53-6-113	46.12.102, 702, 703	1958
53-6-113	46.12.204, 501, 502	1334
53-6-113	46.12.204, 501, 502, 2010 - 2013	1688
53-6-113	46.2.210, 212	2082
53-6-113	46.12.302, 590 - 592, 599	1116
53-6-113	46.12.315	2142
53-6-113	46.12.401, 402	2164
53-6-113	46.12.401, 402, 404	1062
53-6-113	46.12.503	1663
53-6-113	46.12.503, 509	1304
53-6-113	46.12.504	1762
53-6-113	46.12.504	2168
53-6-113	46.12.505	1804
53-6-113	46.12.526	1329
53-6-113	46.12.526	2094
53-6-113	46.12.2003, 2004, 2006, 2008	1035
53-6-113	46.12.2006, 2007	1496
53-6-113	46.12.3401, 3403, 3804	1300
53-6-113	46.12.3401, 3403, 3404	1655
53-6-113	46.12.3803	1346
53-6-113	46.12.3803	1764
53-6-113	46.12.3803	2084
53-6-131	46.10.321	1300
53-6-131	46.12.102	1958
53-6-131	46.10.321	1655
53-6-131	46.12.3401, 3403, 3804	1300
53-6-131	46.12.3401, 3403, 3404	1655
53-6-131	46.12.3803	1346
53-6-131	46.12.3803	1764
53-6-131	46.12.3803	2084
53-6-141	Rules I, II (SRS)	1307
53-6-141	46.12.102, 702, 703	1958
53-6-141	46.12.202, 605	2359
53-6-141	46.12.204, 501, 502	1688
53-6-141	46.12.302, 590 - 592, 599	1116
53-6-141	46.12.315	2142
53-6-141	46.12.503	1663

MCA	Rule or A.G.'s Opinion	Register Page No.
53-6-141	46.12.503, 509	1304
53-6-141	46.12.504	1762
53-6-141	46.12.504	2168
53-6-141	46.12.505	1804
53-6-141	46.12.526	1329
53-6-141	46.12.526	2094
53-6-141	46.12.2003, 2004, 2006, 2008	1035
53-6-141	46.12.2006, 2007	1496
53-6-141	46.12.3803	1346
53-6-141	46.12.3803	1764
53-6-141	46.12.3803	2084
53-6-202	16.35.102, 103, 105, 108, 109, 111	1387
53-6-202	16.35.110	1791
53-6-402	46.12.502	1688
53-7-102	46.2.210, 212	2082
53-7-102	46.2.212	2395
53-9-103	Rules I, II (Justice-Crime Control)	1391
53-9-103	23.15.307	1793
53-9-104	23.15.203, 307	1793
53-9-125, 128	23.15.307	1793
53-9-130	23.15.203	1793
53-9-104	Rules I - XIX (Justice-Crime Control)	1391
53-9-106	Rule IX (Justice-Crime Control)	1394
53-9-121	Rule V (Justice-Crime Control)	1392
53-9-122	Rules VI, VII (Justice-Crime Control)	1392
53-9-122	23.15.203	1793
53-9-123	Rule XIII (Justice-Crime Control)	1395
53-9-124	Rule V (Justice-Crime Control)	1392
53-9-125	Rules III, IV, XVI, XVII (Justice-Crime Control)	1391
53-9-127	Rules II, V, VIII, XIII (Justice-Crime Control)	1391
53-9-128	Rules II, X, XII, XIV - XVI, XVIII (Justice-Crime Control)	1391
53-9-130, 131	Rules VI, VII (Justice-Crime Control)	1392
53-9-131	23.15.203	1793
53-9-132	Rule XIX (Justice-Crime Control)	1396
53-20-203, 204	46.8.501	2358
53-24-101, 103	Opinion No. 28	1824
53-24-204	20.3.202, 209, 401, 403 - 406, 408 - 414, 501, 503, 504	1906

MCA	Rule or A.G.'s Opinion	Register Page No.
53-24-204	20.3.202, 203, 208, 209, 212 - 216, 401, 403 - 406, 408 - 414, 501, 503, 504	2383
53-24-208	20.3.202, 203, 208, 209, 212 - 216, 401, 403 - 406, 408 - 414, 501, 503, 504	2383
53-24-208	20.3.203, 208, 212 - 216	1907
53-24-302 - 304	Opinion No. 28	1824
53-30-203	20.2.201	2341
53-30-229	20.2.201	2341
Title 61	Opinion No. 34	2173
61-1-105	Opinion No. 21	1497
61-1-129 - 131	Opinion No. 21	1497
61-1-133	Opinion No. 21	1497
61-3-103	Rule II (Justice)	2058
61-3-314	Temporary Rule VIII (Revenue)	1109
61-3-315	Rule XII (Revenue)	1017
61-3-501	Temporary Rules VI, IX (Revenue)	1109
61-3-501	Rule IX (Revenue)	1017
61-3-501	Rule XII (Revenue)	1017
61-3-506	Temporary Rules I - XI (Revenue)	1106
61-3-506	Rules I - XIII (Revenue)	1014
61-3-531	Opinion No. 21	1497
61-5-101 - 106	Rule XXII (Justice)	1420
61-5-101 - 406	Rules VII, IX, X, XIX (Justice)	1405
61-5-102	Rules I, II (Justice)	1399
61-5-104	Rules III - VI (Justice)	1401
61-5-104 - 108	Rules I, II (Justice)	1399
61-5-105	Rules IV - VI, XVII (Justice)	1402
61-5-107	Rule XX (Justice)	1420
61-5-110	Rules III - VI, XII - XVI (Justice)	1401
61-5-110	23.3.118, 119	1002
61-5-110	23.3.118, 119	1611
61-5-110 - 201	Rules I, II (Justice)	1399
61-5-111	Rules III - VI, VIII, XI (Justice)	1401
61-5-111	23.3.118, 119	1002
61-5-111	23.3.118, 119	1611
61-5-112	Rules I - XI, XIV - XXII (Justice)	1399
61-5-112	Rules III - VI, VIII, XI - XVI (Justice)	1401
61-5-113	23.3.119	1002
61-5-113	23.3.119	1611

MCA	Rule or A.G.'s Opinion	Register Page No.
61-5-117	Rules I - XXII (Justice)	1399
61-5-125	Rules I - XII (Justice)	1399
61-5-125	23.3.118, 119	1002
61-5-125	23.3.118, 119	1611
61-5-201	Rules III, V (Justice)	1401
61-5-203 - 302	Rules I, II (Justice)	1399
61-5-305, 306	Rules I, II (Justice)	1399
61-8-405	Rules I - XI (Justice)	2138
61-8-714	Opinion No. 34	2173
61-10-124	18.8.517	1484
61-10-209	Rule I (Highways)	1000
61-10-209	18.8.429	1483
61-11-101	Rules I, II (Justice)	1399
61-12-401 - 404	Opinion No. 32	2099
61-12-407	Opinion No. 32	2099
61-13-103	Rule I (Justice)	2058
63-3-314	Rule XI (Revenue)	1017
69-3-102	Rules I - IV (Public Service Regulation)	2356
69-3-102	38.5.1801 - 1811	2161
69-3-102	38.5.2502	1614
69-3-102	38.5.2502	2162
69-3-103	Rules I - IV (Public Service Regulation)	2356
69-3-103	38.5.1801 - 1811	2161
69-3-103	38.5.2502	2162
69-3-201	Rules I - IV (Public Service Regulation)	2356
69-12-102	Declaratory Ruling (Public Service Regulation)	1358
72-16-445 - 450	Opinion No. 42	2398
Title 75, Ch. 7, Pt. 1	Opinion No. 33	2104
75-2-111	16.8.937, 1402, 1423, 1424	2136
75-2-202	16.8.937	2136
75-2-203	16.8.937, 1402, 1423, 1424	2136
75-7-102, 103	Opinion No. 33	2104
75-7-201 - 217	Opinion No. 24	1572
75-10-405	Rules I - XIV (Health)	1887
75-10-405	16.44.102, 104, 109, 118, 202, 322, 351, 504, 508, 610, 802 - 810, 812 - 814, 822	1881
75-10-406	16.44.104, 109, 118, 202, 610	1882
75-15-101 - 223	Opinion No. 43	2404
76-2-101 - 412	Opinion No. 43	2404
76-3-101, 103	Opinion No. 36	2182

MCA	Rule or A.G.'s Opinion	Register Page No.
76-3-105	Opinion No. 36	2182
76-3-201	Opinion No. 36	2182
76-3-301, 302	Opinion No. 36	2182
76-3-504	Opinion No. 36	2182
76-3-601, 604	Opinion No. 36	2182
76-3-610, 612	Opinion No. 36	2182
76-3-614	Opinion No. 36	2182
77-1-202	Rule I (State Lands)	1286
77-1-202	26.3.129, 140	1281
77-1-208	26.3.137	1281
77-1-209	Rule I (State Lands)	1286
77-1-209	26.3.129, 137, 140, 144 - 149	1281
77-1-301	Rule I (State Lands)	1286
77-1-301	26.3.140	1282
77-1-302	26.2.401	1281
77-2-333	26.3.144	1282
77-6-201	26.3.137	1281
77-6-205	26.3.144	1282
77-6-208	26.3.145 - 147	1283
77-6-210, 211	26.3.148	1285
77-6-401 - 404	26.3.149	1286
77-6-501, 502	26.3.137	1281
77-6-504	26.3.137	1281
80-2-201	Rules I - III (Agriculture)	1861
80-2-201	4.4.302	1861
80-2-203, 205	Rule I (Agriculture)	1861
80-2-244	Rules II, III (Agriculture)	1862
80-2-244	4.4.302	1861
80-3-110	4.12.1806	1340
80-3-603	4.12.2604, 2605, 2612, 2613, 2619, 2620	1341
80-3-608, 610	4.12.2604, 2605, 2612, 2613, 2619, 2620	1341
80-3-705	4.12.2604, 2605, 2612, 2613, 2619, 2620	1341
80-3-708, 709	4.12.2604, 2605, 2612, 2613, 2619, 2620	1341
80-5-105, 112	Rules II, III (Agriculture)	1859
80-5-201	Rules I, III (Agriculture)	1859
80-5-202, 206	Rule I (Agriculture)	1859
80-6-101	Emergency Rule II (Agriculture)	1963
80-6-201	Emergency Rules I, II (Agriculture)	1963
80-6-201	Rules I - VII (Agriculture)	1855
80-6-202	Emergency Rules I, II (Agriculture)	1963
80-6-202	Rules II - IV, VI, VII (Agriculture)	1855
80-6-311	Rule VI (Agriculture)	1857

MCA	Rule or A.G.'s Opinion		Register Page No.
80-6-1103	Rules I - XI	(Administration)	1232
80-6-1103	4.12.1222, 1226, 1228		1965
80-6-1104	Rule V	(Administration)	1233
80-6-1105	Rules V - IX	(Administration)	1233
80-6-1105	4.12.1226, 1228		1966
80-6-1108	Rule XI	(Administration)	1236
80-6-1109	Rules II, X, XI	(Administration)	1232
80-6-1111	4.12.1222		1965
80-7-111	4.12.1806		1340
80-7-801, 812	4.5.110		1860
80-13-104, 111	4.15.101		1342
81-2-101	32.3.216		1288
81-2-102	32.3.104		1293
81-2-102	32.3.216		1288
81-2-102	32.3.219		1291
81-2-102	32.3.220		2345
81-2-102	32.3.401, 410, 412, 425, 426, 431		1295
81-2-102	32.3.1203, 1204, 1207		1930
81-9-220	Rule I	(Livestock)	2342
81-20-101	32.3.220		2345
81-23-203	8.86.301		2318
81-23-302	Pooling Rules (Commerce-Milk Control)		1737
81-23-302	8.86.301		2318
82-1-101, 104	36.22.502		1095
82-4-202	Rules I, II	(State Lands)	2063
82-4-203	Rules I - X	(State Lands)	2063
82-4-204, 205	Rules I - X	(State Lands)	2063
82-4-222	Rule III	(State Lands)	2064
82-4-231	Rules IV - VIII	(State Lands)	2064
82-4-232	Rules V, VIII, IX (State Lands)		2065
82-4-233	Rule VIII	(State Lands)	2067
82-4-235	Rule IX	(State Lands)	2068
82-4-239	Rule X	(State Lands)	2068
85-7-2103, 2104	Opinion No. 21		1497
Title 87, Ch. 5, Pt. 5	Opinion No. 33		2104
87-1-303	12.6.901		955
87-1-303	12.6.901		1557
87-3-121	Rules I - VIII	(FWP)	959
87-3-121	12.7.801 - 808		1627
87-5-502	Opinion No. 33		2104
87-5-506, 507	Opinion No. 33		2104
90-2-1103	Rule I	(DNRC)	2347
90-2-1104	Rule XIX	(DNRC)	2353
90-2-1105	Rules I - XXII	(DNRC)	2347

MCA	Rule or A.G.'s Opinion	Register Page No.
90-2-1111	Rules II, III, XIII - XV, XVIII, XX, XXI (DNRC)	2348
90-2-1112	Rules II, IV, XIII, XIV, XVI, (DNRC)	2348
90-2-1113	Rules XIII, XIV (DNRC)	2348
90-2-1114	Rules XVII - XXI (DNRC)	2352
90-3-203	Rules I - XXXIV (Commerce-Mt. Science & Technology Development)	2020
90-3-203	8.122.101, 203	2018
90-3-301	Rules XXXI - XXXIII (Commerce-Mt. Science & Technology Development)	2034
90-3-402	Rules II - IX, XV - XVII (Commerce-Mt. Science & Technology Development)	2020
90-3-412	Rules VIII - XIV (Commerce-Mt. Science & Technology Development)	2023
90-3-413	Rules VII, IX - XIII, XV, XVI, XVIII - XXI, XXX (Commerce-Mt. Science & Technology Development)	2023
90-3-414	Rule XXI (Commerce-Mt. Science & Technology Development)	2030
90-3-415	Rules III, VIII, XV - XXI (Commerce-Mt. Science & Technology Development)	2020
90-5-101, 102	Opinion No. 29	1829
90-6-307	8.104.203A	1781
90-7-202, 211	8.120.206	2327
90-8-101, 104	8.97.802	1874
90-8-105	Rule I (Commerce-Investments)	1877
90-8-105	8.97.802 - 805, 807	1874
90-8-105	8.97.803	1070
90-8-201	8.97.802	1874
90-8-202	Rule I (Commerce-Investments)	1877
90-8-202	8.97.802 - 805, 807	1874
90-8-204	8.97.803 - 805	1875
Ch. 10, Sec. 6, L. 1986	46.25.728	1117
Ch. 53, Sec. 3, L. 1985	46.10.321	1655
Ch. 53, Sec. 3, L. 1985	46.12.3401, 3403, 3404	1655
Ch. 54, Sec. 2, L. 1985	26.3.137	1281
Ch. 70, Sec. 4, L. 1987	Rules I - X (State Lands)	2063
Ch. 77, Sec. 2 L. 1985	46.12.102, 702, 703	1958
Ch. 77, Sec. 2, L. 1985	46.12.503	1663
Ch. 77, Sec. 2, L. 1985	46.12.605	2362

MCA	Rule or A.G.'s Opinion	Register Page No.
Ch. 78, Sec. 5, L. 1987	8.61.404	1721
Ch. 109, Sec. 3, L. 1987	Rules I - XIV (Health)	1887
Ch. 109, Sec. 3, L. 1985	16.44.102, 104, 109, 118, 202, 322, 351, 504, 508, 610, 802 - 810, 812 - 814, 822	1881
Ch. 154, Sec. 3, L. 1987	8.124.221	1975
Ch. 161, Sec. 13, L. 1987	8.127.1201	1279
Ch. 180, Sec. 4, L. 1987	42.12.128, 323	1491
Ch. 184, L. 1987	38.5.2502	1614
Ch. 184, L. 1987	38.5.2502	2162
Ch. 207, Sec. 11, L. 1987	Rules I - XI (Revenue)	1020
Ch. 211, Sec. 10, L. 1987	8.124.202	1972
Ch. 211, Sec. 10, L. 1987	8.124.202, 222	1265
Ch. 211, Sec. 10, L. 1987	8.124.222	1975
Ch. 219, Sec. 3, L. 1987	Rule I (Health)	1384
Ch. 219, Secs. 3 - 5, L. 1987	Rule I (Health)	1786
Ch. 220, Sec. 2, L. 1987	42.28.406	1565
Ch. 220, Sec. 5, L. 1987	Rule I (Revenue)	1008
Ch. 220, Sec. 5, L. 1987	42.28.406	1565
Ch. 242, Secs. 1 & 2, L. 1987	Rule I (Labor & Industry-Workers' Comp.)	1549
Ch. 242, Secs. 1 & 2, L. 1987	24.29.4001	1992
Ch. 262, Secs. 1 & 2, L. 1987	Rule I (Revenue)	1196
Ch. 262, Sec. 2, L. 1987	42.28.122	1651
Ch. 287, Sec. 2, L. 1987	Rules I - VIII (Family Services)	949
Ch. 287, Sec. 2, L. 1987	11.6.102, 107, 109, 110	1981
Ch. 293, Sec. 2, L. 1987	42.11.201, 205, 211 - 215, 217, 232, 242 - 245, 251, 252	1441
Ch. 295, L. 1987	Rules I, II (Secretary of State)	1553
Ch. 317, Sec. 2 L. 1987	Emergency Rule I (Revenue)	1068

MCA	Rule or A.G.'s Opinion	Register Page No.
Ch. 317, Secs. 2 & 3, L. 1987	Rule V (Commerce-Video Gaming)	1278
Ch. 317, Sec. 6, L. 1987	Emergency Rules I, II (Revenue)	1068
Ch. 317, Sec. 6, L. 1987	Rule VII (Commerce-Video Gaming)	1278
Ch. 317, Sec. 8, L. 1987	Emergency Rule II (Revenue)	1069
Ch. 317, Sec. 8, L. 1987	Rules V, VII (Commerce-Video Gaming)	1278
Ch. 317, Sec. 8, L. 1987	42.7.102 (Emergency Amendment)	1067
Ch. 317, Sec. 10, L. 1987	8.124.214	1975
Ch. 329, Sec. 4, L. 1987	Rules I - IV (SRS)	1331
Ch. 329, Sec. 4, L. 1987	46.12.102, 702, 703	1958
Ch. 329, Sec. 4, L. 1987	46.12.204, 501, 502	1334
Ch. 329, Sec. 4, L. 1987	46.12.526	2094
Ch. 329, Sec. 4, L. 1987	46.12.605	2362
Ch. 336, Sec. 3, L. 1987	Rules I - XIV (Health)	1887
Ch. 336, Sec. 3, L. 1987	16.44.102, 104, 109, 118, 202, 322, 351, 504, 508, 610, 802 - 810, 812 - 814, 822	1881
Ch. 347, Sec. 8, L. 1987	Rules III, IV (Commerce-Psychologists)	2306
Ch. 347, Sec. 8, L. 1987	8.52.613	2305
Ch. 370, Sec. 1, L. 1985	46.12.401	1062
Ch. 370, Sec. 1, L. 1985	46.12.401	2164
Ch. 383, Secs. 2 & 3, L. 1987	26.3.144	1282
Ch. 383, Secs. 4 & 5, L. 1987	26.3.144, 147	1282
Ch. 403, Sec. 2, L. 1987	46.10.321	1655
Ch. 403, Sec. 2, L. 1987	46.12.3401, 3403, 3404	1655
Ch. 418, Sec. 17, L. 1987	Rules I - XXII (DNRC)	2347
Ch. 426, Sec. 1, L. 1987	46.8.501	2358
Ch. 437, Sec. 3, L. 1985	42.31.2141	1438

MCA	Rule or A.G.'s Opinion	Register Page No.
Ch. 461, Sec. 25, L. 1987	Rules I - XXXIV (Commerce-Mt. Science & Technology Development)	2020
Ch. 461, Sec. 25, L. 1987	8.122.101, 203	2019
Ch. 464, Sec. 5, L. 1987	Temporary Rule I (Labor & Industry-Workers' Comp.)	1083
Ch. 464, Sec. 5, L. 1987	Temporary Rule I (Labor & Industry-Workers' Comp.)	1084
Ch. 464, Sec. 5, L. 1987	Rule I (Labor & Industry-Workers' Comp.)	1547
Ch. 464, Sec. 5, L. 1987	24.29.702A - 24.29.702M	1540
Ch. 464, Sec. 5, L. 1987	24.29.1425	2388
Ch. 464, Sec. 5, L. 1987	24.29.4001	1992
Ch. 464, Sec. 14, L. 1987	Rule I (Labor & Industry-Workers' Comp.)	1532
Ch. 464, Sec. 14, L. 1987	24.29.2801	1991
Ch. 464, Sec. 24, L. 1987	Temporary Rule I (Labor & Industry-Workers' Comp.)	1083
Ch. 464, Sec. 24, L. 1987	Temporary Rule I (Labor & Industry-Workers' Comp.)	1084
Ch. 464, Sec. 24, L. 1987	Rule I (Labor & Industry-Workers' Comp.)	1534
Ch. 464, Sec. 25, L. 1987	24.29.702A - 702I, 702L, 702M	2385
Ch. 464, Sec. 25, L. 1987	24.29.1425	2388
Ch. 464, Sec. 34, L. 1987	Temporary Rule I (Labor & Industry-Workers' Comp.)	1083
Ch. 464, Secs. 34-50, L. 1987	Rules I - IV (Labor & Industry-Workers' Comp.)	1536
Ch. 464, Sec. 51, L. 1987	Rule I (Labor & Industry-Workers' Comp.)	1547
Ch. 464, Sec. 51, L. 1987	24.29.702A - 702M	1540
Ch. 464, Sec. 69, L. 1987	Rule I (Labor & Industry-Workers' Comp.)	1547
Ch. 464, Sec. 69, L. 1987	24.29.702A - 702M	1540
Ch. 464, Sec. 69, L. 1987	24.29.702A - 702I, 702L, 702M	2385
Ch. 464, Sec. 69, L. 1987	24.29.702B, 702C	1921
Ch. 474, Sec. 5, L. 1987	18.8.517	1484
Ch. 480, Sec. 4, L. 1985	Rule I (Labor & Industry-Workers' Comp.)	1928
Ch. 480, Sec. 4, L. 1985	24.29.702A - 702I, 702L, 702M	1920

MCA	Rule or A.G.'s Opinion	Register Page No.
Ch. 488, Sec. 7, L. 1985	26.3.137, 144	1281
Ch. 489, Secs. 1 & 2, L. 1987	Rules I - III (Revenue)	1194
Ch. 501, Sec. 2, L. 1987	Rule I (Revenue)	1188
Ch. 538, Sec. 16, L. 1987	Rules I, II (DNRC)	1180
Ch. 538, Sec. 19, L. 1987	Rules I - III (DNRC)	1180
Ch. 538, Sec. 19, L. 1987	36.21.415	1180
Ch. 562, Sec. 3, L. 1987	Rules I - XIV (Health)	1887
Ch. 562, Sec. 3, L. 1987	16.44.102, 104, 109, 118, 202, 322, 351, 504, 508, 610, 802 - 810, 812 - 814, 822	1881
Ch. 563, Sec. 3, L. 1987	Rules I, II, IV - VI, VIII - X (Revenue)	1433
Ch. 563, Sec. 5, L. 1987	Rules I - X (Revenue)	1433
Ch. 564, Sec. 20, L. 1987	Rule I (Revenue)	1750
Ch. 564, Sec. 20, L. 1987	42.2.401	2390
Ch. 579, Sec. 2, L. 1987	Rule III (Labor & Industry)	1005
Ch. 579, Sec. 4, L. 1987	Rules I, III, V, VII, VIII (Labor & Industry)	1005
Ch. 579, Sec. 5, L. 1987	Rules I, III, IV, VI, VIII (Labor & Industry)	1005
Ch. 579, Sec. 6, L. 1987	Rules I - III (Labor & Industry)	1005
Ch. 579, Sec. 7, L. 1987	Rules I - VIII (Labor & Industry)	1005
Ch. 583, Sec. 5, L. 1987	Rule I (Commerce-Investments)	1877
Ch. 583, Sec. 5, L. 1987	8.97.803 - 805, 807	1875
Ch. 602, Sec. 13, L. 1985	8.14.603, 606, 802, 803, 805, 810, 813, 814, 1206	2278
Ch. 603, Sec. 8, L. 1987	Emergency Rule III (Revenue)	1069
Ch. 603, Sec. 8, L. 1987	42.7.229 (Emergency Amendment)	1068
Ch. 603, Sec. 11, L. 1987	Emergency Rule III (Revenue)	1069
Ch. 603, Sec. 11, L. 1987	Rules II, III, IV, VIII (Commerce-Video Gaming)	1269
Ch. 603, Sec. 11, L. 1987	8.124.102, 103, 105, 106, 126, 202, 205, 223, 229	1258

MCA	Rule or A.G.'s Opinion	Register Page No.
Ch. 603, Sec. 11, L. 1987	8.124.122, 123, 125, 127, 201, 203 - 208, 216	1974
Ch. 603, Sec. 11, L. 1987	8.124.127, 202, 206, 207, 209	1972
Ch. 603, Sec. 11, L. 1987	42.7.229 (Emergency Amendment)	1068
Ch. 607, Sec. 1, L. 1987	Temporary Rules I - III (Revenue)	1097
Ch. 607, Sec. 2, L. 1987	Temporary Rules II, IV, V (Revenue)	1097
Ch. 607, Sec. 2, L. 1987	Rules II, IV, V (Revenue)	1021
Ch. 607, Sec. 3, L. 1987	Temporary Rule VII (Revenue)	1102
Ch. 607, Sec. 3, L. 1987	Rule VII (Revenue)	1025
Ch. 607, Sec. 4, L. 1987	Temporary Rule IX (Revenue)	1102
Ch. 607, Sec. 4, L. 1987	Rule IX (Revenue)	1025
Ch. 607, Sec. 5, L. 1987	Temporary Rule VI (Revenue)	1101
Ch. 607, Sec. 5, L. 1987	Rule VI (Revenue)	1024
Ch. 607, Sec. 6, L. 1987	Temporary Rules VIII, X (Revenue)	1102
Ch. 607, Sec. 6, L. 1987	Rules VIII, X (Revenue)	1025
Ch. 607, Sec. 8, L. 1987	Temporary Rule XI (Revenue)	1102
Ch. 607, Sec. 8, L. 1987	Rule XI (Revenue)	1025
Ch. 607, Sec. 11, L. 1987	Temporary Rules I - XI (Revenue)	1097
Ch. 609, Sec. 5, L. 1987	Temporary Rules I - VIII (Family Services)	1163
Ch. 609, Sec. 5, L. 1987	Temporary Rules I - VIII (Family Services)	1169
Ch. 609, Sec. 5, L. 1987	Rules I - III (Family Services)	1382
Ch. 609, Sec. 5, L. 1987	Rules III - XIII (Family Services)	1374
Ch. 609, Sec. 6, L. 1987	Rule I (Family Services)	1382
Ch. 609, Sec. 8, L. 1987	Rules II, III (Family Services)	1382
Ch. 609, Sec. 11, L. 1987	46.4.101 - 46.5.1715 - Transferred to 11.4.101 - 11.19.127	1492
Ch. 609, Sec. 11, L. 1987	46.4.129, 201 - 204	1653

MCA	Rule or A.G.'s Opinion	Register Page No.
Ch. 609, Sec. 11, L. 1987	46.5.401 - 403, 505 - 507, 531 - 539, 608	1653
Ch. 609, Secs. 15-19, L. 1987	Temporary Rules I - VIII (Family Services)	1163
Ch. 609, Secs. 15-19, L. 1987	Temporary Rules I - VIII (Family Services)	1169
Ch. 609, Sec. 112, L. 1987	11.12.101	2133
Ch. 609, Sec. 113, L. 1987	46.2.210, 212	2082
Ch. 609, Sec. 113, L. 1987	46.2.212	2395
Ch. 609, Sec. 113, L. 1987	46.4.101 - 46.5.1715 Transferred to 11.4.101 - 11.19.127	1492
Ch. 609, Sec. 113, L. 1987	46.4.129, 201 - 204	1653
Ch. 609, Sec. 113, L. 1987	46.5.401 - 403, 505 - 507, 531 - 539, 608	1653
Ch. 609, Sec. 113, L. 1987	46.8.501	2358
Ch. 609, Sec. 113, L. 1987	46.13.302 - 304, 401, 403, 502	1454
Ch. 609, Sec. 113, L. 1987	46.13.401	1805
Ch. 611, Sec. 39, L. 1987	Temporary Rules I - XI (Revenue)	1106
Ch. 611, Sec. 39, L. 1987	Rules I - XIII (Revenue)	1014
Ch. 614, Secs. 1 & 3, L. 1987	46.25.728	1117
Ch. 616, Sec. 9, L. 1987	Rule I (Revenue)	1951
Ch. 616, Sec. 9, L. 1987	Rules I - XI (Revenue)	1945
Ch. 616, Sec. 11, L. 1987	Rule XI (Revenue)	1948
Ch. 633, Sec. 7, L. 1985	Rules I - XIV (Health)	1887
Ch. 633, Sec. 7, L. 1985	16.44.102, 104, 109, 118, 202, 322, 351, 504, 508, 610, 802 - 810, 812 - 814, 822	1881
Ch. 640, Sec. 2, L. 1987	8.124.202	1265
Ch. 640, Sec. 2, L. 1987	8.124.202	1972
Ch. 648, Secs. 1 & 2, L. 1987	Rules I - IV (Revenue)	1183
Ch. 655, Sec. 7, L. 1987	Temporary Rules III - V (Revenue)	1011
Ch. 655, Sec. 7, L. 1987	Rule III (Revenue)	1032

MCA	Rule or A.G.'s Opinion		Register Page No.
Ch. 655, Sec. 10, L. 1987	Temporary Rule III	(Revenue)	1011
Ch. 655, Sec. 10, L. 1987	Rule III	(Revenue)	1032
Ch. 655, Sec. 25, L. 1987	Temporary Rule III	(Revenue)	1011
Ch. 655, Sec. 25, L. 1987	Rule III	(Revenue)	1032
Ch. 656, Sec. 2, L. 1987	Temporary Rules I - VI	(Revenue)	1010
Ch. 656, Sec. 2, L. 1987	Temporary Rules I - VI	(Revenue)	1489
Ch. 656, Sec. 2, L. 1987	42.25.1005 (Temporary Amendment)		1010
Ch. 656, Sec. 2, L. 1987	42.25.1005 (Temporary Amendment)		1489
Ch. 656, Sec. 2, L. 1987	42.25.1005		1031
Ch. 656, Sec. 3, L. 1987	Temporary Rule II	(Revenue)	1011
Ch. 656, Sec. 3, L. 1987	Rule II	(Revenue)	1032
Ch. 656, Sec. 4, L. 1987	Temporary Rule I	(Revenue)	1563
Ch. 656, Sec. 4, L. 1987	Temporary Rules I, III, VI (Revenue)		1010
Ch. 656, Sec. 4, L. 1987	Rule I	(Revenue)	1200
Ch. 656, Sec. 4, L. 1987	Rules I, III, VI	(Revenue)	1031
Ch. 656, Sec. 5, L. 1987	Temporary Rule I	(Revenue)	1563
Ch. 656, Sec. 5, L. 1987	Temporary Rules I - VI	(Revenue)	1010
Ch. 656, Sec. 5 L. 1987	Temporary Rules I - VI	(Revenue)	1489
Ch. 656, Sec. 5, L. 1987	Rule I	(Revenue)	1198
Ch. 656, Sec. 5, L. 1987	Rule I	(Revenue)	1200
Ch. 656, Sec. 5, L. 1987	Rules I - VI	(Revenue)	1031
Ch. 656, Sec. 5, L. 1987	42.25.1005 (Temporary Amendment)		1010
Ch. 656, Sec. 5, L. 1987	42.25.1005 (Temporary Amendment)		1489
Ch. 656, Sec. 5, L. 1987	42.25.1005		1031
Ch. 656, Sec. 7, L. 1987	Rule IV, V	(Revenue)	1032
Ch. 657, Secs. 1 & 3, L. 1987	Rule I	(Revenue)	1186

MCA	Rule or A.G.'s Opinion		Register Page No.
Ch. 659, Sec. 1, L. 1987	Rules I - III, V	(Revenue)	1450
Ch. 659, Sec. 2, L. 1987	Rule IV	(Revenue)	1450
Ch. 659, Sec. 3, L. 1987	Rule I	(Revenue)	1450
Ch. 659, Sec. 7, L. 1987	Rules I - V	(Revenue)	1450
Ch. 666, Sec. 6, L. 1987	Rule I	(Revenue)	1192
Ch. 666, Sec. 6, L. 1987	42.17.105		1029
Ch. 666, Sec. 6, L. 1987	42.17.105		1564
Ch. 666, Sec. 7, L. 1987	Rule I	(Revenue)	1190
Ch. 666, Sec. 10, L. 1987	Rule I	(Revenue)	1190
Ch. 666, Sec. 10, L. 1987	Rule I	(Revenue)	1192
Ch. 666, Sec. 10, L. 1987	42.17.105		1564
Ch. 670, Sec. 19, L. 1985	46.25.728		1117
Ch. 687, Sec. 2, L. 1985	26.3.144		1282
Ch. 724, Sec. 3, L. 1985	Rules I - X	(Revenue)	1422
Ch. 728, Sec. 11, L. 1985	Rules I - III	(DNRC)	1180
Ch. 728, Sec. 11, L. 1987	36.21.415		1180
H.B. 815, Sec. 5, L. 1987	Rules II - IV	(Administration)	1232