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MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 10

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

IN THE MATTER OF AMENDMENT of rule concerning mistakes in bids.) NOTICE OF PROPOSED AMENDMENT) of Rule 2.5.505 Mistakes in) Bids

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On July 1, 1988, the Department of Administration proposes to amend the above-noticed rule 2.5.505, regarding the acceptance of minor mistakes in bids by the Procurement Officer.

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

2.5.505 MISTAKES IN BIDS Subsections (1) through (1)(d) remain the same.

(e) signature omitted.

Subsection (2) remains the same. AUTH: 18-4-221 MCA, IMP: 18-4-3-3 and 18-4-303 MCA.

3. The rationale for the amendment is that allowing a vendor to validate an unsigned bid affords the State the opportunity to obtain additional competition and pricing. It is in best interest of the State to declare unsigned bids as mistakes.

4. Interested parties may submit their data, views or arguments concerning the proposed change in writing to Mr. Earl Fred, Bureau Chief, Purchasing Bureau, Procurement and Printing Division, Room 165, Mitchell Building, Helena, MT 59620, no later than June 23, 1988.

5. If a person who is directly affected by the rule change 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 Mr. Fred at the above address, no later than June 23, 1988.

6. If the Department receives requests for a public hearing on the proposed amendment from either 10 percent or 25, whichever is less of the persons who are directly affected by the proposed changes, the administrative code committee or the legislature; a governmental subdivision or agency; an association having not less than 25 members who will be directly affected, a notice of hearing will be published in the Montana Administrative Register. The number of those persons directly affected has been determined to be more than 25.

DEPARTMENT OF ADMINISTRATION

Ellen Feaver

Ellen Feaver, Director

Certified to Secretary of State, May 16, 1988

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

In the matter of the amendment of rules pertaining to crop hail insurance rate filings	)))	AMENDED NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULES 6.6.1502 and 6.6.1503.

TO: All Interested Persons.

1. On May 16, 1988, at 10:00 a.m., a public hearing was scheduled to be held in the conference room of the state auditor's office in the Mitchell Building at Helena, Montana, to consider the amendment of ARM 6.6.1502 and ARM 6.6.1503. The public hearing was not held at that time because of lack of notification to interested parties and a scheduling conflict with the hearing examiner. Therefore, a public hearing will be held on July 12, 1988, at 10:00 a.m., in the conference room of the state auditor's office in the Mitchell Building at Helena, Montana.

2. The proposed amendments replace present rules ARM 6.6.1502 and ARM 6.6.1503. The proposed amendments would set March 15 of each year as the filing deadline for both promulgated and deviated rates.

3. The text of the proposed amendments to the rules is published at pages 631-32 of the Montana Administrative Register, Issue No. 7.

4. The above amendments are being proposed to eliminate confusion among crop hail agents and insurers about when they must file their rates. To end this confusion and make it simpler for agents and insurers to file properly, the Insurance Department proposes that a March 15th date for both promulgated and deviated rates be adopted. This will also allow more time for the agents to begin selling their product prior to the hail season.

5. Interested parties may submit oral or written comments at the hearing. Written comments may also be submitted no later than June 30, 1988, to Jim Borchardt, Chief Examiner, State Auditor's Office, Mitchell Building, Helena, MT, 59604.

6. Jim Borchardt will preside over the hearing.

7. The authority of the state auditor to amend the above rules is based on 33-1-313, MCA, and the rules implement sections 33-16-201 and 33-16-203, MCA.

Andrea "Andy" Bennett
State Auditor and
Commissioner of Securities

Certified to the Secretary of State this 16th day of May, 1988.

10-5/26/88

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

In the matter of the proposed amendment of ARM 6.10.101 through ARM 6.10.124 and the proposed adoption of rules on whole mortgages and certificates of deposit	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED REPEAL AND AMENDMENT OF ARM 6.10.101 THROUGH ARM 6.10.124 AND THE PROPOSED ADOPTION OF RULES ON WHOLE MORTGAGES AND CERTIFICATES OF DEPOSIT

TO: All Interested Persons.

1. On June 30th, 1988, at 9:00 a.m., a public hearing will be held in Room 270, Mitchell Building, Helena, Montana, to consider the amendment of ARM 6.10.101 through ARM 6.10.124.

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

6.10.101 APPLICABILITY OF SUB-CHAPTER (1) ~~THIS~~ Except as provided in subsection (2), this sub-chapter applies to securities~~/~~ and to transactions involving securities, subject to the Securities Act of Montana, Title 30, ~~CHAPTER~~ chapter 10, ~~PARTS~~ parts 1 through 3, MCA.

(2) ~~THIS/SUBCHAPTER~~ Except as provided in ARM 6.10.124, ARM 6.10.103 does not apply to any exempt securities or exempt transactions, as set forth in ~~SECTIONS~~ 30-10-104 and 30-10-105, MCA. ARM 6.10.123 does not apply to securities exempt under 30-10-104(1), MCA.

AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.102 DEFINITIONS As used in this sub-chapter, unless the context indicates otherwise:

(1) The definitions contained in ~~SECTION~~ 30-10-103, MCA, apply.

(2) "Affiliate" means a person who, directly or indirectly through one or more intermediaries, controls or is controlled by or is under common control with the person specified. For example, corporations with common principal owners or common executive management are "affiliates."

(3) "Branch office" means an office, other than a main office but including a corporate subsidiary and any place of business of one or more registered salesmen of a registered broker-dealer, which is located in this state, owned or controlled by the broker-dealer, and engaged in the securities business in this state.

(4) "Promoter"

(a) means a person who, acting alone or in conjunction with one or more persons, directly or indirectly, takes the initiative in founding and organizing the business or enterprise of an issuer or an officer, director or party owning, directly or indirectly, 5% or more of the outstanding shares of the corporation before or immediately following the

public offering, or any affiliate of the aforesaid persons; and

(b) does not include an unaffiliated institutional purchaser who purchased its shares more than 1 year prior to the public offering.

~~(7)~~ (5) "Promotional security" means:

(a) a security issued within 3 years ~~from~~ before the date of registration in return for:

~~(a)~~ (i) a price less than 85% of the consideration for which such securities are proposed to be sold to the public; or

~~(b)~~ (ii) ~~services~~ services rendered, patents, copyrights, other intangibles, or real or personal property, the actual value of which has not been established to the satisfaction of the ~~securities~~ commissioner; or

(b) ~~promoter~~ a security issued or to be issued to a promoter while a corporation is in a promotional or developmental stage.

(6) "Sales material" means an advertisement, display, pamphlet, brochure, letter, article, or communication published in a newspaper, magazine, or periodical, or script, or a recording, radio or television announcement, broadcast, or commercial to be used or circulated in connection with the offer or sale of a security to a person in this state.

AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.103 SALES MATERIALS (1) ~~Any~~ Except as provided in subsections (3) and (4) of this rule, sales material ~~published or circulated or proposed to be published or circulated~~ to be used in connection with the offer or sale of securities to persons in this state must ~~first~~ be ~~approved by~~ filed with the ~~securities~~ commissioner at least 10 days prior to being used in this state.

(2) ~~Any person filing~~ The commissioner may by order disallow the use of sales material filed pursuant to this rule if the commissioner finds that such an order is necessary to protect the investor or a person engaged in securities transactions and is in the public interest. Unless the commissioner disallows the use of sales material filed pursuant to this rule within 10 days from the date filed, the sales material may be disseminated.

(3) This rule does not apply to sales material that is used exclusively in connection with the offer or sale of securities that are registered in this state by notification or coordination pursuant to 30-10-203 or 30-10-204, MCA.

(4) This rule does not apply to sales material that is used exclusively in connection with the offer or sale of securities that are exempt from registration pursuant to 30-10-104 or 30-10-105, MCA, or the rules thereunder, unless the exemption statute or rule specifically provides that sales material must be filed.

~~(3)~~ (5) The commissioner may, upon written request and

for good cause shown by ~~an issuer or applicant~~ a person wishing to use sales material, waive any of the requirements of this rule.

AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.104 PROMOTIONAL SECURITIES--~~NOTIFICATION AND~~ ESCROW ~~(1) An issuer intending to issue promotional securities shall first notify the securities commissioner and shall provide any information regarding the transaction requested by the commissioner.~~

~~(2)~~ (1) The commissioner may require that promotional securities be placed in escrow with ~~an approved escrow agent~~ a financial institution approved by the commissioner for a period of 2 years from the date that the registration becomes effective, or for such other period, or upon such terms and conditions as the commissioner may, in his discretion, require.

~~(3)~~ (2) An issuer may not sell or transfer ~~any~~ an escrowed promotional ~~securities~~ security or an interest in ~~them~~ one, except by will, intestate succession, or other similar methods, without first obtaining written consent from the commissioner. The owner of an escrowed promotional security may exercise voting rights that attach to that security.

AUTH: 30-10-107, MCA IMP: 30-10-107 and 30-10-206, MCA

6.10.104A DEFINITION OF PROMOTIONAL OR DEVELOPMENTAL STAGE (1) For the purposes of 30-10-206, MCA, and ARM 6.10.102(5), a corporation in the "promotional or developmental stage" means a corporation which has no public market for its shares and has no significant earnings within the past ~~five~~ 5 years (or shorter period of its existence).

(2) "Significant earnings" ~~shall be deemed to~~ exist if the corporation's earnings record over the last ~~five~~ 5 years (or shorter period of its existence) demonstrates that for such period the corporation's net earnings per share is 30% of the public offering price per share (as adjusted for stock splits and stock dividends) or the corporation has earnings per share of 10% or more of the public offering price per share for any ~~two~~ 2 consecutive years.

AUTH: 30-10-107, MCA IMP: 30-10-206, MCA

6.10.105 PROMOTIONAL SECURITIES--REQUIRED WAIVERS (1) Each promotional security ~~shall~~ must contain a provision waiving dividend rights and rights of participation, in the distribution of assets in the event of liquidation or dissolution, in favor of shareholders who paid cash or its equivalent for their securities that are not promotional securities.

(2) ~~Waivers shall remain~~ A waiver remains in effect ~~for the period required by the securities commissioner in the particular case~~ only while the security is in escrow.

AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.106 NEW VENTURE FINANCING is proposed to be repealed and can be found at page 6-280, Administrative Rules of Montana.

AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.107 FILING OF REGISTRATION STATEMENTS--WHEN COMPLETE is proposed to be repealed and can be found at page 6-280, Administrative Rules of Montana.
AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.108 NOTICE OF TERMINATION OF OFFERING--CHANGE OF OFFICERS (1) An issuer ~~which~~ that has completed, discontinued, or terminated the sale of securities registered with the ~~securities~~ commissioner shall annually while registered and upon completion, discontinuance, or termination of the sale of registered securities, notify the commissioner in writing and shall also submit a complete sales report ~~which shall include~~ that includes, for this state, ~~the number of sales,~~ the number of units ~~of securities~~ sold~~,~~ and the aggregate dollar amount of sales.

(2) Until written notice has been provided as required by subsection (1) of this rule, the commissioner shall be notified~~, within 15 days of the effective date,~~ of ~~any changes~~ each change in the officers, directors, trustees, partners, or other principal members of a registrant within 15 days of the change.
AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.109 FILING BY BROKERS, DEALERS, AND SALESMEN is proposed to be repealed and can be found at pages 6-280 and 6-281, Administrative Rules of Montana.
AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.110 ~~BASIS OF SELLING EXPENSES~~ STOCK SUBSCRITPION AGREEMENT-NO DEFAULT OR PENALTY PROVISION ~~(1) In the sale of securities, other than those of an investment company defined in the Investment Company Act of 1940 and other than securities listed on a national securities exchange, commissions to broker-dealers or salesmen, and all other expenses of sale chargeable to the purchaser, shall be based only on cash actually paid by the purchaser and not upon the amount of securities of subscription taken.~~

~~(2)~~ (1) ~~There shall be no default or penalty provisions in any~~ A stock purchase agreement or stock subscription agreement may not contain a default or penalty provision.
AUTH: 30-10-107, MCA IMP: 30-10-105 and 30-10-107, MCA

6.10.111 WARRANTS AND OPTIONS (1) The ~~securities~~ commissioner will consider the granting of warrants or ~~stock~~ options, to persons other than purchasers of securities, as grounds for denial of an application for registration, with the exception of:

(a) ~~Options~~ options to management in the nature of restricted ~~stock~~ options for incentive purposes, if reasonable in number and method of exercise;

(b) ~~Options~~ options to employees or their nominees pursuant to stock purchase plans or profit sharing plans, if reasonable in number and method of exercise; and

~~(c) Options or warrants to underwriters in connection with a public offering if:~~

~~(i) They are issued to the managing underwriter under a firm underwriting agreement and are not assignable or transferable, except among partners of the underwriter when the underwriter is a partnership;~~

~~(ii) The number of shares covered by the warrants or options do not exceed 10% of the securities, including warrants to employees, to be outstanding at the completion of the offering;~~

~~(iii) The initial purchase price of the options is at least equal to the public offering price with a "step-up" of at least 7% of the exercise price each year they are outstanding;~~

~~(iv) The options or warrants do not exceed 3 years in duration and are exercisable no sooner than 11 months after issuance; and~~

~~(v) The options or warrants are issued by a relatively small company in the promotional stage where it appears from the available facts and circumstances that issuance of the options or warrants is necessary to obtain competent investment banking service, as long as the direct commissions to the underwriters are lower than the usual and customary commissions would be in the absence of such options or warrants.~~

(c) options or warrants issued to underwriters or other persons as compensation, in whole or in part, for the sale of securities if:

(i) the issuer does not have:

(A) a public market for its securities; or

(B) previously issued options or warrants to an underwriter in connection with more than one public offering of its securities;

(ii) the options or warrants are issued only to a managing underwriter and no options or warrants are issued in connection with a best efforts underwriting unless the entire issue is sold, except that options or warrants may be issued in connection with a minimum-maximum offering if the amount to be issued is prorated depending on the amount of the underwriting which is sold;

(iii) the exercise of the options or warrants is not accomplished for a period of one year from the completion of the public offering;

(iv) the options or warrants are nontransferable except by will, by intestate succession, or by operation of law, except that the options or warrants may be transferred without payment thereto to:

(A) partners of the underwriter if the underwriter is a partnership;

(B) persons who are both officers and shareholders of the underwriter if the underwriter is a corporation; or

(C) employees of the underwriter;

(v) the initial exercise price of the options or warrants is at least equal to the public offering price plus either:

(A) 7% each year they are outstanding, commencing 1 year after issuance, so that the exercise price throughout the second year is 107%, throughout the third year is 114%, throughout the fourth year is 121%, and throughout the fifth

year is 128%; or

(B) 20% at any time after 1 year from the date of issuance;

(vi) the term of an option or warrant is not longer than 5 years; and

(vii) units of securities underlying the options or warrants acquired by an underwriter and related persons, whether acquired prior to, at the time of, or after the offering (but which is determined to be in connection with or related to the offering) are not, in the aggregate, more than 10% of the total number of shares that are outstanding at the conclusion of the offering. For purposes of this limitation, over-allotment units and units underlying options, warrants, or convertible securities that are a part of the proposed public offering are not to be counted as part of the aggregate number of shares being offered against which the 10% limitation is to be applied.

(3) The commissioner may, upon a showing of good cause, approve an application even though warrants or options have been granted that do not meet the conditions specified in subsection (2) of this rule. However, the burden of justifying issuance rests upon the applicant.

AUTH: 30-10-107, MCA IMP: 30-10-107 and 30-10-207, MCA

6.10.112 BLOTTERS OR RECORDS OF ORIGINAL ENTRY REQUIRED is proposed to be repealed and can be found at page 6-682.
AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.113 LEDGERS REQUIRED is proposed to be repealed and can be found at page 6-682.
AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.114 MEMORANDA OF BROKERAGE ORDERS AND INSTRUCTIONS REQUIRED is proposed to be repealed and can be found at pages 6-682 and 6-683.
AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.115 MEMORANDA OF PURCHASE AND SALES ORDERS REQUIRED is proposed to be repealed and can be found at page 6-683.
AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.116 COPIES OF CONFIRMATIONS REQUIRED is proposed to be repealed and can be found at page 6-683.
AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.117 CASH AND MARGIN ACCOUNT RECORDS REQUIRED is proposed to be repealed and can be found at page 6-683.
AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.118 MONTHLY TRIAL BALANCES REQUIRED is proposed to

be repealed and can be found at page 6-683.
AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.119 QUARTERLY AND ANNUAL STATEMENTS REQUIRED is proposed to be repealed and can be found at page 6-684.
AUTH: 30-10-107, MCA IMP: 30-10-107, MCA

6.10.120 UNIFORM MONTANA LIMITED OFFERING EXEMPTION (1) By the authority delegated to the commissioner in 30-10-105, MCA, the following rule is proposed to be adopted:

(1) An offer or sale of securities offered or sold in compliance with Securities Act of 1933, Regulation D, Rules 230.501 through 230.503 and 230.505 and/or 230.506 as made effective in Release No. 33-6389 and amended by Release No. 6663 and Release No. 6758 is exempt from the registration requirements of 30-10-202, MCA.

(2) Each person who offers or sells securities in this state to nonaccredited and/or accredited investors, as defined in Securities Act of 1933, Regulation D, Rule 230.501(a)(5) through 230.501(a)(7), shall be registered in accordance with 30-10-201, MCA. It is a defense to a violation of this subsection if the issuer sustains the burden of proof to establish that he or she did not know and, in the exercise of reasonable care, could not have known that the broker-dealer or salesman was not appropriately registered in this state.

(3) An exemption under this rule is not available for the securities of an issuer if any of the parties described in Securities Act of 1933, Regulation A, Rules 230.252(c), 230.252(d), 230.252(e), or 230.252(f):

(a) has filed a registration statement that is the subject of a currently effective registration stop order entered pursuant to a state's securities law within 5 years prior to the filing of the notice required under this exemption;

(b) has been convicted within 5 years prior to the filing of the notice required under this exemption of a felony or misdemeanor in connection with the offer, purchase, or sale of a security or a felony involving fraud or deceit, including but not limited to forgery, embezzlement, obtaining money under false pretenses, larceny, or conspiracy to defraud;

(c) is currently subject to a state administrative enforcement order or judgment entered by that state's securities administrator within 5 years prior to the filing of the notice required under this exemption or is subject to a state's administrative enforcement order or judgment in which fraud or deceit, including but not limited to making untrue statements of material facts and omitting to state material facts, was found and the order or judgment was entered within 5 years prior to the filing of the notice

required under this exemption;

(D) (d) is subject to any a state's administrative enforcement order or judgment that prohibits, denies, or revokes the use of any an exemption from registration in connection with the offer, purchase, or sale of securities; or

(E) (e) is currently subject to any an order, judgment, or decree of any a court of competent jurisdiction temporarily or preliminarily restraining or enjoining, or is subject to any an order, judgment, or decree of any a court of competent jurisdiction, permanently restraining or enjoining, such the party from engaging in or continuing any conduct or practice in connection with the purchase or sale of any a security or involving the making of any a false filing with the state entered within five 5 years prior to the filing of the notice required under this exemption.

(F) (4) The prohibitions of paragraphs A-C, and D, and subsections (3)(a) through (3)(c) and subsection (3)(e) do not apply if the person subject to the disqualification is duly licensed or registered to conduct securities-related business in the state in which the administrative order or judgment was entered against such the person, or if the person subject to the disqualification is registered to conduct securities-related business by the Securities Exchange Commission and the order or judgment was entered against the person by the Securities and Exchange Commission, or if the broker-dealer employing such the person is licensed and registered in this state and the form BD as adopted by the North American Securities Administrators Association, Inc., and filed with this state discloses the order, conviction, judgment or decree relating to such the person. No A person disqualified under this subsection rule may not act in a capacity other than that for which the person is licensed and registered.

(G) (5) A disqualification caused by this section rule is automatically waived if the Securities and Exchange Commission, state securities administrator, or agency of the state which created the basis for disqualification determines, upon a showing of good cause, that it is not necessary to deny the exemption under the circumstances that exist, but was not specified at the time the

denied.

(H) (6) The issuer shall file with the commissioner

(a) a notice on an original, manually signed form D as adopted by the North American Securities Administrators Association, Inc., (17CFR239.500);

(I) at least ten 10 days prior to any an offer or sale being made to a person in this state, annually until completion and upon completion of the offer or sale, and at all such other times and in the form required under Securities Act of 1933, Regulation D, Rule 230.503, to be filed with the Securities and Exchange Commission.

(J) The notice shall must contain an undertaking by the issuer to furnish to the commissioner, upon written request, the information furnished by the issuer to

offerees, except when unless the commissioner, by order, requires that the information be filed at the same time with the filing of the notice.

(b) A consent to service of process included with or in the initial notice, and

(c) the filing fee of $200 for the first $100,000 of securities, in 30-10-209, MCA; and

(d) the name and address of each person who will offer or sell, in this state, a security under this rule.

(7) In all sales to nonaccredited investors in this state, the issuer and any each person acting on its behalf shall have reasonable grounds to believe, and after making reasonable inquiry shall believe, that one of the following conditions is satisfied:

(A) the (a) the investment is suitable for the purchaser upon the basis of the facts, if any, disclosed by the purchaser as to his net other securities holdings and as to his financial situation and needs. For the purpose of this condition only, it may be presumed that, if the investment does not exceed 10% of the investor's net worth, it is suitable.

(B) the (b) the purchaser either alone or with his purchaser representative has such knowledge and experience in financial and business matters that he is or the capable of evaluating the merits and risks of the prospective investment.

(8) A transaction that is exempt under this rule may not be combined with any other rule and sale an offer and sale exempt under any other rule implementing or a section of the Securities Act of Montana. However, nothing in this limitation any acts as an election. If the offer and sale fail to comply with all of the conditions for this exemption, the issuer may claim the availability of any other applicable exemption.

(9) The commissioner may, by order, increase the number of purchasers or waive any other conditions of this exemption.

(10) The commissioner may, upon written request and a showing of good cause, waive the examination requirements of ARM 6.10.121 for any securities salesman offering and/or selling securities exempted by this rule/ a securities.

(11) In the case of offerings of direct participation programs as defined in Section 34 of Article III of the National Association of Securities Dealers, Inc.'s Rules of Fair Practice, each person who offers or sells securities in this state under this rule shall deliver a disclosure document containing the information required by Securities Act of 1933, Regulation D, Rule 230.502(b), to individuals covered by Securities Act

of 1933, Regulation D, Rules 230.502(a)(5), 230.502(a)(6), and 230.502(a)(7).

(12) The commissioner may by order revoke, deny, or further condition the use of this exemption with respect to a particular offering when the commissioner finds that such an order is necessary to protect the investor or a person engaged in securities transactions and is in the public interest.

(13) An issuer using the Montana Limited Offering Exemption shall file such other information as the commissioner may require.

~~(11)~~ (14) The exemption authorized by this rule ~~shall be known and~~ may be cited as the "~~Uniform~~ Montana Limited Offering Exemption".~~/~~

AUTH: 30-10-105 and 30-10-107, MCA
IMP: 30-10-105, MCA

6.10.121 REGISTRATION AND EXAMINATION-SECURITIES SALESMEN, INVESMENT ADVISER REPRESENTATIVES, BROKER-DEALERS, AND INVESTMENT ADVISERS (1) ~~In order to~~ To become ~~licensed~~ registered in this state as a securities salesman or an investment ~~advisor~~ adviser representative, the individual applicant~~, an officer, if the applicant is a corporation, or a general partner, if the applicant is a partnership,~~ shall pass the ~~NASD~~ National Association of Securities Dealers, Inc., Uniform Securities Agent State Law Exam ~~with a score of 70% or better~~ or an examination designated by the commissioner. The applicant must also complete ~~a Uniform Application Form ADV~~ an application form described in subsection (2). A salesman applying to register with an issuer does not have to take an examination.

(2) Each application for registration in this state must be made on the most current revised uniform application form as adopted by the North American Securities Administrators Association, Inc., unless the commissioner, by order, designates another form. Broker-dealers shall use form BD, investment advisers shall use form ADV, and securities salesmen and investment adviser representatives shall use form U-4.

(3)(a) Except for a salesman representing an issuer or a salesman representing a broker-dealer that is not a member of the National Association of Securities Dealers, Inc., and except as provided in subsection (3)(c) of this rule, each individual applying for registration as a salesman in this state shall register through the Central Registration Depository, a division of the National Association of Securities Dealers, Inc.

(b) Except as provided in subsection (3)(c) of this rule, each applicant for registration as a broker-dealer, investment adviser, or investment adviser representative in this state shall apply for registration with the commissioner.

(c) The commissioner, in his discretion, may by order provide for a manner of filing an application to register different from the procedures provided in subsections (3)(a) and (3)(b) of this rule.

(4) Each person registered pursuant to 30-10-201, MCA, wishing to terminate registration shall file, with the

commissioner, an application to terminate registration. Each application to terminate registration must be made on the most current revised uniform termination form as adopted by the North American Securities Administrators Association, Inc., unless the commissioner, by order, designates another form. Broker-dealers shall use form BDW, investment advisers shall use form ADV-W, and securities salesmen and investment adviser representatives shall use form U-5.

(5)(a) Except for a salesman representing an issuer or a salesman representing a broker-dealer that is not a member of the National Association of Securities Dealers, Inc., and except as provided in subsection (5)(c) of this rule, each individual applying for termination of registration as a salesman in this state shall terminate through the Central Registration Depository, a division of the National Association of Securities Dealers, Inc.

(b) Except as provided in subsection (5)(c) of this rule, each applicant for termination of registration as a broker-dealer, investment adviser, or investment adviser representative in this state shall apply for termination of the registration with the commissioner.

(c) The commissioner, in his discretion, may by order provide for a manner of filing an application to terminate registration different from the procedures provided in subsections (5)(a) and (5)(b) of this rule.

(6) Each change in the information included in an application for registration or termination must be set forth in an amendment to the application and filed with the commissioner within 30 days after the change occurs.

~~(2) If the information contained in any document filed with the commissioner is or becomes inaccurate or incomplete in any material respect, the person filing the document shall promptly file a correcting amendment.~~

(7) If an individual is not registered as an investment adviser representative because he is registered as a salesman pursuant to 30-10-201, MCA, then the investment adviser with which the investment adviser representative is associated shall notify the broker-dealer with which the investment adviser representative is registered as a salesman that the individual is acting as an investment adviser representative for the investment adviser. An investment adviser that uses an individual who is not required to register as an investment adviser representative because he is registered as a salesman pursuant to 30-10-201, MCA, shall first file with the commissioner a copy of the first page of the form U-4 as adopted by the North American Securities Administrators Association, Inc., disclosing the name of the individual's employing broker-dealer. Upon termination of the investment adviser representative, the investment adviser shall file with the commissioner the form U-5 as adopted by the North American Securities Administrators Association, Inc.

~~(3)~~ (8) Upon the written request of ~~any~~ an applicant and

for good cause shown, the ~~Commissioner~~ commissioner may waive ~~the examination requirement specified in subsection 1 for good cause when in the commissioner's opinion the requirement is excessively burdensome or is unnecessary in light of the applicant's circumstances~~ any of the requirements of this rule.
AUTH: 30-10-107, MCA IMP: 30-10-201, MCA

6.10.122 ~~REPORTING REQUIREMENTS~~ BROKER-DEALER BOOKS AND RECORDS (1) ~~Each investment adviser shall file with the commissioner a copy of any complaint related to its business transactions or operations in this state, naming the investment adviser or any of its partners, officers, or investment advisory representatives as defendants in any civil or criminal proceedings, or in any administrative or disciplinary proceeding by any public or private regulatory agency, within 10 days of the date the complaint is served on the investment adviser, a copy of any answer or reply to the complaint filed by the investment adviser within 10 days of the date the answer or reply is filed; and a copy of any decision, order or sanction made with respect to any such proceedings within 10 days of the date the decision, order or sanction is rendered.~~

~~(2) Each investment adviser shall file with the commissioner a notice of transfer of control or change of name not less than 30 days prior to the date on which the transfer of control or change of name is to become effective, or such shorter period as the commissioner may permit.~~

~~(3) Except as provided in subs. (1) and (2) all material changes in the information included in an investment adviser's most recent application for registration shall be set forth in an amendment to Form ADV and filed with the commissioner within 30 days after the change occurs.~~ Except as provided in subsection (4), each broker-dealer registered in this state shall make and keep all books and records in conformity with Securities Exchange Act of 1934, regulation 240.17a-3. In addition, each broker-dealer registered in this state must make and keep those books and records required to be made and kept by any self regulatory organization of which it is a member and by any federal government agency with which it is registered or licensed.

(2) Each broker-dealer shall keep and maintain at branch offices the following items relating to the operations of that branch office, which, together with any other books and records made or kept at the branch office, are open to inspection by the commissioner, pursuant to 30-10-201(11), MCA:

(a) a complaint file containing either:

(i) a separate file of each written customer or client complaint and the action taken by the broker-dealer with respect to each complaint; or

(ii) a separate record of each complaint and a clear reference to the files containing the correspondence connected with each complaint as maintained in the branch office;

(b) a litigation file documenting each criminal or civil action filed in a state or federal court against the broker-dealer branch office or against any of its personnel with respect to a securities or an investment advisory

transaction and the disposition of any such litigation;

(c) a correspondence file containing all correspondence disseminated to or received from the public in connection with the business of the branch office;

(d) copies of each confirmation of purchase and sale sent to each customer and each order ticket completed at the branch office;

(e) copies of each periodic statement sent to a customer;

(f) commission runs showing the amount of commissions earned by each salesman of the broker-dealer;

(g) the name and address of each customer or client, whether the customer or client is legally of age, the signature of the salesman introducing the account, and the signature of the officer or manager accepting the account for the broker-dealer. If a broker-dealer customer is associated with or employed by another broker-dealer, this fact must be recorded. In discretionary broker-dealer accounts, the broker-dealer shall also record:

(i) the age or approximate age and occupation of the customer;

(ii) the signature of the person authorizing the use of discretion; and

(iii) the signature of each person authorized to exercise discretion in such account;

(h) copies of each written margin agreement; and

(i) copies of each written option agreement.

(3) The commissioner may copy records made, kept, or maintained pursuant to subsections (1) and (2) or require a broker-dealer registered in this state to copy those records and provide the copies to the commissioner in a manner reasonable under the circumstances.

(4) The commissioner may by order, upon written request and for good cause shown, waive any of the requirements of this rule.

AUTH: 30-10-107, MCA IMP: 30-10-201, MCA

6.10.123 INVESTMENT ADVISER BOOKS AND RECORDS (1) Every investment adviser shall make and keep true, accurate, and current books and records relating to his investment advisory business including at least the following:

(a) a list or other record of each account in which the investment adviser is vested with any a power of attorney with respect to any a client.

(b) each power of attorney and other evidences of the granting of any discretionary authority by a client to the investment adviser, or copies thereof.

(c) each written agreement (or copies thereof) entered into by the investment adviser with any a client or otherwise relating to the business of the investment adviser as such.

(d) a complaint file containing each written customer or client complaint and the action taken by the investment adviser with respect to each complaint;

(e) a litigation file documenting each criminal or civil

action filed in a state or federal court against the investment adviser or against any of its personnel with respect to a securities or an investment advisory transaction and the disposition of any such litigation;

(f) a correspondence file containing all correspondence disseminated to or received from the public in connection with the business of the investment adviser.

(2) Each registered investment adviser, before ceasing to conduct or discontinuing business as an investment adviser, shall arrange for and be responsible for the preservation of the books and records required to be made and kept and shall notify the commissioner in writing of the exact address where such books and records will be kept.

(3) The commissioner may copy records made, kept, or preserved pursuant to subsections (1) and (2) or require an investment adviser registered in this state to copy those records and provide the copies to the commissioner in a manner reasonable under the circumstances.

(4) The commissioner may by order, upon written request and for good cause shown, waive any of the requirements of this rule.

AUTH: 30-10-107, MCA; IMP: 30-10-201, MCA

6.10.124 THE MONTANA VENTURE INVESTMENT CAPITAL EXEMPTION (1) [illegible] Pursuant to 30-10-105, MCA, securities offered or sold in accordance with all the conditions set forth in this rule are exempt from the registration requirements of 30-10-202, MCA. The exemption authorized by this rule may be cited as the Montana Investment Capital Exemption.

[illegible] (2) Each person who offers or sells securities pursuant to this exemption the Montana Investment Capital Exemption shall be registered as salesman or broker-dealer in accordance with section 30-10-201, MCA. [illegible]

(3) Only a corporation may use the Montana Investment Capital Exemption. The Montana Investment Capital Exemption is available only if one class of stock is outstanding after the offering unless, upon written request, the commissioner waives this requirement as not being necessary under the circumstances to protect investors. The Montana Investment Capital Exemption may not be used for the offer and sale of debt securities. The Montana Investment Capital Exemption is not available if the issuer or its affiliates have previously sold securities of such issuer or affiliate under 30-10-203, MCA, (registration by notification); 30-10-204, MCA, (registration by coordination); 30-10-205, MCA, (registration by qualification); or under similar provisions of the securities or blue sky laws of any other state. If an issuer has previously filed an application for registration of its securities in this or any state but no sales were made pursuant to that registration, the Montana Investment Capital Exemption remains available, but the issuer must advise the commissioner of its prior applications for registration. The commissioner may require disclosure of the reasons why no sales were made pursuant to the prior registration applications. An issuer may use the Montana Investment Capital Exemption more than once but the total amount of funds raised by the issuer

(a) under the Montana Investment Capital Exemption, excluding offerings by affiliates of the issuer with respect to business ventures unrelated to that of the issuer occurring more than 24 months prior to or more than 24 months after the offering by the issuer under consideration, may not exceed $500,000; and

(b) under all exemptions, including offerings by affiliates of the issuer and excluding amounts raised pursuant to the exemptions provided for in 30-10-105(7) and 30-10-105(8), MCA, may not exceed $500,000 in any 12-month period during which the Montana Investment Capital Exemption is used.

(4) Sales commissions or other remuneration may be paid

for offering or making sales of shares under the Montana Investment Capital Exemption, but the amount of all such remuneration must be disclosed on the Montana Investment Capital Exemption Form.

(5) The maximum number of purchasers under the Montana Investment Capital Exemption in any consecutive 12 months is 40. Husband and wife are counted as one purchaser, as is an estate. Each shareholder of a corporation and each beneficiary of a trust is counted separately as a purchaser in addition to the corporation or trust unless the shareholder or beneficiary has been a shareholder or beneficiary for at least 6 months prior to the purchase.

(6) Each offeree under the Montana Investment Capital Exemption shall be furnished a disclosure document on a form, called the "Montana Investment Capital Exemption Form", provided by the commissioner. A copy of the Montana Investment Capital Exemption Form with all attachments must be furnished to each prospective purchaser at the time of the offer of such shares and at least 24 hours before the prospective purchaser either agrees to purchase the shares or pays consideration, whichever is earlier. If during the course of an offering made under the Montana Investment Capital Exemption an event that would materially affect the issuer, its prospects, or properties or otherwise materially affect the accuracy or completeness of the information contained in the Montana Investment Capital Exemption Form occurs, the offeror must revise the Montana Investment Capital Exemption Form promptly to reflect the event, file the revised Montana Investment Capital Exemption Form with the commissioner, and use the revised Montana Investment Capital Exemption Form for each offer and sale of shares in the offering thereafter.

(7) Upon effectiveness of the Montana Investment Capital Exemption, sales material may be used, in accordance with ARM 6.10.103, to solicit investors.

(8) Each share sold pursuant to each Montana Investment Capital Exemption offering must be sold for cash and must be offered and sold at the same price.

(9) The terms of the subscription of purchase for all shares sold under the Montana Investment Capital Exemption must provide that the shares will be fully paid for within 90 days of the date of subscription.

(10) The issuer shall specify, in the Montana Investment Capital Exemption Form, the minimum amount of funds necessary to achieve the results anticipated. The minimum amount of funds necessary to achieve the results anticipated shall be equal to the minimum amount of funds to be raised through an offering made under the Montana Investment Capital Exemption. The issuer shall also establish a maximum amount of funds to be so raised, and the minimum amount may not be less than 75% of the maximum amount.

(11) The issuer must establish, through a signed escrow agreement, a separate escrow account, with a financial institution acting as escrow agent, for all funds received for sales of securities under the Montana Investment Capital Exemption until at least the minimum amount has been raised.

If the minimum amount is not raised within 6 months of the effective date of the Montana Investment Capital Exemption, then all funds, including any interest thereon, must be promptly returned to the investors. Upon good cause shown, the commissioner may, however, extend the date by which the minimum amount must be raised.

(12) The Montana Investment Capital Exemption is effective upon order of the commissioner and remains effective for 1 year.

(13) An initial management compensation in cash or property may not be paid to a promoter, officer, director, or person owning 10% or more of the outstanding shares of the issuer, but

(a) actual out-of-pocket expenses may be reimbursed to the promoter, officer, director, or person owning 10% or more of the outstanding shares of the issuer; and

(b) reasonable salaries may be paid to any such persons during periods when the issuer is actually conducting business operations.

(14) The issuer shall place a legend on the stock certificate evidencing the shares sold under the Montana Investment Capital Exemption in substantially the following form: "These shares are not registered under the Securities Act of Montana and may not be offered, sold, pledged (except a pledge pursuant to the terms of which any offer or sale upon foreclosure would be made in a manner that would not violate the registration provisions of the Securities Act of Montana), or otherwise distributed for value, nor may these shares be transferred on the books of the company without opinion of counsel that no violation of registration provisions would result therefrom."

(15)(a) A person may not purchase shares under the Montana Investment Capital Exemption in excess of the greater of

(i) $15,000;

(ii) 25% of his annual income for the last calendar year; or

(iii) 25% of his net worth, exclusive of equity in residence, automobiles, furnishings, jewelry and personal effects.

(b) If a person purchases more than $15,000 worth of shares in an offering, the issuer shall obtain from the purchaser and preserve for 3 years a signed statement that the amount of the purchaser's investment does not exceed 25% of his annual income or net worth.

(c) If shares are to be purchased for a pension fund, an IRA account, or a Keough plan, the pension fund, IRA account, or Keough plan must meet independently the requirements of subsection (15)(a)(i) through (15)(a)(iii).

(16) Each director, chief executive officer, and accounting officer of the issuer shall sign the Montana Investment Capital Exemption Form and by such action shall certify that each has made reasonable efforts to verify the material accuracy and completeness of the information it contains. For the Montana Investment Capital Exemption to be available, the chief executive and accounting officers of the

issuer shall, before the investor invests, make themselves and the issuer's books and records available to each investor to respond to questions and otherwise verify the information contained in the Montana Investment Capital Exemption Form.

(17) An issuer using the Montana Investment Capital Exemption shall file with the commissioner:

(a) an original, manually signed copy of the Montana Investment Capital Exemption Form;

(b) a filing fee of $200.00;

(c) a consent to service of process, which is attached to and made a part of the Montana Investment Capital Exemption Form;

(d) a copy of the signed escrow agreement required by subsection (11) of this rule;

(e) such other information as the commissioner may require; and

(f) a final sales report within 60 days of either the date of the last sale made pursuant to the Montana Investment Capital Exemption or the end of the year for which the exemption was granted, whichever is earlier. The final sales report must include the number of sales, the number of securities sold, and the aggregate dollar amount of sales.

(18) An exemption under this rule is not available for the securities of an issuer if the person filing the Montana Investment Capital Exemption Form, the issuer, officer, or director of the issuer, a person occupying a similar status or performing similar functions, or a person directly or indirectly controlling or controlled by the issuer

(a) has been convicted within 5 years prior to filing the Montana Investment Capital Exemption Form of:

(i) a felony or misdemeanor in connection with the offer, purchase, or sale of any security; or

(ii) a felony involving fraud or deceit, including but not limited to forgery, theft, or deceptive practices;

(b) is currently subject to a state administrative enforcement order or judgment entered by that state's commissioner within 5 years prior to filing the Montana Investment Capital Exemption Form;

(c) is currently subject to an order or judgment entered by the federal securities and exchange commission within 5 years prior to filing the Montana Investment Capital Exemption Form; or

(d) is currently subject to an order, judgment, or decree of a court of competent jurisdiction temporarily or permanently restraining or enjoining the party from engaging in a conduct or practice in connection with the offer, sale, or purchase of a security.

~~(2)~~ (19) The ~~commissioner~~ commissioner may by order revoke, deny, or further condition the use of this exemption with respect to ~~any~~ a particular offering when the commissioner finds that such an order is necessary ~~for the protection of~~ to protect the investor or a person engaged in securities transactions and is in the public interest.

~~(3)~~ (20) Upon the entry of an order under subsection ~~(2)~~ (22) of this rule, the commissioner shall promptly notify the

issuer of the securities that an order has been entered and of the reasons therefore and that, if requested by the issuer within 15 days after the receipt of the commissioner's order, the matter will be promptly set down for hearing. If no hearing is requested within 15 days and none is ordered by the commissioner, the order will remain in effect until it is modified or vacated by the commissioner. If a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing, may affirm, modify, or vacate the order.

AUTH: 30-10-105 and 30-10-107, MCA
IMP: 30-10-105, MCA

3. The text of the proposed new rules is as follows:

Rule I WHOLE MORTGAGES EXEMPTION (1) By authority delegated to the commissioner in 30-10-105, MCA, a transaction in a bond or other evidence of indebetedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, is exempt from the registration requirements of 30-10-201(1) through 30-10-201(3), MCA, and 30-10-202, MCA, if the entire mortgage, deed of trust, or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit.

AUTH: 30-10-105 and 30-10-107, MCA
IMP: 30-10-105, MCA

Rule II CERTIFICATES OF DEPOSIT EXEMPTION (1) By authority delegated to the commissioner in 30-10-105, MCA, a transaction in a certificate of deposit issued by and representing an interest in or a debt of or guaranteed by a savings and loan association or a building and loan or similar association, other than those described in 30-10-104(4), MCA, is exempt from the registration requirements of 30-10-201(1) through 30-10-201(3), MCA and 30-10-202, MCA, if:

(a) it is sold through a registered broker-dealer and registered salesman;

(b) the issuer savings and loan association is a member of the federal savings and loan insurance corporation; and

(c) the sums representing the certificate of deposit are fully insured by the federal savings and loan insurance corporation.

AUTH: 30-10-105 and 30-10-107, MCA
IMP: 30-10-105, MCA

4. The amendments to ARM 6.10.101 identify specifically the rule that applies to exempt securities or exempt transactions. The amendments to ARM 6.10.102 add definitions for terms used in the rules but not defined in the Securities Act of Montana and to clarify existing rule definitions. The amendments to ARM 6.10.103 specify the instances in which sales material must be filed with the commissioner. The amendments to ARM 6.10.104 eliminate obsolete provisions and describe the escrow requirement authorized in 30-10-206(2), MCA. The amendments to ARM 6.10.105 clarify that waivers remain in existence only while a security is in escrow. ARM 6.10.106 is

being repealed because the commissioner lacks authority to enforce it. ARM 6.10.107 is being repealed because it imposes unnecessary requirements. The amendments to ARM 6.10.108 clarify that an issuer must file a sales report annually while registered and upon completion, discontinuance, or termination of the sale of registered securities and that a complete sales report must include information only for sales in this state. ARM 6.10.109 is being repealed because it imposes unnecessary requirements. The amendments to ARM 6.10.110 eliminate obsolete provisions and prevent a promoter from assessing a penalty against a subscriber who subsequently changes his mind and refuses to purchase securities in a new company. To promote uniformity in regulation, ARM 6.10.112 through ARM 6.10.119, providing recordkeeping requirements, are being repealed and recordkeeping requirements are instead proposed in ARM 6.10.122. The amendments to ARM 6.10.120 correct outlining problems, clarify that a subject of an order or judgment entered by the SEC who is registered by the SEC is not barred from obtaining an exemption for securities he wishes to offer or sell, and change the name of the exemption provided in the rule to reflect that it is not a uniform exemption. The amendments to ARM 6.10.121 implement statutory authority to regulate investment adviser representatives; specify which applicants for registration must pass an examination and, if an examination is necessary, which examination the commissioner requires; specify the place where an application for registration or termination of registration must be filed; and clarify that an investment adviser must advise the commissioner if it uses as an investment adviser representative an individual who is not licensed as such because he is licensed as a salesman. The amendments to ARM 6.10.122 describe the books and records that each broker-dealer and each branch of a broker-dealer must keep, maintain, and make available to the commissioner. The amendments to ARM 6.10.123 describe the books and records that each investment adviser must keep, maintain, and make available to the commissioner. The amendments to ARM 6.10.124 are reasonably necessary because the exemption that the rule currently provides requires that certain specific items of disclosure be provided to prospective investors but does not specify the amount of disclosure that must be made with respect to each item. Most filings currently filed pursuant to the exemption currently provided by the rule would probably violate 30-10-301, MCA, because they do not provide adequate disclosure to potential investors. If the commissioner were to review current filings for compliance with 30-10-301, MCA, the issuers would likely have to obtain professional assistance to ensure compliance. There would be little incentive to use the existing exemption. The proposed amendments alleviate questions of adequate disclosure and allow small businesses to raise investment capital without having to go to the expense of registration. The amendments require an issuer to use a fill-in-the-blank disclosure form that, if properly completed, provides information similar to that contained in a professionally prepared prospectus covering the securities of a small issuer. A potential investor provided

the fill-in-the-blank disclosure form would have sufficient disclosure about the offered security. Use of the fill-in-the-blank disclosure form would protect the promoter of a new venture from being accused of omitting material facts and provide a clear understanding of the disclosures he must make to avoid registration. Rule I is reasonably necessary to promote uniform regulation of securities among the state by exempting, from registration, transactions involving whole mortgages. Rule II is reasonably necessary to exempt from registration certificates of deposit issued by an out-of-state savings and loan association.

5. Interested persons may present oral or written comments at the hearing. Written comments may also be submitted to Kathy M. Irigoin, State Auditor's Office, P.O. Box 4009, Helena, Montana, 59604, before June 27, 1988.

6. Kathy M. Irigoin has been designated to preside over and conduct the hearing.

7. The commissioner's authority to amend, repeal, and adopt the rules is 30-10-107, MCA, and the rules implement Title 30, chapter 10, parts 1 through 3, MCA.

Andrea "Andy" Bennett
State Auditor and
Commissioner of Securities

Certified to the Secretary of State this 16th day of May, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF VETERINARY MEDICINE

In the matter of the proposed amendment of a rule pertaining to fees.) NOTICE OF PROPOSED AMENDMENT OF 8.64.402 FEE SCHEDULE)

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested persons:

1. On June 25, 1988, the Board of Veterinary Medicine proposes to amend the above-stated rule.

2. The proposed amendment of 8.64.402 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-1783, Administrative Rules of Montana)

8.64.402 FEE SCHEDULE

(1)	Veterinarians		
(a)	Annual renewal of certificate of registration		$25.00
(b)	Restoration	~~25.00~~	50.00
(c)	Application for examination		75.00

Auth: 37-1-134, 37-18-307, MCA Imp: 37-18-307, MCA

REASON: The board is raising the restoration fee due to the increased cost of sending late notices (return receipt requested), the cost of running duplicate renewals, and the time spent by the board and staff on reviewing applications for restoration of license.

3. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Veterinary Medicine, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than June 23, 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 Veterinary Medicine, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than June 23, 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

the fill-in-the-blank disclosure form would have sufficient disclosure about the offered security. Use of the fill-in-the-blank disclosure form would protect the promoter of a new venture from being accused of omitting material facts and provide a clear understanding of the disclosures he must make to avoid registration. Rule I is reasonably necessary to promote uniform regulation of securities among the state by exempting, from registration, transactions involving whole mortgages. Rule II is reasonably necessary to exempt from registration certificates of deposit issued by an out-of-state savings and loan association.

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(c)	Application for examination		75.00

Auth: 37-1-134, 37-18-307, MCA Imp: 37-18-307, MCA

REASON: The board is raising the restoration fee due to the increased cost of sending late notices (return receipt requested), the cost of running duplicate renewals, and the time spent by the board and staff on reviewing applications for restoration of license.

3. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Veterinary Medicine, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than June 23, 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 Veterinary Medicine, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than June 23, 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 75 based on the licensees in Montana.

BOARD OF VETERINARY MEDICINE
WILLIAM J. QUINN, D.V.M.
PRESIDENT

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

Certified to the Secretary of State, May 16, 1988.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of Teaching Assignments, Definitions and Endorsement Information	) NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF ARM 10.55.303, TEACHING ASSIGNMENTS, ARM 10.57.102, DEFINITIONS, AND ARM 10.57.301, ENDORSEMENT INFORMATION

TO: All Interested Persons

1. On June 17, 1988, at 10:00 a.m., or as soon thereafter as it may be heard, a public hearing will be held in Room 303, Workmen's Compensation Building, 5 South Last Chance Gulch, Helena, Montana, in the matter of the amendment of ARM 10.55.303, Teaching Assignments, ARM 10.57.102, Definitions and ARM 10.57.301, Endorsement Information.

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

10.55.303 TEACHING ASSIGNMENTS (1) and (a) remain the same.

(b) Teachers assigned in grade 7 or 8 who hold a secondary certificate may teach in subject areas for which they hold no endorsement if they have 15 quarter hour (10 semester) credits of preparation in the assigned subject area and are assigned by September 1, 1988. The 15 credits shall include a methods course in the teaching of that subject area appropriate to the grade levels. Transcripts reflecting the 15 specific subject credits including a methods course must be submitted with the 1988-89 Fall Report for evaluation and certification by the certification office. If this requirement is not met, a deviation would occur on the school's accreditation status. Teachers not meeting this requirement, or those who are reassigned or moved to a different school, shall need endorsement.

(c) and (d) remain the same.

(2) Certification at the elementary level based on a bachelor's degree entitles the holder to teach in grades kindergarten through ~~nine~~ eight. Exception: In schools organized as a junior high school, teachers with such certification who are assigned at the ninth grade level by September 1, 1988, shall have a minimum of 30 quarter (20 semester) credits in all subjects ~~which they teach at the ninth grade~~ for which they hold no endorsement. Transcripts reflecting the 30 specific subject credits must be submitted with the 1988-89 Fall Report for evaluation and certification by the certification office. If this requirement is not met, a deviation would occur on the school's accreditation status. Teachers not meeting this requirement, or those who are reassigned or moved to a different school, shall need endorsement.

AUTH: Sec. 20-7-101 MCA
IMP: Sec. 20-4-101, 20-4-102 MCA

3. The board is proposing this amendment to delete an exception from the existing rules and provide continuity in the present rules.

10.57.102 DEFINITIONS (1) through (8) remain the same.

(9) "Elementary endorsement" of class 1, class 2 and class 5 certificate means the holder is authorized to teach in grades kindergarten through eight. ~~nine, except that ninth grade teachers shall have a minimum of 30 quarter (20 semester) credits in all areas in which they teach.~~

(10) through (21) remain the same.

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

3. The board is proposing the amendment to the rule to remove a misleading statement from the certification rules since, in practice, an elementary teacher cannot teach in the secondary level.

10.57.301 ENDORSEMENT INFORMATION (1) through (8) remain the same.

(9) An endorsement may be dropped from a teaching or administrative certificate at the end of the valid term of the certificate provided minimum certification requirements (as outlined in 10.57.402 or 10.57.403) are met without that endorsement. The applicant must request removal of the endorsement in writing and indicate where he/she is teaching/administering, if appropriate. The school district will be advised of the action. Once an endorsement has been removed from a certificate, future endorsement in that area is contingent on verification of completion of a current college approved program.

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

3. The board is proposing this amendment to provide a procedure that allows for the removal of an endorsement while protecting interested parties.

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 June 23, 1988.

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

Alan Nicholson
ALAN NICHOLSON, CHAIRMAN
BOARD OF PUBLIC EDUCATION

BY: Claudette Morton

Certified to the Secretary of State May 16, 1988.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.25.511 relating to Coal Gross Proceeds on Processing, Refining, Royalties for Contract Sales Price.	)))))	NOTICE OF PUBLIC HEARING on ARM 42.25.511 relating to Coal Gross Proceeds on Processing, Refining, Royalties For Contract Sales Price

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On July 5, 1988, the Department of Revenue proposes to amend ARM 42.25.511 relating to Coal Gross Proceeds on Processing, Refining, Royalties.

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

42.25.511 DETERMINATION OF CONTRACT SALES PRICE (1) The department shall consider the date the coal is loaded for final transportation to the purchaser as the time for determining the contract sales price of the coal. To arrive at FOB mine price any shipping or any other expenses incurred after the coal is prepared for shipment may be excluded from the contract revenue. The contract sales price will be determined by deducting from the coal sales value ~~F.O.B. mine price amounts charged to the purchaser to pay taxes on production.~~ (a) the allowance for federal, state, and Indian royalties, (b) the processing allowance resulting from imputing value according to 42.25.515, and (c) the amounts charged to the purchaser to pay taxes on production.

(2) In computing production taxes the operator may include that amount which he expects to pay or the amount charged to the purchaser. If the taxes actually paid on the production are more or less than the production taxes deducted and affect the contract sales price, the difference shall be an adjustment in production taxes deducted for the following year.

(3) ~~The formula for computing contract sales price shall be FOB mine price equals contract sales price plus severance tax plus resource indemnity trust tax gross proceeds tax. In computing the contract sales price, the calendar year sales or revenue will be the known reference point.~~ Contract sales price should be computed for each contract individually with the exception of those contracts for which the department imputes value. The resource indemnity trust tax and the gross proceeds tax deductions shall be the actual amount charged to the purchaser.

(4) remains the same. AUTH, 15-23-108 MCA; IMP, 15-23-701 and 15-23-702 MCA.

3. ARM 42.25.511 is proposed to be amended because in 1983

the legislature added deductions for federal, state, and Indian royalties and value added by processing coal. This amendment adds those deductions to the rule which discusses the computation of contract sales price.

The starting point in the computation of contract sales price has been referred to as "FOB mine price" in this rule. It has been changed to "coal sales value", a more general term, to include situations when FOB mine price is not the value from which contract sales price is computed. For example, when value is imputed according to 15-35-107(a), (c), of (d) MCA.

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

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

no later than July 8, 1988.

5. If a person who is directly affected by the proposed amendments 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 Cleo Anderson at the above address no later than July 8, 1988.

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

JOHN D. LaPAVER, Director
Department of Revenue

Certified to Secretary of State 5-16-88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.25.1115 relating to Deduction For New Reduction Equipment Related To Mines Net Proceeds.	NOTICE OF PUBLIC HEARING on ARM 42.25.1115 relating to Deduction For New Reduction Equipment Related To Mines Net Proceeds.

TO: All Interested Persons:

1. On June 29, 1988, at 10:30, a public hearing will be held in the 4th Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the amendment of ARM 42.25.1115 relating to Deduction For New Reduction Equipment Related to Mines Net Proceeds.

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

42.25.1115 COSTS OF MILLING~~, SMELTER,~~ AND REDUCTION WORKS

(1) remains the same.

(2) An amount equal to six percent of the assessed valuation of the mill~~, smelter,~~ or reduction works, for the calendar year for which the return is made, may be deducted if the person working the mine or deposit also operates the mill~~, smelter,~~ or reduction works and mills~~, smelts,~~ or treats the ore or deposit mined by him. However, if the mill~~, smelter,~~ or reduction works is used to mill~~, smelt,~~ or treat the ore or deposit from any other mine or mines, then the amount of such depreciation must be apportioned so that only the proper proportionate part thereof will be included in this return.

(3) Milling and reduction expenses are either (a) repairs or replacements or (b) additions or betterments to the plant. Costs for repairs and replacements which are fully deductible when incurred may not be added to the amortization base. AUTH, 15-23-108 MCA; IMP, 15-23-503 MCA.

3. Amendments to ARM 42.25.1115 are proposed to explain that reduction expenses fit into one of two deduction categories, but not both. This amendment limits the deductible amount to actual cost for replacements and advises taxpayers that replacement costs may not be added to the amortization base for plant additions and betterments.

Also, all language referring to smelters and smelting has been deleted since this tax no longer pertains to metals. Metals are subject to the metal mines gross proceeds tax.

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:

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

no later than July 2, 1988.

5. Paul Van Tricht, Tax Counsel, Department of Revenue, Office of Legal Affairs, has been designated to preside over and conduct the hearing.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 5-16-88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rules I, II and III relating to Partnerships In Apportionment Formula.	NOTICE OF PUBLIC HEARING on the PROPOSED ADOPTION of Rules I, II and III relating To Partnerships In Apportionment Formula.

TO: All Interested Persons:

1. On June 16, 1988, at 1:30, a public hearing will be held in the 4th Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the adoption of rules I, II and III relating to Partnerships In Apportionment Formula.

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

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

RULE I PARTNERSHIP DEFINED (1) For purposes of rules I and II, a partnership is defined as an enterprise involving undivided joint ownership and includes but is not limited to joint ventures and trusts with joint beneficiaries.
AUTH. 15-31-501 and 15-31-313 MCA; IMP. 15-31-305 MCA.

RULE II TREATMENT OF PARTNERSHIPS IN THE APPORTIONMENT FORMULA (1) If the operations of the partnership are unitary with the business operations of the corporate partner, the corporate partner's prorata share of the partnership's property, payroll and sales will be included in the computation of the apportionment factors.

(2) The definition of unitary will be the same as the definition of a unitary business as outlined in 15-31-301(2). However, the corporate partner need not own in excess of 50% of the partnership for the partnership to be unitary.
AUTH. 15-31-501 and 15-31-313 MCA; IMP. 15-31-305 MCA.

RULE III PARTNERSHIPS - NON-BUSINESS INCOME (1) A partnership that is not part of a corporate partner's unitary business operation will be treated as follows:

(a) The corporate partner's share of partnership income will not be included in business income to be apportioned, but allocated to the states where the partnership operates based upon the apportionment formula outlined in 15-31-305.

(2) Gain or loss from the sale of a non-unitary partnership interest is allocable to this state in the ratio of the original cost of partnership tangible property in this state to the original cost of partnership tangible property everywhere, determined at the time of sale. In the event that more than 50% of the value of a partnership's assets consists of

intangibles, gain or loss from the sale of the partnership interest shall be allocated to this state in accordance with the sales factor of the partnership for its first full tax period immediately preceding its tax period during which the partnership interest was sold. AUTH. 15-31-501 MCA; IMP. 15-31-304 and 15-31-305 MCA.

4. The Department is proposing rule I to define what a partnership is.

Rule II is needed to outline the treatment of partnerships for apportionment factor purposes and define what constitutes a unitary partnership for purposes of inclusion in the apportionment factors. Before the property, payroll and sales of any business may be included in the computation of the apportionment factor, a unitary business relationship must exist between the payor and the payee. This criteria has been upheld in numerous court cases involving the unitary business principle including recent U.S. Supreme Court cases involving ASARCO and Woolworth.

Rule III is needed to clarify the treatment of non-unitary partnerships for Montana corporate license or income tax purposes. Rule III is also needed to correct a potential problem that has occurred in California regarding the disposal of a non-unitary partnership interest. In the California case a non-unitary partnership with 100% of it's business operations in California was disposed of by its corporate partners. The California court assigned the gain on the sale of the partnership to the corporate partner's commercial domicile which was not in California. The Department believes the gain should be assigned to those states where the partnership's tangible property is located. Without this rule, Montana would be faced with the same situation as in California.

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

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

no later than June 23, 1988.

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

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 5/16/88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rule I relating to "Point Of Beneficiation" Mines Net Proceeds.	NOTICE OF PUBLIC HEARING on the PROPOSED ADOPTION of Rule I relating to "Point Of Beneficiation" Mines Net Proceeds.

TO: All Interested Persons:

1. On June 29, 1988, at 9:30, a public hearing will be held in the 4th Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the adoption of rule I, relating to "Point of Beneficiation" Mines Net Proceeds.

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

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

RULE I MINING VERSUS NONMINING PROCESSES (1) The gross value of minerals subject to tax will be determined at the point where mining processes end and manufacturing or non-mining processes begin. In general, mining includes overburden removal, blasting, loading, transportation between mining processes, sorting, reduction and drying. Processes which will be considered non-mining are fine grinding, burning or calcining, blending with other materials, and treatment effecting a chemical change and packaging.

The points at which mining processes end for specific minerals are listed below.

Mineral	Valuation Point
Bentonite	after crushing and drying
Gypsum	after crushing
Limestone	after crushing
Talc	after crushing and sorting
Vermiculite	after screening

No deductions will be allowed for costs incurred beyond the valuation point. AUTH. 15-23-108 MCA; IMP. 15-23-502 and 15-23-503 MCA.

4. The Department is proposing rule I because the mines net proceeds statute does not address the point at which a mineral is to be valued for this tax. The Montana Supreme Court decision in the Pfizer vs. Madison County represents the first authority on this subject. This rule establishes the guidelines for minerals not at issue in that case and also provides guidelines for future determinations of the valuation point for other minerals.

The Internal Revenue Service also makes a distinction between mining and non-mining processes for determining depletion allowances. The valuation points established in this rule are well within the guidelines set forth in the Internal Revenue Code and regulations.

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

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

no later than July 2, 1988.

6. Paul Van Tricht, Tax Counsel, Department of Revenue, Office of Legal Affairs, has been designated to preside over and conduct the hearing.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 5-16-88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.26.236 relating to Exclusion of Royalties From Property Factor	NOTICE OF PUBLIC HEARING on ARM 42.26.236 relating to Exclusion of Royalties From Property Factor

TO: All Interested Persons:

1. On June 16, 1988, at 2:30, a public hearing will be held in the 4th Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the amendment of ARM 42.26.236 relating to Exclusion of Royalties from Property Factor.

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

42.26.236 VALUATION OF RENTED PROPERTY (1) through (3)(a)(ii) remain the same.

(b) "Annual rent" does not include:

(i) incidental day-to-day expenses such as hotel or motel accommodation, daily rental of automobiles, etc.

(ii) royalties based on extraction of natural resources, whether represented by delivery or purchase. For this purpose, a royalty includes an amount paid to a holder of an interest in real property which constitutes a sharing of current or future production of natural resources from such property, whether denominated as a royalty, advance royalty, rental, or otherwise.

(4) remains the same. AUTH, 15-1-201, 15-31-313 and 15-31-501 MCA; IMP, 15-1-601 MCA and Title 15, chapter 31, part 3, MCA.

3. ARM 42.26.236 is proposed to be amended because taxpayers have raised the argument that royalties paid on oil or gas production is a form of rent expense and therefore should be capitalized times 8 and included in the property factor for corporate license tax purposes.

The corporation tax division has reviewed this issue with the MTC and other MTC state members. The consensus has concluded that a royalty payment is not a form of rent expense and should not be included in the property factor.

We have consistently taken the position that a royalty payment is in effect a reimbursement to the royalty owner from the producer for the royalty owner's share of the oil and gas production i.e. the producer is purchasing the royalty owner's share of production by making the royalty payment.

In addition, the United States Supreme Court on several occasions has held that holders of a royalty interest are deemed to have an economic interest in the oil and gas subject to depletion and therefore are entitled to a depletion allowance

under the federal income tax laws. On the other hand recipients of rents are not entitled to any such depletion allowance.

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:

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

no later than June 23, 1988.

5. Eric Fehling, Tax Counsel, Department of Revenue, Office of Legal Affairs, has been designated to preside over and conduct the hearing.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 5/16/88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.25.1112 relating to Machinery Expense Deduction For Mines Net Proceeds.	NOTICE OF PUBLIC HEARING on ARM 42.25.1112 relating to Machinery Expense Deduction For Mines Net Proceeds.

TO: All Interested Persons:

1. On June 29, 1988, at 1:30, a public hearing will be held in the 4th Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the amendment of ARM 42.25.1112 relating to Machinery Expense Deductions for Mines Net Proceeds.

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

42.25.1112 EXPENSES RELATED TO MACHINERY (1) All ~~monies expended~~ expenditures for machinery may be deducted in computing net proceeds as provided under ARM 42.25.1102 and 42.25.1103.

(2) Machinery shall include all that is used in the construction, sinking, or running of shafts, tunnels, drifts, or other works in the extracting or mining of the ore deposit.

(3) In open pit, ~~placer,~~ and quarry mining operations, heavy equipment, including shovels, draglines, dozers, graders, loaders, trucks, railroad cars, locomotives, drilling and pumping equipment used in the actual mining area (extracting ore to point of reduction~~, beneficiation of shipping, as related to the individual operations~~) are to be considered as costs of machinery used in extracting and mining the mineral.

(4) Expenditures ~~Monies expended~~ for ~~the rental of~~ machinery or equipment rental used in the mining operations are ~~considered a~~ deductible. ~~item.~~

(5) No expenditures for ~~monies invested in~~ machinery including leased and rented machinery shall be allowed as a deduction unless this machinery ~~represented by such money shall be returned~~ is reported to the county assessor of the county in which such mine is located for assessment purposes.

(6) Deductions for mining equipment shared by otherwise separate mining operations must be pro rated to each operation. Tonnage removed, manhours expended, or other appropriate criteria may be used to allocate the expenses.

(7) Only the actual cost to acquire machinery and the subsequent direct operating, maintenance, and insurance costs are deductible. Personal property taxes paid on machinery are not deductible. AUTH, 15-23-108, MCA; IMP, 15-23-503.

3. ARM 42.25.1112 is proposed to be amended because several changes were needed to update this rule. All the old references to "monies" were changed. The word "placer" was deleted since this tax no longer applies to metals. The language "beneficiation of shipping" was eliminated.

Machinery expenses have been pro rated in the past, to solve the problem of computing deductions for shared equipment, but the procedure has never been described in a rule.

The Anaconda v. Junod Montana Supreme Court decision stated that personal property taxes on mining equipment are not deductible. This language is added to the rule for clarity.

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:

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

no later than July 2, 1988.

5. Paul Van Tricht, Tax Counsel, Department of Revenue, Office of Legal Affairs, has been designated to preside over and conduct the hearing.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 5-16-88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.25.1101 and 42.32.101 relating to Scoria and Travertine For RITT and Net Proceeds.	))))	NOTICE OF PUBLIC HEARING on ARM 42.25.1101 and 42.32.101 relating to Scoria and Travertine For RITT and Net Proceeds.

TO: All Interested Persons:

1. On June 29, 1988, at 2:30, a public hearing will be held in the 4th Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the amendment of ARM 42.25.1101 and 42.32.101 relating to Scoria and Travertine for RITT and Net Proceeds.

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

42.25.1101 DEFINITIONS (1) remains the same.

(2) "Mineral" includes precious or semiprecious stones or gems, gold, silver, lead, coal, lime rock, granite, marble, travertine, ~~gravel,~~ talc, phosphate, and other minerals, rock, or stone extracted from underground mines, ~~placer mines,~~ quarries, open pits, dumps, or tailings.

(3) "Reduction works" shall be meant to include ~~smelters,~~ mills, crushing, washing, or treatment plants which prepare the product mined to a point where it has marketable value. AUTH, 15-31-501 MCA; IMP, 15-31-201 and 15-31-202 MCA.

42.32.101 TERMINOLOGY (1) For resource indemnity trust tax purposes, mineral is defined as any precious stones or gems, gold, silver, copper, coal, lead, scoria, travertine, petroleum, natural gas, oil, uranium, or other non renewable merchantable products extracted from the surface or subsurface of the state of Montana, including sand and gravel. AUTH, 15-1-201 MCA; IMP, 15-38-103 and 15-38-105 MCA.

3. ARM 42.25.1101 and 42.32.101 are proposed to be amended because the definition of mineral in 15-38-103 MCA does not specifically list scoria or travertine as taxable minerals, but is does state that "other nonrenewable merchantable products extracted" are taxable. Scoria and travertine are non-renewable merchantable products and are subject to the Resource Indemnity Trust Tax. This amendment adds scoria and travertine to the list of taxable minerals.

Travertine, which is a dense concretionary form of limestone, is subject to the mines net proceeds tax as is ordinary limestone. Travertine is included in the statutory language "other valuable mineral" but should also be specifically identified as a taxable mineral in this rule. Gravel should be stricken from the list of taxable minerals because of the Tressler-Lowe v. Department of Revenue district

court decision which held that sand and gravel are not subject to the net proceeds tax. The references to "placer mines" and "smelters" have been stricken since the net proceeds tax no longer applies to metals.

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:

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

no later than July 2, 1988.

5. Paul Van Tricht, Tax Counsel, Department of Revenue, Office of Legal Affairs, has been designated to preside over and conduct the hearing.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 5-16-88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMEND- MENT of ARM 42.25.512 Imputed Valuation of Coal.	NOTICE OF PUBLIC HEARING on ARM 42.25.512 Imputed Valuation of Coal.

TO: All Interested Persons:

1. On June 16, 1988, at 9:30 a.m., a public hearing will be held in the 4th Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the amendment of ARM 42.25.512 relating to Imputed Valuation.

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

42.25.512 IMPUTED VALUATION (1) When coal is sold or used under the following circumstances, the department may impute the value;

(a) the operator of a coal mine is using the produced coal in an energy conversion or other manufacturing process;

(b) a person sells coal under a contract which is not an arm's length agreement; ~~or~~ and the transaction price is less than market value;

(c) the person neglects or refuses to file a statement.

(2) The department will consider market value to mean the ~~amount determined by multiplying the~~ FOB mine price of a similar ton of coal, as established by the marketplace. ~~at the time the sale was negotiated, by the number of tons of coal sold.~~ In determining said FOB mine prices, the department will consider the contract term, ~~and other contract conditions as they affect the current FOB mine price of the similar ton of coal.~~ tonnage, quality, Btu rating, and any other appropriate comparability criteria.

(3) The department will not impute a value according to (1)(b) unless the price differential is more than 10 cents/ton or 1% of FOB mine price, whichever is greater.

(4) The department will maintain the confidentiality of all comparable contract data and will use contract data provided by the producer in question whenever possible. AUTH, 15-23-108; IMP, 15-23-701 and 15-23-702 MCA.

3. Paragraph (1)(b) ARM 42.25.512 is proposed to be amended to address the question of whether the department will always impute value in the case of a non arm's length sale. The rule states that the department will adjust the sales price only in those cases where the price does not reflect market value. This interpretation is consistent with 15-35-107 MCA which states that the department may impute a value to the coal which approximates market value when a non arm's length sales contract exists.

The language relating to computing value by multiplying a per

ton price by the quantity has been deleted. The valuation question is addressed in this rule as value or price per ton. It follows logically that the gross value of production is computed by multiplying production quantity by unit value.

The "other contract conditions" are specifically listed by the proposed amendment. A tolerance or threshold for imputing value in (1)(b) is established to allow for price variations related to outside factors. Paragraph (4) emphasizes the fact that all customer specific contract data will be kept confidential by the department in accordance with the provisions of 15-35-205 MCA which require that coal sales agreements be kept confidential.

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:

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

no later than June 24, 1988.

5. Paul Van Tricht, Tax Counsel, Department of Revenue, Office of Legal Affairs, has been designated to preside over and conduct the hearing.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 5-16-88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMEND-) MENT of ARM 42.25.1116 re-) lating to Mines Net Proceeds)	NOTICE OF PROPOSED AMENDMENT of ARM 42.25.1116 relating to Mines Net Proceeds NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On July 5, 1988, the Department of Revenue proposes to amend ARM 42.25.1116 relating to Mines Net Proceeds.

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

42.25.1116 TRANSPORTATION EXPENSES (1) Cost of transporting crude ore or deposit to mills~~,--smelter,~~ or reduction works may be deducted in computing net proceeds as provided under ARM 42.25.1102 and 42.25.1103. Included in these deductions shall be costs actually expended for hauling, freight charges, and other expenses ~~connected~~ related directly ~~with~~ to transporting the ore or deposit from the mine to the mill, ~~smelter~~, or reduction works. Transportation expenses incurred beyond the point of mineral valuation for net proceeds purposes are not deductible. AUTH, 15-23-503 MCA; IMP, 15-23-503 MCA.

3. ARM 42.25.1116 is proposed to be amended to eliminate the reference to smelters. This language relates to metals which are no longer subject to the Mines Net Proceeds Tax. When metal mines became subject to the Metal Mines Gross Proceeds Tax this net proceeds rule was not changed.

The last sentence was added to emphasize the fact that expenses, in this case transportation, and valuation stop at the same point. The Montana Supreme Court acknowledged this in Pfizer, Inc. v. Madison County in 1973.

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

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

no later than June 24, 1988.

5. If a person who is directly affected by the proposed amendments 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 Cleo Anderson at the above address no later than June 24, 1988.

6. If the agency receives requests for a public hearing

on the proposed amendments 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 no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 5-16-88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.25.503 relating to Failure to File Coal Gross Proceeds Returns	NOTICE OF PROPOSED AMENDMENT of ARM 42.25.503 relating to Failure to File Coal Gross Proceeds Returns NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On July 5, 1988, the Department of Revenue proposes to amend ARM 42.25.503 relating to Failure to File Coal Gross Proceeds Returns.

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

42.25.503 FAILURE TO FILE (1) Any person producing coal in this state must, on or before March 31 each year, file with the department of revenue a coal gross proceeds tax return for coal produced in the preceding calendar year. ~~who fails to file department of revenue form "gross proceeds #1" by March 31, must do so within 10 days after receipt of demand by the department.~~

(2) Any person refusing or neglecting to file after receipt of demand by the department will have the value of his coal computed by the department for gross proceeds tax purposes according to ARM 42.25.512. AUTH, 15-23-108 MCA; IMP, 15-23-701 MCA.

3. ARM 42.25.503 is proposed to be amended to eliminate the conflict with 15-23-701 MCA caused by language in the existing rule. The gross proceeds tax return is due March 31 each year not 10 days after the department of revenue notifies a taxpayer that his return has not been filed.

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

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

no later than June 24, 1988.

5. If a person who is directly affected by the proposed amendments 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 Cleo Anderson at the above address no later than June 24, 1988.

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

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 5-16-88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rule I and Rule II relating to Installment Gains - Corporations.	NOTICE OF THE PROPOSED ADOPTION of Rule I and II relating to Installment Gains - Corporations.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On July 5, 1988, the Department proposes to adopt rules I and rule II relating to Installment Gains.

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

RULE I SPECIAL RULES RELATED TO INSTALLMENT SALES (1) The amount of the gain or loss from the sale of assets used in the regular course of business which is apportioned to this state shall be calculated separately if the taxpayer elects to report the gain on the installment method. The separate calculation shall be made:

(a) for installment sales of Montana assets which generate net gains in excess of $2,500,000, or

(b) installment sales of major assets located outside the state of Montana which generate net gains in excess of $10,000,000.

(2) The separate calculation shall be made as follows:

(a) for purposes of the sales factor the gross receipts from the sale shall be included in the sales factor in the year of the sale unless specifically excluded from the sales factor under another part of ARM 42.26.263(1)(a);

(b) for purposes of calculating apportionable business income from the installment sale, the factors of the year of sale shall be utilized in apportioning the gain regardless of the year in which the income is reported; and

(c) the factors of the year of sale shall be applied to the gain from the sale as it is reported by the taxpayer to determine the amount of business income from the sale which is apportionable to this state, unless the gain is accelerated under Rule II. AUTH, 15-31-501 and 15-31-313 MCA; IMP, 15-31-305 MCA.

RULE II UNREPORTED INCOME ON INSTALLMENT OBLIGATION IN YEAR OF DISSOLUTION (1) Where a taxpayer elects to report income arising from the sale or other disposition of property as provided under this regulation and the entire income therefrom has not been reported prior to the year that the taxpayer ceases to be subject to tax under 15-31-301 MCA, the unreported income shall be included in the measure of the tax for the last year in which the taxpayer is subject to tax under 15-31-301 MCA. AUTH, 15-31-501 and 15-31-313 MCA; IMP, 15-31-305 MCA.

3. Rule I addresses the situation where a taxpayer

reports the gain on the sale of an asset on the installment basis over a period of years. If the taxpayer has multistate operations, the question arises as to what portion of the gain that is reported each year is apportioned to Montana. The rule states that in computing Montana's portion of the gain that is recognized each year, the taxpayer must use the apportionment factor that was determined in the year of the actual sale. Since that was the year in which the income was earned, that must also be the year in which Montana's portion of the income must be determined. This procedure does not necessarily work to the taxpayer's advantage or disadvantage. However, it will more accurately reflect the amount of income earned in Montana.

Rule II is very similar to Rule I except it deals with the situation where the taxpayer, who is reporting gains on the installment basis, withdraws from the state prior to reporting the entire gain. A rule is needed to explain how the state would deal with that portion of the installment gain that remained unreported. This rule properly states that that portion of unreported gain must be reported in the last year in which the taxpayer operates in the state. This rule will ensure that all income earned in Montana will be reported and that merely by leaving the state will not allow the taxpayer to avoid reporting income.

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

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

no later than June 24, 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 Cleo Anderson at the above address no later than June 24, 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 no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 5-16-88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION) of Rule I relating to Limit-) ation On Charitable Contri-) bution Deduction for Corp-) orations.)	NOTICE OF THE PROPOSED ADOPTION of Rule I relating to Limitation On Charitable Contribution Deduction for Corporations.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On July 5, 1988, the Department proposes to adopt rule I relating to Limitation On Charitable Contribution Deduction.

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

RULE I LIMITATION ON CHARITABLE CONTRIBUTION DEDUCTION

(1) The charitable contribution deduction provided for in 15-31-114 cannot exceed 10% of the Montana taxable income figured without regard to the charitable contribution deduction or any net operating loss carryback to that year.

(2) This limitation can create a difference in the amount of the deduction claimed for Montana and federal income tax purposes. When a difference exists, the taxpayer is required to include a reconciliation between the Montana deduction and the federal deduction. If the federal deduction includes any carryover of contributions previously made, a schedule must be included showing the amount and the year of such contributions. The Montana deduction must be adjusted accordingly for any contributions previously deducted for state purposes and not deducted in prior years on the federal return. AUTH, 15-31-501 MCA; IMP, 15-31-114(7)(a) MCA.

3. A rule is necessary to clarify the provisions of 15-31-114(7) MCA. Specifically, that section states "charitable contributions and gifts that qualify for deduction under section 170 of the Internal Revenue Code" are deductible. Section 170 of the IRC states that the deduction for charitable contributions is limited to 10% of federal taxable income figured without regard to the contribution deduction and certain other deductions.

The reference in 15-31-114(7) MCA to Section 170 of the IRC was intended to clarify what types of contributions qualify for the deduction and the methodology to be used in computing the limitation. However, 15-31-114(7) MCA was not intended to restrict the deduction for charitable contributions at the federal level. Since Montana taxable income is normally greater than federal taxable income, this rule will provide the taxpayer the benefit of claiming a larger deduction for charitable contributions.

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

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

no later than June 24, 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 Cleo Anderson at the above address no later than June 24, 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 no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 5-16-88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.26.236 relating to Valuation of Rented Property	NOTICE OF PROPOSED AMENDMENT of ARM 42.26.236 relating to Valuation of Rented Property
	NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On July 5, 1988, the Department of Revenue proposes to amend ARM 42.26.236 relating to Valuation of Rented Property.

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

42.26.236 VALUATION OF RENTED PROPERTY (1) through (3)(a)(ii) remain the same.

(iii) any amount payable for a delay rental as defined by U.S. Treasury regulations Section 1.612-3(c)(1)(1980) which defines delay rental as follows: A delay rental is an amount paid for the privilege of deferring development of the property and which could have been avoided by abandonment of the lease, or by commencement of development operations, or by obtaining production.

(3)(b) through (4) remains the same. AUTH, 15-31-501 MCA; IMP, 15-31-307.

3. ARM 42.26.236 is proposed to be amended because the question of whether delay rentals are considered a rent expense and includable in the apportionment formula needs to be addressed in a rule. Based upon the nature of a delay rental, the department considers it to be a rent expense and to be included in the apportionment formula. This treatment is consistent with most other states that have a similar apportionment statute.

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

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

no later than June 24, 1988.

5. If a person who is directly affected by the proposed amendments 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 Cleo Anderson at the above address no later than June 24, 1988.

6. If the agency receives requests for a public hearing

on the proposed amendments 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 no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 5-16-88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT) of ARM 42.28.324 relating to) Motor Fuels Tax.)	NOTICE OF PUBLIC HEARING on ARM 42.28.324 relating to Motor Fuels Tax.

TO: All Interested Persons:

1. On June 17, 1988, at 1:30 p.m., a public hearing will be held in the 4th Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the amendment of ARM 42.28.324 relating to failure to maintain records.

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

42.28.324 FAILURE TO MAINTAIN RECORDS (1) remains the same.

(2) The department of revenue shall, in the event a special fuel user fails to retain the required records, make estimates of the miles traveled, special fuel purchases, and average miles per gallon in order to determine the special fuel users tax liability. These estimates will be based, whenever possible, on records for a portion of the operations of the user's vehicles consuming special fuels or other available information indicating fuel usage by the vehicles for which reports are being made. In those cases where the records are not adequate to verify the average miles per gallon (ampg) reported and the average cannot be estimated, an ampg ~~of 4.5 will be used~~ specified in (4) will be used.

(3) If, within 30 days of the date the department issues an assessment based on the ampg ~~of 4.5~~ in (4), the user provides the department with adequate records to verify or estimate fuel usage for the user's vehicles, the department will review the records and adjust the assessment to the extent necessary.

(4) An ampg in accordance with the following schedule will be used:

(a) trucks and truck tractors whose manufacturers gross vehicle weight rating is 9,000 lbs. or more 4.5;

(b) pickups and trucks whose manufacturers gross vehicle weight rating is 6,000 lbs. or less than 9,000 lbs. 10; and

(c) automobiles and pickups whose manufacturers gross vehicle weight rating is less than 6,000 lbs. 15.

3. The proposed amendment updates the rule to reflect the growing use of special fuels in automobiles and trucks. It provides ampg figures that more accurately reflect the actual fuel use, resulting in less assessment litigation. AUTH, 15-70-104 MCA; IMP, 15-70-306 and 15-70-323 MCA.

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:

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

no later than June 24, 1988.

5. Paul Van Tricht, Tax Counsel, Department of Revenue, Office of Legal Affairs, has been designated to preside over and conduct the hearing.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 5-16-88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rule I, relating to Metalliferous Mines Tax.	NOTICE OF THE PROPOSED ADOPTION of Rule I relating to Metalliferous Mines Tax.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On July 5, 1988, the Department proposes to adopt rule I relating to Metalliferous Mines tax.

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

RULE I AVERAGE PRICE QUOTATIONS (1) The average price during the calendar quarter referred to in 15-37-102 MCA, is a weighted average as opposed to an arithmetic average of daily prices for each day of the quarter. The quarterly gross value will be determined by multiplying the quantity of each metal produced in each lot by the prevailing price per unit on the day the quantity is determined. In most instances this computation is reflected on the smelter returns. AUTH, 15-1-201 MCA; IMP, 15-37-102 MCA.

3. Rule I is necessary to clarify requirements of 15-37-102. It provides that the prices based on market authorities for the settlement of each lot may be used. This, in effect, results in the use of a weighted average.

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

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

no later than June 24, 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 Cleo Anderson at the above address no later than June 24, 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 no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 5-16-88.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF OCCUPATIONAL THERAPISTS

In the matter of the amendment) NOTICE OF AMENDMENT OF
of a rule pertaining to fees) 8.35.407 FEES

TO: All Interested Persons:

1. On April 4, 1988, the Board of Occupational Therapists published a notice of proposed amendment of the above-stated rule at page 633, 1988 Montana Administrative Register, issue number 7.

2. The Board amended the rule exactly as proposed.

3. No comments or testimony were received.

BOARD OF OCCUPATIONAL
THERAPISTS
DEBRA J. AMMONDSON, OTR/L
CHAIRMAN

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

Certified to the Secretary of State, May 16, 1988.

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

In the matter of proposed Amendment of Rule 8.86.301 (6)(g),(h) as it relates to price formula	))))	NOTICE OF AMENDMENT OF RULE 8.86.301 DOCKET # 81-87

TO: ALL LICENSEES UNDER THE MONTANA MILK CONTROL ACT (SECTION 81-23-101, MCA, AND FOLLOWING) AND TO ALL INTERESTED PERSONS:

1. On December 14, 1987 the Montana Board of Milk Control published notice of a proposed amendment of rule 8.86.301(6)(g),(h) relating to its class I price formula. The notice was published at page 2318 of 1987 Montana Administrative Register, issue No. 24, as MAR NOTICE No. 8-86-22.

2. The hearing was held January 25, 1988 at 9:00 a.m. in the SRS auditorium, 111 Sanders, Helena, Montana. A total of sixty-six persons attended the hearing. Twenty-six persons offered testimony on the proposed rules. Of those offering testimony, thirteen spoke in favor of the second proposal, identified as the "Alke" proposal and against the first proposal, identified as the "Kelly" proposal. Ten of those testifying spoke against both the proposals. One person spoke in favor of the Kelly proposal, but only as it pertained to the elimination of servicing of shelves under subsection (B)(I) and (III) of rule 8.86.301(6)(g)(i). Two other persons spoke against the "Alke" proposal. They were only in favor of the "Kelly" proposal from the standpoint that it was considered the better of the two alternatives. A total of thirty-six written comments were submitted, twenty-seven at the hearing, nine were received prior. Of those in favor of the "Alke" proposal, thirty-three were from retailers, one from an economist. Two additional comments received were opposed to both proposals.

3. After thoroughly considering all of the testimony and comments received, the board is denying the entire context of the rules as proposed except for the following change which they are adopting: (text of matter stricken is interlined and new matter added is underlined)

"8.86.301 PRICING RULES

(1) through (6)(g)(i)(B) remain the same as before proposed.

(C) Wholesale dock pickup ~~or delivery~~ price:

(I) Delivery shall be FOB the distributor's dock ~~or FOB the wholesale grocer's dock~~.

(II) . . ." remain the same as before proposed.

AUTH: 81-23-302, MCA IMP: 81-23-302, MCA

4. Principal reasons given for the adoption of the amendments to the rule were as follows:

(a) Current retailer margins do not permit a profit on milk sales.

(b) Elimination of the imbalance in retailers' margins might forestall potential competitive pressures in the marketplace as a result of higher Montana prices in relation to prices currently charged in adjacent and surrounding states.

(c) Adoption of the proposal should eliminate inefficiencies in the distribution of milk which are fostered by current pricing regulations. This would be because the products can all be purchased from one source. Milk will be delivered by one driver. This will reduce security problems for stores.

(d) Adoption of the proposal will tend to insure minimum prices which are fair and equitable to producers, distributors, jobbers, retailers and consumers of the state because prices will match-up with costs associated with the distribution of milk.

5. Principal arguments against adoption of the proposed rules were as follows:

(a) Rural areas will be left without service to schools, hospitals, rest homes and cafes because jobbers and small distributors will be forced out-of-business.

(b) Adoption of the proposals will cause total disarray in the marketplace because everyone will try to stay in business and look elsewhere to offset their losses.

(c) Retailers' margins are high enough to permit reasonable profit on sales at current price levels.

(d) Montana's milk prices are based on cost. Since no actual cost evidence has been submitted to show that milk can be processed and distributed any cheaper, than presently the proposals were not supported by sufficient evidence that shows the plan is viable.

(e) There was not sufficient evidence that the milk industry in Montana could afford the implementation of the proposals.

6. The board's reasons for denying proposals were as follows:

(a) The board did not believe from the evidence submitted that retailers' margins were inadequate. Evidence introduced indicates milk is one of the most profitable items in other areas where margins are only half of what they are in Montana.

(b) Adoption of the proposals would not foster stability or efficiencies in the marketplace. Instead it would eliminate many jobbers and some small distributors. This would leave rural areas without service to schools, hospitals, rest homes and cafes.

(c) Proponents failed to present actual costs to support their proposals. Evidence regarding margins and percentages presented a distorted picture of costs of distribution in a large part because there was no consideration of the effects of inventory turnover. By not providing actual costs, proponents failed to prove that the industry could afford such reduction in their margins.

(d) The board adopted the proposed amendment in paragraph 3 as noted for purposes of clarification because both petitioners had requested it and there wasn't any countervailing testimony specifically against that change.

MONTANA BOARD OF MILK CONTROL

BY: Curtis C Cook
CURTIS C. COOK, CHAIRMAN

Certified to the Secretary of State May 16, 1988.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the) NOTICE OF ADOPTION OF ARM 10.56.101
adoption of RULE I) (RULE I) STUDENT ASSESSMENT

TO: All Interested Persons

1. On February 25, 1988, the Board of Public Education published notice of a proposed amendment of ARM 10.56.101 (RULE I), Student Assessment, on page 340 of the 1988 Montana Administrative Register, issue number 4.

2. The Board has adopted the rule as proposed with the following additions and changes:

10.56.101 (RULE I) STUDENT ASSESSMENT (1) By the authority of section 20-2-121(12), MCA, the board of public education adopts rules for student assessment in the public schools and those private schools seeking accreditation.

(2) The board recognizes that the primary purpose of student assessment is to improve the quality of education and that there are a variety of assessment tools. At the local level, because norm-referenced tests are not designed to measure local programs, districts should begin to develop appropriate school and classroom assessment tools to measure the attainment of educational goals and objectives and the level of individual student achievement. Assessment results will be used in instructional planning and in evaluating the effectiveness of educational programs. ~~Because, a~~ At the state level, since it is useful to know how Montana students generally compare to students from other states, all accredited schools will annually administer norm-referenced tests selected from a list of such tests approved by the board and provided by the office of public instruction, except that schools that on the effective date of this rule are either:

(a) not using norm-referenced tests from the board approved list;

(b) not using norm-referenced tests to test in grade levels three, eight and eleven; or

(c) using only parts of the approved norm-referenced tests;

have until July 1991 to comply with this subsection. The tests will be administered to students in grades three, eight and eleven in reading, ~~writing~~ language arts, math, science and social studies. A spring test will be given and the test date will be within the empirical norm date for the selected test. ~~The test will be given in the month of April, and a~~ All scores will be sent to the office of public instruction by June 30 in a format specified by the office of public instruction and approved by the board of public education.

(3) Test scores are a part of each student's records which will be governed by the office of public instruction's guidelines for student records.

(4) The office of public instruction will collect and

provide a statewide summary of the results to the board and legislature. ~~The summary will include a comparison of Montana's statewide achievement levels to the achievement levels of states with similar demographic characteristics.~~ No comparison of one Montana school or district to another will be made by the board of public education or the office of public instruction but schools are encouraged to compare their scores with the state norms and share testing information and results with parents and the local community.

(5) All norm-referenced test results released to the public by schools will be accompanied by a clear statement of the purposes of the test, subject areas that have been tested, how they were tested, limitations of norm-referenced tests, what is meant by the results and how the results will be used.

~~(6) Because norm-referenced tests are not designed to measure local programs, schools should develop appropriate district and classroom assessment tools to measure the attainment of educational goals and objectives and the level of individual student achievement. Assessment results will be used in instructional planning and in evaluating the effectiveness of educational programs. The office of public instruction will annually review these efforts and report to the board of public education.~~

~~(7) A student who has an individualized education program pursuant to 10.16.1207 shall not be required to participate in the norm referenced testing program. A student may participate if parental consent is obtained.~~

(6) Full time special education students shall not be required to participate in the norm-referenced testing program. Those students receiving only special education instruction in any of those tested academic areas shall not be required to participate in that section of the test for which they receive exclusive special education instruction.

3. At the public hearing which was held on March 24, 1988, three persons testified as proponents, six as opponents and three with general comments. The Board received three written comments as opponents, one as a proponent and two with general comments prior to March 25, 1988, the date on which the Board closed the hearing record. The Board considered all comments and then made additions and deletions in the proposed rule which: clarified the Board's intent, provided more flexibility in testing dates, and ensured continuity throughout the rule. The Board, therefore, feels the rule as written sufficiently addresses the comments from the public hearing.

Alan Nicholson
ALAN NICHOLSON, CHAIRMAN
BOARD OF PUBLIC EDUCATION

BY: Clarabelle Morton

Certified to the Secretary of State May 16, 1988.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of Rule 11.5.407 defining supplemental payment eligibility based on living arrangement and Rule 11.5.410 setting standards for supplemental payments	)))))	NOTICE OF THE AMENDMENT OF RULE 11.5.407 DEFINING SUPPLEMENTAL PAYMENT ELIGIBILITY BASED ON LIVING ARRANGEMENT AND RULE 11.5.410 SETTING STANDARDS FOR SUPPLEMENTAL PAYMENTS

TO: All Interested Persons

1. On April 14, 1988, the Department of Family Services, published notice of the amendment of Rules 11.5.407 and 11.5.410 pertaining to defining supplemental payment eligibility based on living arrangement and setting standards for supplemental payments at page 642 of the 1988 Montana Administrative Register, issue number 7.

2. The Department has amended Rule 11.5.407 ELIGIBILITY BASED ON LIVING ARRANGEMENT and Rule 11.5.410 PAYMENT STANDARDS as proposed.

3. No comments or testimony were received.

Director, Department of Family Services

Certified to the Secretary of State May 16, 1988.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of Rule 11.6.104 pertaining to eligibility requirements for adoptive applicants	))))	NOTICE OF THE AMENDMENT OF RULE 11.6.104 PERTAINING TO ELIGIBILITY REQUIREMENTS FOR ADOPTIVE APPLICANTS

TO: All Interested Persons

1. On April 14, 1988 the Department of Family Services published notice of the proposed amendment of Rule 11.6.104 pertaining to eligibility requirements for adoptive applicants at page 644 of the 1988 Montana Administrative Register, issue number 7.

2. The Department has amended Rule 11.6.104 HOME APPROVAL, ELIGIBILITY REQUIREMENTS as proposed.

3. No public hearing was held and no written comments or testimony were received.

Director, Department of Family Services

Certified to the Secretary of State May 16, 1988.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Amendments to 42.25.1001, 42.25.1011, 42.25.1013, 42.25.1014, 42.25.1015, 42.25.1017 & 42.25.1021, 42.25.1022 and 42.25.1023, the Repeal of 42.25.1006, 42.25.1024, 42.25.1025 and 42.25.1026 and the Adoption of Rule I(42.25.1010); Rule II (42.25.1026); Rule III (42.25.1009) and Rule IV (42.25.1018)	NOTICE OF THE ADOPTION, AMENDMENTS and REPEAL of Net Proceeds Rules for the Natural Resource & Corporation Tax Division.

TO: All Interested Persons:

1. On February 25, 1988, the Department published notice of the proposed adoption, amendment and repeal of the above-referenced rules relating to Net Proceeds Tax at pages 361 through 376 of the 1988 Montana Administrative Register, issue no. 4.

2. A public hearing was held on March 16, 1988, to consider the proposed adoption, amendment and repeal of these rules. Thirteen persons appeared at this hearing and presented testimony. Nineteen written comments were received concerning the rules. The Department has attempted to address each comment. In those cases where comments were very similar, they were combined and given one response.

3. Several changes have been made to the rules as they were published in the February 25, 1988 Administrative Register. However, the philosophy of the regulations has not changed. That is, the gross sales proceeds will be based upon an arm's-length sale; all consideration received will be included in gross sales proceeds and only limited deductions are allowed in calculating net proceeds.

Many of the comments that were received provided a positive contribution to the process. When possible the Department incorporated those comments into the regulations. The amendments are as follows:

42.25.1001 DEFINITIONS ~~(1)--"Gross value" means the worth of the gross yields as determined by the operator's or producer's sales contracts. If the contracts are not arms-length, a value must be applied which reflects the market value at the sales contract date. The gross value is not dependent upon a sale.~~

(2) and (3) will be renumbered (1) and (2).

(3) "OPERATION AND Development" means AN any activity at or near a well site which enhances or causes the continuation of

production from a well. ~~This includes but is not limited to such things as repairs, installing new equipment, pulling, cleaning, bailing, acidizing, and sandfracing which occur~~ after the ~~date of~~ initial DATE OF production ~~for the well~~. THIS ONLY INCLUDES THOSE ACTIVITIES AS LISTED UNDER ARM 42.25.1012, 42.25.1013, 42.25.1014 AND 42.25.1017.

(4) through (20) remain the same as originally proposed.

(21) "Stored gas" means UNPROCESSED natural, gas OR RESIDUE produced IN MONTANA from one producing formation and injected into another depleted formation for purposes of temporary storage.

~~(22) These definitions apply to returns filed for production years 1987 and after.~~

(22) "POSTED PRICE" MEANS THE PRICE PAID FOR OIL BY PURCHASERS TO PRODUCERS IN ARM'S-LENGTH CONTRACTS/TRANSACTIONS AND SPECIFIED IN PUBLICLY AVAILABLE PRICE BULLETINS OR OTHER PRICE NOTICES PUBLISHED BY ARM'S LENGTH PURCHASERS. THE PRICE WILL BE NET OF ALL ADJUSTMENTS FOR QUALITY (E.G. API GRAVITY, SULFUR CONTENT, ETC.) AND LOCATION FOR OIL IN MARKETABLE CONDITION, WHEN APPLICABLE.

(23) THESE RULES CODIFY THE EXISTING LAW, POLICY, PRACTICES AND DECISIONS OF THE COURTS AND TAX APPEALS BOARD, AND APPLY TO ALL TAXABLE PERIODS NOT CLOSED BY THE APPLICABLE STATUTE OF LIMITATIONS. AUTH: Sec. 15-23-108 MCA; IMP, Secs. 15-23-602 and 15-23-603 MCA.

42.25.1011 TREATMENT OF ROYALTIES (1) Remains the same.

(2) All taxable royalty payments shall be assessed at full cash value regardless of the net proceeds of the operator. Certain royalty interests are considered to be nontaxable. The following are nontaxable royalties: ~~are set forth in subsection (3).~~

~~(3)--All royalties are subject to taxation with certain exceptions as defined below.~~

(a) Royalties paid to the U. S. government, state, county, city, school district, or other political subdivision of the state. ~~are considered to be nontaxable~~

(b) Royalties paid to Indian tribes from production on tribal land leased pursuant to the 1938 Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g ~~have been determined to be taxable, but~~ and royalties paid to the U. S. government from production on allotted Indian land. ~~have been determined to be nontaxable~~

AUTH: Sec. 15-23-108 MCA; IMP, Secs. 15-23-603 and 15-23-605 MCA.

42.25.1013 LABOR COSTS (1) All monies expended for labor to the extent used in the OPERATION AND development ~~or production~~ of a well, lease, or unit, except as provided in ARM 42.25.1015, may be deducted in computing net proceeds as provided under ARM 42.25.1002 and 42.25.1004. Labor costs incurred in drilling a well must be amortized through the procedures in ARM 42.25.1015.

(2) Labor shall include all monies expended for labor in the OPERATION AND development or production of gas or oil including payments to a person for pumping and metering a well, lease or unit.

(3) Salaries of engineers, geologists, maintenance and other technical personnel are a deductible item only to the extent that such personnel devote time to the specific well, lease, or unit.

(4) ~~Superintendents~~ Superintendence ~~shall be meant to~~ includes only the WAGES PAID TO persons or officers actually engaged directly in the working of the well, lease, or unit or superintending the management thereof. This deduction is not meant to include any personnel in a corporate or headquarters office who are not involved in the actual on site operations. Superintendence does not include salaries of engineers, geologists, maintenance and other technical personnel delineated in (3) above.

(5) Labor costs include, in addition to salaries and wages, payroll taxes and payments by employers to health, welfare, and retirement plans for the benefit of employees whose salaries or wages are deductible under this rule.

(6) Except as provided for in (3) above, labor costs are deductible only to the extent that the employee's services are performed at the site of a well, ~~the~~ ALL LABOR costs ~~are~~ MUST BE verifiable through contemporaneous record keeping. ~~, an~~ AN actual payment ~~has~~ MUST BE ~~been~~ made for the costs, and the amount claimed MUST BE ~~is~~ reasonable and consistent with amounts paid for comparable services within the oil and gas industry in Montana.

(7) ~~These amendments apply to returns filed for production years 1987 and after.~~ THESE RULES CODIFY THE EXISTING LAW, POLICY, PRACTICES AND DECISIONS OF THE COURTS AND TAX APPEALS BOARD, AND APPLY TO ALL TAXABLE PERIODS NOT CLOSED BY THE APPLICABLE STATUTE OF LIMITATIONS.

AUTH: Sec. 15-23-108 MCA; IMP, Secs. 15-23-602 and 15-23-603 MCA.

42.25.1014 COSTS OF IMPROVEMENTS, REPAIRS, AND BETTERMENTS

(1) All monies expended for improvements, repairs, and betterments necessary in and about the working of the well, lease, or unit may be deducted in computing net proceeds as provided under ARM 42.25.1002 and 42.25.1004.

(2) All monies expended to workover a well may be deducted and shall include but are not limited to pulling, cleaning, bailing, acidizing and sandfracing. These costs shall not include any amounts expended for chemical supplies needed and used in a tertiary recovery project as these costs are amortized pursuant to ARM 15.23.603(5).

(3) ~~These amendments apply to returns filed for production years 1987 and after.~~ THESE RULES CODIFY THE EXISTING LAW, POLICY, PRACTICES AND DECISIONS OF THE COURTS AND TAX APPEALS BOARD, AND APPLY TO ALL TAXABLE PERIODS NOT CLOSED BY THE APPLICABLE STATUTE OF LIMITATIONS. AUTH: Sec. 15-23-108 MCA; IMP, Secs. 15-23-602 and 15-23-603 MCA.

42.25.1015 DEDUCTION FOR DRILLING COSTS AND CAPITAL EXPENDITURES (1) through (5) remains the same.

(6) Acquisition costs cannot be deducted in the year incurred or capitalized and amortized pursuant to this rule. However, the new owner of a previously producing well, lease or unit will be allowed to continue to deduct any unamortized drilling costs and capital expenditures of the previous owner(s) over the remainder of the original amortization period.

(7) ~~These amendments apply to returns filed for production years 1987 and after.~~ THESE RULES CODIFY THE EXISTING LAW, POLICY, PRACTICES AND DECISIONS OF THE COURTS AND TAX APPEALS BOARD, AND APPLY TO ALL TAXABLE PERIODS NOT CLOSED BY THE APPLICABLE STATUTE OF LIMITATIONS. AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 3, Ch. 642, L. 1985, Eff. 4/30/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-602, 15-23-603 and 15-23-604 MCA.

42.25.1017 ~~ADMINISTRATIVE AND~~ OTHER OPERATIONAL COSTS (1) All monies expended for supplies, tools, chemicals and additives to the extent used in the OPERATION AND development ~~or production~~ of a well, lease, or unit except as provided for in ARM 42.25.1015 may be deducted in computing net proceeds as provided under ARM 42.25.1002 and 42.25.1004. Chemicals and additives as used in this section are not meant to include chemicals and additives used in a tertiary recovery project. ~~Clerical and office expenses are allowed only to the extent that they relate to the actual production of the product.~~

(2) through (5) remain as originally proposed on February 25, 1988.

(6) All monies expended for fuel and power used in the operation AND DEVELOPMENT of a well, lease or unit may be deducted. To the extent that fuel consumed on a lease, well, or unit is produced from that well, lease or unit and the volume and value has been included in the gross product yielded as described in 42.25.1004, the fuel may be deducted.

(7) remains as originally proposed.

(8) All on site expense actually incurred in the ~~development and~~ operation AND DEVELOPMENT of a well, lease or unit, may be deducted and must be documented pursuant to ~~42.25.1018~~ RULE IV.

(9) and (10) remain as originally proposed.

(11) ~~No miscellaneous items will be allowed.~~ All deductions must be itemized.

(12) ~~These amendments apply to returns filed for production years 1987 and after. Provided, however that the language deleted in subsection (1) applies to all production years open under the applicable statute of limitations.~~ THESES RULES CODIFY THE EXISTING LAW, POLICY, PRACTICES AND DECISIONS OF THE COURTS AND TAX APPEALS BOARD, AND APPLY TO ALL TAXABLE PERIODS NOT CLOSED BY THE APPLICABLE STATUTE OF LIMITATIONS. AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 3, Ch. 642, L. 1985, Eff. 4/30/85 and Sec. 25, Ch. 644, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-602 and 15-23-603 MCA.

42.25.1021 NEW PRODUCTION REPORTING REQUIREMENT (1) Will be adopted as originally proposed. AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 22, Ch. 695, L. 1985, Eff. 5/9/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-602 and 15-23-603 MCA.

42.25.1022 NET PROCEEDS COMPUTATION - QUARTERLY FILINGS Will be adopted as originally proposed.
AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 22, Ch. 695, L. 1985, Eff. 5/9/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-603 and 15-23-604 MCA.

42.25.1023 COMMENCEMENT OF NEW PRODUCTION EXEMPTION Will be adopted as originally proposed. AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 22, Ch. 695, L. 1985, Eff. 5/9/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-601 and 15-23-612 MCA.

42.25.1006 NATURAL GAS EXEMPT FROM ONE-HALF THE NET PROCEEDS TAX IS HEREBY REPEALED. AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Sec. 15-23-612 and 15-36-121 MCA.

42.25.1024 UNITIZED LEASES - NEW PRODUCTION DETERMINATION IS HEREBY REPEALED. AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 22, Ch. 695, L. 1985, Eff. 5/9/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Sec. 15-23-601 MCA.

42.25.1025 PRODUCTION FROM NEW FORMATION OF CURRENTLY PRODUCING LEASE IS HEREBY REPEALED.
AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 22, Ch. 695, L. 1985, Eff. 5/9/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Sec. 15-23-601 MCA.

42.25.1026 CHANGES IN LEASES IS HEREBY REPEALED. AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 22, Ch. 695, L. 1985, Eff. 5/9/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Sec. 15-23-601 MCA.

RULE I (42.25.1010) POLICY ON NET PROCEEDS DEDUCTIONS (1) The net proceeds of oil and gas law provides for limited deductions for expenses incurred at the well or lease located in Montana. The net proceeds tax is a property tax and is significantly different from an income tax. Accordingly, the net proceeds law does not allow the broad spectrum of deductions allowed under an income tax. Deductions are allowable only to the extent that they represent expenses directly related to extracting oil and gas from the ground and were actually incurred and paid for. Further, the expenses must only be for those costs specifically listed in the law and in these rules.

(2) ~~This rule applies to returns filed for production years 1987 and after.~~ THESE RULES CODIFY THE EXISTING LAW, POLICY, PRACTICES AND DECISIONS OF THE COURTS AND TAX APPEALS BOARD, AND

APPLY TO ALL TAXABLE PERIODS NOT CLOSED BY THE APPLICABLE STATUTE OF LIMITATIONS. AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 3, Ch. 642, L. 1985, Eff. 4/30/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-602 and 15-23-603 MCA.

RULE II (42.25.1026) DECLARATORY RULING PROCEDURE (1) When an operator is uncertain how these regulations will apply to a particular circumstance that person may petition the Department for a declaratory ruling as to the applicability of the statute and/or these regulations to his activity or proposed activity. Section 2-4-501 provides the authority, and ARM 1.3.227 through 1.3.229 provides for the procedures to be used in requesting a ruling.

(a) In addition to the contents of the petition outlined in ARM 1.3.227, a petition must delineate the well or wells for which the petition is submitted.

(2) ~~This rule applies to returns filed for production years 1987 and after.~~ THE FACT THAT A PERSON DID NOT PETITION THE DEPARTMENT FOR DECLARATORY RULING AS TO THE APPLICABILITY OF A STATUTE AND/OR REGULATION TO THAT PERSON'S ACTIVITY OR PROPOSED ACTIVITY SHALL NOT BE CONSTRUED AS A FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES IN ANY SUBSEQUENT ADMINISTRATIVE OR JUDICIAL REVIEW, OR LITIGATION, BETWEEN THE DEPARTMENT AND THE PERSON INVOLVED OVER ANY PARTICULAR ITEM WITH RESPECT TO NET PROCEEDS TAXATION.

(3) THESE RULES CODIFY THE EXISTING LAW, POLICY, PRACTICES AND DECISIONS OF THE COURTS AND TAX APPEALS BOARD, AND APPLY TO ALL TAXABLE PERIODS NOT CLOSED BY THE APPLICABLE STATUTE OF LIMITATIONS. AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 3, Ch. 642, L. 1985, Eff. 4/30/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-602 and 15-23-603 MCA.

RULE III (42.25.1009) GROSS SALES PROCEEDS (1) The gross sales proceeds from the sale of oil and condensate shall be equal to the total production sold times the ~~stated contract price for the oil-and-condensate, in no event will the stated price be less than the posted field price for similar oil.~~ "POSTED PRICE." IF THERE IS A NON-ARM'S-LENGTH OR NO CONTRACT FOR THE SALE OF OIL OR CONDENSATE THE PRICE REPORTED MAY NOT BE LESS THAN THE "POSTED PRICE" FOR SIMILAR OIL AND CONDENSATE.

~~(a) Where an arm's-length sales contract price or a posted price includes a provision whereby the listed price is reduced by a transportation factor the gross sales proceeds will equal the contract price or posted price less the transportation factor.~~

~~If an operator has a non-arm's-length transportation contract or performs the transportation services himself, the amount of transportation will be based upon the operator's actual cost to transport the oil. However, this cost shall not exceed the transportation costs incurred under comparable arm's-length sales contracts or as provided for in posted prices in the area. In determining comparability the following factors will be considered: type of transportation (truck vs pipeline) distance transported, volume and such OTHER factors as may be appropriate to reflect the actual cost to transport.~~

(2) (a) remains as originally proposed.

(b) If there is no contract or a non-arm's-length contract at the wellhead and the wellhead is the point of sale, the gross sales proceeds will be equivalent to a contract price derived from, or paid under, comparable arm's-length contracts for purchases, sales or other dispositions of like-quality gas in the same field multiplied by the volume of natural gas. In determining comparability the following factors will be considered: time of execution, duration, market or markets served, terms, quality of gas, volume, and such OTHER factors as may be appropriate to reflect the value of the gas.

(2) (c) and (d) remain as originally proposed.

(3) (a) through (c)(ii) remain as originally proposed.

(iii) If natural gas liquids are sold pursuant to an arm's-length contract the gross sales proceeds for the natural gas liquids will be the contract price received multiplied by the volume of liquids and adjusted for the plant products price adjustment attributable to the natural gas liquids determined as follows:

(A) The plant products price adjustment for ~~the natural gas liquids only, divided by the total gallons produced for the operator, and other producers, if any. This quotient is the plant products price adjustments/gallon. For each return filed pursuant to 15-23-602, MCA the operator may adjust the contract price of each gallon reported by the plant products price adjustment.~~LIQUIDS ONLY WILL BE MULTIPLIED BY THE FOLLOWING PERCENTAGE:

$$\frac{\text{TOTAL GALLONS ATTRIBUTABLE TO OPERATOR}}{\text{TOTAL GALLONS ATTRIBUTABLE TO OPERATOR \& OTHERS}}$$

THIS IS THE PLANT PRODUCTS PRICE ADJUSTMENTS, FOR LIQUIDS ONLY, ATTRIBUTABLE TO THE OPERATOR. THIS FIGURE IS THEN SUBTRACTED FROM THE 100% GROSS SALES PROCEEDS OF LIQUIDS PRODUCED BY THE OPERATOR TO DETERMINE THE TAXABLE GROSS SALES PROCEEDS FIGURE FOR THE OPERATOR.

(iv) Remains the same as originally proposed.

(v) If other products are sold pursuant to an arm's-length contract the gross sales proceeds for the other products will be the contract price received multiplied by the volume of other products adjusted for the plant products price adjustment attributable to the other products determined as follows:

(A) The plant products price adjustment for ~~the other product only divided by the total units produced for the operator, and other producers, if any. This quotient is the plant products price adjustments/unit. For each return filed pursuant to 15-23-602, MCA the operator may adjust the contract price of each unit reported by the plant products price adjustment.~~OTHER PRODUCTS ONLY WILL BE MULTIPLIED BY THE FOLLOWING PERCENTAGE:

$$\frac{\text{TOTAL UNITS ATTRIBUTABLE TO OPERATOR}}{\text{TOTAL UNITS ATTRIBUTABLE TO OPERATOR AND OTHERS}}$$

THIS IS THE PLANT PRODUCTS PRICE ADJUSTMENTS, FOR OTHER PRODUCTIONS ONLY, ATTRIBUTABLE TO THE OPERATOR. THIS FIGURE IS

THEN SUBTRACTED FROM THE 100% GROSS SALES PROCEEDS OF OTHER PRODUCTS PRODUCED BY THE OPERATOR TO DETERMINE THE TAXABLE GROSS SALES PROCEEDS FIGURE FOR THE OPERATOR.

(vi) If other products are sold pursuant to a non-arm's-length contract the gross sales proceeds will be equivalent to the gross sales proceeds contract price derived from, or paid under, comparable arm's-length contracts for purchases, sales or other dispositions of like-quality products in the same field or area multiplied by the volume of other products. In determining comparability the following factors will be considered: time or execution, duration, market or markets served, terms, quality of gas, volume, and such other factors as may be appropriate to reflect the value of the products.

(A) plant products price adjustments will be allowed as described in (iii) (A) above.

(vii) IF A NEGATIVE FIGURE IS CALCULATED WHEN TOTALLING (iii)(A) OR (iv)(A) + (v)(A) OR (vi)(A) THE REMAINDER MAY BE SUBTRACTED FROM THE GROSS SALES PROCEEDS OF THE RESIDUE ATTRIBUTABLE TO THE OPERATOR, TO CALCULATE THE TAXABLE GROSS SALES PROCEEDS FOR NET PROCEEDS PURPOSES.

(4) and (5) remain as originally proposed.

(6) ~~This rule applies to returns filed for production years 1987 and after.~~ THESE RULES CODIFY THE EXISTING LAW, POLICY, PRACTICES AND DECISIONS OF THE COURTS AND TAX APPEALS BOARD, AND APPLY TO ALL TAXABLE PERIODS NOT CLOSED BY THE APPLICABLE STATUE OF LIMITATIONS. AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 3, Ch. 642, L. 1985, Eff. 4/30/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-602 and 15-23-603 MCA.

RULE IV (42.25.2518) NECESSITY OF PROOF (1) Any expense or adjustment will be disallowed if the operator does not keep adequate records or other proof to show the amount and purpose of the expense. To satisfy the adequate records requirement, there must be records maintained that were prepared at or near the time of use, and the records must be supported by receipts, vouchers or other documentary evidence.

(2) ~~This rule applies to returns filed for production years 1987 and after.~~ THESE RULES CODIFY THE EXISTING LAW, POLICY, PRACTICES AND DECISIONS OF THE COURTS AND TAX APPEALS BOARD, AND APPLY TO ALL TAXABLE PERIODS NOT CLOSED BY THE APPLICABLE STATUTE OF LIMITATIONS. AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 3, Ch. 642, L. 1985, Eff. 4/30/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-602 and 15-23-603 MCA.

4. Proposed Rules V through VII are not going to be adopted.

5. Public comments were received and are addressed as follows:

42.25.1001(3) - DEFINITIONS - DEVELOPMENT

COMMENT: The Department should adopt a definition of "operation".

RESPONSE: The department has reviewed the issue of defining "operation". Section 15-23-603, MCA describes what expenses may be deducted in the "operation and development" of a well. The term "operation" is always used in conjunction with the term "development". There doesn't need to be a separate definition for "operation", but rather a definition that describes both terms. "Operation and Development" means an activity at or near the well site which enhances or causes the continuation of production from a well after the initial date of production. This only includes those activities as listed under 42.25.1013, 42.25.1014 and 42.25.1017.

Drilling costs and capital expenditures as described in 42.25.1015 are not treated as "operation and development" activities.

42.25.1001(4) - DEFINITIONS - ARM'S-LENGTH CONTRACT

COMMENT: Many comments were submitted stating the proposed definition of arm's-length contract was "too narrow" and "restrictive".

RESPONSE: The cornerstone to any determination of whether a sale is an actual arm's-length sale is what influence any party to a sale had over the other party to that same sale. If a sale begins with two parties at arm's-length, the total price received should be accepted as the gross sales proceeds. However, if the transaction is not at arm's length, other factors must be taken into account to determine if the resulting price under a non-arm's-length contract is reasonable. If the price arrived at under a non-arm's-length contract is reasonable, the determination of whether it is arm's length is of no consequence. The department believes the definition needs to be restrictive to insure that only contracts which are truly arm's-length be accepted without question.

COMMENT: The definition of arm's-length contract recently adopted by the Minerals Management Service (MMS) should be adopted by Department of Revenue. The MMS definition does not use the term "adverse economic interest" and it has tests to determine if there is control.

RESPONSE: The MMS definition uses the term "opposing" economic interest, the Webster's New World Dictionary defines adverse as "moving or working in an opposite or contrary direction; opposing; opposite in position." It would appear that the two definitions are substantially the same. The department believes the result (i.e. opposite or opposing economic interests) clearly describes what an arm's length transaction should be. In addition, the issue of "adverse economic interest" has been addressed by Federal Court, Creme Manufacturing Co., Inc. v. United States 492 F.2d 515:

> To be at arm's length under Section 4216(b), a transaction must be between parties with "adverse economic interests". Campana Corp. v. Harrison, 7 Cir. 1940, 114 F.2d 400, 408, overruled on other grounds, F. W. Fitch Co. v. United States, 1945, 323 U.S. 582, 65 S. Ct. 409, 89 L.Ed. 472. Each party to the transaction must be in a position to distinguish his economic interest from that of the other party and where they conflict, always choose that to his individual benefit. In other words, if the seller would hesitate to raise the price for the sole reason that it would hurt the buyer, the parties are not at arm's-length.

The definition as proposed by the Montana Petroleum Association(MPA) uses only formal affiliation or common ownership between contracting parties to establish arm's length contract. This concept was also rejected by the Federal Court in Creme Manufacturing:

> Overlapping ownership and control are indicators that the parties may not be adverse, see e.g. Campana Corp. v. Harrison, supra, but the absence of these factors does not automatically signal an arm's-length transaction. We must examine the entire relationship of the parties.

The department believes the definition as proposed by MPA ignores the fact that parties may have contractual or other relationships which may have had an influence on how the price is arrived at under the contract.

COMMENT: There were several comments submitted stating that in the past many, if not all, of the non-arm's-length contracts pay higher wellhead prices.

RESPONSE: If this is true, the "non-arm's-length" contract will be accepted as gross sales proceeds provided the 50% requirement in Rule III(2)(c)(ii) is also met.

COMMENT: The Department of Revenue's arm's length interpretation allows for bureaucratic mischief and will simply mire the state and industry in needless lawsuits and taxes paid under protest.

RESPONSE: While there may be differing interpretations of the statute and these regulations, the declaratory ruling provisions which have been proposed should help to clarify any particular circumstances. The department intends for these rules to reduce the number of lawsuits and taxes paid under protest by clarifying the policies pertinent to the administration of the tax.

COMMENT: Department of Revenue's definition of "arm's length" makes it impossible for independents to compress or process their own gas.

RESPONSE: As previously stated, if the department determines that a contract is "non- arm's-length" it would not necessarily mean that the gross sales proceeds under the contract would be invalidated. If the sales proceeds from a non- arm's-length contract reasonably reflects market value, the non arm's length gross sales proceeds would be accepted.

COMMENT: A single arm's-length contract in a particular field should be sufficient evidence of the market value of the gas in that field. It seems ludicrous to require that the arm's length contracts be for more than 50% of the producing wells in the field.

RESPONSE: This particular standard was adopted to provide reasonable assurance that there were sufficient arm's-length sales in a field to provide a good comparison for the non-arm's-length contracts. By adopting the 50% standard, the department has provided an objective measure to determine if the sellers in the arm's-length contracts had a sufficient market share to remove market dominance by the purchaser.

COMMENT: There are many, many situations where an arm's-length contract does exist by virtue of the purchase of the natural gas by the lessee from the lessor. The market price agreed to between the lessor and the lessee should, and does, establish the market price of the natural gas in that particular area or in that particular field.

RESPONSE: Clearly the market price of a product is not determined by a lease agreement. Accordingly, this comment is rejected. Market price is established between purchasers and producers not lessor.

COMMENT: Why is it that Oil and Gas is selected out as influencing the sale price? Are we automatically guilty? It appears so! Why can not two parties enter into an honest contract or agreement simply to sell or purchase product without being guilty in the State Revenue's eyes?

RESPONSE: The department does not believe that the oil and gas industry is being singled out. The standards under which the contracts will be evaluated have been used by courts in other jurisdictions, as was previously discussed. In addition, coal contracts are evaluated for the coal severance and gross proceeds tax using the same arm's-length standards.

COMMENT: The proposed definition of arm's length will make it nearly impossible for an arm's length contract to exist, whether there is only one or numerous operators in the area. Many operators have other businesses, where relationships other than their operations exist. The arm's length contract must be assumed to be valid unless there is strong evidence that indicates otherwise. A proposal was given to the department to address this problem. A copy of this proposal is enclosed

(encl. 1). This proposal is still in a very rough form, but the basic idea could be developed into a workable method for the department and industry.

RESPONSE: Again, the mere fact that a contract is non-arm's length does not nullify the calculation of gross sales proceeds. The department agrees there must be evidence to the contrary before the results on any agreement are invalidated. The proposed rules will provide a methodology to evaluate the results of non-arm's length contracts.

The proposal submitted was studied at length subsequent to its submission on February 10, 1988. There are two primary reasons why the department did not incorporate the concept into the rules:

1) The determination of arm's-length vs. non- arm's-length is still a critical component to this concept. Therefore, the department could not eliminate the language describing how arm's-length will be determined.

2) The proposal uses an "average field price" calculated from the net proceed returns filed each year. A "lower pricing limit" is determined by subtracting one-half the standard deviation of the wellhead prices from the "average field price". If any price for natural gas is equal to or greater than the "lower pricing limit" the wellhead price on the particular well or group of wells for which the comparison is made would be accepted as gross sales proceeds. The major flaw in this calculation is that all wellhead prices are included. No attempt is made to eliminate from the calculation the non-arm's-length wellhead prices. As a result, many prices that are not bona fide sales prices would be included in the universe of prices used to calculate the "average field price". Verification of the wellhead prices could not be done in many cases until after audit. This would render the sample unusable as a standard until after the returns were audited, perhaps after several years. In the meantime, no producer would know what price would be used for calculating gross sales proceeds.

42.25.1001(21) - DEFINITION - STORED GAS

COMMENT: The "natural gas" in the definition of stored gas should be changed to "residue".

RESPONSE: The department agrees in part with the comment. However, rather than delete "natural gas" entirely, the department has changed the definition so stored gas can be both unprocessed natural gas and residue. Not all gas would be processed prior to being stored.

The definition of stored gas is amended to read as follows:

(21) "Stored gas" means unprocessed natural gas or residue produced in Montana from one producing formation and injected into another depleted formation for purposes of temporary storage.

COMMENT: Concern was raised that under the proposed definition of stored gas, it was unclear whether the department intended to tax only gas produced in Montana. Some gas that is presently being stored in Montana was produced in other states.

RESPONSE: It was never the department's intent to tax natural gas that wasn't produced in Montana. Specific amendments have been made to clarify that point. In particular, the language "in Montana" has been added to the definition in order to clarify that the department is not trying to tax gas produced outside Montana.

COMMENT: We do not believe the entire definition for the tax treatment of stored gas is in accord with the statute. The net proceeds statute is based on gross sales proceeds, so without a sale, there can be no taxable gross sales proceeds. By definition, stored gas has not been sold.

RESPONSE: Under Rule III(4) the operator may exercise an option whereby any gas that is stored may be reported and the tax paid as though it were sold or the stored gas can be inventoried and reported when it is sold. The department believes that there is very clear statutory authority to require the second option (i.e. inventory the gas and pay the tax when required from storage). However, the department recognizes that the recordkeeping may be burdensome. Therefore, the department has allowed the operator to choose the method.

42.25.1011 - TREATMENT OF ROYALTIES

COMMENT: Are royalty payments to government deemed a Tax?

RESPONSE: Royalty payments are not a tax. By definition, they are a share of production, free of the expenses of production.

42.25.1013 - LABOR COSTS

COMMENT: With respect to "superintendence", the provision merely defines what superintendence is without specifically stating that superintendence is a labor cost which can be deducted in computing net proceeds. An amendment is suggested.

RESPONSE: The department agrees that this could be clarified and has amended 42.25.1013 to state that "superintendence" refers to wages paid to persons or officers actually engaged in the working of the well.

COMMENT: Delete from part 6 the phrase "an actual payment has been made for the costs". This deletion relates to "in kind" deductions.

RESPONSE: The district court case of Somont Oil Company v. Department of Revenue, Cause No. 12994 Ninth Judicial District affirmed the State Tax Appeal Board's decision Docket No. PT-1982-117, which states:

> 2. Further, Somont seeks to deduct for "in-kind" activities in which no money exchanged hands. For example, Somont seeks to deduct money for Carl Jansky's superintendency. However, he did not receive any money from Somont. Since he did not receive any income from Somont Carl Jansky probably did not report this "in-kind" superintendency on his income tax return or pay any income tax on this sum.

The decisions of the Montana Supreme Court and the legislative history of the Net Proceeds Tax demonstrates that only "actual costs" can be deducted from the gross sales proceeds under the Net Proceeds Tax. Sections 15-23-602 and 15-23- 603, Montana Code Annotated. Also, see Anaconda Copper Mining Company v. Junod, 71 Mont. 132, 227 P. 1001 (1924).

The legislature did not intend for these types of "non-taxable", "in-kind" deductions to be deducted from the gross sales proceeds."

COMMENT: Amend 42.25.1013(7) from 1987 to 1988. The time is too short to expect producers to have the data necessary to file a return based upon rules still to be heard, amended, and adopted.

RESPONSE: These rules are intended to clarify present Department procedures, and do not represent a significant change from previous Department interpretations and appeals decisions.

COMMENT: The Department of Revenue should permit a deduction under 42.25.1013(4) for costs incurred by the operator associated with the performance of functions required by the laws and rules of the State of Montana.

RESPONSE: ARM 42.25.1013(4) explains the superintendence expenses allowable for labor costs.

The Montana Supreme Court has stated:

> . . . not all, but only the direct costs and expenses were contemplated as deductible items.. . . It was the aim and intention of the legislature to fix some definite and uniform basis for the determination of the net proceeds for taxing purposes. This it has done by authorizing deduction of only actual costs. It was not its intention to permit deductions of every conceivable item of expense.

Anaconda Copper Mining Co. v. Junod, 71 Mont. 132, 138-140, 227 P. 1001 (1924).

"Performance of functions required by the State of Montana" aren't direct costs incurred by person(s) directly engaged in the working of the well which the legislative history of the net proceeds laws provide for.

COMMENT: Change line 3 of 42.25.1013(6) to read "performed at the site of or directly attributable to a well, lease, or unit, etc."

RESPONSE: Adding the language "directly attributable" would allow for costs away from the well site for superintendence (i.e. Somont Oil Company v. Department of Revenue, Cause No. 12994, Ninth Judicial District of Montana). This would oppose statutory and case law. Therefore, the amendment is not included.

42.25.1015(b) - ACQUISITION COSTS

COMMENT: By the department not allowing acquisition costs, there has been a total disregard of 15-23-603(2) and 15-23-604. It was stated that the phrase "money invested in the well and improvements" as provided in 15-23-607(2) supports the position that acquisition costs should be allowed.

RESPONSE: If 15-23-603(2), MCA is read in its entirety, it does not support the idea of deducting acquisition costs.

15-23-603(2), MCA states:

> No money invested in the well and improvements during any year except the year for which such statement is made may be included in such expenditures, except as provided in 15-23-604, and such expenditures may not include the salaries or any portion thereof of any person or officer not actually engaged in the working of the well or superintending the management thereof.

Section 15-23-603(2), MCA, when read properly states only expenses incurred in the year for which a return is filed may be deducted on that return, with the exception of drilling costs and capital expenditures which are to be deducted as stated in 15-23-604, MCA. Both 15-23-603(2) and 15-23-604, MCA do not provide what can be deducted, but rather how the deduction will be calculated.

The law provides deductions for the "cost of construction, repairs and betterments" per 15-23-602(2)(ii), MCA and more specifically, for "all money expended for improvements, repairs and betterments in and about the working of the well" 15-23-603(d), MCA. The law specifies how these capital costs will be amortized over a period of years (15-23-604, MCA).

There is no statutory support in either 15-23-603(2) on 15-23-604, MCA for the deduction of acquisition costs.

The sales price of a producing lease may be derived from many factors that go beyond the cost of a well. The fact that the ownership changes does not effect the costs that will be incurred to actually extract oil or gas from the well.

COMMENT: The Department of Revenue is penalizing the owner for not being the entity which incurred the initial drilling costs and capital expenditures.

RESPONSE: As stated previously, all costs associated with the actual production of the oil and gas are allowed. However, once the cost of the drilling and production equipment have been amortized, no additional deduction will be allowed.

COMMENT: Several individuals stated that many of the producing properties that are sold are marginal, and if the department does not allow the amortization of acquisition costs those properties will be rendered unsalable.

RESPONSE: As the department has stated during the entire rule making process, the main objective has been to provide clarity to the regulations. Allowing acquisition costs would not be a clarification, but statutory change.

COMMENT: Suggestion that, if the sale of a producing property is pursuant to an arms'-length contract and the sales price is allocated to the capital improvements and drilling costs, the deduction for acquisition costs could be allowed on the same basis. Also, if the sale was pursuant to a non-arm's-length contract, the burden would be on the taxpayer to establish how the sales price would be allocated.

RESPONSE: Although this suggestion does describe a methodology on how to segregate the sales price, it does not address the statutory problem outlined above. In addition, it illustrates the problem with the whole concept of acquisition costs by suggesting that there are additional "drilling costs" that need to be recovered. The "actual cost" to drill a well is a one-time expense and will not reoccur. This concept of an asset being depreciated several times by several different owners is an income tax concept and not appropriate for net proceeds.

42.25.1017 - OTHER OPERATIONAL COSTS

COMMENT: Administrative expenses have been allowed in the past through numerous audits.

RESPONSE: As a general rule, administrative expenses relate to costs incurred away from the well and are not for the "operation and development" of the well. Administrative expense most often includes such things as tax return preparation, accounting,

disbursements of funds, etc, none of which are incurred directly to enhance or continue actual production.

COMMENT: Change the language of 42.25.1017 to "all on site or directly attributable expenses actually incurred".

RESPONSE: Adding the language "directly attributable" could allow for costs away from the well site. This would be contrary to statutory and case law, and therefore is not be included.

COMMENT: 42.25.1017(8) refers to Administrative Rules of Montana 42.25.1018 which has been reserved by the Department of Revenue.

RESPONSE: The reference to 42.25.1018 in this section has been deleted and replaced by "Rule IV".

COMMENT: The existing regulations state that clerical and office expenses are allowed only to the extent that they relate to the actual production of the product. Why has this language been stricken from the proposed regulations? Please name case and statutory law.

RESPONSE: Although the existing regulations state that there is an allowance for deduction of clerical and office expenses, recent case law established that such items are not deductible.

Section 15-23-603(1)(b), MCA states that net proceeds shall be determined by subtracting from the gross sales proceeds "all money expended for necessary labor and machinery needed and used in the operation and development (of the well)". Clerical and office expense would fall under the labor category of this statute. But, as they do not relate to the actual operation and development of the well they are not an allowable deduction.

This concept was established by case law in the 1924 Anaconda Copper Mining v. Junod 71 Mont. 132, 227 P. 1001. This case established three main principles for net proceeds deductions:

1. Producers must actually incur and pay for an item of expense.

2. The expense must be for direct costs of extraction, and

3. The item must be specifically named in the statute.

Clerical and office expenses would fall under 1. as listed above, but not 2. and 3. Therefore, this item is not deductible.

Even though this reading is based on a Net Proceeds of Mines case, the Legislature, in writing the net proceeds law for oil and gas, carried over the mines net proceeds language on actual costs of production to the oil and gas proceeds law. Thus the

Anaconda decision does apply to the administration of the oil and gas law. These decisions have also been upheld in Somont Oil Company v. Department of Revenue, Cause No. 12994, Ninth Judicial District of Montana. Ed Vanderpas Oil v. Department of Revenue, Cause No. 12995, Ninth Judicial District of Montana. Duard Rossmiller v. Department of Revenue, PT-1979-5, State Tax Appeal Board.

COMMENT: By what law or statute was it determined that there are no administrative costs directly related to producing oil or gas?

RESPONSE: Please see responses to comments above.

COMMENT: ARM 42.25.1013 and 42.25.1017 refer to the necessity of activity taking place at the site of the well to be deductible. However ARM 42.25.1013(3) allows for geologic, maintenance, engineering and other technical work to take place at some other point.

RESPONSE: The department recognizes that certain labor costs relating to oil and gas production is unable to be performed at the well site. It is not always feasible for technical work to be performed on site, even though, if possible it would be. However by allowing this deduction, the Department of Revenue is not wavering from statutory or case law as the cost of this labor is necessary as a direct cost of extraction. Also these regulations are specific in identifying that only the costs as listed in 42.25.1013(3) are allowable away from the well site as can be seen by the language in 42.25.1013(4) and (6). In addition, these costs clearly fit within the definition of "operation and development".

COMMENT: Issue is taken with the Department of Revenue statement that only "on site" costs related to oil and gas are deductible. Nowhere in the statute, nor in the current regulations are the words "on site".

RESPONSE: Section 15-23-603(1)(b), MCA states that the Net Proceeds shall be calculated by subtracting from the gross sales proceeds thereof the following:

> All money expended for necessary labor and machinery needed and used in the operation and development (of the well).

The definition for development in ARM 42.25.1001(3) states "at or near a well site.. . ." Even though "on site" is not specifically mentioned in the language "at or near the well site" infers the same.

COMMENT: Considering the statutory definition of "well" why can a net proceeds tax report not be filed on all of the wells in one field or water flood unit, or one lease or group of leases?

RESPONSE: The statutory definition of a well is found under 15-23-601(5), MCA. It states:

> The term "well" includes each single well or group of wells, including dry wells, in one field or production unit and under control of one operator or producer.

In addition, the present regulations clearly define both a lease and a unit in terms of wells or pools. ARM 42.25.1001(2) & (3).

When the Department refers to filing on a well basis it relates directly to the definition in 15-23-601(5), MCA. The "well" as used in the regulations is defined in statute. Numerous producers in the state file returns based on a unitized production area, or on a leasehold area. (The only exception to this would be returns filed on wells that are not a part of an actual lease, or outside of a unitized area and included in the same.)

COMMENT: The deductibility of travel expense is too restrictive in that it does not allow for travel between wells on a waterflood unit or leasehold area.

RESPONSE: Travel between wells on a waterflood unit or leasehold area are allowed per ARM 42.25.1017(7) by the statutory definition of "well". This expense has never been disallowed if specific documentary evidence supports the expense. Vehicle expense to travel from well to well is provided for in 15-23-603(1)(e), MCA.

COMMENT: Necessary travel expenses would be required for the planning and designing of a waterflood unit. Would these expenses be allowed?

RESPONSE: Travel expenses related to a waterflood unit are handled exactly as for a non-waterflood unit.

COMMENT: An amendment to the proposed rules has been made which benefits the major companies. This is where you are allowing "the supervision or superintendence of the persons or officers actually engaged directly in the working of the well, lease or unit or superintending the personnel in a corporate or headquarters office who are not involved in the actual on-site operations."

RESPONSE: ARM 42.25.1013(4) states:

> Superintendence shall be meant to include only the persons or officers actually engaged directly in the working of the well, lease or unit or superintending the management thereof. <u>This deduction is not meant to include</u> any personnel in a corporate or headquarters office who are not involved in the actual on-site operations. (emphasis added)

When the overall rule is read, the meaning becomes obvious. The Department treats all oil and gas operators the same.

COMMENT: ARM 42.25.1017, in defining "operational costs" disallows "chemicals and additives used in tertiary recovery projects". There is no logical reason why chemicals and other additives should be excluded. They are absolutely necessary in order to effect recovery, whether it be primary, secondary or tertiary. The proposal of this rule indicates to me a complete lack of understanding on the part of the person writing that rule of what constitutes "tertiary recovery project.

RESPONSE: These expenses are not disallowed but rather clarified as to how they will be deducted.

ARM 42.25.1017(1) quotes the same language as listed above and explains that the costs will be amortized pursuant to 15-23-603(5), MCA as enacted by the 1985 Legislature. The rule is a clarification of statutory law and legislative intent as it pertains to filing the net proceeds return.

42.25.1021 - NEW PRODUCTION REPORTING REQUIREMENT

COMMENT: The DOR should allow an operator of an oil or gas well completed after March 31, 1987 the option to elect under the provisions of the laws defining "New Production" or under prior laws governing "Old Production" or wells completed prior to March 31, 1987.

RESPONSE: In reading both 15-23-602(2) and 15-23-607(2), MCA there is no statutory authority to allow an operator an option:

> 15-23-602(2) states:
> Each operator having interim production or new production as defined in 15-23-601 shall, on or before the last day of the months of October, January, April, and July, make out and deliver to the department of revenue a statement of the gross sales proceeds of such interim production or new production from each well owned or worked by such person during the preceding calendar quarter. The statement must be in the form prescribed by the department and verified as provided in subsection (1). The statement shall show the information required in subsections (1)(a) through (1)(d). (Emphasis added.)

This section states the operator shall file interim on new production as provided for. Therefore, we believe there is no option available.

> 15-23-607(2) states:
> For interim production or new production, as defined in 15-23-601, the county assessor may not levy or assess any mills against the value of such interim production or new production, but shall instead levy a tax as follows:

(a) for interim production or new production of petroleum or other mineral or crude oil, 7% net proceeds, as described in 15-23-603(3); or

(b) for interim production or new production of natural gas, 12% of net proceeds, as described in 15-23-603(3). (Emphasis added.)

For there to be any authority to allow "new production" to file as "old production" the assessor would have to have been given the ability to use either mill levies or the flat 7% or 12% tax rates, no such authority is granted.

COMMENT: Twelve comments were received pertaining to Rules 42.25.1021, 42.25.1022, 42.25.1023 and Rules V, VI and VII. These comments related to inconsistences with, and restatements of the statute.

RESPONSE: The statute is clear as to the filing requirements for New and Interim Production. Therefore, proposed Rule V, VI and VII will not be adopted and rules 42.25.1021, 42.25.1022 and 42.25.1023 will be repealed pursuant to a separate rule notice.

Miscellaneous

COMMENT: Replace the Net Proceeds Tax with a Gross Proceeds Tax.

RESPONSE: The change to a Gross Proceeds Tax would encompass a change in statute and can only be done by an act of the Legislature.

COMMENT: An operator of an oil and gas lease should not be responsible for filing any production taken in-kind.

RESPONSE: The responsibility for filing the Net Proceeds return lies with the operator of the well, lease or unit, not with the individual interest owners. It is a long standing rule of the Department of Revenue that one operator file the Net Proceeds form. This can be seen under ARM 42.25.1001(2) and (3) which states that:

One operator shall be named as lease operator and be responsible for filing the Net Proceeds form.

RULE II - DECLARATORY RULING PROCEDURE

COMMENT: Three individuals raised the concern that a failure to request a declaratory ruling under this rule could be construed as a failure to exhaust administrative remedies. Thus, barring the taxpayer from any further remedies.

RESPONSE: This was never the intent of the department. The department does acknowledge the concern. Therefore, the following language has been added to Rule II:

The fact that a person did not petition the Department for declaratory ruling as to the applicability of a statute and/or regulation to that person's activity or proposed activity shall not be construed as a failure to exhaust administrative remedies in any subsequent administrative or judicial review, or litigation, between the Department and the person involved over any particular item with respect to net proceeds taxation.

COMMENT: One person asked if a declaratory ruling would be applicable to other parties? Will these rulings be published, and when must an application be filed in order to be applicable to particular production year?

RESPONSE: Rule II makes reference to the statutory and regulatory provisions that apply to declaratory rulings. Declaratory rulings as stated in 1.3.229 Administrative Rules of Montana are binding between the agency and the petitioner based on the facts presented. A ruling would be in effect as long as the facts upon which the ruling was based remained unchanged, and any ruling would affect only the petitioner. The department's rulings must be filed with the Secretary of State for publication. Declaratory rulings will generally be considered prospective and will be related to the facts presented at that time.

RULE III - GROSS SALES PROCEEDS

COMMENT: Why will an operator/producer be penalized if he is forced to furnish his own compression and treating facilities.

RESPONSE: When an operator furnishes his own compression and treating, the natural gas value at the wellhead will be determined under a non-arm's-length or no contract situation. If the gross sales proceeds under these circumstances are comparable to the gross sales proceeds under other arm's-length contracts in the field or area, the non-arm's-length or no contract gross sales proceeds will be accepted for net proceeds purposes. If the gross sales proceeds are not comparable or the sales of arm's-length represents less than 50% of the wells in the field, a different method will be used to determine gross sales proceeds. Under Rule III(d) the gross sales proceeds would be based upon the first arm's-length sale less the delivery price adjustments.

Both methods described above are not intended to penalize an operator, but rather are to give every operator the opportunity to base his gross sales proceeds upon a reasonable basis.

COMMENT: What or how do you handle it if the central facility and processing plant are in fact one facility? You seem to feel they must be separate facilities. Please explain the need for separation of operations.

RESPONSE: All delivery price adjustments, plant product price adjustments or combinations of these will be allowed up to the point of valuation. This holds true whether the operations are performed at a combined facility or separate facilities.

COMMENT: Delivery price adjustments: In your definition, it seems only new facilities can be amortized over ten years. Why can not a new purchase of an old facility be deducted over 5 or 10 years?

RESPONSE: Please see the discussion regarding acquisition costs.

COMMENT: Change "field" in Rule III(2)(8) line 6:(c) line 6,(c)(ii) line 3, and perhaps other places to "area".

RESPONSE: The department views the word "field" as used in Rule III, to a geographical area. Therefore, "field" isn't too restrictive in the context in which it is used. In addition, the last paragraph of Rule III describes that other factors can be used.

COMMENT: In many of the circumstances of which I am aware, these "non-arms-length" contracts were specifically designed to provide a price to the well owner equal to or greater than the price which such well owner could have received had he been able to obtain an arms-length contract with a non affiliated buyer. The well owner should be able to use the "non-arms-length" price under this circumstance.

RESPONSE: The department agrees that if "non-arms- length" contracts where the wellhead is not the "point of sale", provide a price greater than the price the operator could have received had he been able to obtain an arms-length contract, the "non-arms-length" price will be used if the requirements in Rule III(c)(11) and (ii) are met.

COMMENT: The situations which are not covered are where non-arms-length contracts are in effect for oil. Remarks were received that requested additional language be added under Rule III.

RESPONSE: The department agrees that additional language should be added for non-arms-length oil transactions. Please see proposed amendment to Rule III.

COMMENT: Too complicated and too long. Issue of valuation is complicated and the new rules as proposed causes more confusion and uncertainty than it clarifies. Department and industry would be bound to a rule which at this time is unworkable.

RESPONSE: The valuation of natural gas is a complicated subject. This is largely due to the variety of selling arrangements under which gas is sold. Therefore, any rules

developed to address this very complicated subject will also have to be complicated. However, the fact that the rules are long and complicated does not make them incorrect or inappropriate. The department's objective is to provide a set of rules that will cover as many of these selling arrangements as possible.

COMMENT: Two industry representatives stated that Plant Products Price Adjustments should be allowed for residue (dry) gas as they are for "liquids" and "other products".

RESPONSE: We have amended the rules to allow for the deduction of processing costs against residue to the extent the processing costs exceed the gross sales proceeds or the natural gas liquids and other products.

COMMENT: Plant Product Price Adjustments and Delivery Price Adjustments, reliant on operational and maintenance expenses, lead to valuation beyond the wellhead, contrary to statute, and may not reflect true market value.

RESPONSE: The use of Plant Product Price Adjustments and Delivery Price Adjustments are used only when there is a non-arm's-length contract or no contract at the well and the first arm's-length sale is at a point away from the well. By using these adjustments, a wellhead price is determined and it will be at this wellhead price that the tax will be based.

COMMENT: Four industry representatives requested clarification as to how the Department of Revenue is going to consider "comparable contracts". Also, once the department establishes a comparable price will the operator be advised of how the comparison was made and will he be able to rebut the price.

RESPONSE: The department feels that the wording used for the comparing of contracts needs no further clarification. It is clear as to the comparisons that will be made.

When the department uses a comparable contract basis for establishing price, usually during the audit process, the operator will be advised of all comparisons used. He will have the opportunity, through discussions with the Department of Revenue and other administrative procedures, to provide evidence if he is in disagreement with how the price was calculated.

COMMENT: No provision is made for transportation costs associated with gas.

RESPONSE: The Plant Products Price Adjustment and Delivery Price Adjustment in allowing for the costs of construction of the "central facilities" and "processing plant" have taken into account the transportation costs. All other sales occur at the wellhead, and therefore transportation is not a factor in marketing the gas.

COMMENT: The regulations do not clarify that no Plant Processing Price Adjustment will be allowed when there is an arm's-length transaction at the wellhead.

RESPONSE: Rule III(3) relates to processed natural gas. It clarifies that there can be a separate sales contract for residue, liquids and other products and/or processing contracts for the same. In any arm's-length contract, gross sales proceeds will equal the price received for all products. However, if a processing contract/transaction is non-arm's-length, gross sales proceeds will be calculated as outlined in Rule III(3)(c).

COMMENT: A definition of "unprocessed natural gas" and "processed natural gas" would help in situations where gas is sold at the wellhead on a percentage contract to a gas plant operator?

RESPONSE: The classification of "processed" versus "unprocessed" is irrelevant for a well-head sale. If gas is sold at the wellhead the contract price reflected from an arm's-length sale will be the gross sales and the rules so state.

COMMENT: When an arm's-length contract exists, the price received should be recognized as gross sales proceeds.

RESPONSE: In fact, the rules recognize an arm's-length contract price for determinating gross sales proceeds.

COMMENT: On a natural gas contract, explain what the gross sales price would be for partially compressed gas, but unrefined from a liquids stripping standpoint whose dew point had not been sufficiently lowered to qualify as pipeline quality when the selling producer is the only comparable sale in the area. This is what is called partially processed gas.

RESPONSE: The question does not state whether a sale has actually taken place, only that the gas does not qualify as pipeline quality as it is only partially processed. Since the department is unable to answer because of incomplete information, it is recommended that the operator seek a declaratory ruling as outlined in Rule II.

COMMENT: We buy unprocessed low pressure gas on an arm's-length basis at the wellhead and put it in a form suitable for resale to Montana Power Company.

Since the gas we purchase is a long way from our central facilities and the gas is low pressure, we install booster compressors at various points in the gathering system so we can take the gas at low suction pressures. Our contracts with third parties call for the booster compression and the gathering system to be installed at our expense but require the energy needed to get the gas to our own central facilities (in particular the gas

used by the booster compressors) to be supplied by the producer at no cost to us.

May the third party producers deduct this gas so expended in computing their gross sales for net proceeds and royalty purposes? Please reference all laws statutes and proposed regulations that support the reply given.

The only alternative third party producers would have to get their gas into our system would be for them to put in their own booster compressors at their cost and supply the gas for same. In such cases the energy usage would clearly be deductible as on-lease fuel gas.

RESPONSE: First, in relation to the valuation of royalties these regulations relate only to the Net Proceeds of Mines Tax and cannot be used in valuing royalties as this is beyond the scope of the department.

Secondly, based upon the information presented, no allowance for fuel used in the booster compressors would be allowed. The reasons for this are:

1. There is an arm's-length contract at the wellhead. Therefore, gross sales proceeds will be accepted as contract price received at the wellhead. (Rule III(2)(a) in the proposed regulations and 15-23-602(2)(d), Montana Code Annotated)

2. Since the point of valuation is the wellhead, only on-site expenses incurred up to that point will be allowable. As stated in the comment, the booster compressors are placed along the gathering lines which would be away from the site of the well. ARM 42.25.1013, 42.25.1014 and 42.25.1017 of the proposed rules and 15-23-602(2)(e)(i), MCA state only on site, actual extraction costs are allowable. Also, in the Supreme Court decision Pfizer v. Madison County, 161 Mont. 261, 505 P. 201, 399, the court affirmed that only costs up to the point of valuation are allowable deductions for Net Proceeds purposes. As the point of valuation is at the wellhead in this case only deductions to that point are allowable.

Since the booster compressors are beyond the point of valuation, these costs would not be allowed.

COMMENT: The department should adopt a definition of posted price and amend Rule III incorporating a definition of posted price.

RESPONSE: The department agrees and the following definition for posted price has been added.

(22) "Posted price" means the price paid for oil by purchasers to producers in arm's-length contracts/transactions and specified in publicly available price bulletins or other price

notices. The price will be net of all adjustments for quality (e.g. API gravity, sulfur content, etc.) and location for oil in marketable condition, when applicable.

Rule III with respect to oil will now read:

(1) The gross sales from the sale of oil and condensate shall be equal to the total production sold times the "posted price". If there is a non- arm's-length or no contract for the sale of oil or condensate the price reported may not be less than the "posted price" for similar oil and condensate.

RULE IV - NECESSITY OF PROOF

COMMENT: Rule IV is invalid. This rule is adding additional record keeping expense to the operator.

RESPONSE: For any expenses claimed as deductions on the net proceeds returns, the operator must maintain the necessary records to support the deductions. This rule hasn't changed or added to that requirement.

COMMENT: Why adopt rules now? The department should wait for the 1989 legislature because the project has become too big and involved.

RESPONSE: At the outset of this rule making process the primary objective was to provide clarity to the net proceeds regulations, and to have stated as clearly and concisely as possible how the net proceeds should be filed. This has been accomplished.

To delay the adoption of these would not serve to resolve the disagreements regarding the rules.

Finally, there were several comments made regarding how and why the department conducts audits. A review of the paper presented on September 11, 1987 to the Revenue Oversight Committee entitled Auditing in the Department of Revenue will answer many of the questions raised.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to the Secretary of State 5/16/88.

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

In the matter of the amendment of Rules 46.8.102, 46.8.104 and 46.8.105 pertaining to individual habilitation plans for developmentally disabled persons	))))))	NOTICE OF THE AMENDMENT OF RULES 46.8.102, 46.8.104 AND 46.8.105 PERTAINING TO INDIVIDUAL HABILITATION PLANS FOR DEVELOPMENTALLY DISABLED PERSONS

TO: All Interested Persons

1. On April 14, 1988, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.8.102, 46.8.104 and 46.8.105 pertaining to individual habilitation plans for developmentally disabled persons at page 695 of the 1988 Montana Administrative Register, issue number 7.

2. The Department has amended Rule 46.8.104 as proposed.

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

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

Subsections (1) through (15) remain as proposed.

(16) "HOME BASED SERVICES" MEAN SERVICES PROVIDED TO CHILDREN WHO LIVE IN FOSTER HOMES OR NATURAL HOMES.

Subsections (16) through (26) remain as proposed but will be renumbered as (17) through (27).

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

46.8.105 INDIVIDUAL HABILITATION PLANS (1) ~~An--individual-habilitation--plan-is-a-written--plan-of-intervention-and action--developed-by-an-interdisciplinary--team-of--persons-on the-basis--of-a--skill-assessment--and--determination--of--the status--and--needs--of-a--client.~~ An IHP must be developed and maintained by an IHP team for each individual who is a recipient of state funded developmental disabilities services, EXCEPT FOR HOME BASED SERVICES. The individual habilitation plan (IHP) ensures that the provision of services will be systematic and that ~~interventions are~~ training is designed to enhance the development of ~~the client~~ persons receiving developmental disabilities services.

~~(2)~~ Each ~~client~~ person receiving state funded developmental disabilities services EXCEPT FOR HOME BASED SERVICES is

entitled to an a single, comprehensive individual habilitation plan (IHP).

Subsections (2) through (4) remain as proposed.

~~(4)(5)--Advisory--members--of-the--individual--habilitation planning-team-may--include:--In-order--to-hold-an-IHP-meeting, each-person-listed-in-subsections--(3)(a)-through-(3)(g)-above who-is-a--member--of-the-team--must-be--present-at-the-meeting unless-unable-to-attend.~~

~~(a)--any-family-member-or-relative;-and~~

~~(b)--psychologists,-medical-personnel-and-other-consultants.~~

Subsections (5) through (14)(d) remain as proposed.

(e) further appeal may be made to the director of the department, of social and rehabilitation services, ~~whose-decision--shall--be-final.~~ WHO WILL, IN CONSULTATION WITH THE DIRECTOR OF THE DEPARTMENT OF FAMILY SERVICES, MAKE THE FINAL DECISION.

Subsections (14)(f) through (15) remain as proposed.

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

4. The Department has thoroughly considered all commentary received:

COMMENT: A staff person commented that the proposed IHP rule includes home-based providers who may not be able to comply with the IHP requirements.

RESPONSE: Wording has been inserted to define and create an exception for home based services in regards to IHP requirements. A rule will be promulgated in the future which will deal specifically with home based services.

COMMENT: The requirement that each IHP team member be present at the meeting unless unable to attend contradicts itself.

RESPONSE: The Department agrees and the contradictory wording has been deleted.

COMMENT: In the interest of a dual agency review process, the Department of Family Services' Director should be consulted before the SRS Director make the final decision.

RESPONSE: The Department agrees and appropriate wording has been added.

COMMENT: The subsections of ARM 46.8.105 were misnumbered in the first notice.

RESPONSE: The Department agrees, but deletion of ARM 46.8.105 (5) has corrected the numbering.

Director, Social and Rehabilitation Services

Certified to the Secretary of State May 16, 1988.

VOLUME NO. 42 OPINION NO. 80

CITIES AND TOWNS - Authority to contract with entities to provide fire protection outside city limits;
FIRE DISTRICTS - When constitute a "taxing unit" under Title 15, chapter 10, MCA;
TAXATION AND REVENUE - Application of property tax limitations in Title 15, chapter 10, part 4, MCA, to new taxing units;
MONTANA CODE ANNOTATED - Title 15, chapter 10, part 4; sections 1-2-101, 2-17-112, 7-5-4301, 7-33-2101, 7-33-2104, 7-33-2105, 7-33-2107, 7-33-2109, 7-33-4201, 15-10-402, 15-10-412;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 21 (1987), 42 Op. Att'y Gen. No. 73 (1988).

HELD: 1. A rural fire district that is operated by a board of trustees is a "taxing unit" under Title 15, chapter 10, part 4, MCA.

2. The creation of a new taxing unit is not a "transfer of property into a taxing unit" under section 15-10-412, MCA.

3. The taxes levied on property in one taxing unit have no effect under Title 15, chapter 10, part 4, MCA, on the amount that may be levied by another taxing unit in which the same property is located.

4. A taxing unit created after 1986 is not subject to the tax limitations in Title 15, chapter 10, part 4, MCA.

5. A city may contract with entities to provide fire protection services outside the city limits.

4 May 1988

Representative Bob Marks
State House of Representatives
302 Lump Gulch
Clancy MT 59634

Dear Representative Marks:

You requested an opinion concerning several questions pertaining to fire districts:

1. May a fire district created under Title 7, chapter 33, part 21, levy taxes to fund the district operations in light of Title 15, chapter 10, part 4, MCA?

   a. Is a fire district a "taxing unit" under Title 15, chapter 10, part 4, MCA?

   b. Does the creation of a new taxing unit entail "transfer of property into a taxing unit" under section 15-10-412, MCA?

   c. How do the taxes paid to a fire district affect the amount of taxes that could be collected by the county or another taxing unit in which the property is located?

   d. If the fire district may levy taxes, is there any freeze applicable to taxes levied by that district since it did not exist in 1986?

2. May the City of Billings, through a contract between the city and a corporation, homeowners' association, or other entity, provide direct fire protection to areas outside of the city limits?

Title 7, chapter 33, part 21, MCA, authorizes the creation of rural fire districts in unincorporated areas, and their funding by the levy of an annual district-wide property tax. §§ 7-33-2101, 7-33-2109, MCA. Your first set of questions addresses the effect of recent legislation limiting property taxes on rural fire districts.

Initiative No. 105 (I-105) and chapter 654, 1987 Mont. Laws, are codified in Title 15, chapter 10, part 4, MCA, entitled "Limitation on Property Taxes." Those provisions generally limit the amount of property taxes which may be assessed upon individual taxpayers to the 1986 tax year level. See 42 Op. Att'y Gen. No. 21

(1987). Although there are specific exceptions to the property tax limitations, fire districts are not listed among them. § 15-10-412(8), MCA.

Section 7-33-2109, MCA, authorizes a property tax to be levied upon all property in the rural fire district. Since this tax levy is based on the value of the properties taxed, and benefits the entire fire district, it is the kind of tax that is subject to the limitations in Title 15, chapter 10, part 4, MCA. See 42 Op. Att'y Gen. No. 21 (1987) and 42 Op. Att'y Gen. No. 73 (1988), which discuss the distinction between assessments or user fees, which are not subject to the property tax limitation, and ad valorem property taxes levied to benefit the taxing jurisdiction as a whole.

You have asked if a rural fire district is a "taxing unit" within the meaning of section 15-10-412, MCA, which uses the term throughout. For example, subsection (2) provides: "The limitation on the amount of taxes levied is interpreted to mean that the actual tax liability for an individual property is capped at the dollar amount due in each taxing unit for the 1986 tax year."

"Taxing unit" is defined in section 15-1-101(2), MCA, for all tax purposes:

> The phrase ... "taxing unit" shall be deemed to include a county, city, incorporated town, township, school district ... or any person, persons, or organized body authorized by law to establish tax levies for the purpose of raising public revenue. [Emphasis added.]

A rural fire district is established by the board of county commissioners of the county in which the district is located. § 7-33-2101, MCA. The board of county commissioners may either operate the fire district itself or appoint a board of trustees to operate the district. § 7-33-2104, MCA. When a board of trustees has been appointed, its duties include preparing the district's budget and determining the tax levy, which is collected by the county. §§ 7-33-2105, 7-33-2109, MCA. Clearly a rural fire district is a "taxing unit" when it is operated by a board of trustees. However, when a rural fire district is operated by the county commissioners, the applicability of the term "taxing

unit" is less clear. Where the county commissioners and not the fire district itself establish the tax levy for the district, the definition of "taxing unit" does not encompass the fire district. A "taxing unit" entails an entity that establishes its own tax levy. In this situation, the board of county commissioners and not the fire district has this role. Thus, a fire district operated by the county and not by a board of trustees is not a "taxing unit." A rural fire district operated by a board of trustees, however, is a "taxing unit" within the meaning of section 15-10-412, MCA.

Your next question is whether the creation of a new taxing unit entails "transfer of property into a taxing unit" under section 15-10-412, MCA. I conclude that it does not. Section 15-10-412, MCA, provides that the limitation on property taxes to 1986 levels does not preclude an increase in total taxable valuation of a taxing unit or in actual tax liability on individual property as a result of, inter alia, "transfer of property into a taxing unit." § 15-10-412(3)(c), (4)(b), MCA. The rules of statutory construction require that the language of the statute be given their plain and ordinary meaning. Rierson v. State, 188 Mont. 522, 614 P.2d 1020, 1023, on rehearing, 622 P.2d 195 (1980). Transfer of property into a taxing unit presumes the existence of a unit into which property may be transferred. Since the rural fire district is newly created, there is no transfer of property into it at the time of its creation.

Your next question is whether taxes levied by a rural fire district created after 1986 affect the amount of taxes that may be levied by another taxing unit in which the same property is located. The provisions limiting property taxes focus on taxing units or jurisdictions; they limit the amount of taxes which may be assessed on property in each taxing unit or jurisdiction. §§ 15-10-402, 15-10-412(2), MCA. A property may be included in several taxing units or jurisdictions, and the amount taxed by one taxing unit or jurisdiction has no legal effect on an amount taxed by another.

Your next question is whether a rural fire district created after 1986 is subject to the limitations on property taxes, since it has no 1986 level to which it may limit its levy. I conclude that such district, established as a taxing unit, is not subject to the

property tax limitations. Those provisions specifically limit the property tax levies to 1986 amounts. There is no provision for new taxing units to limit their levies to their first year of existence, or to 1986 amounts levied by another taxing unit. I cannot construe such a limitation on new taxing units where the Legislature has not done so. See § 1-2-101, MCA.

Your last question is whether the City of Billings, through a contract between the city and a corporation, homeowners' association, or other entity, can provide direct fire protection to areas outside the city limits.

The statutes that regulate fire protection in the State of Montana are found in Title 7, chapter 33, MCA. Section 7-33-4201, MCA, sets forth the general authority of a city council to establish a fire department and to prescribe its duties. The city's ability to enter into agreements in furtherance of this power is established in section 7-5-4301, MCA. There is no specific provision concerning the authority of a municipality to contract to provide fire protection outside its boundaries. However, several statutory sections imply that such contracts may be entered into by a city.

Section 2-17-112, MCA, provides that the State may contract with local fire services and make payments to local governments for fire services provided to state agencies. Rural fire districts are given specific authority to contract with city councils for the extension of fire protection service by the city, and may agree to pay a reasonable consideration therefor. §§ 7-33-2104, 7-33-2107, MCA. Implementation of these statutes would necessarily involve local governments contracting to provide extraterritorial fire protection. The city's authority to contract with entities outside its boundaries is implicit because it is essential in order to execute the power actually conferred in the above-mentioned statutes. See 2A Sutherland, Statutory Construction § 55.03 (1973).

The Montana Supreme Court has held that a city may enter into contracts to provide services beyond its boundaries. City of Billings v. Public Service Commission of Montana, 38 St. Rptr. 1162, 1173, 631 P.2d 1295, 1307 (1981); Crawford v. City of Billings, 130 Mont. 158, 163, 297 P.2d 292, 295 (1956). Courts in other jurisdictions have specifically addressed

furnishing firefighting services outside municipal boundaries. In Pueblo v. Flanders, 225 P.2d 832 (Colo. 1950), and Miller v. City of St. Joseph (Mo. Ct. App. 1972), the authority of a city to provide fire protection outside city limits was upheld as within the interest of the public's health, safety, and welfare.

Thus, I conclude that a city may enter into contracts to provide fire protection outside the boundaries of the city.

THEREFORE, IT IS MY OPINION:

1. A rural fire district that is operated by a board of trustees is a "taxing unit" under Title 15, chapter 10, part 4, MCA.

2. The creation of a new taxing unit is not a "transfer of property into a taxing unit" under section 15-10-412, MCA.

3. The taxes levied on property in one taxing unit have no effect under Title 15, chapter 10, part 4, MCA, on the amount that may be levied by another taxing unit in which the same property is located.

4. A taxing unit created after 1986 is not subject to the tax limitations in Title 15, chapter 10, part 4, MCA.

5. A city may contract with entities to provide fire protection services outside the city limits.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 81

CITIES AND TOWNS - Whether statutes allowing local governments to contract with private parties to build, maintain, or operate jails conflict with statutes regulating indebtedness, contracts, provision of jail facilities, or interlocal agreements of local governments;
COUNTIES - Whether statutes allowing local governments to contract with private parties to build, maintain, or operate jails and permitting multi-county jails conflict with statutes regulating indebtedness, contracts, provision of jail facilities, or interlocal agreements of local governments;
CORRECTIONAL FACILITIES - Whether statutes allowing local governments to contract with private parties to build, maintain, or operate jails and permitting multi-county jails conflict with statutes regulating indebtedness, contracts, provision of jail facilities, or interlocal agreements of local governments;
MONTANA CODE ANNOTATED - Title 7, chapter 5, part 23; 7-5-2101, 7-5-2306, 7-5-2307, 7-11-104, 7-32-2201 to 7-32-2234, 7-32-4201 to 7-32-4203;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 70 (1988), 42 Op. Att'y Gen. No. 13 (1987), 39 Op. Att'y Gen. No. 37 (1981), 38 Op. Att'y Gen. No. 101 (1980), 38 Op. Att'y Gen. No. 75 (1980), 37 Op. Att'y Gen. No. 152 (1978).

HELD: Chapter 447, 1985 Mont. Laws, does not directly conflict with Montana statutes regulating the indebtedness, contracts, jail facilities, or interlocal agreements of local governments. However, chapter 447 is subject to the various applicable limitations contained in those statutes.

6 May 1988

Patrick L. Paul
Cascade County Attorney
Cascade County Courthouse
Great Falls MT 59401

Dear Mr. Paul:

You have requested an opinion concerning:

> Whether the act allowing counties to contract with private parties for the building, maintenance, and operation of jails (1985 Mont. Laws, ch. 447) conflicts with any statutes regulating indebtedness, contracts, jail facilities, or interlocal agreements entered into by local governments.

Chapter 447, 1985 Mont. Laws, created four new statutes and revised fifteen others. Part of its purpose was stated in the first section:

> It is the purpose of 7-32-2231 through 7-32-2234 to allow regional or single-county jails to be built by private industry and leased back to the participating county or counties for operation by the county, collectively by participating counties, or by a private entity with the concurrence of the sheriff or sheriffs involved.

§ 7-32-2231, MCA. To further this purpose, new statutes were written which detailed the requirements for jail contracts between counties and private parties (§ 7-32-2232, MCA), set forth the procedures for counties to follow in requesting and selecting bid proposals (§ 7-32-2233, MCA), and enumerated the powers of jail administrators and private-party jailers (§ 7-32-2234, MCA). Amendments to existing statutes allowed counties to act in common to provide jail facilities, either public or private (§ 7-32-2201(2), MCA), and to maintain and operate, as well as build, such jails (§§ 7-32-2204 to 2207, MCA).

Section 7-32-2201, MCA, requires counties to provide jail facilities. As I noted recently (42 Op. Att'y Gen.

No. 70, (1988)), municipalities are not required to provide jail facilities, but do have the power to incarcerate offenders. Chapter 447, 1985 Mont. Laws, made several revisions to existing statutes so that the counties' responsibility to provide jail facilities could be carried out consistently with the goal of allowing counties to enter into agreements under which private parties would build, maintain, or operate jails (1985 Mont. Laws, ch. 447, §§ 10 to 19). I find that chapter 447, 1985 Mont. Laws, is not in conflict with either county or municipal powers or duties regarding jail facilities (§§ 7-32-2201 to 2234, 7-32-4201 to 4203, MCA).

With regard to interlocal agreements, section 7-11-104, MCA, allows local governments to contract with each other to perform jointly any undertaking which they are authorized by law to perform individually. (See 39 Op. Att'y Gen. No. 37 at 147 (1981), 38 Op. Att'y Gen. No. 75 at 261 (1980).) I find nothing in chapter 447 concerning the counties' responsibilities to provide jail facilities, nor in sections 7-32-4201 and 7-32-4203, MCA, concerning the powers of municipalities with regard to jails, that is inconsistent with interlocal agreement statutes. Therefore, interlocal agreements regarding jail services may be used where authorized by law. Of course, the relevant provisions of an interlocal agreement should be disclosed to a private party who has contracted to operate a jail.

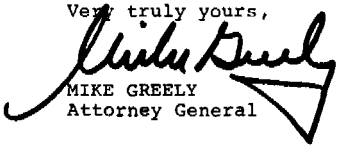
The statutes regulating county contracts are contained in Title 7, chapter 5, part 23, MCA. County commissioners have general authority to enter into contracts (§ 7-5-2101, MCA) as well as specific authority to enter into installment purchase contracts (§ 7-5-2306, MCA) and rental-purchase contracts (§ 7-5-2307, MCA). Although no special amendments to these county contracting statutes were included in chapter 447, 1985 Mont. Laws, I see no conflicts between the statutes authorizing private parties to build, maintain, or operate jails (§§ 7-32-2231 to 2233, 7-7-2201, 7-7-2203, MCA), and those statutes authorizing counties to enter various types of contracts (§§ 7-5-2101, 7-5-2306, 7-5-2307, MCA). While there is no basic conflict among these statutes, the specific statutory conditions of each type of contract must be met. (See 37 Op. Att'y Gen. No. 152 at 627 (1978), 38 Op. Att'y Gen. No. 101 at 349 (1980).)

Your final question asks whether there is any conflict between chapter 447, authorizing private parties to build, maintain, or operate jails, and the statutes which regulate the amount of indebtedness which local governments may incur. Chapter 447 made specific changes to the bonded indebtedness statutes (§§ 5, 6) to allow for the funding of multi-county jail facilities for use by counties other than those in which the facilities are located. I find this language limiting the purposes for which general obligation bonds may be issued to in-county projects to have been properly amended for multi-county jails by chapter 447, sections 5 and 6. The other language in the statutes limiting county indebtedness (concerning total amounts, purposes, etc., cf. 42 Op. Att'y Gen. No. 13 (1987)) does not create any direct conflict with chapter 447. While these limitations must be observed where applicable, they do not constitute a direct conflict that would render chapter 447 a nullity.

THEREFORE, IT IS MY OPINION:

> Chapter 447, 1985 Mont. Laws, does not directly conflict with Montana statutes regulating the indebtedness, contracts, jail facilities, or interlocal agreements of local governments. However, chapter 447 is subject to the various applicable limitations contained in those statutes.

Very truly yours,



MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 82

CITIES AND TOWNS - Authority to accelerate future installments of special assessments;
CITIES AND TOWNS - Procedure to obtain tax deed prior to 1987;
CITIES AND TOWNS - Requirement to continue funding SID fund from revolving fund and to continue levying city-wide property tax until SID bonds are discharged;
COUNTIES - Tax collection for city taxes;
DEEDS - Procedure for a city to obtain a tax deed prior to 1987;
SPECIAL IMPROVEMENT DISTRICTS - Authority of city to accelerate future installments of special assessments;
SPECIAL IMPROVEMENT DISTRICTS - Requirement of city to continue funding SID fund from revolving fund and to continue levying city-wide property tax until SID bonds are discharged;
MONTANA CODE ANNOTATED - Sections 1-2-101, 7-12-4181 to 7-12-4183, 7-12-4201, 7-12-4202, 7-12-4205, 7-12-4206, 7-12-4221 to 7-12-4224, 15-17-303, 15-17-304 (1985);
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 77 (1986).

HELD: 1. When a city has established a revolving fund to secure payments on SID bonds, and when an SID fund does not have sufficient amounts to make payments on its bonds, the city must continue to make loans from the revolving fund to the SID fund, and must continue to levy the property tax in accordance with section 7-12-4222, MCA, until the obligations on all bonds and warrants in the SID are discharged.

2. A city whose taxes are collected by the county has statutory authority to accelerate future installments of special assessments when one installment becomes delinquent.

3. Prior to 1987 a city could not obtain a valid tax deed on property it received through a tax sale until the outstanding and delinquent assessments on the property were paid and discharged.

10 May 1988

Eric F. Kaplan
Deputy City Attorney
P.O. Box 329
Columbia Falls MT 59912

Dear Mr. Kaplan:

You have requested my opinion on the following questions concerning the city's special improvement districts:

1. If the city cannot pay the outstanding principal on SID bonds on or before their maturity date, for how long a period of time will the city be required to levy the tax required by section 7-12-4222, MCA?

2. If money borrowed from the revolving fund cannot be repaid by the SID fund due to the delinquencies on payments of assessments, can the city forgive or write off those loans?

3. Does the city of Columbia Falls have statutory authority to accelerate future installments of special assessments when one installment becomes delinquent?

4. Is the city required to recover outstanding and delinquent SID taxes on property it received through a tax sale and which it proposes to sell to a third party?

Your questions arise from a situation that is becoming increasingly common in this state: Subdividers, unable to market lots after a special improvement district (SID) has been created and SID assessments imposed, default on the payments of those assessments.

In 1980 the City of Columbia Falls created Special Improvement District No. 28 (SID 28) and subsequently sold bonds to finance the district's improvements. The maturity date of the bonds is 2001. A major portion of the SID is owned by a developer who, being unable to

sell the lots, has defaulted on payment of the assessments. The failure to pay the assessments has resulted in a deficiency in the SID bond fund to such an extent that the city has been unable to make all the semi-annual interest and principal payments on the bonds and anticipates being unable to redeem them on or before the maturity date. The city established a special improvement district revolving fund and, in order to restore the deficiencies in the SID fund, has been levying a tax on the entire city under section 7-12-4222, MCA. However, even with the revenue from the revolving fund, the city is unable to meet its interest and principal payments on the bonds.

The complexity of your questions requires some explanation of the statutes governing SID bonds. Section 7-12-4201, MCA, authorizes the city to issue bonds to pay the cost of improvements in a special improvement district. The proceeds from the sale of the bonds are placed in a special improvement district fund used to pay the costs of the improvements. § 7-12-4205, MCA. The bonds are repaid with proceeds of assessments levied on property in the special improvement district, § 7-12-4206, MCA, and a lien is created on behalf of the bondholders on the assessed properties in the district, §7-12-4202, MCA. The city may establish a revolving fund to assure prompt payment of bond interest and principal. § 7-12-4221, MCA. (In 1981, when the bonds in question were sold, the city was required to create a revolving fund, under section 7-12-4221, MCA, prior to its 1983 amendment.) The revolving fund is funded by loans from the city's general fund and by a tax on all taxable city property in an amount which would bring the balance in the revolving fund to no greater than 5 percent of the principal of the outstanding SID bonds and warrants. § 7-12-4222, MCA. In the event there is insufficient money in the SID fund to pay the interest and principal on the bonds, the revolving fund loans money to the SID fund for such payments. § 7-12-4223, MCA. Whenever the SID fund borrows money from the revolving fund, a lien arises on behalf of the revolving fund against all unpaid assessments in the SID and all money coming into the SID fund. § 7-12-4224, MCA.

With respect to SID 28, Columbia Falls established by resolution an SID fund. The resolution sets forth in detail the purposes of the SID, the bonds to be issued, and the manner of assessments and the collection

thereof. The resolution further provides that the assessments are a lien upon the properties assessed and that any tax deed issued will not eliminate subsequent assessments on the property. A revolving fund was established by ordinance in 1953 to be used for all city SID's and is still in existence. The ordinance authorizes the city to levy a city-wide property tax and to borrow from the general fund. It provides that the city may borrow money from the revolving fund for any SID fund by resolution. The resolution pertaining to SID 28 incorporates the revolving fund. The resolution contains no provisions should default on payment of the bonds occur.

Your first question concerns the obligation of the city to continue levying the city-wide property tax for the revolving fund to pay interest and principal on SID 28 bonds when it anticipates that the bonds will not be redeemed by their maturity date. Section 7-12-4222(1)(b), MCA, requires the city to levy a city-wide property tax in an amount necessary to meet the financial requirements of the revolving fund--but only up to an amount that would bring the balance of the revolving fund to 5 percent of the outstanding SID bonds and warrants secured thereby. Section 7-12-4221, MCA, provides:

> Nothing herein shall authorize or permit the elimination of a revolving fund until all bonds and warrants secured thereby and interest thereon have been fully paid and discharged.

This language is clear and unambiguous and thus speaks for itself. Blake v. State, 44 St. Rptr. 580, 735 P.2d 262, 265 (1987). Consequently, until all the SID bonds have been paid and discharged, Columbia Falls must continue to supply the SID fund with money from the revolving fund and must continue to levy the city-wide property tax to fund the revolving fund. Because the city anticipates being unable to redeem all the bonds by their maturity date, it could conceivably be required to impose the annual city-wide tax indefinitely because the interest and principal on these bonds might never be fully paid.

Columbia Falls anticipates being unable to retire the bonds at any time in the foreseeable future, for various

reasons including recent decline in marketability of the delinquent properties in SID 28. The Legislature has not provided authority for the city to terminate the loans from the revolving fund to the SID on this basis. I cannot construe such authority where the Legislature has failed to act. See § 1-2-101, MCA. I therefore conclude that the city is required to continue loaning money from the revolving fund to the SID fund and to continue levying the city-wide property tax for the revolving fund for those loans, until such time that the obligation on SID bonds has been discharged.

As I stated earlier, the revolving fund loans money to the SID fund for payment on the bonds, and it has a lien on all unpaid assessments and other money coming into the SID fund. §§ 7-12-4223, 7-12-4224, MCA. The revolving fund's only security is that lien. Hansen v. City of Havre, 112 Mont. 207, 114 P.2d 1053, 1056 (1941). In providing for the establishment of a revolving fund and its operation with respect to deficient SID funds, the Legislature placed upon the city a limited obligation with respect to SID debts to bondholders. In Stanley v. Jeffries, 86 Mont. 114, 284 P. 134, 138-39 (1929), the Court discussed the enactment of the provision authorizing the establishment of an SID revolving fund stating that the effect of the enactment would give bondholders greater security for payment on the bonds. The Court further observed that the enactment "modified the SID law to impose upon the general public, within the municipality, a conditional obligation to pay a small portion of the cost of erecting the public improvement, whereas it might have, lawfully, imposed a much greater burden on the municipality." Id.

It is well settled that SID bonds and assessments are not general obligations of the city but are secured by the properties assessed in the district. Hansen v. Havre, 114 P.2d at 1057; Guffin v. Opinion Pub. Co., 114 Mont. 502, 138 P.2d 580, 588 (1943); State ex rel. Truax v. Town of Lima, 121 Mont. 152, 193 P.2d 1008, 1010 (1948). Any loss due to uncollectible assessments or other deficiencies must fall on the bondholder and not the city. Guffin, 138 P.2d at 588. Section 7-12-4222, MCA, provides an additional, albeit limited, security on the bonds, and when the bond obligations are finally discharged, the revolving fund must be reimbursed by any remaining moneys in the SID fund.

In summary, until such time as the obligations on all bonds and warrants in the SID are discharged, the revolving fund must continue to loan money to the SID fund whenever deficiencies require such loans, and the city must continue to impose the property tax in accordance with section 7-12-4222, MCA.

This opinion does not address avenues of resolving the city's inability to redeem the SID bonds because any agreements with the bondholders concerning such resolutions would involve particular facts and negotiations between the city and the bondholders.

Your next question is whether the city can forgive or write off unrepayable loans made by the revolving fund to the SID fund. This question concerns a city's individual accounting practices and is therefore inappropriate for an Attorney General's Opinion.

Your third question is whether Columbia Falls may accelerate future installments of assessments on parcels of land whose installments are delinquent. I conclude that Title 7, chapter 12, MCA, authorizes the city to do so. Columbia Falls' assessments are collected by the county, thus the collections are governed by section 7-12-4181, MCA. However, sections 7-12-4182(1) and 7-12-4183(1), MCA, which govern collection of taxes by the city, are also relevant.

Section 7-12-4181, MCA, does not address the authority of the city with respect to collection of taxes and acceleration of future installments of assessments. Such authority is however provided in sections 7-12-4182(2) and 7-12-4183(2), MCA. Those subsections contain identical language which states in pertinent part:

> When the payment of an installment of a special assessment becomes delinquent, all payments of subsequent installments may, at the option of the city or town council and upon adoption of the appropriate resolutions, become delinquent.

This language is unambiguous and requires no construction. Blake v. State, 735 P.2d at 265. The city's authority to accelerate under sections 7-12-4182(2) and 7-12-4183(2), MCA, is not conditioned

upon its method of collecting taxes. Thus, although the authority is not included in section 7-12-4181, MCA, I conclude that the Legislature intended that authority to exist irrespective of the method of collection.

Your last question concerns the duty of the city to recover and discharge outstanding and delinquent SID assessments on property it received from the county through a tax sale and which it proposes to sell to a third party. Your concern focuses on the ability of the city, under the statutes in effect prior to 1987, to obtain a valid tax deed to the property in the following manner: The SID assessments on the property became delinquent and the city certified the delinquencies to the county, which in turn unsuccessfully attempted to sell the property at a tax sale. The property was then struck off to the county which assigned it to the city upon the city's payment to the county of all delinquent taxes including the SID assessments. In order to obtain the money to pay the delinquencies on the property, the city borrowed money from another SID fund because the SID fund connected to the property was deficient. The county returned to the city the SID assessments the city had paid to obtain the assignment of the property. The city placed this reimbursement into the SID fund from which it had been borrowed. The effect of this transaction was that the delinquent SID assessments on the property assigned to the city were not paid and discharged.

The property in question was assigned to the city by the county under former section 15-17-303, MCA. Under that statute, to obtain the assignment the city was required to pay the county the total amount of outstanding taxes due, including city SID assessments. See 41 Op. Att'y Gen. No. 77 (1986). Upon the county's return of the amount of the city assessments to the city, the city was expected to remit that amount into the SID fund to credit the assessments due on the property when assigned to the city; the city was further obligated to discharge any SID assessment which became due between the date of assignment and such remittance (§ 15-17-304, MCA (1985)). Thus, prior to 1987, the city, as assignee, was required to pay the delinquent and outstanding SID assessments, together with all associated interest and penalties on the assigned property in order to obtain a valid tax deed.

THEREFORE, IT IS MY OPINION:

1. When a city has established a revolving fund to secure payments on SID bonds, and when an SID fund does not have sufficient amounts to make payments on its bonds, the city must continue to make loans from the revolving fund to the SID fund, and must continue to levy the property tax in accordance with section 7-12-4222, MCA, until the obligations on all bonds and warrants in the SID are discharged.

2. A city whose taxes are collected by the county has statutory authority to accelerate future installments of special assessments when one installment becomes delinquent.

3. Prior to 1987 a city could not obtain a valid tax deed on property it received through a tax sale until the outstanding and delinquent assessments on the property were paid and discharged.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 83

CRIMINAL LAW AND PROCEDURE - Definition of "explosives" in statute prohibiting unlawful transactions with children;
FIRE MARSHAL - Definition of "explosives" in Uniform Fire Code applied to statute prohibiting unlawful transactions with children;
JUVENILES - Definition of "explosives" in statute prohibiting unlawful transactions with children;
ADMINISTRATIVE RULES OF MONTANA - Section 23.7.111(1);
MONTANA CODE ANNOTATED - Sections 1-2-107, 7-33-4205, 7-33-4206, 45-5-623(1)(a), 45-8-332(2), 45-8-344, 50-3-102(3), 50-37-103(2).

HELD: The term "explosives" in section 45-5-623(1)(a), MCA, does not include small arms ammunition or fireworks permitted to be sold to the public under section 50-37-104(1), MCA.

10 May 1988

Ray E. Blehm Jr.
State Fire Marshal
Room 371, Scott Hart Building
303 North Roberts
Helena MT 59620-1417

Dear Mr. Blehm:

You have asked my opinion on the following question:

> Does the term "explosives" in section 45-5-623(1)(a), MCA, include small arms ammunition or fireworks?

Section 45-5-623(1)(a), MCA, provides:

> A person commits the offense of unlawful transactions with children if he knowingly ... sells or gives explosives to a child under the age of majority except as authorized under appropriate city ordinances.

The term "explosives" is not defined for the special purposes of this statute. The Montana Criminal Code does not contain a generally applicable definition in section 45-2-101, MCA. However, a definition of "explosive" is found in section 45-8-332(2), MCA, which is helpful in answering your question. In the absence of a clear legislative expression of contrary intention, this definition is applicable to the term "explosives" in section 45-5-623, MCA. See § 1-2-107, MCA.

Section 45-8-332(2), MCA, states that "explosive," as used in the Montana Criminal Code's chapter on offenses against public order, means any explosive defined in rules adopted by the state fire marshal pursuant to section 50-3-102(3), MCA. Section 50-3-102(3), MCA, provides that the state fire marshal "shall adopt rules based on nationally recognized standards necessary for safeguarding life and property from the hazards associated with the manufacture, transportation, storage, sale, and use of explosive materials." Pursuant to his rulemaking authority, the state fire marshal, through the Department of Justice, has adopted and incorporated by reference the Uniform Fire Code, International Conference of Building Officials (1985 ed.) See § 23.7.111(1), ARM, eff. March 28, 1986.

Section 9.107 of the Uniform Fire Code defines "explosive" as follows:

> EXPLOSIVE is any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion, that contains any oxidizing and combustible units or other ingredients in such proportions, quantities, or packing, that an ignition by fire, by friction, by concussion, by percussion or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructive effects on contiguous objects or of destroying life and limb.

I note that this definition is identical, in all substantial respects, to the definition of "explosives" in section 61-1-506, MCA, concerning highway safety (see § 61-9-413, MCA), and the definition of "explosives" in former section 50-38-101(3), MCA.

In determining whether small arms ammunition or fireworks should be viewed as "explosives" for purposes of section 45-5-623(1)(a), MCA, I am guided by certain provisions in Article 77 of the Uniform Fire Code, which applies to the manufacture, possession, storage, sale, transportation, and use of explosives. Sections 77.102(a)(3) and 77.102(a)(4) of the Code provide that nothing in Article 77 shall be construed as applying to the "sale, possession or use of fireworks" or to the "possession, transportation, and use of small arms ammunition." Although both fireworks and small arms ammunition contain small amounts of explosive materials, neither is considered an explosive for purposes of the regulatory provisions of Article 77 of the Uniform Fire Code.

I therefore conclude that neither small arms ammunition nor permissible fireworks, as those terms are defined in the Uniform Fire Code and Montana statutes, comes within the meaning of "explosives" as that term is used in section 45-5-623(1)(a), MCA.

This conclusion is supported by my review of the background of section 45-5-623(1)(a), MCA, and is consistent with the apparent intention of the Legislature. See § 1-2-102, MCA.

Section 45-5-623, MCA, is a partial recodification of a number of statutes on unlawful transactions with children and was enacted by the Legislature as part of the Montana Criminal Code of 1973. Subsection (1)(a) was taken from section 69-1902, R.C.M. 1947, which stated in pertinent part:

> It shall be unlawful to sell, give away, or otherwise dispose of, or deliver to any person under eighteen (18) years of age any explosives, whether said person is acting for himself or for any other person.

Section 69-1902, R.C.M. 1947, was retained by the 1973 Legislature and was eventually recodified as section 50-38-302, MCA. As part of the statutory law regarding explosives, this section was subject to the other provisions of Title 50, chapter 38, including section 50-38-105(2), MCA, which stated that the chapter's provisions did not apply to small quantities of explosives (not exceeding five pounds at any one time)

or to persons carrying ammunition in reasonable amounts. Chapter 38 of Title 50 was repealed in its entirety by the Legislature in 1985 (section 3, chapter 187, 1985 Mont. Laws); however, prior to repeal the Legislature apparently intended to exempt small arms ammunition and small amounts of explosive materials, such as those contained in lawful fireworks, from the provisions of these former statutes, including the statute from which section 45-5-623(1)(a), MCA, was derived.

I also note that the sale of fireworks is regulated by separate provisions in both the Montana statutes and the Uniform Fire Code. Tit. 50, ch. 37, MCA; Art. 78, Uniform Fire Code (1985). While section 50-37-103(2), MCA, makes it unlawful for an individual under the age of 18 to possess for sale, sell, or offer for sale permissible fireworks, it does not forbid the sale of such fireworks to persons under the age of majority. If the Legislature had intended to restrict the sale of fireworks to persons who have attained a certain age, it would have expressly provided for such a restriction in chapter 37 of Title 50. Nor is any such age restriction found in Article 78 of the Uniform Fire Code.

Another indication of legislative intent to treat fireworks and explosives differently is found in sections 7-33-4205 and 7-33-4206, MCA, which provide separate grants of authority for a city or town council to regulate these two kinds of fire-causing materials. If the Legislature considered fireworks to be "explosives," it would not have needed to grant additional authority, in section 7-33-4206, MCA, to the municipal council to regulate the sale and use of fireworks.

Courts in other jurisdictions have held that the commonly accepted meaning of "explosives" does not include ordinary fireworks which are lawfully available for sale to the public. See, e.g., People v. Santorelli, 408 N.Y.S.2d 893 (N.Y. Sup. Ct. 1978); Henderson v. Massachusetts Bonding & Insurance Co., 84 S.W.2d 922 (Mo. 1935). While the annotation compiler's comments to section 45-5-623, MCA, suggest that the Legislature may have intended to include fireworks within the coverage of subsection (1)(a), MCA, I have found no further indication of such intent in my review of both present and former statutes regulating this area.

With respect to small arms ammunition, you correctly point out that a contrary construction of section 45-5-623(1)(a), MCA, would result in apparent conflict with more specific statutes which regulate the use of firearms, particularly for hunting. Section 45-8-344, MCA, permits a child under the age of 14 to carry and use a loaded firearm in certain supervised situations and by implication allows a child over the age of 14 to possess a loaded firearm without the direct supervision of an adult. Provisions in part 5 of Title 87, chapter 2, MCA, allow persons who are 12 years of age or older to obtain various game animal licenses which entitle the holder to hunt, shoot, and kill game animals. Selling or giving small arms ammunition to persons under the age of majority is implicitly and necessarily authorized by these statutes, and it would be inconsistent to construe the term "explosives" in section 45-5-623(1)(a), MCA, in a manner that would turn such sales or gifts into unauthorized transactions with children.

You have directed my attention to certain hazardous materials regulations of the United States Department of Transportation. These regulations classify both common fireworks and small arms ammunition as Class C Explosives and set forth specifications for shipping containers used in the transportation of explosives and other dangerous articles. 49 C.F.R. §§ 173.50 to 173.114. While I can understand that the federal government would view substantial quantities of common fireworks and small arms ammunition as minimum-hazard explosives for purposes of regulating their transportation, I am not persuaded that this classification should apply to section 45-5-623(1)(a), MCA. I note that the federal code chapter on explosive materials does not apply to small arms ammunition and its components. 18 U.S.C. § 845(a)(4). Although the definition of "explosives" in 18 U.S.C. § 841(d) has been held to include certain illegal and highly powerful fireworks (see, e.g., United States v. Womack, 654 F.2d 1034 (5th Cir. 1981), cert. denied, 454 U.S. 1156 (1982), the federal definition in Title 18 is substantially broader than the Uniform Fire Code's definition of "explosive" and, in any event, does not appear to include permissible "common fireworks," as defined in section 50-37-105, MCA, which may be lawfully sold to the public pursuant to section 50-37-104, MCA.

It is certainly possible, of course, that fireworks which do not meet the definition of "permissible fireworks" under section 50-37-105, MCA, could come within the purview of section 45-5-623(1)(a), MCA. My holding is therefore confined to those fireworks which may be lawfully sold at retail in accordance with section 50-37-104(1), MCA.

Finally, I again call your attention to the specific authority of cities and towns to regulate both explosives and fireworks. §§ 7-33-4205, 7-33-4206, MCA. Section 45-5-623(1)(a), MCA, acknowledges this authority by expressly permitting a city to enact an ordinance excepting certain transactions from the scope of the statute. I do not find any indication of legislative intent to extend this ordinance-making authority to counties.

THEREFORE, IT IS MY OPINION:

The term "explosives" in section 45-5-623(1)(a), MCA, does not include small arms ammunition or fireworks permitted to be sold to the public under section 50-37-104(1), MCA.

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. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute Number and Department

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

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 1987. This table includes those rules adopted during the period December 31, 1987 through March 31, 1988 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

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

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