MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 17

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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NOTICE SECTION

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 2.21.1812, relating to exempt compensatory time	) NOTICE OF PUBLIC HEARING ON) THE PROPOSED AMENDMENT OF ARM) 2.21.1812, RELATING TO EXEMPT) COMPENSATORY TIME

TO: All Interested Persons.

1. On October 4, 1988, at 12:15 p.m. in Room 136, Mitchell Building, Helena, Montana, a public hearing will be held to consider the amendment of ARM 2.21.1812, relating to the administration of exempt compensatory time.

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

2.21.1812 EXEMPT EMPLOYEES AND EXEMPT COMPENSATORY TIME (1)-(8) Remains the same.

(9) There shall be no cash compensation for accrued exempt compensatory time upon transfer or termination.

~~(9)~~ (10) Agencies are under no obligation to extend an employee's termination date to allow an exempt employee to take off accrued exempt compensatory time upon termination.

(11) An agency head may approve the use of exempt compensatory time to extend an employee's termination date up to a maximum of 120 hours when the employee has been denied reasonable opportunity to take off accrued exempt compensatory time because:

(a) The compensatory time was accrued upon management's request in order to complete projects or meet objectives prior to termination, or

(b) Requests to take off accrued compensatory time were denied by management in order that projects be completed or objectives met prior to termination.

(12) This rule does not authorize an extension of termination date for officers or employees exempted or personal staff listed in 2-18-103 or 2-18-104 MCA.

(Auth. 2-18-102 MCA; Imp. 2-18-102 MCA)

3. The Exempt Compensatory Time policy (ARM 2.21.1801 et seq.) is silent on cash out of exempt compensatory time on termination. The policy now provides that agencies are under no obligation to extend a termination date to allow an employee to take off accrued compensatory time. To insure consistent practice between agencies, agencies have asked that cash payment for exempt compensatory time be prohibited and that standards and limits on the extension of termination dates be established.

4. The Department believes it is necessary to address these issues by amending ARM 2.21.1812 because:

(a) State employees pay is set according to statute. When an employee is covered by the overtime provisions of the Fair Labor Standards Act, a specific legal mandate exists to pay

above the statutory limit. In the case of exempt employees, no specific authority exists to pay more than the amount provided in the state's pay plan. The Exempt Compensatory Time Policy allows time off, but does not authorize the payment of additional wages.

(b) If an employee receives additional wages beyond the statutory salary, there may be a question as to whether or not the position is properly designated as exempt from the FLSA.

(c) Cash compensation at termination for unused compensatory time may create an equity problem between agencies or between divisions within agencies. In agencies or divisions where extra funding is available, an employee's salary may be increased simply because of the availability of the funds.

Using compensatory time to extend a termination date should be allowed in certain circumstances. For example, an employee who has given notice of termination may agree to work additional hours to complete a project or to meet agency objectives. The ability to request an extension would be an incentive for the employee to agree to the extra work.

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

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

no later than October 6, 1988.

6. Gale Kuglin, Personnel Policy Coordinator, State Personnel Division, Department of Administration, Mitchell Building, Helena, Montana, 59620, has been designated to preside over and conduct the hearing.

7. The authority of the agency to make the proposed amendment is based on 2-18-102, MCA, and the rules implement 2-18-102, MCA.

Ellen Feaver

Ellen Feaver, Director
Department of Administration

Certified to the Secretary of State August 29, 1988.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the proposed adoption of rules relating to the exchange and loan of employees	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF RULES RELATING TO THE EXCHANGE AND LOAN OF EMPLOYEES

TO: All Interested Persons.

1. On October 6, 1988, at 12:15 p.m., in Room 136, Mitchell Building, Helena, Montana, a public hearing will be held to consider the adoption of rules relating to the exchange and loan of employees.

2. The proposed new rules provide as follows:

RULE I SHORT TITLE (1) This policy may be cited as the employee exchange/loan policy.
(Auth. 2-18-102 MCA; Imp. 2-18-102 MCA)

RULE II POLICY AND OBJECTIVES (1) It is the policy of the state of Montana to allow the exchange or loan of employees between positions which cross agency boundaries. Employee exchanges or loans may be approved to improve efficiency, to improve service provided, to enable employee personal development or training, or to make best use of an employee's knowledge, skill, and interest.

(2) This policy is not intended to replace the recruitment and selection policy, ARM 2.21.3701 et seq. to permanently fill a vacancy. (Also see policy 3-0165, Montana operations manual, volume III.)

(3) This policy does not guarantee the approval of an exchange or loan requested by an employee or employees.

(4) It is the objective of this policy to establish minimum standards for employee exchanges or loans and to establish the criteria and procedures for approval of an exchange or loan.

(5) Agency heads retain the authority to reorganize, transfer or exchange employees within the agency. Nothing in this policy restricts that authority.
(Auth. 2-18-102 MCA; Imp. 2-18-102 MCA)

RULE III DEFINITIONS As used in this sub-chapter, the following definitions apply:

(1) "Comparable position" means, for purposes of this policy, a position in the same job classification and the same grade level with a skill match. Skill match means a determination made as to whether an employee's qualifications and experience meet the requirements to perform the duties and responsibilities of a specific position.

(2) "Employee exchange" means the voluntary permanent or temporary transfer between state agencies of two or more

employees from their positions to different positions involved in the exchange.

(3) "Employee loan" means the voluntary assignment of a single employee to another agency on a temporary basis not to exceed 9 months.

(4) "Vacant position" means a position with no current incumbent. A vacant position normally is filled through internal or external recruitment and selection, in compliance with the recruitment and selection policy, ARM 2.21.3701 et seq.

(5) "Eligible employee" means an employee who:

(a) occupies a permanent position in an executive branch agency;

(b) has been employed in his or her current position for a minimum of one year; and

(c) has a satisfactory performance history.

(Auth. 2-18-102 MCA; Imp. 2-18-102 MCA)

RULE IV PERMANENT EXCHANGE (1) A permanent employee exchange may be initiated by agency management or by request of the employees affected. The employees shall meet the minimum qualifications for the positions involved in the exchange.

(2) When management initiates a permanent exchange, the agencies must receive the voluntary approval of the employees who will be exchanged.

(3) An exchange shall be approved by the heads of the agencies affected. Approval or disapproval of an employee exchange requested by the employees is solely at the discretion of the agency heads.

(4) There shall be a written agreement with each employee involved in the exchange which describes the terms and conditions of the exchange. The agreement shall contain, at a minimum:

(a) the classification title, grade, position number, and agency of the position to which the employee will be transferred;

(b) the location of the position;

(c) notification that the exchange is permanent;

(d) notification that the employee gives up all rights to the original position;

(e) approval of each agency head and of each employee who will be exchanged; and

(f) other matters pertinent to the exchange.

(5) Upon the approval and implementation of an exchange, an affected employee shall become an employee of the agency to which he or she has moved. The employee shall be covered under all the policies and procedures applicable to the employees of that agency. The employee shall be treated as a continuing employee of the new agency. The employee shall retain the following:

(a) permanent status in a permanent position;

(b) the step in the pay plan held prior to the exchange, unless the exchange includes a promotion or demotion. In a

promotion, pay plan rule 1809, regular promotion, applies. In a demotion, pay plan rule 1813, demotion with a change in duties, applies. (See the pay plan rules, policy 3-0505, Montana operations manual, volume III.); and

(c) all accrued longevity increment hours and leave accelerator hours.

(6) The qualifying period for sick and annual leave and the anniversary date shall not be reset.

(7) The employee's accrued sick and annual leave shall transfer to the new position.

(8) Accrued non-exempt compensatory time shall be cashed out upon implementation of the exchange, as provided in ARM 2.21.1713(3b). Accrued exempt compensatory time may be transferred, as provided in ARM 2.21.1812(8).

(9) In an exchange, an employee's length of service with the original agency shall transfer to the new agency and shall be included with service in the new agency for purposes of taking personnel actions where length of service is a consideration.

(10) If an exchange will result in a change in retirement systems in which the employee is enrolled, the public employees' retirement division, department of administration, should be contacted prior to the exchange.

(Auth. 2-18-102 MCA; Imp. 2-18-102 MCA)

RULE V TEMPORARY EXCHANGE (1) A temporary employee exchange may be initiated by agency management or by request of the employees affected. The employees shall meet the minimum qualifications for the positions involved in the exchange.

(2) When management initiates an exchange, the agencies shall receive the voluntary approval of the employees who will be exchanged.

(3) An exchange shall be approved by the heads of both the agencies affected. Approval or disapproval of an employee exchange requested by the affected employees is solely at the discretion of the agency heads.

(4) There shall be a written agreement with each employee involved in the exchange which describes the terms and conditions of the exchange. The agreement shall contain, at a minimum:

(a) the classification title, grade, position number and agency of the position to which the employee will be transferred;

(b) the location of the position;

(c) notification that the exchange is temporary;

(d) the anticipated duration of the exchange;

(e) the employee's right to reinstatement to the original position or a comparable position upon completion of the temporary exchange;

(f) approval of each agency head and of each employee who will be exchanged;

(g) a statement that management of either agency has the right to terminate the temporary exchange at any time; and

(h) other matters pertinent to the exchange.

(5) Upon the approval and implementation of a temporary exchange, the employees shall remain employees of the original agency. Their permanent status is retained with the original agency and their length of service accrues to the original agency. For the duration of the temporary exchange, the employee shall be under the supervision of the receiving agency for purposes including, but not limited to, evaluating performance, disciplinary action and termination of the temporary exchange. The employees shall be covered under the policies and procedures applicable to employees of the receiving agency for the duration of the temporary exchange.

(6) If an employee who has been temporarily exchanged is unable to perform the duties of the new position at an acceptable level, the temporary exchange may be terminated.

(7) If disciplinary action becomes necessary during a temporary exchange, it should be taken by the receiving agency in consultation with the original agency. If discharge is contemplated, the exchange should be terminated. Action should be taken by the original agency.

(8) Records of all personnel actions taken by management during the temporary exchange such as, performance appraisal, commendations or discipline, shall be made available to the original agency upon termination of the temporary exchange and shall become part of the employee's personnel records.

(9) Upon completion of the temporary exchange, the employees shall return to the original positions or comparable positions. During a temporary exchange, if an employee resigns for any reason or otherwise terminates employment with the state, the employee shall be transferred back to the original agency. The original agency is responsible for leave cash out and for completing the employee's separation from state service.

(10) If one of the positions involved in a temporary exchange is to be eliminated, the exchange shall be terminated. The original incumbent shall be covered by the reduction in work force policy, ARM 2.21.5005 et seq. (also found at policy 3-0155, Montana operations manual, volume III.)

(11) All salary and benefits shall be paid by the receiving agency for the duration of the temporary exchange.

(12) The employee shall retain the following:

(a) permanent status in a permanent position;

(b) all accrued longevity increment hours and leave accelerator hours.

(c) the step in the pay plan held prior to the exchange, unless the exchange involves a promotion or demotion. In a promotion, pay plan rule 1809, regular promotion, applies. In a demotion, pay plan rule 1813, demotion with a change in duties, applies. (See the pay plan rules, policy 3-0505, Montana operations manual, volume III.)

(i) An employee temporarily exchanged to a position at a lower grade shall be paid at the highest step of the lower

grade which retains the salary in the original position, not to exceed step 13 of the lower grade. This pay protection shall continue for the duration of the exchange.

(ii) In a management-initiated temporary exchange involving a demotion, the receiving agency head may protect the salary level of the exchanged employee in excess of step 13 for the duration of the loan.

(13) The qualifying period for sick and annual leave and the anniversary date shall not be reset.

(14) The employee's accrued sick and annual leave shall transfer to the new position, and shall be available for use from that position for the duration of the temporary exchange.

(15) Accrued non-exempt compensatory time may be cashed out upon implementation of the temporary exchange or it may be retained with the original position for use from that position when the exchange terminates. Unused non-exempt compensatory time accrued during the temporary exchange shall be cashed out at the termination of the exchange by the receiving agency.

(16) Accrued exempt compensatory time may be transferred to the receiving agency upon implementation of the temporary exchange or it may be retained with the original position for use from that position when the temporary exchange terminates. Unused exempt compensatory time accrued during the temporary exchange may be transferred to the original position at the agency's discretion, or shall be taken off at the end of the exchange from the receiving agency.

(17) If an exchange will result in a change in retirement systems in which the employee is enrolled, the public employees' retirement division, department of administration, should be contacted prior to the exchange.

(Auth. 2-18-102 MCA; Imp. 2-18-102 MCA)

RULE VI EMPLOYEE LOAN (1) An employee loan may be initiated by agency management or upon request of the employee affected. An employee loan shall not exceed 9 months. The employee shall meet the minimum qualifications for the position involved in the loan.

(2) When management initiates an employee loan, the agencies shall receive the voluntary approval of the employee to be loaned.

(3) To initiate an employee loan, the receiving agency shall have a vacant position.

(4) Before a loan can be implemented, it shall be approved by the heads of both agencies affected. Approval or disapproval of an employee loan requested by an employee is solely at the discretion of the agency heads.

(5) There shall be a written agreement with the employee which describes the terms and conditions of the loan. The agreement shall contain, at a minimum:

(a) the classification title, grade, position number and agency of the position to which the employee will be loaned;

(b) the location of the position;

(c) the expected duration of the loan;

(d) the employee's right to reinstatement to the original position or a comparable position upon completion of the loan.

(e) the approval of each agency head and the employee to be loaned;

(f) a statement that management of either agency has the right to terminate the loan at any time; and

(g) other matters pertinent to the loan.

(6) Upon the approval and implementation of a loan, the employee shall remain an employee of the original agency. The employee's permanent status is retained with the original agency and the employee's length of service accrues in the original agency. For the duration of the loan, the employee shall be under the supervision of the receiving agency for purposes including, but not limited to, evaluating performance, disciplinary action, and termination of the loan. The employee shall be covered under all the policies and procedures applicable to employees of the receiving agency for the duration of the loan.

(7) If an employee who has been loaned is unable to perform the duties of the new position at an acceptable level, the loan may be terminated.

(8) If disciplinary action becomes necessary during a loan, it should be taken by the receiving agency in consultation with the original agency. If discharge is contemplated, the loan should be terminated. Action should be taken by the original agency.

(9) Records of all personnel actions taken by management during the loan such as, performance appraisal, commendations or discipline, shall be made available to the original agency upon termination of the loan and shall become part of the employee's personnel records.

(10) Upon completion of the loan, the employee shall return to the same or a comparable position. During a loan, if an employee resigns for any reason or otherwise terminates employment with the state, the employee shall be transferred back to the original agency. The original agency is responsible for leave cash out and for completing the employee's separation from state service.

(11) If the position involved in a loan is to be eliminated, the loan shall be terminated.

(12) All salary and benefits shall be paid by the receiving agency for the duration of the loan.

(13) The employee shall retain the following:

(a) permanent status in a permanent position;

(b) all accrued longevity increment hours and leave accelerator hours;

(c) the step in the pay plan held prior to the loan, unless the loan involves a promotion or demotion. In a promotion, pay plan rule 1809, regular promotion, applies. In a demotion, pay plan rule 1813, demotion with a change in duties, applies. (See the pay plan rules, policy 3-0505, Montana operations manual, volume III.)

(i) An employee loaned to a position at a lower grade shall be paid at the highest step of the lower grade which

retains the salary in the original position, not to exceed step 13 of the lower grade. This pay protection shall continue for the duration of the loan.

(ii) In a management-initiated loan involving a demotion, the receiving agency head may protect the salary level of the loaned employee in excess of step 13 for the duration of the loan.

(14) The qualifying period for sick and annual leave and the anniversary date shall not be reset.

(15) The employee's accrued sick and annual leave shall transfer to the new position, and shall be available for use from that position for the duration of the loan.

(16) Accrued non-exempt compensatory time may be cashed out upon implementation of the loan or it may be retained with the original position for use from that position when the loan terminates. Non-exempt compensatory time accrued during the loan shall be cashed out at the termination of the loan by the receiving agency.

(17) Accrued exempt compensatory time may be transferred to the receiving agency upon implementation of the loan or it may be retained with the original position for use from that position when the loan terminates. Unused exempt compensatory time accrued during the loan may be transferred to the original position at the agency's discretion, or shall be taken off at the end of the loan from the receiving agency.

(18) If a loan will result in a change in retirement systems in which the employee is enrolled, the public employees' retirement division, department of administration, should be contacted prior to the loan.

(Auth. 2-18-102 MCA; Imp. 2-18-102 MCA)

RULE VII CLOSING (1) This policy shall be followed unless it conflicts with negotiated labor contracts or specific statutes, which shall take precedence.

(2) The exclusive bargaining agent must agree in advance that an employee in a position covered by a collective bargaining agreement may participate in an employee exchange or loan.

(Auth. 2-18-102 MCA; Imp. 2-18-102 MCA)

3. State agencies have asked that the department develop rules to allow the exchange of employees with other agencies on a permanent or temporary basis and the loan of employees to other agencies. Agencies would like the authority to exchange or loan employees to improve efficiency, to improve services provided, to enable employee personal development or training, or to make best use of an employee's knowledge, skill and interest. The proposed rules are necessary to establish consistent procedures for creation and termination of an exchange or loan, to ensure the voluntary nature of the program on the part of employees, and to clarify employee rights and benefits during an exchange or loan.

Currently, agency management may reorganize, transfer or reassign employees within an agency, but similar flexibility is

not available across agency boundaries. The capability to exchange or loan employees would provide management with access to a wider pool of employee knowledge and experience. At the same time, an exchange or loan would provide employees with expanded opportunities to enhance knowledge and experience which might not be available in the current position or agency. The proposed rules are not intended to replace the requirements of the recruitment and selection policy, ARM 2.21.3701 et seq., when a vacancy occurs in a permanent position.

4. The proposed rules would establish general policy and objectives (Rule II), definitions (Rule III), and the procedures for a permanent exchange, temporary exchange and a loan (Rules IV, V, and VI).

5. Interested parties may submit their data, views or arguments concerning adoption of the new rules in writing to: Laurie Ekanger, Administrator, State Personnel Division, Department of Administration, Room 130, Mitchell Building, Helena, Montana 59620, no later than October 6, 1988.

6. Gale Kuglin, Personnel Policy Coordinator, State Personnel Division, Department of Administration, Mitchell Building, Helena, Montana 59620, has been designated to preside over and conduct the hearing.

7. The authority of the agency to make the proposed adoption of new rules is based on 2-18-102, MCA, and the rules implement 2-18-102, MCA.

Ellen Feaver

Ellen Feaver, Director
Department of Administration

Certified to the Secretary of State August 29, 1988

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF COSMETOLOGISTS

In the matter of the proposed amendment of a rule pertaining to requirements) NOTICE OF PROPOSED AMENDMENT OF 8.14.603 SCHOOL REQUIREMENTS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On October 8, 1988, the Board of Cosmetology proposes to amend the above-stated rule.

2. The proposed amendment will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-411 through 8-413.1, Administrative Rules of Montana)

"8.14.603 SCHOOL REQUIREMENTS (1) through (11)(a) will remain the same.

(b) Cosmetology students shall not be allowed more than ~~16~~ 32 hours of overtime per month and manicuring students shall not be allowed more than 16 hours of overtime per month.

(c) through (25) will remain the same."

Auth: 37-31-203, MCA AUTH Extension, Sec. 13, Ch. 602, L. 1985 Imp: 37-31-301, 37-31-304, 37-31-311, MCA

REASON: This amendment is needed to allow cosmetology students more flexibility in scheduling their acquisition of the requisite 2000 hours training, and to allow cosmetology schools more flexibility in the scheduling of tutelage.

3. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Cosmetologists, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than October 6, 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 Cosmetologists, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than October 6, 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 hearing will be held at a later date.

Notice of the hearing will be published in the Montana Administrative Register.

BOARD OF COSMETOLOGISTS
DAVID BLANCO, PRESIDENT

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

Certified to the Secretary of State, August 29, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF MORTICIANS

In the matter of the proposed amendment of a rule pertaining to conduct) NOTICE OF PROPOSED AMENDMENT OF 8.30.701 UNPROFESSIONAL CONDUCT

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On October 8, 1988, the Board of Morticians proposes to amend the above-stated rule.

2. The proposed amendment of 8.30.701 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at page 8-943 and 8-944, Administrative Rules of Montana)

"8.30.701 UNPROFESSIONAL CONDUCT (1) and (a) will remain the same.

(b) false or misleading advertising;--advertising--or using-the-name-of-an-unlicensed-person-in-connection-with-that of-any-funeral-establishment;

(i)--this-does-not-prohibit-funeral-homes-and--mortuaries from--publicising-the-names-of-non-licensed-employees-or-staff members-when-those-firms--do--not--misrepresent--the--capacity under-which-the-non-licensed-individuals-are-employed;

(c) through (w) will remain the same."

Auth: 37-1-136, 37-19-202, MCA Imp: 37-19-311, 37-19-404, MCA

REASON: The Federal Trade Commission (FTC) performed a review of the board law and rules and found this section to be in conflict with their regulations. The board decided to change the rule to conform to FTC regulations.

3. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Morticians, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than October 6, 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 Morticians, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than October 6, 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 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 30 based on the 301 licensees in Montana.

BOARD OF MORTICIANS
GUY W. MISER, CHAIRMAN

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

Certified to the Secretary of State, August 29, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF OPTOMETRISTS

In the matter of the proposed amendment of a rule pertaining to examinations) NOTICE OF PROPOSED AMENDMENT OF 8.36.404 EXAMINATIONS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On October 8, 1988, the Board of Optometrists proposes to amend the above-stated rule.

2. The proposed amendment of 8.36.404 will read as follows: (new matter underlined, deleted matter interlined) (full text of the rule is located at pages 8-1071 and 8-1072, Administrative Rules of Montana)

"8.36.404 EXAMINATIONS (1) will remain the same.

(a) All applicants must pass ~~Parts I and II~~ all parts of the ~~written~~ examination ~~prepared~~ administered by the National Board of Examiners in Optometry.

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

Auth: 37-10-202, MCA Imp: 37-10-302, MCA

REASON: The reason for this amendment is the restructuring of the National Board of Examiners in Optometry exam. The exam is no longer given in two sections.

3. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Optometrists, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than October 6, 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 Optometrists, 1424 - 9th Avenue, Helena, Montana 59620, no later than October 6, 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 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 23 based on the 235 licensees in Montana.

BOARD OF OPTOMETRISTS
K.R. ZUROFF, O.D., PRESIDENT

BY: 
GEOFFREY L. BRAZIL, ATTORNEY
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, August 29, 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)(a), (b) and (g) as it relates to class I pricing formulas	)	NOTICE OF PUBLIC HEARING ON A PROPOSED AMENDMENT OF RULE 8.86.301
	)	PRICING RULES
	)	DOCKET #89-88

TO: ALL LICENSEES UNDER THE MONTANA MILK CONTROL ACT (SECTION 81-23-302, MCA, AND FOLLOWING), AND ALL INTERESTED PERSONS:

1. On Thursday, September 29, 1988, at 9:00 a.m. or as soon thereafter as interested persons can be heard, a public hearing will be held at Jorgenson's Restaurant, banquet room, 1720 11th Avenue, Helena, Montana. The hearing will continue at said place from day to day thereafter until all interested persons have had a fair opportunity to be heard and to submit data, views or arguments.

2. The hearing will be held on the board's own motion and in response to an emergency request filed by Meadow Gold Dairies with branches in Billings, Great Falls, Kalispell, and Missoula, Montana; Vita Rich Dairy, Havre, Montana; and Clover Leaf Dairy, Helena, Montana. The purpose for the hearing is to take evidence, data, views or arguments on the merits of amending ARM 8.86.301(6)(a),(b) and (g) to change formulas for fixing class I producer, wholesale, jobber and retail prices as shown below. (Full text of the rule is located at pages 8-2539 through 8-2549, Administrative Rules of Montana)(new matter underlined, deleted matter interlined)

"8.86.301 PRICING RULES

(1) . . .

(6) . . .

(a) The minimum prices which shall be paid to producers by distributors in the state of Montana shall be calculated by either applying the flexible economic formula described below or the Minnesota-Wisconsin series plus three dollars ($3.00) whichever price is lower. The flexible economic formula utilizes a November 1969 base equalling 100, an interval of 4.5 and consists of seven (7) factors. The factors and their assigned weights are as follows:

	FACTOR	WEIGHT	CONVERSION FACTOR
(i)	Unemployment US (6.67 (3.8 - C) + 100) .05	5%	
(ii)	Unemployment MT. (6.67 (6.1 - C) + 100) .10	10%	
(iii)	*Weekly Wages - Total private (Revised and seasonally adjusted)	15%	.13297873
(iv)	Prices Received by Farmers - MT. ('47 - '49 = 100)	15%	.22960139
(v)	Mixed Dairy Feed	20%	.32258065
(vi)	Alfalfa Hay	12%	.48000000
(vii)	Prices Paid by Farmers - US ('67 = 100)	23%	.41990335
		100%	

*Note: The reported revised weekly wage - total private is seasonally adjusted by dividing each months revised figures by the following factors: Jan. - .9867; Feb. - .9832; March - .9809; April - .9822; May - .9911; June - 1.0053; July - 1.0165; Aug. - 1.0261; Sept. - 1.0136; Oct. - 1.0192; Nov. - 1.0047; Dec. - .9905.

The following table will be used in computing producer prices:

TABLE I

Producer price determination using above formula with November 1969 - 100 and an interval - 4.5

FORMULA INDEX		PRICE PER CWT
~~201.5---205.1~~	219.5-223.1	$12.86
~~205.0---209.6~~	224.0-227.6	13.09
~~210.5---214.1~~	228.5-232.1	13.32
~~215.0---218.6~~	233.0-236.6	13.55
~~219.5---223.1~~	237.5-241.1	13.78
~~224.0---227.6~~	242.0-245.6	14.01
~~228.5---232.1~~	246.5-250.1	14.24
~~233.0---236.6~~	251.0-254.6	14.47
~~237.5---241.1~~	255.5-259.1	14.70
~~242.0---245.6~~	260.0-263.6	14.93
~~246.5---250.1~~	264.5-268.1	15.16
~~251.0---254.6~~	269.0-272.6	15.39
~~255.5---259.1~~	273.5-277.1	15.62
~~260.0---263.6~~	278.0-281.6	15.85
~~264.5---268.1~~	282.5-286.1	16.08
~~269.0---272.6~~	287.0-290.6	16.31
~~273.5---277.1~~	291.5-295.1	16.54
~~278.0---281.6~~	296.0-299.6	16.77
~~282.5---286.1~~	300.5-304.1	17.00
~~287.0---290.6~~	305.0-308.6	17.23

* Note: The amendment as noticed reduces the producer class I price $.92 per CWT.

(i) The class I butterfat differential will be calculated by multiplying the average Chicago area butterfat price (grade A 92 score) by or most recently reported by the United States department of agriculture, by .118 and the resulting answer from this calculation shall be rounded to nearest half cent. When milk does not test 3.5 percent butterfat, the price per CWT will be adjusted by the above resulting calculation for each .1 percent the butterfat test moves up or down.

The butterfat differential will be recalculated each time the producer price is adjusted up or down by at least $0.23 per hundredweight.

(b) The flexible economic formula which shall be used in calculating minimum on-the-farm wholesale and retail, jobber, wholesale, institutional and retail prices of class I milk in the state of Montana utilizes a November 1969 base equalling 100, an interval of 5.3 and consists of five (5) economic factors. It is used to calculate incremental deviations from the price which was calculated for the first quarter of 1974. The factors and their assigned weights are as follows:

	FACTOR	WEIGHT	CONVERSION FACTOR
(i)	Weekly wages - total private revised	50%	.4035187
(ii)	Wholesale price index (US)	28%	.2607076
(iii)	Pulp, paper and allied products (US)	12%	.1142857
(iv)	Industrial machinery (US)	6%	.0556586
(v)	Motor vehicle and equipment (US)	4%	.0376294
		100%	

NOTE: The reported revised weekly wages - total private is seasonally adjusted by dividing each months revised figures by the factors listed above in paragraph (6)(a).

The following table will be used in computing distributor prices.

TABLE II

Handler incremental deviation from last official reading of present formula. (December 1973 - 122.10; Formula Base = November 1969; Interval = 5.3.)

FORMULA INDEX		HANDLER INCREMENTAL DEVIATION	
~~101.30-105.54~~	217.90-222.14	-$ 0.02	
~~106.60-110.84~~	223.20-227.44	- 0.01	
~~111.90-116.14~~	228.50-232.74	- 0.00	
~~117.20-121.44~~	233.80-238.04	0.01	
~~122.50-126.74~~	239.10-243.34	0.02	~~(NOTE--This~~
~~127.80-132.04~~	244.40-248.64	0.03	~~chart-is-amended~~
~~133.10-137.34~~	249.70-253.94	0.04	~~to-reflect-a-two~~
~~138.40-142.64~~	255.00-259.24	0.05	~~cent-($0.02)~~
~~143.70-147.94~~	260.30-264.54	0.06	~~reduction-in-the~~
~~149.00-153.24~~	265.60-269.84	0.07	~~distributor's~~
~~154.30-158.54~~	270.90-275.14	0.08	~~margin-based-on~~
~~159.60-163.84~~	276.20-280.44	0.09	~~a-half-(1/2)~~
~~164.90-169.14~~	281.50-285.74	0.10	~~gallon-of-whole~~
~~170.20-174.44~~	286.80-291.04	0.11	~~milk,-as-ordered~~
~~175.50-179.74~~	292.10-296.34	0.12	~~by-the-board-of~~
~~180.80-185.04~~	297.40-301.64	0.13	~~milk-control-on~~
~~186.10-190.34~~	302.70-306.94	0.14	~~Sept.-15,-1979.)~~
~~191.40-195.64~~	308.00-312.24	0.15	
~~196.70-200.94~~	313.30-317.54	0.16	
~~202.00-206.24~~	318.60-322.84	0.17	
~~207.30-211.54~~	323.90-328.14	0.18	
~~212.60-216.84~~	329.20-333.44	0.19	
~~217.90-222.14~~	334.50-338.74	0.20	
~~223.20-227.44~~	339.80-344.04	0.21	
~~228.50-232.74~~	345.10-349.34	0.22	
~~233.80-238.04~~	350.40-354.64	0.23	
~~239.10-243.34~~	355.70-359.94	0.24	
~~244.40-248.64~~	361.00-365.24	0.25	

* The amendment as noticed reduces the distributor's margin by approximately $0.22 per 1/2 gallon and retail prices are reduced accordingly.

(c) Detailed information on converting the above factors in both formulas to a current weighted value can be obtained by contacting the Milk Control Bureau, 1520 E. 6th Avenue - Rm 50, Helena, Montana 59620, phone (406) 444-2875.

(d) The factors in both formulas will be converted to a weighted value as soon as practicable after the first of each month.

(e) For each 4.5 points that the weighted index advances or retreats, prices paid to producers will increase or decrease twenty-three cents ($0.23) per hundredweight. For each officially announced increase or decrease in producer prices, the wholesale price of all fluid milk items will increase or decrease by the amount of the increase or decrease in raw product cost.

(f) For each 5.3 points that the distributor weighted index increases or decreases, the wholesale price of one half (1/2) gallon of whole milk will increase or decrease one cent ($0.01). Prices for all other milk items are calculated by historic factors in relation to one half (1/2) gallon of whole milk. Three (3) quart containers of homo and low fat will be priced at one and one half (1 1/2) times the one half (1/2) gallon container. It is impractical to reproduce all such factors herein, but they may be obtained at the board office, 1520 E. 6th Avenue - Rm 50, Helena, Montana 59620, phone (406) 444-2875.

(g) The minimum wholesale price will be marked up ten fifteen percent ~~(10%)~~(15%) to arrive at minimum retail prices.

(i) Special wholesale price for retail grocery stores will be based on the procedures provided in subsections (A), ~~(B) and (C)~~ below. ~~All milk purchased under one of the procedures indicated below must be paid within fifteen (15) days after invoicing unless there is a different time frame specified in the applicable rule section. Retailers are prohibited from purchasing milk at more than one level of service from any one distributor and distributors are prohibited from offering more than one level of service to any one retailer in any single billing period. This does not prohibit a retailer from changing levels of service in subsequent billing periods.~~

~~(A) A special wholesale price for retail grocery stores will be calculated by multiplying regular retail prices by a factor of eighty nine percent (89%) for full service delivery by a distributor. Any milk purchased herein must be paid for within fifteen (15) days after invoicing.~~

~~(B) Wholesale drop service for retail stores:~~

~~(I) Deliveries shall be limited to a maximum of four (4) times per week, with a one hundred fifty dollar ($150.00) minimum sale.~~

~~(II) The minimum retail price will be marked down by sixteen percent (16%) to arrive at a minimum wholesale drop service price.~~

~~(C)~~(A) Wholesale dock pickup price:

(I) Delivery shall be FOB the processing plant's dock or the processing plant's warehouse dock.

~~(I) The minimum retail price will be marked down by twenty two and three tenths percent (22.3%) to arrive at the minimum wholesale dock pickup or delivery price.~~

(II) The minimum wholesale price will be marked down by eleven and two-tenths percent (11.2%) to arrive at the minimum wholesale dock pickup or delivery price.

(III) Any milk purchased herein must be paid for within ten (10) days after invoicing.

~~(IV) Resale will be based upon the wholesale full service price or wholesale drop service price, whichever is applicable.~~

~~(V)~~(IV) A minimum pickup or delivery will be five hundred (500) gallons.

(h) Minimum jobber prices will be calculated by multiplying the difference between the applicable wholesale price and raw product cost times a factor of 55.597% with the resulting answer being added to the current raw product cost. The jobber prices calculated will be the minimum jobber prices.

(i) . . ."

3. The rationale for the proposed action is to stabilize the marketing of milk in this state by setting prices that enable distributors to be competitive with milk that is available in areas adjacent to and surrounding Montana for marketing in Montana.

4. Specific factors which the board will take into consideration in these proceedings will include, but may not be limited, to the following:

a) cost factors in producing milk, including those set forth in section 81-23-302(5)(c), MCA;

b) supplies of milk in adjacent and surrounding areas;

c) prices of milk in adjacent and surrounding areas;

d) current and prospective supplies of milk in relation to current and prospective demand for such milk for all purposes;

e) alternative opportunities, both farm and nonfarm, recently open to milk producers;

f) cost factors in distributing milk, which shall include among other things the prices paid by distributors for equipment of all types required to process and market milk and prevailing wage rates in this state;

g) cost factors in jobbing milk, which shall include among other things raw product and ingredient costs, carton or other packaging costs, processing costs, and that part of general administrative costs of the supplying distributor which may properly be allocated to the handling of milk to the point at which such milk is at the supplying distributor's dock, equipment of all types required to market milk, and prevailing wage rates in the state.

5. In its consideration on the merits of the proposed action, the board takes official notice as facts within its own knowledge of the following:

TABLE A

Producer prices in adjacent and surrounding areas - July 1988

	CLASS I PRICE	CLASS II PRICE	CLASS III PRICE	BLEND PRICE
Oregon-Washington	12.29	10.75	10.52	11.17
Puget Sound-Inland	12.19	10.75	10.52	11.10
S.W. Idaho-E. Oregon	11.84	10.60	10.52	10.72
Western Colorado	12.34	10.60	10.52	11.63
Great Basin	12.24	10.60	10.52	11.38
Eastern Colorado	13.07	10.60	10.52	11.90
Rapid City	12.39	10.52		11.44
North Dakota	11.63	10.60	10.10	*10.40
Montana	13.34	10.64	9.04	**11.40

*June 1988 **Price at test

TABLE B

Supplies of milk which are available in surrounding areas - July 1988

	CLASS I UTILIZATION	CLASS II UTILIZATION	CLASS III UTILIZATION
Oregon-Washington	72,073,853	15,761,519	111,681,477
Puget Sound-Inland	80,093,704	21,416,144	149,166,209
S.W. Idaho-E. Oregon	11,055,885	7,821,826	63,018,540
West & East Colorado	60,134,580	19,569,962	34,500,431
Great Basin	61,859,982	13,832,414	72,724,068
Western North Dakota	* 7,494,191	* 672,336	* 6,288,610

*June 1988

TABLE C

Based on a current cost survey of two major processing plants in Montana conducted by staff of the Milk Control Bureau, simple average dock costs for private label milk for period November 1, 1987, through April 30, 1988, were as follows:

ITEM	RAW PROD COSTS	CRTN/INGR COSTS	PROCESSING COSTS	GEN/ADMN COSTS	DOCK COSTS
WHOLE MILK					
1/2 Gal	.57728	.08073	.14443	.03988	.84232
Gallon	1.15457	.16178	.25537	.07976	1.65148
LOWFAT 2%					
1/2 Gal	.49826	.08071	.14443	.03988	.76328
Gallon	.99651	.16245	.25537	.07976	1.49409
SKIM MILK					
1/2 Gal	.37559	.08874	.15391	.04408	.66232
Gallon	.75117	.17970	.24246	.07998	1.25331

TABLE D

Based on a current cost survey of two major processing plants in Montana conducted by staff of the Milk Control Bureau, simple average dock costs for brand label milk for period November 1, 1987, through April 30, 1988, were:

ITEM	RAW PROD COSTS	CRTN/INGR COSTS	PROCESSING COSTS	GEN/ADMN COSTS	DOCK COSTS
WHOLE MILK					
1/2 Gal	.57728	.08073	.14443	.05470	.85661
Gallon	1.15457	.16178	.25537	.10940	1.68112
LOWFAT 2%					
1/2 Gal	.49826	.08071	.14443	.05470	.77757
Gallon	.99651	.16245	.25537	.10940	1.52373
SKIM MILK					
1/2 Gal	.37559	.08874	.15391	.06046	.67870
Gallon	.75117	.17970	.24246	.09914	1.27247

(Table D Continued)

ITEM	DOCK COSTS	WHSLE DEL UNIT COST	TOTAL WHSLE DEL UNIT COST
WHOLE MILK			
1/2 Gal	.85661	.07854	.93515
Gallon	1.68112	.15709	1.83821
LOWFAT 2%			
1/2 Gal	.77757	.07854	.85611
Gallon	1.52373	.15709	1.68082
SKIM MILK			
1/2 Gal	.67870	.08902	.76772
Gallon	1.27247	.17803	1.45050

TABLE E

Based on a current cost survey of two major processing plants in Montana conducted by staff of the Milk Control Bureau, simple average cost of delivery on drop-shipment route for December 1987

	WHOLE MILK		LOWFAT MILK		SKIM MILK	
	1/2 Gal	Gal.	1/2 Gal	Gal.	1/2 Gal	Gal.
WHOLESALE DROP DEL. UNIT PRICE	.03702	.07404	.03702	.07404	.04196	---

TABLE F

Milk prices for sales to Malmstrom Air Force base for period March through September 1988

	WHOLE MILK		LOWFAT MILK		SKIM MILK	
	1/2 Gal	Gal.	1/2 Gal	Gal.	1/2 Gal	Gal.
UNIT PRICE	.75	1.52	.68	1.36	.59	---

TABLE G

Milk prices to retailer on Ryan's warehouse program for Meadow Gold Dairies, Billings, Montana - August 22, 1988

	WHOLE MILK		LOWFAT MILK		SKIM MILK	
	1/2 Gal	Gal.	1/2 Gal	Gal.	1/2 Gal	Gal.
UNIT PRICE	.8022	1.6125	.7355	1.4600	---	1.4000

TABLE H

Country Classic milk prices on Wyoming program for Montana stores beginning September 1, 1980

	WHOLE MILK-GALLON		LOWFAT MILK-GALLON	
	DARIGOLD	PRIVATE LABEL	DARIGOLD	PRIVATE LABEL
UNIT PRICE	$1.90	$1.71	$1.70	$1.56

TABLE I

Sales of milk by Bridgman Dairy, Bismarck, North Dakota to jobber Gordon Turner - May 1988

	WHOLE MILK		LOWFAT MILK		SKIM MILK	
	1/2 Gal	Gal.	1/2 Gal	Gal.	1/2 Gal	Gal.
UNIT PRICE	.765	1.56	.675	1.36	.535	---

TABLE J

Maximum allowable rates for transporting milk contained in ARM 8.86.301(9) are:

DISTANCE IN MILES	MAXIMUM FREIGHT ALLOWANCE
25 to 50	$ .25
51 to 75	.40
76 to 100	.50
101 to 150	.64
151 to 200	.85
201 to 250	1.06
251 to 300	1.28
301 to 350	1.49

Rate for transporting class III milk allowed by ARM 8.86.301 (8)(b) is $.95 per running mile.

6. The board takes official notice that the simple average of the class I prices for September 1988 in areas surrounding and adjacent to Montana is $12.51.

7. The board takes official notice that Meadow Gold Dairies and Country Classic Dairies represent 81.96% of the total fluid milk volume in Montana for 1987.

8. The board takes official notice of changes in the marketplace and of the fact Country Classic currently sells 84.93% of their total wholesale dollar volume either through the grocery warehouse system or at drop-shipment prices.

9. The board takes official notice of a five (5) store Helena area survey on November 20-23, 1981, which concluded that frequency of milk delivery was three to four times a week with an average inventory turnover of 2.76 times per week.

10. The board takes official notice of the unrest which has been prevalent in the milk industry and continues to exert pressure as evidenced by the request for emergency rule making in March 1986, November 1987 and August 1988.

11. Interested persons may participate and present data, views or arguments pursuant to section 2-4-302, MCA, either orally or in writing at the hearing or by mailing the same to the Milk Control Bureau no later than October 7, 1988.

12. Geoffrey L. Brazier, Esq., 1424 9th Avenue, Helena, Montana, has been appointed as presiding officer and hearing examiner to preside over and conduct this hearing. However, the full board will sit in convened session at the hearing.

13. Authority for the board to take the action and adopt the rules as proposed is in section 81-23-302, MCA. Such rules if adopted in the form as proposed or in a modified form, will implement section 81-23-203, MCA.

MONTANA BOARD OF MILK CONTROL
CURTIS C. COOK, CHAIRMAN

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

Certified to the Secretary of State August 29, 1988.

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

In the matter of the amendment of Rule 12.6.707 pertaining to the definition of "vessel"	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULE 12.6.707 PERTAINING TO THE DEFINITION OF "VESSEL"

TO: All interested persons

1. On the following dates, at the locations given, the Department of Fish, Wildlife and Parks will hold public hearings to amend ARM 12.6.707 pertaining to the definition of vessel.

(1) September 28, 1988, 7:00 o'clock p.m., at Department Headquarters, 1400 South 19th, Bozeman, Montana.

(2) September 29, 1988, 7:00 o'clock p.m., at Department Headquarters, 1420 East Sixth, Helena, Montana.

(3) October 4, 1988, 7:00 o'clock p.m., at Lone Pine State Park, Kalispell, Montana.

12.6.707 DEFINITION OF "VESSEL" (1) The definition of "vessel" in 23-2-502(13), MCA does not include inner tubes (motor vehicle type), float tubes (belly boats), ~~and~~ air mattresses and sailboards when used without mechanical propulsion by one individual.

AUTH: 23-2-502(13), MCA IMP: 23-2-502(13), MCA

3. This rule is being amended in response to complaints by the sailboarders (windsurfers) who have proposed that the sailboard is a new sport with a new device and should not be viewed as a vessel. Vessels must carry Coast Guard life saving equipment. This change will allow the commission greater flexibility and allow for more practical use of flotation suits such as wet suits and dry suits if the use is required for safety concerns.

4. Interested persons may present their data, views or arguments either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Robert N. Lane, Chief Legal Counsel, Department of Fish, Wildlife and Parks, 1420 East Sixth, Helena, Montana, 59620, no later than October 6, 1988.

5. Robert N. Lane has been designated to preside over and conduct the hearing.

Ronald G. Marcoux,
Associate Director
Montana Department of
Fish, Wildlife and Parks

Certified to the Secretary of State August 29, 1988.

MAR Notice No. 12-2-168 17-9/8/88

BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 12.6.701	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 12.6.701 REGARDING PERSONAL FLOTATION DEVICES AND LIFE PRESERVERS

TO: All interested persons

1. On the following dates, at the locations given, the Department of Fish, Wildlife and Parks will hold public hearings to amend ARM 12.6.701 to add the use of personal flotation devices and life preservers to operators of sailboards.

(1) September 28, 1988, 7:00 o'clock p.m., at Department Headquarters, 1400 South 19th, Bozeman, Montana.

(2) September 29, 1988, 7:00 o'clock p.m., at Department Headquarters, 1420 East Sixth, Helena, Montana.

(3) October 4, 1988, 7:00 o'clock p.m., at Lone Pine State Park, Kalispell, Montana.

12.6.701 PERSONAL FLOTATION DEVICES AND LIFE PRESERVERS Section (1) through (1)(d) remain the same.

(2) The following are requirements for sailboards used on waters of this state:

(a) A person operating a sailboard (windsurfer) must have on his person a personal flotation device that may include: Coast Guard approved life preserver, Coast Guard approved buoyant vest, wet suit, dry suit or ski belt.

(b) A person operating a sailboard (windsurfer), who has not reached his 12th birthday, must have a Coast Guard approved life preserver securely fastened to his person.

AUTH: 87-1-301 MCA, 87-1-303 MCA, and 23-2-521 MCA
IMP: 23-2-521 MCA

3. This rule is being amended in response to the concerns of the sailboarders (windsurfers) who have requested that windsurfers should not be required to wear any flotation devices. The Commission, however, is proposing the above amendment as being in the interests of public safety and as a requirement more compatible with the sport of sailboarding. This amendment will allow adults to use wet and dry suits and still provide for Coast Guard approved life saving devices on those under the age of 12. Public comment is sought on the safety need for the amendment, including whether any flotation devices should be required at all.

4. Interested persons may present their data, views or arguments either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to Robert N. Lane, Chief Legal Counsel, Department of Fish, Wildlife and

Parks, 1420 East Sixth, Helena, Montana, 59620, no later than October 6, 1988.

5. Robert N. Lane has been designated to preside over and conduct the hearing.

Ronald G. Marcoux
Associate Director
Montana Fish and Game
Commission

Certified to the Secretary of State August 29, 1988.

BEFORE THE DEPARTMENT OF HIGHWAYS
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 18.8.511A concerning the circumstances under which flag vehicles are required.	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF RULE 18.8.511A ON WHEN FLAG VEHICLES ARE REQUIRED

TO: All Interested Persons:

1. On October 4, 1988 at 9:00 o'clock A. M. a public hearing will be held in the Auditorium of the Department of Highways building at Helena, Montana, to consider the amendment of rule 18.8.511A.

2. The proposed amendment replaces present rule 18.8.511A found in the Administrative Rules of Montana. The proposed amendment would change the conditions under which flag cars are required for oversized vehicles or loads.

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

18.8.511A WHEN FLAG VEHICLES ARE REQUIRED (1) Flag vehicles are required ~~front--and--rear--on--primary--and secondary--highways--and~~ at the rear of a vehicle on interstate highways if the main body of the load or the vehicle ~~or load~~ exceeds ~~the~~ 14 feet in width ~~of the travel lane from the centerline to the continuous shoulder line or the edge of the paved surface, whichever is the lesser~~ or if the overall width including appurtenances exceeds 15 feet.

(2) Flag vehicles are required at the front on all highways except interstate highways when the main body of the load or the vehicle exceeds 12 feet in width.

(3) Flag vehicles are required at the front and at the rear on all highways except interstate highways when the main body of the load or the vehicle exceeds 14 feet in width or if the overall width including appurtenances exceeds 15 feet.

~~(2)~~ (4) A vehicle or load over 10 feet wide ~~but not exceeding the width of the traveled lane~~ must be preceded and followed by a flag vehicle front and rear when it is not equipped with flashing amber lights and "wide load" signs.

~~(3)~~ (5) A flag vehicle is required at the rear when the vehicle or load exceeds 100 feet in length on primary or secondary highways.

(6) A flag vehicle is required at the rear when a vehicle or load exceeds 110 feet in length on the interstate highway.

4. The department is proposing this amendment because it received complaints from the mobile home movers to the effect that the new rule adopted on July 29, 1988, is too restrictive and adds unnecessary expenses to mobile home moves. The department has considered their concerns and proposes this amendment to decrease the situations under which flag cars are required, to require the flag cars it believes are necessary for traffic safety, and to conform its rules more closely with the requirements of the neighboring states.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to William D. Hutchison, Agency Legal Services, Department of Justice, 215 N. Sanders, Helena, Montana 59620, no later than October 6, 1988.

6. William D. Hutchison, Attorney, Agency Legal Services, Department of Justice, 215 N. Sanders, Helena, Montana 59620, has been designated to preside over and conduct the hearing.

7. The implied authority of the agency to make the proposed rule is based on sections 61-10-121 and 61-10-122, MCA, and the rule implements sections 61-10-121 and 61-10-122, MCA.

Gary J. Wicks
Director of Highways

By: Gary J. Wicks

Certified to the Secretary of State August 29, 1988

BEFORE THE DEPARTMENT OF HIGHWAYS
OF THE STATE OF MONTANA

In the matter of the amendment of Rules 18.8.514 and 18.8.515 regarding special permits for length	)))	NOTICE OF PROPOSED AMENDMENT OF RULES 18.8.514 and 18.8.515 ON LENGTH NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On October 14, 1988, the Department of Highways proposes to amend rules 18.8.514 and 18.8.515 which regulate the conditions for special permits for length.

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

18.8.514 LENGTH Subsections (1) - (6) remain the same.

(7) No overdimensional permit may be issued for a combination of vehicles in excess of 95 feet except as provided in ~~subsection~~ subsections (8), (9), and (10).

Subsections (8) and (9) remain the same.

(10) A vehicle combination with a divisible length which does not exceed 100 feet may be issued a single trip overdimensional permit for travel only on interstate highways and within a 2-mile radius of an interchange on the interstate system on other highways only in order to obtain necessary services or to load or unload at a terminal.

~~(10)~~(11) Resident implement dealers may purchase a term overdimensional permit for lengths determined by the department.

Auth: IMPLIED 61-10-121 and 61-10-122, MCA; Imp. 61-10-121 and 61-10-122, MCA.

18.8.515 REGULATIONS FOR MOVEMENT OF A LONG LOAD

(1) Vehicles and combinations of vehicles ~~with non-reducible loads~~ exceeding 95 feet to and including 120 feet, but not exceeding the statutory width, are restricted to the following:

(a) Travel during daylight hours, 7 days a week, excluding holidays and holiday weekends, on all highways except those indicated on the "red route restrictions" map.

(b) A long load with a combined length, including towing vehicle, over 100 feet requires a flag vehicle at the rear of the combination and a "long load" sign displayed at the rear of the load when travelling on a two-lane highway. The power vehicle must maintain a minimum speed of 25 m.p.h. at all times.

(c) A long load with a combined length, including towing vehicle, over 110 feet requires a flag vehicle at the rear of the combination and a "long load" sign displayed at the rear of the load when travelling on an

interstate highway. The power vehicle must maintain a minimum speed of 25 m.p.h. at all times.

Subsections (2) and (3) remain the same.

Auth: IMPLIED 61-10-121 and 61-10-122, MCA; Imp. 61-10-121 and 61-10-122, MCA.

3. The department is proposing these amendments because it is responding to a petition to allow vehicle combinations with reducible loads up to 100 feet in length to travel on highways under special permits. The department has considered the petition and has proposed these amendments to allow such vehicle combinations on interstate highways only. It has rejected the petitioner's request for travel on other highways because it believes the number of overlength vehicles should not be increased because of safety considerations for the traveling public, especially in passing maneuvers.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendments in writing to Jesse Munro, Administrator Gross Vehicle Weight Division, 2701 Prospect Avenue, Helena, Montana 59620, no later than October 6, 1988.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Jesse Munro, Administrator Gross Vehicle Weight Division, 2701 Prospect Avenue, Helena, Montana 59620, no later than October 6, 1988.

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

Gary J. Wicks
Director of Highways

By: John L. Crubel

Certified to the Secretary of State August 29, 1988

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

In the matter of the amendment of certain prevailing wage rates, pursuant to Rule 24.16.9007	)))	NOTICE OF SECOND PUBLIC HEARING ON PROPOSED AMENDMENT OF PREVAILING WAGE RATES

TO: All interested persons:

1. On Tuesday, October 4, 1988, at 1:00 p.m., a public hearing will be held in the First Floor Conference Room of the Employment Security Building, 1327 Lockey, Helena, Montana, to consider proposed amendments to the prevailing wage rates.

2. On June 9, 1988, at p. 1127 of the 1988 Montana Administrative Register, Issue No. 11, the Commissioner of the Department of Labor and Industry published notice of a public hearing on proposed amendments to Rules 24.16.9001 through 24.16.9007, as well as the adoption of new rules on prevailing wage rates and new prevailing wage rates. The hearing was held July 12, 1988.

After considering the testimony offered at the hearing and conducting its own research into the matter, the Department has determined to amend certain of the proposed prevailing wage rates. The new prevailing wage rates will be incorporated into the rules by reference pursuant to Rule 24.16.9007(3). No other changes in the rules are proposed.

3. Interested parties may submit their data, views, or comments, either orally or in writing, at the hearing. Written data, views, or comments may also be submitted to the Administrator, Employment Relations Division, Department of Labor and Industry, P.O. Box 1728, Helena, MT 59624, no later than October 11, 1988.

4. David A. Scott, Chief Counsel, Department of Labor and Industry, P.O. Box 1728, Helena, MT 49624, has been designated to preside over and conduct the hearing.

5. The authority of the department to adopt new prevailing wage rates is based on 18-2-402 and 18-2-431, MCA, and the rules implement 18-2-402, 18-2-403 and 18-2-411, MCA.

Mary M. Hartman, Commissioner
Department of Labor & Industry

17-9/8/88

BEFORE THE DEPARTMENT OF MILITARY AFFAIRS
OF THE STATE OF MONTANA

In the matter of amendment of Rules 34.5.101, 34.5.110 and 34.5.120 relating to the Montana State Veterans Cemetery.	))))	NOTICE OF PROPOSED AMENDMENT OF RULES 34.5.101, 34.5.110 AND 34.5.120 relating to the Montana State Veterans Cemetery.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Person:

1. On October 8, 1988, the Department of Military Affairs proposes to amend rules 34.5.101, 34.5.110 and 34.5.120 relating to the Montana State Veterans Cemetery.

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

34.5.101 ELIGIBILITY OF VETERAN (1) Any veteran who received any discharge, other than a dishonorable discharge, from the armed forces of the United States is eligible for burial in the cemetery. The term "veteran" shall include individuals who served with national guard and reserve units of the U.S. military forces, and all members of the first special service force who served with this unit during WW II.

(2) Veterans not qualifying for a veterans administration "plot allowance" shall be charged an equivalent fee for opening and closing of all gravesites.

AUTH: 10-2-602 MCA IMP: 10-2-602 MCA

34.5.110 PLOT CHARGES (1) There will be no charge for any burial plot, however all costs associated with reinterments and disinterments shall be the responsibility of the person or entity making the request.

AUTH: 10-2-602 MCA IMP: 10-2-602 MCA

34.5.120 DEPOSITING MONIES (1) Ten percent of all plot allowance monies received shall be deposited in the perpetual maintenance account.

AUTH: 10-2-602 MCA IMP: 10-2-602 MCA

3. These rule amendments are necessary: (1) to include an additional group of veterans as being eligible for burial in the cemetery, (2) to set a policy of costs associated with reinterments and disinterments, (3) to define the specific source of monies used for the maintenance account.

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

Rich Brown, Administrator
Montana Veterans Affairs Division
P.O. Box 5715
Helena, Montana 59604

no later than October 6, 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 a written request for a hearing and submit this request along with any written comments he has to Rich Brown at the above address no later than October 6, 1988.

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

7. The authority of the Department to make the proposed amendments is based on 10-2-602 MCA. The rule implements 10-2-602 MCA.

James W. Duffy, MG
The Adjutant General
Department of Military Affairs

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.2.501 relating to Application of Partial Payments.	NOTICE OF THE PROPOSED AMENDMENT of ARM 42.2.501 relating to Application of Partial Payments.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On October 17, 1988, the Department proposes to amend ARM 42.2.501 relating to Application of Partial Payments.

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

42.2.501 APPLICATION OF PARTIAL PAYMENTS (1) All partial payments on accounts receivable balance received by the department for payment of administrative fee, tax, penalty, and interest must be first applied to the amount of ~~interest due~~, administrative fee due, until satisfied. Any amounts remaining will then be applied to the amount of interest, then to the amount of penalty due and then to the tax due. AUTH, 2-4-201, 15-1-201, 15-30-305, 15-31-501, 15-35-122, 15-53-104 and 15-70-104 MCA; IMP, 2-4-201, 15-1-206, 15-30-321, 15-31-502, 15-35-105, 15-36-107, 15-37-108, 15-38-107, 15-53-111, 15-54-111, 15-55-108, 15-56-111, 15-58-106, 15-59-106, 15-59-205, 15-70-210 and 15-70-330.

3. The department feels this rule is necessary because the recent adoption of 42.2.501 did not consider the Administrative Fee assessment mandated by HB 791, Section 3(2) (15-25-111(2)). The Administrative Fee is assessed to offset costs incurred in assessing value, in collecting the tax, and in any review and appeal process. The fee is added to the assessment. The current rule does not address the application of payments in relation to the fee.

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

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

no later than October 6, 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 October 6, 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 8/29/88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rule I relating to Proceeds of Drug Tax.) NOTICE OF THE PROPOSED ADOPTION of Rule I relating to Proceeds of Drug Tax.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On October 17, 1988, the Department proposes to adopt rule I relating to Proceeds of Drug Tax.

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

RULE I - COLLECTION AND DISPOSITION OF TAX (1) All monies collected under this act shall be deposited in the Dangerous Drug Tax Administration Revenue Fund.

(2) Tax, penalty and interest deposited in the fund must be transferred to the State Treasurer for distribution on a monthly basis.

(3) Collections of partial payments will be applied in accordance with 42.2.501. AUTH, 2-4-201, 15-1-201, 15-30-305, 15-31-501, 15-35-122, 15-53-104 and 15-70-104 MCA; IMP, 2-4-201, 15-1-206, 15-30-321, 15-31-502, 15-35-105, 15-36-107, 15-37-108, 15-38-107, 15-53-111, 15-54-111, 15-55-108, 15-56-111, 15-58-106, 15-59-106, 15-59-205, 15-70-210 and 15-70-330.

3. The department feels this rule is necessary because the statute does not address the penalty and interest collections. The process of identifying and applying payments to the tax, penalty and interest and administrative fee segments is also not addressed.

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 October 6, 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 October 6, 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 8/29/88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rule I and THE AMENDMENT of ARM 42.25.1117 and 42.25.1113 relating to Mines Net Proceeds.	NOTICE OF PUBLIC HEARING on the PROPOSED ADOPTION of Rule I and the PROPOSED AMENDMENT of ARM 42.25.1117 and 42.25.1113 relating to Mines Net Proceeds.

TO: All Interested Persons:

1. On October 20, 1988, at 1:30 pm 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 and the amendment of ARM 42.25.1117 and 42.25.1113, relating to Mines Net Proceeds.

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

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

RULE I - COMPUTATION OF GROSS VALUE (1) Gross value for purposes of the mines net proceeds will be determined at the point where mining processes end and manufacturing or non-mining processes begin as discussed in 42.25.1104.

(2) Gross value at the point of valuation will be determined using one of the following methods which are listed in the order they are to be considered.

(a) The producer's actual sales prices for mineral products sold at the point of valuation will be considered the best evidence of value provided the sales are arm's-length and represent approximately 30% of total mineral production. Sales of less than 30% of total production may be acceptable indicators of value if the sales price per unit is corroborated with other representative market data for minerals of like kind and grade. Documentation for this method must be provided by the producer to the department on request.

(b) If the producer does not have the sales information discussed in (a), a market survey of other producers' sales of like kind and grade mineral products may be done. If this method is used, the producer must obtain market data for 3 or more other producers. This data must represent the results of competitive transactions in markets with a substantial number of unrelated buyers and sellers. The producer must document that all values used are for minerals of comparable quality sold in quantities approximating the producers level of production. It may also be necessary to consider the geographic area served by the markets used for comparison. All information obtained by the producer to support this method must be provided to the department on request.

(c) If the information required by (a) and (b) is not available, the proportionate profits method may be used to compute a value in the absence of adequate market data. The general formula for this computation is stated below.

$$\text{Taxable value/unit} = \frac{\text{Direct costs through valuation point}}{\text{Total direct costs}} \times \text{Sales price/unit}$$

(d) Direct costs through the valuation point will include overburden removal, drilling, blasting, loading, hauling, crushing, sorting, drying, mine reclamation, production taxes and royalties and any other direct costs incurred through the valuation point.

(e) Total direct costs will include, in addition to those noted above, all direct costs applied to the mineral products up to the point of production of the first marketable product or group of products which have not been manufactured or fabricated. These costs will typically include grinding, burning or calcining, blending with other materials and treatment effecting a chemical change.

(f) The sales price per unit will be the weighted average price of the first marketable product or group of substantially similar products sold in significant quantities by the producer. The first marketable product or group of products will not include manufactured products. For example, a cement producer must use the sales price of bulk cement not the price of concrete blocks he may manufacture from the cement.

(g) Only direct costs may be used in computing the cost ratio for the formula. No costs that benefit the operation as a whole or are not directly related to a specific phase of the mining or processing of the mineral product will be included in the ratio.

(h) The department may use an alternative valuation method if warranted by an unusual situation. AUTH, 15-23-108 MCA; IMP, 15-23-502 and 15-23-503 MCA.

42.25.1117 MARKETING, ADMINISTRATIVE, AND OTHER OPERATIONAL COSTS (1) All ~~monies expended~~ expenses for supplies may be deducted in computing net proceeds as provided under ARM 42.25.1102 and 42.25.1103.

~~(2) All monies actually expended for transporting the ores or mineral products to the place of sale and for marketing the product and the conversion of the same into money may also be deducted in computing net proceeds as provided under ARM 42.25.1102 and 42.25.1103. In the case of ores or concentrates sold or transported in a crude or unfinished condition from a Montana mine, market costs must reflect the actual marketing expenses (including any handling and storage charges and sales costs), including brokers' commissions. In the case of mineral products manufactured in Montana from ores or concentrates produced in this state, the ores or concentrates may be valued~~

~~at the end of the mining process and prior to further manufacturing, and in that event the deduction for transporting the mineral products to market and the cost of marketing the product and conversions into money will be determined by allocating an amount of the transportation cost to the place of sale based on the actual cost of transporting a crude product to the same point, and then the amount representing the actual marketing expenses, based on the costs of marketing a crude product, including any handling and storage charges and sales costs including brokers' commissions. No deduction will be allowed for expenses which cannot be shown to be directly related to the transportation, handling and sales costs incurred in marketing the product and converting it into money.~~

(2) Actual marketing costs directly related to the sale of mineral products processed up to the point of valuation for net proceeds purposes may be deducted. These expenses may include the applicable salesperson's salary and/or commission, technical assistance, and advertising, but only to the extent these expenses pertain specifically to the mineral product processed up to the point of valuation. Marketing expenses related to mineral products processed beyond that point may not be allocated back to mineral products that are not sold until further processing has occurred. Technical and scientific testing costs will not be considered marketing, but may be deductible if they meet the requirements of 15-23-503(h) MCA.

(3) All ~~monies expended~~ expenses for fire insurance, boiler and machinery insurance, and public liability insurance paid for the mine, reduction works or beneficiation process are deductible. ~~and for worker's compensation insurance, social security, unemployment insurance, medical surgical hospital insurance, and for payments by mine operators to welfare and retirement funds when required by wage contracts between mine operators and employees.~~

(4) No payments for taxes on production, license taxes, corporation, income, sales, real estate, personal property, and excise taxes may be used as a deduction.

(5) No ~~monies expended~~ expenses for land lease rental or for land lease holdings may be used as a deduction. AUTH, 15-23-108 MCA; IMP, 15-23-503 MCA.

42.25.1113 LABOR COSTS ~~(1) All monies expended for labor may be deducted in computing net proceeds as provided under ARM 42.25.1102 and 42.25.1103.~~

~~(2) Labor shall include all monies expended for actual costs of necessary labor in the extracting of the mineral deposit.~~

~~(3) In the case of a mine where the actual mining operations are performed under contract by a subsidiary, the mine operator must furnish the department of revenue with an explanation of the basis on which the contract is made and an itemized breakdown of the actual costs included in the contract agreement.~~

~~(4) Salaries of engineers, geologists, and other~~

~~technical personnel are a deductible item only to the extent that such personnel are employed exclusively in the mine operation.~~

~~(5) Superintendents shall be meant to include only the persons or officers actually engaged directly in the working of the mine or superintending the management thereof (at the mine site or in the vicinity thereof). This deduction is not meant to include any personnel in a corporate or headquarters office who have no part in the actual operations of the mine.~~

(1) Labor expenses will include amounts paid to employees up to and including mine and mill foremen and superintendents. No deduction will be allowed for any person or officer not actually engaged in the mining or milling operations. Labor expenses for the following functions will be deductible to the extent they relate specifically to the mining and processing operations up to the point of mineral valuation:

(a) Overburden removal;
(b) Drilling and blasting;
(c) Loading;
(d) Hauling;
(e) Crushing;
(f) Washing, sorting, and screening;
(g) Drying;
(h) Testing to satisfy federal and state health and safety laws;
(i) Plant security;
(j) Assaying and sampling;
(k) Reclamation;
(l) Engineering and geological services performed in Montana for existing operations;
(m) Equipment maintenance;

(2) Labor expenses for the following functions are not deductible:

(a) Accounting and bookkeeping;
(b) Legal;
(c) Management above the superintendent level;
(d) Engineering and geological services performed out of Montana or related to exploration;
(e) Janitorial;
(f) Laboratory work except as allowed in (h) and (j) above;
(g) Any other labor expenses incurred beyond the point of mineral valuation;

(3) The following items may be included in the amounts deducted for the functions listed in (1) above:

(a) Wages and salaries;
(b) Overtime;
(c) Holiday and vacation pay;
(d) Shift differentials;
(e) Payroll taxes;
(f) Health and welfare benefits;
(g) Safety clothing;
(h) Locker and shower facilities;
(i) Meal expenses;

(j) Bonuses;
(k) Safety training;
(l) Transportation to the mine provided by employer;
(m) Workers' compensation insurance;
(n) Retirement fund contributions provided for in labor contracts;

(4) Accounting records for labor expenses must be maintained by the taxpayer. These records must include contemporaneous manhour logs for employees who do not work 100% of their time in one of the functions listed in (1) above or who are involved in processing minerals both up to and beyond the point of mineral valuation. AUTH, 15-23-108 MCA; IMP, 15-23-503 MCA.

4. The Department is proposing rule I because no guidelines for computing gross value "at the point of valuation" have ever been adopted. The only information previously available to taxpayers regarding mineral valuation was contained in the Pfizer court decision. This rule is in compliance with the concept of mineral taxation expressed in that case, i.e. the tax is based on the net proceeds of the mining process only.

ARM 42.24.1117 is being amended because more specific guidelines are needed to determine which marketing costs are deductible. The rule as rewritten is in compliance with the Anaconda, Pfizer, and Cyprus Mines court decisions. These decisions made it clear that only actual marketing costs are deductible and that allocations of marketing expense incurred for mineral products processed beyond the point of valuation are not deductible. The language relating to the transportation deduction was deleted since that topic is covered by 42.25.1116 which has recently been amended. The language in paragraph (3) relating to employee benefits has been deleted from this rule and added to 42.25.1113 which relates to labor costs. Other types of insurance expense made deductible by a recent statute change have been added to paragraph (3). The "monies expended" language in paragraphs (1), (3) and (5) has been replaced with the word "expenses". This change was made to update the terminology only. The term "expenses" will continue the interpretation that an actual cash outlay is necessary.

ARM 42.25.1113 is being amended because the existing labor cost rule is essentially a restatement of the statute. A new rule is needed to specifically list the deductible labor costs and also identify costs that are not deductible. The guidelines established in this rule should help eliminate misunderstandings concerning these costs.

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 October 24, 1988, 1988.

6. Paul Van Tricht, 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 8/29/88.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF PROFESSIONAL ENGINEERS AND LAND SURVEYORS

In the matter of the amendment) NOTICE OF AMENDMENT OF 8.48.
of a rule pertaining to fees) 1105 FEE SCHEDULE

TO: All Interested Persons:

1. On July 28, 1988, the Board of Professional Engineers and Land Surveyors published a notice of proposed amendment of the above-stated rule at page 1643, 1988 Montana Administrative Register, issue number 14.

2. The Board amended the rule exactly as proposed.

3. No comments or testimony were received.

BOARD OF PROFESSIONAL ENGINEERS
AND LAND SURVEYORS
NANCY MOE, CHAIRMAN

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

Certified to the Secretary of State, August 29, 1988.

BEFORE THE BOARD OF OIL
AND GAS CONSERVATION
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 36.22.1306 pertaining to reentry of plugged oil and gas wells.	NOTICE OF AMENDMENT OF ARM 36.22.1306

TO: All Interested Persons:

1. On July 28, 1988, the Board of Oil and Gas Conservation of the State of Montana published notice of public hearing on its proposed amendment of ARM 36.22.1306 at page 1657, 1988 Montana Administrative Register, issue no. 14.

2. The Board of Oil and Gas Conservation of the State of Montana has adopted the Rule as proposed.

3. The Board received a letter supporting the rule's change from Mr. Rod Samdahl of the Department of State Lands. Also, Diana C. Cutler, a Program Specialist for the Board of Water Well Contractors, wished to go on record as noting that the reentry of a plugged oil and gas well in search of water would fall under the licensing requirements for water well contractors and their regulations enacted thereunder. At the hearing, Mr. Tom Richmond, the Board's Petroleum Engineer, asked if someone reentering an oil or gas well with the intention of completing it as a water well would be required to post the bond required by this board for oil and gas wells. It was determined that such a bond would be required but that it could be released once the water well was successfully completed and the staff was satisfied that the plug below the target aquifer was adequate.

Dee Rickman

Dee Rickman, Executive Secretary
Board of Oil and Gas Conservation

Certified to the Secretary of State, August 29, 1988.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.22.1311 relating to Industrial Machinery and Equipment Trend Factors.	NOTICE OF THE AMENDMENT of ARM 42.22.1311 relating to Industrial Machinery and Equipment Trend Factors.

TO: All Interested Persons:

1. On June 9, 1988, the Department published notice of the proposed amendment of ARM 42.22.1311 relating to Industrial Machinery and Equipment Factors at page 1170 of the 1988 Montana Administrative Register, issue no. 11.

2. The Department has amended ARM 42.22.1311 as proposed.

3. No comments or testimony were received.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 8/29/88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.23.404 relating to Depreciation Rules, Corporation Taxes.	NOTICE OF THE AMENDMENT of ARM 42.23.404 relating to Depreciation Rules, Corporation Taxes.

TO: All Interested Persons:

1. On June 23, 1988, the Department of Revenue published notice of the proposed amendment of ARM 42.23.404 relating to Depreciation Rules, Corporation Taxes at page 1241 of the 1988 Montana Administrative Register, issue no. 12.

2. A public hearing was held on August 10, 1988.

3. No one appeared to give testimony at the hearing and no written comments were received.

4. The Department amends ARM 42.23.404 as proposed.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 8/29/88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rule I (42.25.1104) relating to "Point of Benefication", Mines Net Proceeds.	NOTICE OF THE ADOPTION of Rule I (42.25.1104) relating to "Point of Benefication", Mines Net Proceeds.

TO: All Interested Persons:

1. On May 26, 1988, the Department of Revenue published notice of the proposed adoption of rule I (42.25.1104) relating to "Point of Benefication", Mines Net Proceeds at page 949 of the 1988 Montana Administrative Register, issue no. 10.

2. A public hearing was held on June 29, 1988 where written and oral comments were received.

3. As a result of the comments received the Department has adopted rule I (42.25.1104) with the following changes:

RULE I (42.25.1104) MINING VERSUS NON-MINING 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.

(a) 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

(b) No deductions will be allowed for PROCESSING costs incurred beyond the valuation point. "AFTER CRUSHING" REFERS TO AFTER ALL CRUSHING BUT BEFORE GRINDING.

4. The proposed changes in rule I are being made and based on the public comments received.

5. Oral and written comments received during and subsequent to the hearing are summarized as follows along with

the response of the Department:

COMMENT: The valuation point for vermiculite is not clearly defined.

RESPONSE: The valuation point specified for vermiculite describes the last mineral processing that occurs prior to shipment to the expanding plants. This is the processing stage at which vermiculite value should be determined for Mines Net Proceeds purposes.

COMMENT: The valuation point for limestone should be at the time of extraction or at the mine mouth.

RESPONSE: The Pfizer v. Madison County case addressed this issue. In this court decision, the valuation point for talc was set after the mineral was crushed, washed and sorted. This rule establishes a similar valuation point for limestone.

COMMENT (POINT OF BENEFICATION): The statement "no deductions will be allowed for costs incurred beyond the valuation point" incorrectly eliminates deductions for marketing and transportation to the point of sale.

RESPONSE: While this was not the Department's intention, the concern is acknowledged. The Department proposes to amend that statement.

COMMENT (POINT OF BENEFICATION): The valuation points listed in the rule do not accurately define the processing stage at which mining ends and processing begins for bentonite, gypsum, limestone, and talc.

RESPONSE: This rule was proposed in response to the industrial mineral producers' requests that the point of benefication be established in rule form. In nine out of ten audit cases the valuation point is not an audit issue. The Department is not, through this rule, attempting to change the point of valuation. We are more than a little puzzled by the comments provided and testimony presented in opposition to this rule.

None of the mineral producers claiming confusion concerning the valuation points established in this rule have offered alternative language to better define the valuation point for their particular situation. The specific questions raised concerning each mineral listed in the rule are addressed below.

Bentonite

The Department will continue to value bentonite after crushing and drying regardless of whether all processes up to that point are performed in Montana or out-of-state.

Gypsum and Limestone

"After crushing" refers to all crushing but before grinding.

Talc

Talc is crushed and sorted by all three Montana talc producers. This is the valuation point established in the Pfizer case. We are aware that one producer "washes" talc to facilitate separation by sorting, but that does not affect the valuation point since value is established after the "washing" process.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 8/29/88.

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 Mineral Net Proceeds.	NOTICE OF THE AMENDMENT of ARM 42.25.1112 relating to Machinery Expense Deduction For Mineral Net Proceeds.

TO: All Interested Persons:

1. On May 26, 1988, the Department of Revenue published notice of the proposed amendment of ARM 42.25.1112 relating to Machinery Expense Deduction For Mineral Net Proceeds at page 953 of the 1988 Montana Administrative Register, issue no. 10.

2. A public hearing was held on June 29, 1988 where written and oral comments were received.

3. As a result of the comments received the Department has amended ARM 42.25.1112 with the following changes:

42.25.1112 EXPENSES RELATED TO MACHINERY (1) through (6) remain the same.

(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. ACQUISITION COSTS MAY INCLUDE THE COST OF FREIGHT AND DELIVERY, ASSEMBLY, INSTALLATION, TESTING, AND STARTUP.

4. Oral and written comments received during and subsequent to the hearing or in written form are summarized as follows along with the response of the Department:

COMMENT: Paragraph (7) limits the intent of the original statute by denying indirect expenditures for machinery such as supplies, oil, electricity, etc. The word "direct" should be omitted from the rule.

RESPONSE: Supplies are specifically allowed as a deduction in Section 15-23-503(1)(b) Montana Code Annotated. Oil and electricity directly related to the operation of deductible machinery are also allowable expenses.

COMMENT: The rule does not treat purchased and rental equipment on the same basis. No deduction for operating, maintenance and insurance costs is specified for rental equipment.

RESPONSE: Paragraph (7) is intended to apply to both rental and owned equipment with regard to the deductibility of operating and maintenance costs.

COMMENT: The rule discriminates against ownership and favors renters.

RESPONSE: The Department has set out in detail which machinery costs are deductible. In the case of rental equipment, the full amount of the rental charges is deductible. No attempt will be made to segregate that charge into deductible and nondeductible components. Mineral producers may wish to consider the net proceeds tax consequences when making lease/buy decisions if they are significant.

COMMENT: Are freight charges for shipping machinery and installation costs deductible? What about interest and other finance charges?

RESPONSE: Freight charges and installation costs (to the extent not deducted elsewhere) are deductible machinery costs. Interest and finance charges are not deductible.

COMMENT (MACHINERY EXPENSE): An amendment has been proposed to add the following language after the first sentence in paragraph (7).

> Acquisition costs shall be deemed to include, without limitation, costs of freight and transportation, assembly or disassembly, installation, testing, startup and other related expenses."

RESPONSE: The Department acknowledges the propriety of the deduction addressed in the proposed amendment, but rejects the language "without limitation" and "other related expenses". If it is the taxpayer's concern that specific acquisition costs that are deductible be stated in the rule the Department will include language beginning after the first sentence in paragraph (7) to cover that concern.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 8/29/88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.25.1116 relating to Transportation Deduction For Mines Net Proceeds.	NOTICE OF THE AMENDMENT of ARM 42.25.1116 relating to Transportation Deduction For Mines Net Proceeds.

TO: All Interested Persons:

1. On July 14, 1988, the Department of Revenue published notice of the proposed amendment of ARM 42.25.1116 relating to Transportation Deduction For Mines Net Proceeds at page 1519 of the 1988 Montana Administrative Register, issue no. 13.

2. A public hearing was held on August 9, 1988 where written and oral comments were received.

3. As a result of the comments received the Department has amended ARM 42.25.1116 as proposed.

4. Oral and written comments received during and subsequent to the hearing are summarized as follows along with the response of the Department:

COMMENT: This rule erroneously denies a deduction for transportation expenses incurred beyond the point of mineral evaluation. The rule is not realistic because it fails to consider the economic realities of integrated mining and manufacturing operations where the manufactured product is the end product that must be sold and transported.

RESPONSE: It is recognized by the Department that in many instances transportation expenses are incurred with respect to the end product, but it must also be recognized that it is not the value of the end product that is subject to tax. Only the value of the mined product not the manufactured or end product is subject to tax. It is not reasonable to expect that the determination of value will stop at one stage of processing and expenses incurred beyond that point will be deductible against that value. The Pfizer vs. Madison County case recognized this in 1972.

COMMENT: Section 15-23-503, MCA, subpart (f) reads as follows:

> All monies actually expended for transporting the ores and mineral products or deposits from the mines to the mill or reductions works or to the place of sale and for extracting the metals and minerals therefrom and for marketing the product and the conversion of the same into money; . . .

Existing rule 42.25.1117 sets forth the deductibility of

transportation costs separate and apart from mining costs. Therefore the rule in question, ARM 42.25.1116, with proposed amendments contradicts both the applicable statute and existing rule.

RESPONSE:

Section 15-23-503(f) establishes two transportation deductions- one for transporting ores and other mineral products from the mine to the mill and the other for transporting minerals to the place of sale. ARM 42.25.1116 which is the rule being amended addresses the first deduction. ARM 42.25.1117 addresses the second deduction. There is no conflict. The amendment to ARM 42.25.1116 would, for example, not allow a deduction for the transportation of talc from the crushers to the grinders, but would allow transportation from the mine to the crusher. ARM 42.25.1116 does not address transportation to the point of sale. That topic is covered by 42.25.1117.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 8/29/88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rule I (42.25.1705) relating to Coal Severance Tax.	NOTICE OF THE ADOPTION of Rule I (42.25.1705) relating to Coal Severance Tax.

TO: All Interested Persons:

1. On June 23, 1988, the Department of Revenue published notice of the proposed adoption of rule I (42.25.1705) relating to Coal Severance Tax at page 1249 of the 1988 Montana Administrative Register, issue no. 12.

2. A public hearing was held on August 9, 1988 where written and oral comments were received.

3. As a result of the comments received the Department has adopted rule I (42.25.1705) with the following changes:

RULE I (42.25.1705) - APPLICABLE TAX RATES (1) Beginning July 1, 1988 the coal severance tax rate will begin an incremental decline to 15%. According to the following schedule:

TAX RATES

Coal Production	Under 7000 BTU	7000 BTU & Over
July 1, 1975-June 30, 1988	20%	30%
July 1, 1988-June 30, 1990	17%	25%
July 1, 1990-June 30, 1991	13%	20%
July 1, 1991-forward	13%	15%

All revenue associated with production in each time frame will be subject to the tax rate in effect when the coal was produced LOADED FOR FINAL TRANSPORTATION TO THE PURCHASER. Revenue received by coal producers for cost escalations, billing adjustments, disputed payments, etc. will not necessarily be taxed at the rate in effect when the payment is received. The applicable tax rate will be the rate in effect when the coal was ~~produced~~ LOADED FOR FINAL TRANSPORTATION TO THE PURCHASER regardless when the final payment was received. AUTH, 15-35-122 MCA; IMP, 15-35-103 MCA.

4. Oral and written comments received during and subsequent to the hearing are summarized as follows along with the response of the Department:

COMMENT: According to 15-35-102(9), MCA, "produced" means severed from the earth. Rule 42.25.511(1) states that "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." It is nearly impossible to determine when coal is produced since some coal is held in storage, blended, etc. The new tax rates should be keyed to when coal is loaded for final shipment to the purchaser instead of when the coal is produced.

RESPONSE: Rule 42.25.511 was adopted to pertain to the coal gross proceeds tax which taxes coal on a sales basis. Hence the language -- "the date the coal is loaded for final transportation" which is normally the point of sale. The severance tax is based on production not sales. The Department recognized, however, the timing problem that results from imposing new rate schedules on a production basis. In the interest of facilitating the change to the new rate schedule, the Department will accept the proposed amendment and key the rate changes to the date the coal is loaded for shipment.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 8/29/88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rules I (42.26.258) and II (42.26.259) and THE AMENDMENT of ARM 42.26.251 relating to Sales Factor Computation.	NOTICE OF THE ADOPTION of Rules I (42.26.258) and II (42.26.259) and THE AMENDMENT of ARM 42.26.251 relating to Sales Factor Computation.

TO: All Interested Persons:

1. On June 9, 1988, the Department of Revenue published notice of the proposed adoption of Rules I and II and the amendment of ARM 42.26.251 relating to Sales Factor Computation at page 1178 of the 1988 Montana Administrative Register, issue no. 11.

2. A public hearing was held on June 30, 1988 where written and oral comments were received.

3. As a result of the comments received the Department has adopted Rules I (42.26.258) and II (42.26.259) with the following change to Rule II and amended ARM 42.26.251 as proposed:

RULE II SALE OF TANGIBLE AND INTANGIBLE PROPERTY COMPUTATION OF THE SALES FACTOR (1) If a taxpayer derives receipts from the sale of tangible property or the sale or redemption of intangible property not held primarily for sale to customers in the ordinary course of its trade or business such receipts will constitute sales for inclusion in the sales factor to the following extent:

(a) Only the net receipts from the sale of tangible or the sale or redemption of intangible property shall be included in the sales factor.

(b) In the case where the taxpayer has multiple transactions from the sale of tangible or the sale or redemption of intangible property only the net gains in excess of net losses will be included in the sales factor.

(c) Before the net receipts from the sale of tangible property or the sale or redemption of intangible property may be included in the sales factor the INCOME FROM THE sales transactions must ~~be part of the taxpayer's regular trade or business operations~~ CONSTITUTE BUSINESS INCOME TO THE TAXPAYER.

4. The proposed changes are being made because of a comment received.

5. Oral and written comments received during the hearing are summarized as follows along with the response of the Department:

COMMENT: The rule would require in all instances that the net receipts only be included in the sales factor because the inclusion of the gross receipts would cause an alleged "severe

distortion." A determination of a "severe distortion" is a factual matter which has to be determined on a case-by-case basis. This rule governs all cases, without any determination of the facts of a particular case to see whether or not in that case the inclusion of gross proceeds would cause such "severe distortion."

RESPONSE: The Department believes to include this type of sale at gross in the computation of the sales factor would in all cases not properly reflect a taxpayer's business operations in Montana. The Department believes that UDITPA never contemplated the inclusion of this type of sale in the sales factor. The purpose of this proposed rule is to specifically eliminate this type of gross proceeds from the sales factor.

COMMENT: The rule fails to define the term "severe distortion" of the sales factor. Absent such a definition it is impossible for any taxpayer to measure the alleged "severe distortion."

RESPONSE: The new rule will eliminate this type of sale at gross from the sales factor in all cases. There is no need to define the term "severe distortion." The use of the phrase "severe distortion" by the Department in its reason for the new rule will be eliminated. The Department believes the inclusion of this type of sale at gross will not fairly reflect the taxpayer's business operation within Montana.

COMMENT: The regulation contravenes the specific language of Section 15-31-302(5), MCA. This regulation would allow only the net proceeds to be included in the sales factor from the sale of any tangible or intangible property. This language is in direct contravention to the statute which defines sales as all "gross receipts" and the Department is not empowered to make such an amendment to the statute, it requires legislative action and cannot be completed under administrative rule making.

RESPONSE: This rule is proposed under Section 15-31-312, MCA which is the relief provision. The Department is not changing the definition of what constitutes sales under Section 15-31-302(5), but merely using the relief provision to better reflect a taxpayer's business operation within Montana. The Department will eliminate any reference to implementing Sections 15-31-302, 15-31-310 and 15-31-311, MCA.

COMMENT: Rule II as written contains an inherent conflict. Section (1) of Rule II provides that this rule relates only to the receipts from the sale of tangible or intangible property "not held primarily for sale to customers in the ordinary course of its trade or business." Yet subsection (1)(c) of Rule II, provides that the net receipts will only be included if the sales transactions are "part of the taxpayer's regular trade or business operations." An inherent conflict exists in that

section (1) relates only to assets which are not sold in the ordinary course of the trade or business, yet subsection (c) relates to the sale of the assets which are part of the taxpayer's regular trade or business operations. Such conflict makes it impossible for a taxpayer to determine what proceeds are included and at what amount.

RESPONSE: The Department agrees that this wording may cause confusion to taxpayers. The Department will change Rule II subsection (1)(c) to eliminate this confusion.

COMMENT: The rule as drafted contains no dates of applicability. This rule, if it is to be adopted, must state for what tax years it will apply. If adopted, specify the applicability dates of the proposed rules and the amendment to ARM 42.26.251.

RESPONSE: The Department does not believe an applicability date is needed for the adoption of this rule. The Department is not taking a new position but merely notifying all taxpayer's of its long standing practice of excluding this type of sale at gross from the sales factor.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 8/29/88.

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

In the matter of the amendment of Rules 46.12.602 and 46.12.605 pertaining to dental services	))))	NOTICE OF THE AMENDMENT OF RULES 46.12.602 AND 46.12.605 PERTAINING TO DENTAL SERVICES

TO: All Interested Persons

1. On July 28, 1988, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.12.602 and 46.12.605 pertaining to dental services at page 1662 of the 1988 Montana Administrative Register, issue number 14.

2. The Department has amended Rules 46.12.602 and 46.12.605 as proposed.

3. No written comments or testimony were received.

Director, Social and Rehabilitation Services

Certified to the Secretary of State August 29, 1988.

VOLUME NO. 42 OPINION NO. 107

CONTRACTS - Whether joint ventures are eligible for "resident" status in bidding on public works contracts; PUBLIC FUNDS - Whether joint ventures are eligible for "resident" status in bidding on public works contracts; MONTANA CODE ANNOTATED - Sections 18-1-102, 18-1-103.

HELD: A joint venture may qualify for "resident" status as a "partnership enterprise" for purposes of the preference under section 18-1-102, MCA, but a majority of the venture's partners must have been Montana residents for at least one year immediately prior to the involved bidding to acquire such status.

17 August 1988

Gary J. Wicks, Director
Montana Department of Highways
2701 Prospect
Helena MT 59620

Dear Mr. Wicks:

You have requested my opinion concerning the following question:

> Is a joint venture composed of two members--one a Montana resident and the second a nonresident--entitled to the preference for resident bidders created under section 18-1-102, MCA, with respect to state-issued contracts for the construction or repair of public works?

I conclude that, while joint ventures are eligible to qualify under section 18-1-103, MCA, for the bidder preference, a majority of its members must be Montana residents, a condition not satisfied in the facts presented by your question.

Section 18-1-102(1), MCA, provides that any public agency in this state must award contracts for the construction or repair of public works to the lowest responsible resident bidder if such person's bid does

not exceed that of the lowest responsible nonresident bidder by 3 percent. The term "resident" is defined in section 18-1-103, MCA, which requires in subsection (2) that, "[i]n a partnership enterprise or an association, the majority of all partners or association members shall have been actual residents of the state of Montana for more than 1 year immediately prior to bidding" to qualify for "resident" status. Other subsections specify standards for an individual or a corporation seeking to qualify as a "resident." § 18-1-103(1), MCA. Joint ventures are not mentioned. It should be noted that special rules apply to bidders on contracts for the purchase of goods, both as to the amount of the preference and as to the conditions precedent to acquiring "resident" status, and are not at issue here.

Despite the absence of an express inclusion of joint ventures under section 18-1-103, MCA, as a business entity capable of qualifying for "resident" status, there is no indication in such provision that arbitrary distinctions were intended to be drawn between various forms of legitimate business entities. That provision should instead be construed to carry out its clear purpose of establishing rules for determining "resident" status for any type of recognized business organization. See, e.g., Montana Wildlife Federation v. Sager, 37 St. Rptr. 1897, 1907, 620 P.2d 1189, 1199 (1980) ("[a] statute will not be interpreted to defeat its evident object or purpose").

In Montana and elsewhere, a joint venture has been viewed as "a quasi-partnership in a single adventure undertaken for mutual gain." Bradbury v. Nagelhus, 132 Mont. 417, 426, 319 P.2d 503, 509 (1957); accord Murphy v. Redland, 178 Mont. 296, 303, 583 P.2d 1049, 1053 (1978); Rae v. Cameron, 112 Mont. 159, 167-68, 114 P.2d 1060, 1064 (1941); see generally 46 Am Jur. 2d Joint Ventures § 4 (1969) (discussing relationship between joint ventures and partnerships). The term "partnership enterprise" in section 18-1-103(2), MCA, obviously admits of an interpretation which extends not only to traditional partnerships but also to joint ventures which share many characteristics of partnerships. See Bender v. Bender, 144 Mont. 470, 480, 397 P.2d 957, 962 (1965). This interpretation is especially warranted because the term "partnership enterprise" logically encompasses all arrangements, including joint ventures, which have partners.

Even though a joint venture may qualify for "resident" status under section 18-1-102, MCA, as a "partnership enterprise," section 18-1-103(2), MCA, requires that a majority of its partners must have been residents of Montana for more than one year immediately prior to the bidding. Here, however, at most only one of the partners in the joint venture satisfies that residency requirement. The joint venture accordingly does not qualify for "resident" status.

THEREFORE, IT IS MY OPINION:

> A joint venture may qualify for "resident" status as a "partnership enterprise" for purposes of the preference under section 18-1-102, MCA, but a majority of the venture's partners must have been Montana residents for at least one year immediately prior to the involved bidding to acquire such status.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 108

ADMINISTRATION, DEPARTMENT OF - Deduction of allocated program costs from income of state special revenue accounts;
INVESTMENTS, BOARD OF - Deduction of allocated program costs from income of state special revenue accounts;
LIVESTOCK, BOARD OF - Deduction of allocated program costs from income of state special revenue accounts;
LIVESTOCK, DEPARTMENT OF - Deduction of allocated program costs from income of state special revenue accounts;
MONTANA CODE ANNOTATED - Sections 17-6-201(8), 81-1-104;
MONTANA CONSTITUTION - Article XII, section 1.

HELD: Section 17-6-201(8), MCA, allows the deduction of allocated program costs from investment earnings of the state special revenue accounts referred to in section 81-1-104, MCA.

23 August 1988

Ellen Feaver, Director
Department of Administration
Room 155, Mitchell Building
Helena MT 59620

Les Graham, Executive Secretary
to the Board of Livestock
Scott Hart Building
301 Roberts
Helena MT 59620

Dear Ms. Feaver and Mr. Graham:

You have requested my opinion on the following questions:

1. Does section 17-6-201(8), MCA, allow the deduction of allocated program costs from investment earnings of the state special revenue accounts referred to in section 81-1-104, MCA?

2. Did the enactment of section 17-6-201(8), MCA, impliedly repeal earlier specific statutes?

3. Is section 17-6-201(8), MCA, in conflict with Article XII, section 1 of the Montana Constitution?

Section 81-1-104, MCA, provides:

> The board may direct the board of investments to invest funds from state special revenue accounts of the department pursuant to the provisions of the unified investment program for state funds. The income from such investments shall be credited to the state special revenue account of the department from which the investment is made.

The "board" referred to in this provision is the Board of Livestock, and the "department" is the Department of Livestock. The Department of Livestock has two state special revenue accounts which are affected by this statute: the account for inspection and control and the account for animal health.

Section 17-6-201(8), MCA, provides in pertinent part:

> (a) The director of the department of administration annually may prepare a statewide cost allocation plan to distribute program costs incurred by state agencies that are funded through the general fund to the programs served by the agencies. Except as provided in subsection (8)(b), the cost to an agency of providing services to a program funded through an account in the state special revenue fund as defined in 17-2-102 must be deducted by the board from the account's investment earnings according to the statewide cost allocation plan. Amounts deducted by the board must be credited to the general fund.

The "board" referred to in this statutory provision is the Board of Investments.

Prior to the adoption of House Bill 248 by the 1987 Montana Legislature, which contained the present

language of section 17-6-201(8), MCA, the Department of Administration and other state entities provided administrative services to many state special revenue accounts but were unable to recover the cost to the general fund of providing those services. House Bill 248 was an attempt to provide a statutory basis for the recapture of general fund administrative costs from state special revenue accounts such as those referred to in section 81-1-104, MCA.

Your question indicates that section 81-1-104, MCA, has been interpreted by some as a mandatory provision which requires that all income derived from the investment of funds in those state special revenue accounts be credited back to those accounts to the exclusion of any deductions. I do not agree with such an interpretation.

First, the plain language of section 81-1-104, MCA, does not indicate that the Legislature intended to exclude deductions from the investment earnings of the Department of Livestock's special revenue accounts. The statutory language merely requires the proper crediting of such earnings once the Board of Livestock has decided to participate in the unified investment program. Moreover, the more specific statute, section 17-6-201(8), MCA, expressly mandates the deductions at issue here, and it is an accepted canon of statutory construction that this more specific statute controls over a more general one where any conflict exists. Phillips v. Lake County, 43 St. Rptr. 1046, 721 P.2d 326 (1986); Witty v. Fluid, 43 St. Rptr. 354, 714 P.2d 169 (1986).

Second, and more importantly, it must be presumed that, when the 1987 Montana Legislature adopted House Bill 248, it did not adopt a meaningless statute. State ex rel. Palmer v. Hart, 201 Mont. 526, 655 P.2d 965 (1982); Mont. Contractors' Ass'n v. Dept. of Highways, 43 St. Rptr. 470, 715 P.2d 1056 (1986). To hold that section 81-1-104, MCA, prohibits the deduction of administrative costs from the investment earnings of the Department of Livestock's special revenue accounts, though, would be to presume just the opposite. It is quite apparent that the Legislature intended each agency to pay its proportionate share of the administrative costs incurred by the Department of Administration and other state entities.

As to your second question, in reviewing the statutes at issue here, I find no earlier more specific statute which could be impliedly repealed by the enactment of section 17-6-201(8), MCA.

Your third question is beyond the scope of an Attorney General's Opinion as it involves the constitutionality of existing legislation.

THEREFORE, IT IS MY OPINION:

Section 17-6-201(8), MCA, allows the deduction of allocated program costs from investment earnings of the state special revenue accounts referred to in section 81-1-104, MCA.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 109

COUNTIES - Responsibility for providing rural fire protection;
FIRE DISTRICTS - County responsibility for providing rural fire protection;
FIRES - County responsibility for providing rural fire protection;
NATURAL RESOURCES - County responsibility for providing rural fire protection;
PROPERTY, PERSONAL - Whether subject to fire district levy;
PROPERTY, REAL - Whether subject to fire district levy;
TAXATION AND REVENUE - Whether fire district formed after tax year 1986 is subject to property tax limitations;
TAXATION AND REVENUE - Whether the term "property" in section 7-33-2109, MCA, includes both real and personal property;
MONTANA CODE ANNOTATED - Sections 1-1-205, 7-33-2101, 7-33-2103, 7-33-2104, 7-33-2109, 7-33-2201 to 7-33-2210, 7-33-2201, 7-33-2202, 7-33-2209, 7-33-2401 to 7-33-2404, 7-33-2404, 15-1-101, 15-10-401 to 15-10-412;
MONTANA LAWS of 1987 - Chapter 351;
MONTANA LAWS of 1977 - Chapter 397;
MONTANA LAWS of 1987 - Chapter 351;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 80 (1988), 42 Op. Att'y Gen. No. 75 (1988), 40 Op. Att'y Gen. No. 36 (1984);
REVISED CODES OF MONTANA, 1947 - Sections 28-601, 28-602.

HELD: 1. County governing bodies are not required to provide rural fire protection under sections 7-33-2201 to 2210, MCA.

2. The property tax limitations in sections 15-10-401 to 412, MCA, do not apply to trustee-operated fire districts established after tax year 1986 but do apply to county-operated fire districts established after tax year 1986.

3. The term "property" in section 7-33-2109, MCA, applies to all forms of real and personal property ordinarily subject to taxation by counties.

25 August 1988

Russell R. Andrews
Teton County Attorney
Teton County Courthouse
Choteau MT 59422

Dear Mr. Andrews:

You have requested my opinion concerning the following questions:

1. Are counties required to provide services for rural fire control under sections 7-33-2201 to 2210, MCA?

2. Are fire district tax levies under section 7-33-2109, MCA, exempt from the property tax limitations imposed under sections 15-10-401 to 412, MCA, when the district was formed after 1986?

3. Does the term "property" in section 7-33-2109, MCA, include both real and personal property?

I conclude that counties are not required to provide rural fire control under section 7-33-2202, MCA, and that the term "property" in section 7-33-2109, MCA, extends to all forms of property subject to ad valorem taxation by counties. Your second question has recently been answered by 42 Op. Att'y Gen. No. 80 (1988), which held that rural fire districts formed after 1986 and managed by a board of trustees are not subject to the property tax limitations in sections 15-10-401 to 412, MCA.

Fire protection services can be provided to rural areas in three ways by counties. First, a fire district may be formed by the board of county commissioners upon petition unless the board determines it to be supported by an inadequate number of signatures or if, prior to the required hearing on the petition, a sufficient number of its signatures are withdrawn to render the petition insufficient under section 7-33-2101, MCA. § 7-33-2103(1), MCA. Upon the district's formation, the

board of county commissioners may contract with either other governmental or private entities to provide fire protection services or may appoint five trustees to manage the district. § 7-33-2104, MCA. The expenses associated with operating the district are paid through a special tax levy "upon all property" within such district. § 7-33-2109, MCA.

Second, sections 7-33-2201 to 2210, MCA, provide a framework for a county governing body to establish volunteer fire control crews and fire companies for rural fire control. Section 7-33-2201, MCA, states:

> For the purpose of protection and conservation of range, farm, and forest resources and of the prevention of soil erosion, the county governing body may perform the functions provided in this part. [Emphasis supplied.]

The following section, however, reads:

> The county governing body, with respect to rural fire control, shall carry out the specific authorities and duties hereinafter imposed:
>
> (1) The governing body shall:
>
> (a) provide for the organization of volunteer rural fire control crews; and
>
> (b) provide for the formation of county volunteer fire companies.
>
> (2) The governing body shall appoint a county rural fire chief and such district rural fire chiefs, subject to the direction and supervision of the county rural fire chief, as it considers necessary.
>
> (3) The county governing body shall, within the limitations of 7-33-2205 through 7-33-2209, protect the range, farm, and forest lands within the county from fire.
>
> (4) The county governing body may enter into mutual aid agreements for itself and for county volunteer fire companies with federal,

> state, local, and other fire protection agencies, including governing bodies of adjoining counties.

§ 7-33-2202, MCA (emphasis supplied). Services rendered under these provisions are paid either from the county general fund or, when the general fund is fully budgeted, from a specific levy not to exceed $15,000. § 7-33-2209, MCA.

Third, under 1987 Montana Laws, chapter 351 (codified in sections 7-33-2401 to 2404, MCA), boards of county commissioners are authorized to establish upon petition fire service areas which are then financed through special assessments. § 7-33-2404, MCA; see generally 42 Op. Att'y Gen. No. 75 (1988) (discussing property subject to fire service area assessments).

Your first question involves the proper interpretation of sections 7-33-2201 and 7-33-2202, MCA. Despite use of the mandatory "shall" in the latter section, it appears the Legislature did not intend to obligate counties to provide the services specified under that section. There are two reasons for this conclusion. Most importantly, these provisions must be read together, and, when so read, section 7-33-2201, MCA, serves to authorize county governing bodies to provide rural fire protection while section 7-33-2202, MCA, specifies those responsibilities which governing bodies have in discharging rural fire protection functions voluntarily undertaken. The present language of these sections was, in all material respects, adopted in 1977 Montana Laws, chapter 397, sections 12 and 13. The 1977 amendments replaced in section 28-601, R.C.M. 1947 (recodified as § 7-33-2201, MCA), the words "are hereby authorized to" with "may" and in section 28-602, R.C.M. 1947 (recodified as § 7-33-2202, MCA), the words "[t]he functions of the respective boards of county commissioners with respect to rural fire control shall be to carry out the specific authorities and duties hereinafter imposed" with the present introductory phrase. House Bill 68, §§ 12, 13 (Mont. 47th Leg.). These particular changes appear to have been adopted for syntactical rather than substantive purposes, and the prior provisions did not impose a mandatory duty on counties to provide rural fire protection. I further note that, although the 1977 amendments were part of a comprehensive modification to Montana's fire laws, no

legislative history exists suggesting that the amendments to sections 7-33-2201 and 7-33-2202, MCA, pertinent here were intended to make mandatory what in the past had been permissive. See Jan. 10, 1977 House State Administration Committee Minutes at 1-2; March 5, 1977 Senate State Administration Committee Minutes at 3-5; Interim Study by Subcommittee on Fire Laws, Revision of Montana's Fire Laws (Dec. 1976).

To impose a mandatory duty on a county to provide those services identified in section 7-33-2202, MCA, moreover, could create unnecessary, and perhaps harmful, duplication of fire protection effort when a fire district or fire service area has been established. The Legislature hardly intended to require counties to provide protection already available, and yet that result arises if sections 7-33-2201 and 7-33-2202, MCA, are interpreted as mandating those services identified in the latter section. I therefore conclude that, as the literal wording of section 7-33-2201, MCA, suggests (County of Chouteau v. City of Fort Benton, 181 Mont. 123, 128, 592 P.2d 504, 507 (1979)), county governing bodies have discretion as to whether they provide rural fire protection but that, if they undertake to render such services, they must comply with section 7-33-2202, MCA.

Your second question has been answered in 42 Op. Att'y Gen. No. 80 (1988) where I held that a fire district, when managed by a board of trustees appointed pursuant to section 7-33-2104(2), MCA, is a taxing unit under sections 15-10-401 to 412, MCA. Nonetheless, the opinion further held that, because the limitations in the latter provisions are established with reference to a taxpayer's liability to a taxing unit for the 1986 tax year, those limitations have no applicability to a taxing unit formed after 1986. It should be emphasized that, if a new fire district is operated by the county and not a board of trustees, the county would constitute the taxing unit and would be subject to the property tax limitations in sections 15-10-401 to 412, MCA, since it imposed taxes in 1986.

Your last question involves the proper interpretation of the term "property" in section 7-33-2109, MCA. That term is not defined in the provisions authorizing creation of rural fire districts, but it is defined in section 15-1-101(1)(m), MCA, to include "moneys,

credits, bonds, stocks, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership." Since that definition applies specifically to matters of taxation and since section 7-33-2109, MCA, authorizes a fire district mill levy, it has particular relevance here. I also note that the general definition of "property" in section 1-1-205(3), MCA, encompasses both real and personal property unless the context requires otherwise. While I have construed the term "property" in other statutory provisions to include only real property (40 Op. Att'y Gen. No. 36 at 147 (1984), 42 Op. Att'y Gen. No. 75 (1988)), section 7-33-2109, MCA, does not support such a limiting interpretation.

THEREFORE, IT IS MY OPINION:

1. County governing bodies are not required to provide rural fire protection under sections 7-33-2201 to 2210, MCA.

2. The property tax limitations in sections 15-10-401 to 412, MCA, do not apply to trustee-operated fire districts established after tax year 1986 but do apply to county-operated fire districts established after tax year 1986.

3. The term "property" in section 7-33-2109, MCA, applies to all forms of real and personal property ordinarily subject to taxation by counties.

Very truly yours,

MIKE GREELY
Attorney General

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

* * * * *

IN THE MATTER of the Petition of Molerway Freight Lines, Inc. for a Declaratory Ruling on the Validity of, or, in the Alternative, Legitimate Operation Under PSC Certificate No. 5703.	)))))	TRANSPORTATION DIVISION DOCKET NO. T-9181

DECLARATORY RULING

1. On January 25, 1988, the Public Service Commission (Commission) received a Petition for Declaratory Ruling from Molerway Freight Lines, Inc. (Molerway), Billings, Montana. In the Petition Molerway asked the Commission to rule on the validity of PSC Certificate No. 5703, owned by J-L Company, Inc., Billings, Montana and presently leased to Robert L. Bell, Sidney, Montana. Certificate No. 5703 allows for the transportation of general commodities (with certain exceptions not relevant here), Class C, between all points and places in Montana. Operation under Certificate No. 5703 is limited to shipments moving on bills of lading or freight bills of six shipping associations named in the Certificate.

2. The specific question raised by Molerway is as follows:

> Whether it is proper for a motor carrier to operate under a state-wide Class C Certificate of Public Convenience and Necessity which restricts the carrier to shipments moving on bills of lading or freight bills of six shipping associations.

It is Molerway's position that Certificate No. 5703 is in violation of State laws and regulations governing Class C motor carriers and should be revoked.

3. Notice of Molerway's Petition was issued on April 6, 1988. The Notice indicated that the Commission would consider the specific question raised by Molerway, as well as the following:

> Assuming PSC Certificate No. 5703 is found valid, what constitutes legitimate operation under that Certificate?

Comments and/or requests for hearing were to be received by May 2, 1988. Although no request for a hearing was received, the Commission determined that it was necessary to establish the nature of the present and past operations under Certificate No. 5703 before it could make an informed ruling on the questions raised. Therefore, a hearing was held for this purpose on June 10, 1988.

Discussion

4. A Class C carrier in Montana is one that furnishes transportation service under contract for six shippers or less. See 69-12-301(4), MCA, 69-12-302(1), MCA, and ARM 38.3.104(1). Though there is no definition in Montana statute or Commission rule that defines "shipper" or restricts the nature of the persons or entities with whom a Class C carrier may contract, the Commission finds it entirely implausible that the legislature should on the one hand seek to encourage and enhance a system of common carriage, and on the other hand countenance the undermining of that system.

5. There are two kinds of motor carriage that are subject to certification by the Commission: common carriage and contract carriage. A common carrier is defined at ARM 38.3.104(2) as "one who holds himself out to serve all the general public for business at regular rates and charges filed with this Commission." The Commission has an obligation to encourage common carriage in Montana. Section 69-12-202, MCA, reads as follows:

> Encouragement of common carrier motor transportation. To fully secure adequate motor transportation facilities for all users of such service and to secure the public advantages thereof, the Commission shall encourage a system of common carrier motor transportation within the state for the convenience of the shipping public. The maintenance of a common carrier motor transportation system within Montana is hereby declared to be a public purpose.

A contract carrier is defined and restricted at ARM 38.3.104 (1) as "one who hauls for less than six shippers under contract or special agreement." The six contract limitation is also contained in 69-12-302, MCA, which statute also sets forth criteria for determining when a contract carrier is considered a common carrier. Rates for common carriers, with the exception of garbage carriers, are set by the Commission. 69-12-201, MCA. Increases or decreases in rates charged by common carriers must be approved by the Commission. 69-12-501, MCA. Rates charged by contract carriers are generally not regulated by the Commission. See, 69-12-201(b) and 69-12-301, MCA. However, the Commission does have the power to regulate contract carrier rates if it is in the best interest of public transportation. 69-12-201(3), MCA.

6. It is the evident concern of the legislature, as reflected in Title 69, Chapter 12, MCA, that there should be a sound system of common carriage in Montana. Contract carriage is permitted, but it is restricted by a limitation on the number of contracts that can be in place at any one time, and by the power to regulate contract carrier rates if deemed necessary. The legislature recognized that an unrestricted system of contract carriage would undermine a healthy system of common carriage, which the legislature declared to be a public purpose.

7. A shippers' association is an organization designed to procure lower transportation rates for its members primarily by acquiring bulk discount rates. It can be made up, theoretically, of an infinite number of members. The Commission finds that for a contract carrier to contract with an association with more than six members is a violation of Montana law. Though the entity actually contracted with may be the association, the Commission finds that the real shippers are the individual members of the association, and that an association is merely a vehicle for improving the transportation efficiencies of its members. The Commission finds that if it were to authorize contract carriage for an association with more than six members, it would violate Montana law, with respect to both the limitation on the number of contracts a contract carrier may have, and the injunction to encourage a strong system of common carriage.

8. The Interstate Commerce Commission (ICC) has addressed the question of contract carriage for shipper's associations in C-Line, Inc., Extension-Precious Jewelry, 114 M.C.C. 226 (1971), and reached the same conclusion that the Commission reaches here. In C-Line, the ICC received an application for contract carrier authority to serve a shippers' association of more than 600 members. Federal law at that time defined a contract carrier as one transporting under continuing contracts with one person or a limited number of persons. In discussing whether carriage for a shippers' association with more than 600 members would meet this definition of contract carriage the ICC wrote, in part, as follows:

> As indicated, applicant would have us find that the service applicant proposes to perform for JSA [Jewelers' Shipping Association] constitutes contract rather than common carriage, because JSA is a corporate entity having legal status separate from that of its members, and because it performs certain functions ordinarily performed by owners or shippers of goods, such as paying freight charges and routing traffic. Except in the most technical sense, however, we believe that this position flies in the face of plain reason and common sense. A shippers' association is an organization . . . made up of a number of individual shippers which have banded together to effect the economical and efficient marketing of their products. It is clear that a carrier which performs transportation for such an association does so for the individual shipper members, and the association merely acts as their agent in making the necessary transportation arrangements. . . . The fact that for certain legal purposes of its own the association chooses to incorporate and become an entity technically separate and distinct from its members does not alter the facts that from a transportation standpoint the association and its membership are in substance one and the same, and that

motor carrier operations performed for such an association are performed not for the corporate abstraction but for the individual members whose traffic is transported.

* * * *

This is not to say that a contract carrier by motor vehicle may not under any circumstances contract to perform transportation for a shipper association. There may be circumstances when it may legitimately do so. But to determine whether such circumstances are present, we must look through the association to the real parties in interest -- the association members. If the carrier can legitimately perform contract carriage for the association membership, it may contract with the members' alter ego to do so. If not, it may not so contract. A bona fide shippers' association can only do that which its members may lawfully do for themselves. . . . This being the case, the relevant issue for consideration here is whether the individual members of JSA could lawfully contract with C-Line to perform the required service. We think not.

At the time of the hearing, JSA had over 600 members, some 60 of which had been added in the year before the hearing. The cost of membership is nominal, there is no requirement that a potential member's business be related to the jewelry trade, and a sizable number of present members have no such relation. Moreover, the actual number of shippers is unknowable since a grant of this application would enable C-Line to serve all subsequently joining members. Clearly, applicant does not propose to serve "one person or a limited number of persons" as contemplated by the act. . . . Rather, it proposes to provide a general-commodities transportation service to all who funnel their goods into interstate commerce through JSA ....

Id. at 230, 232.

9. The Commission is not bound by decisions of the ICC, but in this case it finds the reasoning of the ICC in C-Line to be persuasive. The Commission therefore rules on Molerway's Petition as follows:

Ruling

10. Certificate No. 5703 is not inherently invalid or inconsistent with Montana statutes. A contract carrier may contract with a shippers' association if the carrier also could contract with the individual members of the association. This means, because of the six contract limit on contract carriage in Montana law, that a contract carrier cannot contract with an association with more than six members. Specifically, with respect to Certificate No. 5703, the holder may contract with each association limited to one member, or the holder may con-

tract with one association limited to six members, or some variation of these two. However, the holder of Certificate No. 5703 may not lawfully contract with an association if he could not lawfully contract with the association members. In order to conform to 69-12-302(1), MCA, a contract carrier may not serve an association unless association membership lasts at least 180 days, or, if membership terminates prior to 180 days, a new member may not be served until 180 days from the date the terminating member joined the association.

Nothing in this ruling prevents a shippers' association of any size from using a common carrier.

Done and Dated this 8th day of August, 1988 by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

HOWARD L. ELLIS, Commissioner

TOM MONAHAN, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Carol Frasier
Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

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 June 30, 1988. This table includes those rules adopted during the period June 30, 1988 through September 30, 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 June 30, 1988, 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 1988 Montana Administrative Register.

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