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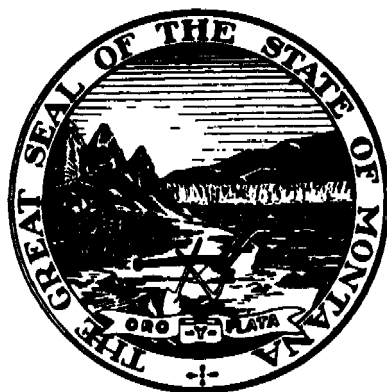
# **MONTANA ADMINISTRATIVE REGISTER**

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**JAN 28 1988**

**OF MONTANA**

**1988 ISSUE NO. 2  
JANUARY 28, 1988  
PAGES 154-216**



## MONTANA ADMINISTRATIVE REGISTER

## ISSUE NO. 2

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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

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BEFORE THE STATE TAX APPEAL BOARD  
OF THE STATE OF MONTANA

IN THE MATTER OF AMENDMENT ) NOTICE OF PROPOSED AMENDMENT  
AND ADOPTION of rules ) of Rule 2.51.307 Orders of the  
concerning appeals from ) Board and ADOPTION of Rule  
real and personal property ) I Decision by the Board  
tax appraisals. )  
NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons.

1. On March 11, 1988, the State Tax Appeals Board proposes to amend or adopt the above-noticed rules 2.51.307 and Rule I, regarding the operation, public participation in and effect of the county and state tax appeals process.

2. The rules are proposed to be amended or adopted as follows:

2.51.307 ORDERS OF THE BOARD (1) The final action of a county tax appeal board upon applications shall be entered in the record by order on forms prescribed by the state tax appeal board. The orders shall specify the changes to be made in the assessment roll.

(2) A signed copy of a board's order shall be mailed to the applicant and to the property assessment division of the department of revenue and additional copies made available to the county clerk, the county treasurer, and the county assessor within 30 days following the signing of the order.

(3) With respect to personal property, the decision of the county tax appeal board shall be final and binding on all interested parties for the tax year in question unless reversed or modified upon review by the state tax appeal board review.

(4) With respect to taxable real property and improvements thereon, the decision of a county tax appeal board shall be final and binding unless reversed or modified upon review by the state tax appeal board. If not-reviewed by the state tax appeal board, the decision of the county tax appeal board is not reviewed by the state tax appeal board, it shall also be final and binding on all interested parties for all subsequent tax years unless there is a change in the property itself or circumstances surrounding the property which affect its value. Statutory reappraisal by the department of revenue pursuant to 15-7-111, MCA, is a circumstance affecting the value of real property and improvements thereon. AUTH: 15-2-201, IMP: 15-2-201, 15-2-301, 15-10-304, 15-15-103.

RULE I DECISION BY THE BOARD (1) With respect to personal property, the decision of the state tax appeal board shall be final and binding upon the parties to the appeal for the tax year in question unless it is reversed or modified by

the district court upon judicial review.

(2) With respect to taxable real property and improvements thereon, the decision of the state tax appeal board shall be final and binding unless reversed or modified by the district court upon judicial review. If the decision of the state tax appeal board is not reviewed by a district court, it is final and binding for subsequent tax years unless there is a change in the property itself or circumstances surrounding the property which affects its value. Statutory reappraisal by the department of revenue pursuant to 15-7-111, MCA, is a circumstance affecting the value of real property and improvements thereon. AUTH 15-2-201, IMP 15-2-201, 15-2-301, 15-15-104.


3. The rationale for these amendments is that they are in response to judicial review of an airplane assessment appeal from the state tax appeal board. The changes clarify the distinction between real and personal property assessments and the manner in which appeal information comes before the tax payer and the board. It is in the best interests of the tax payer to facilitate and distinguish county and state tax appeal board review of 15-8-111, MCA, market value personal property appraisals and 15-7-103 or 15-7-111 real property appraisals or reappraisals.

4. Interested parties may submit their data, views or arguments concerning the proposed change in writing to Mr. Dale D. Dean, Chairperson, State Tax Appeals Board, 1209 Eighth Avenue, Helena, MT 59601, no later than February 26, 1988.

5. If a person who is directly affected by these rule changes wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request, along with any written comments he has, to Mr. Dean at the above address, no later than February 26, 1988.

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

STATE TAX APPEAL BOARD

  
Dale D. Dean, Chairperson

BEFORE THE DEPARTMENT OF INSTITUTIONS  
OF THE STATE OF MONTANA

In the matter of the proposed amendment of Rule 20.3.401(2).	)	NOTICE OF PROPOSED AMENDMENT OF RULE 20.3.401(2), pertaining to Certification of chemical dependency counselor.
Certification of chemical dependency counselor.	)	ical dependency counselor, costs of re-examination.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On March 25, 1988 the Department of Institutions proposes to amend Rule 20.3.401, ARM which creates the system overview for certification of chemical dependency counselors and the new amendment will explain the cost of the re-examination fee which will be charged to applicants.

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

20.3.401 SYSTEM OVERVIEW

(1) remains the same.  
(2) Each person registering for certification will be required to pay a written examination fee at the time of registration to the department or a designated agency. The examination fee will reflect the cost of the exam, and must be paid each time that the examination is taken. No refunds will be made if the examination is not taken by an applicant.

Auth: 53-24-105 MCA  
53-24-204 MCA  
53-24-208 MCA

Imp: 53-24-204 MCA

3. The rationale behind this rule is to offset the cost of retaking the examination. This is not a licensure fee by the agency, but rather is the cost of preparing a standardized, valid examination for the applicants. It will either be charged by the department or by the designated agency who will actually prepare and administer the examination. The examination fee reflects the actual cost of preparing, taking and grading the examination. It is intended that it will be paid each time that an exam is taken by an applicant, including repeats, and that no refunds will be made if an examination is not taken by an applicant.


4. Interested parties may submit their data, views, or arguments concerning the proposed amendment in writing to the Legal Unit, Department of Institutions, 1539 11th Avenue, Helena, Montana 59620, no later than February 29, 1988.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written

request for a hearing and submit this request along with any written comments he has to the Legal Unit, Department of Institutions, 1539 11th Avenue, Helena, Montana 59620, no later than February 29, 1988.

6. No public hearing is contemplated, but if the agency receives requests for a public hearing on the proposed amendment from either ten percent, or twenty-five persons, whichever is less of those persons who are directly affected by the proposed amendment, or from the administrative code committee; from a governmental agency or subdivision or from an association having no less than twenty-five members who will be directly affected, a public hearing will be held at a later date. Notice of such hearing will be published in the Montana administrative register. The percentage of those persons directly affected has been determined to be 15 based on a three year average that 150 people apply for certification each year.

7. The authority of the agency to make the proposed amendment is based on Sections 53-24-105, 53-24-204, 53-24-208 MCA, and the rule implements Section 53-24-204, MCA.

  
CARROLL SOUTH, Director  
Department of Institutions

Certified to the Secretary of State January 18, 1988.

assessment/sales ratio exceeds 1 will be adjusted to 1, except for de minimus amounts.

REASON: Although increases in property values are barred by virtue of Initiative 105 and Ch. 654, decreases in property values are not. Therefore, it is necessary to adopt a rule or rules implementing Ch. 613 to insure that the decreases in property values are made in accordance with laws requiring equalization of property values at 100% of market value. Although Ch. 613 mandates a reduction of property values in a region only when the assessment/sales ratio for the property exceeds 1.1, reducing the value of only those properties to a ratio of 1 will create an inequity with respect to strata of properties falling between 1 and 1.1. To equalize the value of all strata of properties with ratios exceeding 1, it is necessary to reduce the values of all such properties to 1. The only exception to be specified in the rules is for the case of property strata where the ratio exceeds 1 by a de minimus amount for which a) the cost of making the adjustments or property values exceeds the estimated benefit and b) the size of the adjustment is clearly within the range of confidence that can be assigned to the statistical studies required by Ch. 613.

III. PROCEDURES FOR STUDIES A rule or rules will be adopted describing the procedures the Department will use to conduct the assessment/sales ratio studies required by Ch. 613. The proposed rules may include but will not be limited to the procedures and standards for determining valid sales, selecting a statistically valid sample of sales in each region, and calculating assessment/sales ratios and coefficients of dispersion using the sample.

REASON: It is necessary to adopt rules describing the procedures for conducting the assessment/sales ratio studies because those procedures have a widespread impact on property values in the state. The procedures and standards for conducting the studies will be designed to conform to the "willing buyer - willing seller" standard for sales specified in 15-8-111, MCA, and professional standards for such studies.

IV. PROPERTY STRATA A rule or rules will be adopted describing the circumstances under which real property subject to Ch. 613 within a region may be divided into separate strata. The proposed rules will specify that the starting point of any studies will be to treat all real property subject to Ch. 613 within a region as a single stratum unless the statistical standards of Ch. 613 require a division of the property into separate strata.

REASON: It is necessary to adopt rules describing the circumstances for dividing real property into separate strata because the division of properties into strata can have a widespread impact on property values in the state.

V. APPLICABILITY PERIODS A rule will be adopted specifying the time periods for which adjustments to taxable values under Ch. 613 will be effective.

REASON: It is necessary to adopt a rule specifying the

BEFORE THE DEPARTMENT OF REVENUE  
OF THE STATE OF MONTANA

IN THE MATTER OF THE	)	NOTICE OF PUBLIC HEARING
ADOPTION of New Rules	)	on the PROPOSED ADOPTION
relating to Real Property	)	of New Rules relating to
Taxes.	)	Sales Assessment Ratio
	)	studies to adjust Real
		Property values.

TO: All Interested Parties:

1. On February 24, 1988, the Department of Revenue will hold a public hearing at 1:30 p.m. in the Third Floor Conference Room of the Sam W. Mitchell Building, Helena, Montana, on rules implementing Ch. 613, L. 1987 (Sections 15-1-101, 15-7-102, 15-7-103, and 15-7-111, MCA), and, in part, implementing Ch. 654, L. 1987 (Sections 15-10-411 and 15-10-412, MCA). Ch. 613 provides a procedure for the Department of Revenue to adjust annually certain real property values through the use of regional sales assessment ratio studies.

2. The rules will cover the subjects and issues described below and will be available in draft form at and prior to the hearing.

I. RESPECTING PROPERTY TAX LIMITS A rule or rules will be adopted implementing Ch. 613 in relation to the limit on property taxes enacted by Initiative 105 and amended Ch. 654, L. 1987. The proposed rules will specify that under the terms of Ch. 654, the annual adjustment process called for in Ch. 613 cannot result in increasing any property values within the state but can result in decreases in property values.

REASON: It is necessary to adopt a rule implementing Ch. 613 in relation to the limit on property taxes enacted by I-105 and amended by Ch. 654 because unless these statutes are reconciled, the activities undertaken pursuant to Ch. 613 could result in violating the property tax limitations. Ch. 654 enacts certain exceptions to the Initiative 105 limit on property taxes, but those exceptions do not include the adjustments to market value required by Ch. 613. Ch. 654 does allow individual property taxes to increase because of "cyclical reappraisal." However, the annual adjustments to market value under the Ch. 613 procedures is separate from and not a part of the cyclical reappraisal required by 15-7-111(1). Therefore, the Department cannot increase property values through the assessment/sales studies required by Ch. 613.

II. RESPECTING MARKET VALUE CRITERIA A rule or rules will be adopted implementing Ch. 613 in relation to general laws on property appraisal and assessment, including but not limited to Article VIII, Section 3, of the Montana Constitution, and 15-8-111, MCA. The proposed rules will specify that any regions or strata of property where the assessment/sales ratio or strata of property where the

time periods for which adjustments to property values will be made so that the public and local governments are properly informed of when such changes could occur.

VI. OTHER RULES Other rules will be proposed and adopted by the Department based on advice from a committee of interested persons convened pursuant to 2-4-304, MCA.

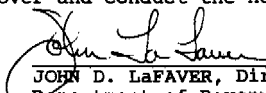
REASON: Because of the complexity of the adjustments required by Ch. 613 within a potentially short period of time, the Department has determined that it is proper to consult with a committee of interested persons in implementing the law. That process of consultation can result in rules on subjects not specified in this notice or changes in the proposals or rationale contained in this notice. Such additions and changes will be reflected in the draft rules available at or prior to the public hearing.

3. Copies of the draft rules will be available on February 22, 1988, from Cleo Anderson, Office of Legal Affairs, Montana Department of Revenue, Mitchell Building, Helena, MT 59620. Copies will also be available at the public hearing.

4. The proposed rules will implement Sections 15-1-101, 15-7-102, 15-7-111, and 15-10-412, MCA. The authority for these proposed rules is Section 15-1-201, MCA. Extensions of authority are contained in Section 5, Ch. 613, L. 1987 and Section 4, Ch. 654, L. 1987.

5. Interested parties may submit their data, views or arguments either orally or in writing at the hearing. Written data, views and arguments may also be submitted to: Cleo Anderson, Paralegal Assistant, Office of Legal Affairs, Mitchell Building, Helena, MT 59620, no later than February 29, 1988.

6. Mike Garrity from the 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 January 18, 1988.

BEFORE THE COMMISSIONER  
OF POLITICAL PRACTICES  
OF THE  
STATE OF MONTANA

In the matter of the amend-	)	NOTICE OF PROPOSED AMEND-
ment of Rule 44.10.331	)	MENTS OF RULES 44.10.331
pertaining to limitations	)	PERTAINING TO LIMITATIONS
on receipts from political	)	ON RECEIPTS FROM POLITICAL
committees to legislative	)	COMMITTEES TO LEGISLATIVE
candidates, the amendment of	)	CANDIDATES, 44.10.501
Rule 44.10.501 pertaining to	)	PERTAINING TO UNIFORM
uniform system of accounts	)	SYSTEM OF ACCOUNTS AND
and the amendment of Rule	)	44.10.521 PERTAINING TO
44.10.521 pertaining to mass	)	MASS COLLECTIONS AT FUND-
collections at fund-raising	)	RAISING EVENTS. NO PUBLIC
events	)	HEARING CONTEMPLATED

TO: All Interested Persons

1. On February 27, 1988, the Commissioner of Political Practices proposes to amend Rules 44.10.331 which pertains to limitations on receipts from political committees by legislative candidates; 44.10.501 which pertains to a uniform system of accounts; and 44.10.521 which pertains to mass collections at fund-raising events.

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

44.10.331 LIMITATIONS ON RECEIPTS FROM POLITICAL COMMITTEES (1) Pursuant to the operation specified in sections 13-37-218 and 15-30-101(8), MCA, limits on contributions from political committees other than political party committees to legislative candidates are as follows:

(a) a candidate for the house of representatives may receive no more than \$800;

(b) a candidate for the state senate may receive no more than ~~\$1300-~~ \$1350.

(2) These limits apply to combined receipts for both the primary and general election campaigns of ~~1986-~~ 1988.

AUTH: Section 13-37-114, MCA

IMP: Sections 13-37-218 and 15-30-101(8), MCA

3. Rationale: The proposed amendment is needed to conform the rule to the mandate of section 13-37-218, MCA, requiring that the limitations set out in that statute be adjusted for each election year by the inflation factor as defined in section 15-30-101(8), MCA.

44.10.501 UNIFORM SYSTEM OF ACCOUNTS (1) Each person required to file reports pursuant to Title 13, chapter 37, and these rules, shall maintain a system of accounts as prescribed and published in manual form by the commissioner. The

2-1/28/88

MAR Notice No. 44-19

manual, entitled "Manual of Instructions and Uniform System of Accounts for Candidates and Political Committees", may be obtained without cost and upon request from the Commissioner of Campaign Finances and Practices, Commissioner of Political Practices, Capitol Station, Helena, Montana 59601 59620, telephone (406) 449-2942, 444-2942.

(a) remains the same.

AUTH: Section 13-37-114, MCA  
IMP: Section 13-37-117(2), MCA

4. Rationale: The proposed amendment deletes the title of the manual, which no longer exists as a title and which is unnecessary to stipulate in the rule.

44.10.521 MASS COLLECTIONS AT FUND-RAISING EVENTS--ITEMIZED ACCOUNT OF PROCEEDS, REPORTING (1) For the purposes of section 13-37-229(7) (8), MCA:

(a) "Mass collections" made at a fund-raising event include the proceeds received from passing the hat or from the sale of items such as campaign pins, flags, emblems, hats, banners, raffle tickets, auction items, refreshments, baked goods, admission tickets and similar items sold at a dinner, rally, auction, dance, bake sale, rummage sale or similar fund-raising event. Provided, that mass collections do not include the proceeds of purchases of \$25 or more at the event of \$75 or more in the case of a statewide candidate or political committee, or \$35 or more for any other candidate or political committee, or \$35 or more at a mixed event for both statewide and any other candidates or political committees.

(b) remains the same.

(2) For purposes of preparing the statement of deposit required by section 13-37-207(2), MCA, a record identifying the name of and amount received from each person must be maintained for a purchase of \$25 \$75 or more at an event for a statewide candidate or political committee, or \$35 or more at an event for any other candidate or political committee, or \$35 or more at a mixed event for both statewide and any other candidates or political committees. The proceeds of purchases of less than \$25 \$75 or \$35, whichever applies, may be recorded and deposited in lump sum without identifying the name of the contributor.

AUTH: Section 13-37-114, MCA  
IMP: Section 13-37-229(8) and (11), MCA

5. Rationale: The proposed amendment is needed to conform the rule to changes in the law enacted by the 1987 legislature and signed into law.

6. Interested parties may submit their data, views or arguments concerning the proposed amendments in writing to the Commissioner of Political Practices, Capitol Station, Helena, Montana 59620, no later than February 25, 1988.

7. If any person who is directly affected by these proposed amendments wishes to express data, views and arguments orally or in writing at a public hearing, then the person must make written request for a public hearing and submit this request, along with any written comments, to the Commissioner of Political Practices, Capitol Station, Helena, Montana 59620, no later than February 25, 1988.

8. If the agency receives requests for a public hearing on the proposed amendments from either 10 percent or 25, whichever is less, of the persons who are directly affected by the proposed action; 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 scheduled 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 persons based on 150 contested elections in 1988 with 2 candidates each.

*Salaries Callum*  
Commissioner of Political Practices

Certified to the Secretary of State *January 12*, 1988.

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

In the matter of the amend- )  
ment of Rule 46.12.1204 ) NOTICE OF PUBLIC HEARING ON  
pertaining to nursing home ) THE PROPOSED AMENDMENT OF  
payment rates ) RULE 46.12.1204 PERTAINING  
TO NURSING HOME PAYMENT  
RATES

TO: All Interested Persons

1. 'On February 24, 1988, at 1:30 p.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana, to consider the proposed amendment of Rule 46.12.1204 pertaining to nursing home payment rates.

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

46.12.1204 PAYMENT RATE Subsections (1) through (3)(a) remain the same.

(4) The payment rate to providers of intermediate care facility services for the mentally retarded is the actual includable cost incurred by the provider as determined in ARM 46.12.1207 divided by the total patient days of service during the provider's fiscal year, except that the payment rate will not exceed ~~the final rate in effect on~~ total allowable costs per day for the 12-month period ended June 30, 1982, as 1989, with increases in subsequent years indexed to the mid-point June 30 of the rate year by 9% per 12-month-year-for fiscal-years-ending-on-or-before-June-30, 1987, and 5-11-per year-indexed-to-June-30-of-the-rate-year-for-fiscal-years-ending-on-or-after-July-1, 1987. year beginning July 1, 1989. Providers having a 1989 cost reporting period ending on a date other than June 30, 1989, must submit detailed cost information supplemental to the cost report. This cost information must be for the period July 1, 1988 through June 30, 1989, and include, at a minimum, worksheet A and the medicaid long term care facility trial balance (form MFB-2), which are standard cost report forms.

Subsections (4)(a) through (5) remain the same.

AUTH: Sec. 53-6-113 MCA

IMP: Sec. 53-6-141 MCA

3. The purpose of the proposed amendment is to update or "rebase" the cost-based payment rate system for intermediate care facility services for the mentally retarded (ICF/MR). The base rate presently used is now six years old. The change would provide for current reasonable and necessary costs of operation in the base rate period.

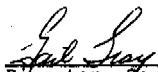
Federal policy and regulations encourage mentally retarded residents requiring intermediate care services to be placed in intermediate care facilities for the mentally retarded (ICF/MR) rather than intermediate care facilities (ICF). Therefore, it is imperative that ICF/MR providers be adequately reimbursed and utilized to the maximum extent possible.

No increase in expenditures to state-operated ICF/MR providers is projected. According to 53-6-141, MCA, payments to state-operated institutions cannot exceed the specified appropriation. Expenditures for services provided by the for-profit ICF/MR provider are projected to increase \$33,000 for fiscal year 1989 and \$16,000 for fiscal year 1990 as a result of this amendment.

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

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than February 25, 1988.

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

  
\_\_\_\_\_  
Director, Social and Rehabilitation Services

Certified to the Secretary of State January 18, 1988.

STATE OF MONTANA  
DEPARTMENT OF COMMERCE  
BOARD OF ARCHITECTS

In the matter of the amendment ) NOTICE OF AMENDMENT OF  
of a rule pertaining to fees ) 8.6.413 FEE SCHEDULE

TO: All Interested Persons:

1. On December 10, 1987, the Board of Architects published a notice of proposed amendment of the above-stated rule at page 2213, 1987 Montana Administrative Register, issue number 23.

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

3. No comments or testimony were received.

BOARD OF ARCHITECTS  
ROBERT C. UTZINGER, PRESIDENT

BY: Jeffrey L. Brazier  
JEFFREY L. BRAZIER, ATTORNEY  
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, January 18, 1988.

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

In the matter of the amendment ) NOTICE OF AMENDMENT OF 8.  
of rules pertaining to examin- ) 24.405 EXAMINATIONS, AND 8.  
ations and renewals ) 24.406 RENEWALS

TO: All Interested Persons:

1. On November 27, 1987, the Board of Landscape Architects published a notice of proposed amendment of the above-stated rules at page 2124, 1987 Montana Administrative Register, issue number 22.
2. The Board has amended the rules exactly as proposed.
3. No comments or testimony were received.

BOARD OF LANDSCAPE ARCHITECTS  
VALERIE TOOLEY, CHAIRMAN

BY:

  
GEOFFREY L. BRAZIER, ATTORNEY  
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, January 18, 1988.

STATE OF MONTANA  
DEPARTMENT OF COMMERCE  
BEFORE THE BOARD OF PHYSICAL THERAPY EXAMINERS

In the matter of the amendment ) NOTICE OF AMENDMENT OF  
of a rule pertaining to fees ) 8.42.403 FEES

TO: All Interested Persons:

1. On December 10, 1987, the Board of Physical Therapy Examiners published a notice of amendment of the above-stated rule at page 2220, 1987 Montana Administrative Register, issue number 23.

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

3. No comments or testimony were received.

BOARD OF PHYSICAL THERAPY  
EXAMINERS  
BARBARA M. REED, P.T., CHAIRMAN

BY:

  
GEOFFREY L. BRAZIER, ATTORNEY  
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, January 18, 1988.

STATE OF MONTANA  
DEPARTMENT OF COMMERCE  
BEFORE THE BOARD OF SOCIAL WORK EXAMINERS  
AND PROFESSIONAL COUNSELORS

In the matter of the amendment	)	NOTICE OF AMENDMENT OF
of rules pertaining to licen-	)	8.61.402 LICENSURE RE-
surre requirements; applica-	)	QUIREMENTS, 8.61.403
tions; hours, credits and	)	APPLICATIONS, 8.61.404
carry over; noncompliance	)	FEES SCHEDULE, 8.61.601
and fees	)	HOURS, CREDITS, AND CARRY
	)	OVER, 8.61.604 NONCOMPLI-
	)	ANCE, 8.61.1202 APPLICATION
	)	PROCEDURE, 8.61.1601 HOURS,
	)	CREDITS, AND CARRY OVER
	)	and 8.61.1604 NONCOMPLIANCE

TO: All Interested Persons:

1. On October 15, 1987, the Board of Social Work Examiners and Professional Counselors published a notice of amendment of the above-stated rules at page 1721, 1987 Montana Administrative Register, issue number 19.
2. The board has amended the rules as proposed.
3. Comments were received from the staff of the Administrative Code Committee as shown below.

COMMENT: Section 37-22-303, MCA was missing from the implementing sections under ARM 8.61.404.

RESPONSE: The Board concurred and the section was added.

COMMENT: The authority and implementing sections listed for ARM 8.61.604 are incorrect.

RESPONSE: The Board concurred. The authority sections should be 37-22-201 and 37-22-311, MCA and the implementing section should be 37-22-311, MCA.

COMMENT: The implementing section given for ARM 8.61.1202 is incorrect.

RESPONSE: The Board concurred. The proper sections are 37-23-102 and 37-23-202, MCA.

COMMENT: The staff of the Administrative Code Committee questioned the Board's authority to adopt the proposed amendment to ARM 8.61.1604.

RESPONSE: The Board voted to adopt the amendment as proposed.

4. No other comments or testimony were received.

BOARD OF SOCIAL WORK EXAMINERS  
AND PROFESSIONAL COUNSELORS  
PATRICK J. KELLY, CHAIRMAN

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

Certified to the Secretary of State, January 18, 1988.

STATE OF MONTANA  
DEPARTMENT OF COMMERCE  
BEFORE THE BUILDING CODES BUREAU

In the matter of the amendment ) NOTICE OF AMENDMENT OF 8.  
of a rule pertaining to appli- ) 70.1401 APPLICATION FOR  
cations ) FIREWORKS WHOLESALER PERMIT

TO: All Interested Persons:

1. On October 15, 1987, the Building Codes Bureau published a notice of proposed amendment of the above-stated rule at page 1735, 1987 Montana Administrative Register, issue number 19.
2. The Bureau has amended the rule exactly as proposed.
3. No comments or testimony were received.

BUILDING CODES BUREAU  
JAMES BROWN, BUREAU CHIEF

BY:

  
GEOFFREY L. BRAZIER, ATTORNEY  
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, January 18, 1988.

BEFORE THE DEPARTMENT OF  
FAMILY SERVICES OF THE  
STATE OF MONTANA

In the matter of the	)	NOTICE OF THE AMENDMENT OF
amendment of Rule 11.12.101	)	RULE 11.12.101 AND THE
and the repeal of Rule	)	REPEAL OF RULE 11.7.109
11.7.109 pertaining to	)	PERTAINING TO SUBSTITUTE
substitute care placement	)	CARE PLACEMENT BUDGETS
budgets	)	

TO: All Interested Persons

1. On November 27, 1987, the Department of Family Services published notice of the proposed amendment of Rule 11.12.101 and repeal of Rule 11.7.109 pertaining to substitute care placement budgets at page 2133 of the 1987 Montana Administrative Register, issue number 22.

2. The Department has amended Rule 11.12.101 YOUTH CARE FACILITY, DEFINITIONS as proposed with the following changes in Authority and Implementation:

AUTH: Sec. 41-3-1103, 41-3-1142 and 53-4-111, MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87

IMP: Sec. 41-3-1102, 41-3-1142, 53-2-201, 53-4-113, MCA and Sec. 112, Ch. 609, L. 1987, Eff. 10/1/87

3. The Department has repealed Rule 11.7.109 as proposed with the following changes in Authority and Implementation:

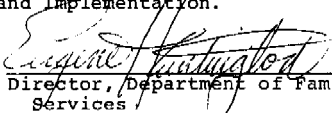
AUTH: Sec. 41-3-1103, MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87

IMP: Sec. 112, Ch. 609, L. 1987

4. No public hearing was held. The Department has thoroughly considered all commentary received:

COMMENT: An attorney for the Administrative Code Committee commented that the Authorities and Implementations should include the current authorities and implementations for the rules with the addition of the extension of authority and repealer found in Chapter 609, Laws of 1987.

RESPONSE: The Department agrees and has made the recommended additions to the Authorities and Implementation.

  
Director, Department of Family  
Services

Certified to the Secretary of State \_\_\_\_\_, January 18, 1988.

BEFORE THE DEPARTMENT OF JUSTICE  
OF THE STATE OF MONTANA

In the Matter of the	)	NOTICE OF ADOPTION OF
Adoption of Rules	)	RULE I (23.3.425) AND
Providing Exemptions	)	RULE II (23.3.426)
From the Seatbelt	)	CONCERNING EXEMPTIONS
Use Act.	)	FROM THE SEATBELT USE ACT

To: All Interested Persons.

1. On November 12, 1987, the department published notice of public hearing on the proposed adoption of Rule I (23.3.425) and Rule II (23.3.426) concerning exemptions from the Seatbelt Use Act at page 2058 of the 1987 Montana Administrative Register, issue number 21.


2. On December 4, 1987, at 8:30 a.m. in the auditorium of the Scott Hart Building, 303 Roberts, Helena, Montana, a public hearing was held on the proposed adoption.

3. The department has adopted the rules as proposed.

4. The department has thoroughly considered all comments received. At the public hearing all comments received supported the proposed rules. A written comment received from the Montana Solid Waste Contractors, Inc. following the hearing suggested that the rule be amended to simply recognize an exemption for occupants of a garbage truck in order to reduce the paperwork and overhead of processing exemption applications. The department has rejected the suggestion because it assumes all contractors and municipalities wish to exempt their employees. Some garbage service providers have already informed department officials that they do not want their employees exempted. Therefore, a blanket exemption will not be provided.

5. Rule II (23.3.426) is authorized by section 61-13-103(3), MCA, and it implements section 61-13-103(2)(f), MCA. The notice of proposed adoption contained a typographical error and misstated the sections.

By:

  
MIKE GREELY  
Attorney General

Certified to the Secretary of State January 13<sup>th</sup>, 1988.

VOLUME NO. 42

OPINION NO. 50

PUBLIC OFFICERS - High school district superintendent as employee rather than public officer for purposes of recall statute;

SCHOOL DISTRICTS - High school district superintendent as employee rather than public officer for purposes of recall statute;

MONTANA CODE ANNOTATED - Sections 2-16-602(1), 2-16-603(1), 20-4-401, 20-4-402;

OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 46 (1984), 40 Op. Att'y Gen. No. 41 (1984).

HELD: A high school district superintendent, appointed under section 20-4-401, MCA, does not hold a "public office" within the scope of the Montana Recall Act.

5 January 1988

John C. McKeon  
Phillips County Attorney  
Phillips County Courthouse  
Malta MT 59538

Dear Mr. McKeon:

You have asked my opinion on the following question:

Does a high school district superintendent, appointed under section 20-4-401, MCA, hold a "public office" within the scope of the Montana Recall Act?

The Montana Recall Act (Recall Act), §§ 2-16-601 to 635, MCA, provides that "[e]very person holding a public office of the state or any of its political subdivisions, either by election or appointment, is subject to recall from such office." § 2-16-603(1), MCA.

"Public office," in turn, is defined in the Recall Act as follows:

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(1) "Public office" means a position of duty, trust, or authority created by the constitution or by the legislature or by a political subdivision through authority conferred by the constitution or the legislature that meets the following criteria:

(a) the position must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public;

(b) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the constitution, the legislature, or by a political subdivision through legislative authority;

(c) the duties must be performed independently and without control of a superior power other than the law, unless the legislature has created the position and placed it under the general control of a superior office or body; and

(d) the position must have some permanency and continuity and not be only temporary or occasional.

§ 2-16-602(1), MCA. (Emphasis added.)

The above-quoted definition was first developed in Montana by the Supreme Court in State ex rel. Barney v. Hawkins, 79 Mont. 506, 528-29, 257 P. 411, 418 (1927). The definition has been applied frequently in Montana case law as well as in Attorney General's Opinions. A lengthy discussion of those precedents is contained in 40 Op. Att'y Gen. No. 46 at 184 (1984). See also 53 A.L.R. 595, 602-06 (1928).

The seminal case on the meaning of "public office" or "civil office" is State ex rel. Barney v. Hawkins, supra, which involved the question of whether an auditor for the State Board of Railroad Commissioners was a public (civil) officer or an employee, subject to the direction of others. Among the many authorities cited in Barney is a case which determined that a school superintendent was an employee rather than a public officer, since the superintendent exercised power

derived from and through the board of trustees that appointed him. Mayor of Baltimore v. Lyman, 92 Md. 591, 48 A. 145 (1901), cited in State ex rel. Barney v. Hawkins, 257 P. 411 at 414-15. An examination of relevant Montana law demonstrates that the position of high school district superintendent appointed pursuant to section 20-4-401, MCA, is similar to that of the superintendent in Mayor of Baltimore v. Lyman, supra.

Under existing Montana statutes, district superintendents are appointed by school trustees, pursuant to section 20-4-401, MCA. A superintendent must enter into an employment contract with the trustees and is subject to termination of employment by them. Compensation and duration of employment are set by the trustees rather than by statute. While a superintendent has general supervisory responsibilities, the statutes make clear that the trustees exercise control over the superintendent's duties in the areas of policy implementation and administration, curriculum development, and textbook and library book selection, as well as control over "any other duties prescribed by the trustees." § 20-4-402(2) to (5), (8), MCA. Thus, a district superintendent's powers, for the most part, are derived from and through the board of trustees, as was true in the Mayor of Baltimore case. See also 40 Op. Att'y Gen. No. 41 at 164 (1984), wherein it was concluded that a school district superintendent does not have the power to enter into a contract on behalf of the school district; Farley v. Board of Education, 62 Okla. 181, 162 P. 797, 799 (1917) (school superintendent, whose employment arose out of a contract whereby he acted under the direction or control of others and the duration and extent of his employment depended upon the terms of the contract, was an employee rather than an officer); State ex rel. Rusch v. Board of County Commissioners, 121 Mont. 162, 165-66, 191 P.2d 670, 672 (1948) ("one who holds a position at the will of the appointing power is not usually classed as a public officer"). Under these circumstances, the position of district superintendent does not fit within part of the definition of "public office" (§ 2-16-602(1)(c), MCA) which requires that duties be performed independently and without control of a superior power.

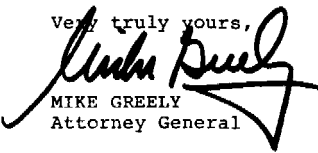
Because a district superintendent of schools is not a "public officer" within the scope of the Recall Act, the recall procedure is inapplicable. Rather, it is within

the province of the school trustees to determine whether the employment of a district superintendent should be terminated, pursuant to section 20-4-401(4), MCA.

THEREFORE, IT IS MY OPINION:

A high school district superintendent, appointed under section 20-4-401, MCA, does not hold a "public office" within the scope of the Montana Recall Act.

Very truly yours,



MIKE GREELY  
Attorney General

VOLUME NO. 42

OPINION NO. 51

FISH, WILDLIFE, AND PARKS, DEPARTMENT OF - Discussions between director of Department of Fish, Wildlife, and Parks and representatives of Confederated Salish and Kootenai Tribes not subject to open meeting law;

INDIANS - Discussions between director of Department of Fish, Wildlife, and Parks and representatives of Confederated Salish and Kootenai Tribes not subject to open meeting law;

OPEN MEETINGS - Discussions between director of Department of Fish, Wildlife, and Parks and representatives of Confederated Salish and Kootenai Tribes not subject to open meeting law;

STATE AGENCIES - Application of open meeting law to director of Department of Fish, Wildlife, and Parks; ADMINISTRATIVE RULES OF MONTANA - Section 12.2.305; MONTANA CODE ANNOTATED - Sections 2-3-101 to 2-3-114, 2-3-201 to 2-3-221, 2-3-202, 2-3-203, 2-15-112(1), 2-15-124(8), 2-15-3301, 18-11-103;

MONTANA CONSTITUTION - Article II, section 9;

OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 170 (1978).

HELD: Discussions between the director of the Department of Fish, Wildlife, and Parks and representatives of the Confederated Salish and Kootenai Tribes are not subject to Montana's open meeting law. Final decisions by the director may, however, be subject to the public participation provisions in sections 2-3-101 to 114, MCA, which give the public the opportunity to be heard at open meetings if an agency decision is of "significant interest."

7 January 1988

Larry J. Nistler  
Lake County Attorney  
Lake County Courthouse  
Polson MT 59860

Dear Mr. Nistler:

You requested my opinion on the following question:

Whether discussions between the director of the Department of Fish, Wildlife, and Parks and representatives of the Confederated Salish and Kootenai Tribes are subject to Montana's open meeting statutory provisions.

I conclude that such discussions do not constitute a "meeting" under section 2-3-203, MCA, because the director of the Department, when acting alone on behalf of the Department, does not fall within the scope of the term "quorum of the constituent membership" used in that provision.

The facts giving rise to your question are undisputed. The director and tribal representatives have met regularly to discuss entering into a state-tribal cooperative agreement which would resolve potential conflicts over regulation of on-reservation hunting and fishing. Such a cooperative agreement is authorized by Title 18, chapter 11, MCA. Section 18-11-103, MCA, permits a public agency, such as the Department, to enter into an agreement with any one or more tribal governments "to perform any administrative service, activity, or undertaking that any of the public agencies or tribal governments entering into the contract is authorized by law to perform." As Department head, the director is generally empowered to act on the Department's behalf in securing such agreements. §§ 2-15-112(1), 2-15-3301, MCA. When attending the discussions the director was at times accompanied by his attorney and a regional supervisor. However, their presence could have no legal effect on securing the state-tribal agreement, since the authority lies in the director alone. The question presented here is whether the negotiations between the director and tribal representatives are subject to Montana's open meeting law, §§ 2-3-201 to 221, MCA.

Montana's open meeting requirements are founded in the Constitution, article II, section 9:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

This provision is implemented in part by the open meeting law. Section 2-3-203(1), MCA, states:

All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds must be open to the public.

That section further provides that a public meeting may be closed if the discussion relates to a matter of individual privacy and the presiding officer determines that the demands of individual privacy exceed the merits of public disclosure. The meeting may also be closed to discuss litigation and collective bargaining strategy. §§ 2-3-203(3), (4), MCA. But see 37 Op. Att'y Gen. No. 170 at 716 (1978). Because I conclude that no "meeting" has occurred here, there is no need to discuss whether the privacy or litigation exceptions apply to the discussions at issue.

The term "meeting" is defined in section 2-3-202, MCA:

As used in this part, "meeting" means the convening of a quorum of the constituent membership of a public agency or association described in 2-3-203, whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power. [Emphasis added.]

Only such meetings are subject to the open meeting statutory requirements. § 2-3-203(1), MCA. The term "constituent membership" is not defined but presumably refers to a group of individuals possessing statutory authority to make decisions on behalf of the involved public agency by majority action. Examples of constituent memberships include the various state government commissions or advisory councils and numerous local government entities such as county commissions and school boards. Conversely, the department head of a state agency, such as the director here, can hardly be viewed as the "constituent membership" of his agency when carrying out statutory responsibilities vested in him alone. At the outset, therefore, substantial

textual difficulties accompany the contention that discussions between the director and tribal representatives fall within the scope of section 2-3-202, MCA. The inapplicability of the "meeting" definition to a department head acting alone is further highlighted by the quorum requirement in section 2-3-202, MCA, and the utilization of the words "deliberations" and "discussion" in sections 2-3-201 and 2-3-203, MCA.

"Quorum" is not specifically defined in the open meeting law. However, it is generally held that in the absence of a contrary statutory provision, a quorum consists of a majority of the entire body. Black's Law Dictionary 1421 (4th ed. 1968); Mad Butcher, Inc. v. Parker, 628 S.W.2d 582, 585 (Ark. Ct. App. 1982); Alonzo v. Louisiana Dept. of Highways, 268 So. 2d 52, 54 (La. Ct. App. 1972). See § 2-15-124(8), MCA (defining a quorum for quasi-judicial boards as "a majority of the membership"). The term "quorum" is typically used in the context of a deliberative body consisting of members who act collectively. E.g., State v. Conrad, 197 Mont. 406, 643 P.2d 239, 241 (1982); Board of Trustees v. Board of County Commissioners, 186 Mont. 148, 606 P.2d 1069, 1071, 1073 (1980); Alonzo v. Louisiana Dept. of Highways, 268 So. 2d at 54. See 74 C.J.S. 171 (1951) ("The idea of a 'quorum' is that when that required number of persons goes into a session as a body the votes of a majority thereof are sufficient for binding action. Thus the word 'quorum' implies a meeting, and the action must be group action, not merely the action of a particular number of members as individuals") (citations omitted). Use of "deliberations" and "discussions" in the context of open meeting laws connotes collective discussion and collective acquisition of information among the "constituent membership" of the agency. See Grein v. Board of Education, 343 N.W.2d 718, 722 (Neb. 1984); Stockton Newspapers v. Members of the Redevelopment Agency, 214 Cal. Rptr. 561, 564 (Cal. Ct. App. 1985); Accardi v. Mayor and Council of City of North Wildwood, 368 A.2d 416, 421 (N.J. 1976); cf. People ex rel. Hopf v. Barger, 332 N.E.2d 649, 658-59 (Ill. 1975). Indeed, to hold that an agency director alone is a "quorum of the constituent membership" of such agency effectively means that he would be deemed meeting with himself--a conclusion directly at odds with common sense. See MacLachlan v. McNary, 684 S.W.2d 534, 537 (Mo. Ct. App.

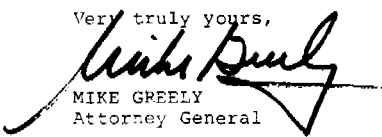
1984) (a single-member body cannot have public meetings).

It is thus evident that the discussions between the director and tribal representatives or other members of the public do not fall within the scope of section 2-3-202, MCA. The inapplicability of the open meeting statutory provisions, however, does not mean an agency decision to enter into a state-tribal cooperative agreement is immune from public scrutiny prior to the agreement being consummated. The Department has developed procedures pursuant to section 2-3-103(1), MCA, to "assure adequate notice and [to] assist public participation before a final agency action is taken that is of significant interest to the public." See § 12.2.305, ARM. While the issue of whether a cooperative agreement arising from the current negotiations is of "significant interest to the public" is not before me, the notice requirement must be liberally construed to achieve the salutary purpose of the public participation provisions in sections 2-3-101 to 114, MCA. Compliance with these provisions will permit full public involvement in governmental decisionmaking.

THEREFORE, IT IS MY OPINION:

Discussions between the director of the Department of Fish, Wildlife, and Parks and representatives of the Confederated Salish and Kootenai Tribes are not subject to Montana's open meeting law. Final decisions by the director may, however, be subject to the public participation provisions in sections 2-3-101 to 114, MCA, which give the public the opportunity to be heard at open meetings if an agency decision is of "significant interest."

Very truly yours,



MIKE GREELY  
Attorney General

VOLUME NO. 42

OPINION NO. 52

COUNTIES - Operation of county assessor's office;  
COUNTY COMMISSIONERS - Operation of county assessor's office;  
COUNTY OFFICERS AND EMPLOYEES - Operation of county assessor's office;  
REVENUE, DEPARTMENT OF - Operation of county assessor's office;  
TAXATION AND REVENUE - Operation of county assessor's office;  
MONTANA CODE ANNOTATED - Sections 2-18-103, 7-4-2110, 7-4-2203, 7-4-2401, 7-4-2503, 7-4-2505, 15-8-102;  
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 23 (1987), 36 Op. Att'y Gen. No. 68 (1976).

HELD: The Department of Revenue is responsible for the internal operation of a county assessor's office, including employment practices, except with regard to county assessors and their deputies, whose employment is controlled by statute.

8 January 1988

Patrick L. Paul  
Cascade County Attorney  
Cascade County Courthouse  
Great Falls MT 59401

Dear Mr. Paul:

You requested my opinion concerning the following issue:

Is the county assessor or the Department of Revenue responsible for setting the policies and internal operating procedures of the office of a county assessor?

The county assessor is listed in section 7-4-2203, MCA, as one of the county officials who may be elected or appointed in each county, and section 7-4-2110, MCA, provides that the county commissioners have the power to supervise the official conduct of all county officers. However, section 15-8-102, MCA, states that county

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assessors are agents of the Department of Revenue (DOR) "for the purpose of locating and providing the department a description of all taxable property within the county, together with other pertinent information, and for the purpose of performing such other administrative duties as are required for placing taxable property on the assessment rolls." Thus, the question is whether the State Department of Revenue or the county is responsible for the assessor's office.

The argument was recently made in the Montana Supreme Court that county commissioners, pursuant to section 7-4-2110, MCA, are responsible for the actions of a county assessor. The Court responded as follows:

Section 7-4-2110, MCA, gives the county commissioners supervisory power over the county assessors "under such limitations and restrictions as are prescribed by law . . . ." Section 15-8-102, MCA, is such a limitation prescribed by law. This much newer statute makes the county assessor an agent of DOR. . . . The changes made in 1973 removed supervision of all internal operations of the assessor's office from the County Commissioners and placed it with DOR.

Cantwell v. Geiger, 44 St. Rptr. 1574, 1577, \_\_\_ P.2d \_\_\_ (1987). Thus, generally speaking, the internal operations of a county assessor's office are the responsibility of the DOR.

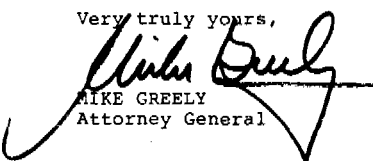
More specifically, you asked which entity is responsible for the hiring, firing, and assignment of duties of employees in a county assessor's office. The county assessors are elected or appointed and therefore serve at the instance of the electorate or appointing power. § 7-4-2203, MCA. Any deputy assessors serve at the instance of the county assessor. § 7-4-2401, MCA. County assessors and their deputies are paid by the county. §§ 7-4-2503, 7-4-2505, MCA. See also § 2-18-103, MCA; 42 Op. Att'y Gen. No. 23 (1987). On the other hand, the other people in the county assessor's office are state employees, who are hired by the DOR. 36 Op. Att'y Gen. No. 68 at 453 (1976). Thus, the DOR has the power and responsibility for the hiring, firing, and assignment of duties of employees in a

county assessor's office, with the exception of the county assessors and their deputies.

THEREFORE, IT IS MY OPINION:

The Department of Revenue is responsible for the internal operation of a county assessor's office, including employment practices, except with regard to county assessors and their deputies, whose employment is controlled by statute.

Very truly yours,



MIKE GREELY  
Attorney General

VOLUME NO. 42

OPINION NO. 53

LIENS - Whether notice of right to claim construction lien must be acknowledged;  
PROPERTY, REAL - Whether notice of right to claim construction lien must be acknowledged;  
REAL ESTATE - Whether notice of right to claim construction lien must be acknowledged;  
TITLE TO PROPERTY - Whether notice of right to claim construction lien encumbers;  
MONTANA CODE ANNOTATED - Title 70, chapter 21; sections 70-21-201, 70-21-203, 70-21-301, 71-3-521 to 542, 71-3-522, 71-3-523, 71-3-526, 71-3-531, 71-3-532, 71-3-535, 71-3-536;  
MONTANA LAWS OF 1987 - Chapter 202.

HELD: A notice of right to claim a lien filed with a county clerk and recorder pursuant to section 71-3-531, MCA, is not subject to the acknowledgment requirements of section 70-21-203, MCA.

11 January 1988

Harold F. Hanser  
Yellowstone County Attorney  
Yellowstone County Courthouse  
Billings MT 59101

Dear Mr. Hanser:

You have requested my opinion concerning the following question:

Is a notice of right to claim a lien sought to be filed pursuant to section 71-3-531, MCA, required to be acknowledged in accordance with section 70-21-203, MCA, before a county clerk and recorder may accept it for such filing?

I conclude that such notice need not be acknowledged as a condition to filing.

The 1987 Legislature substantially revised Montana statutes dealing with mechanics' liens and established a new procedure for perfecting a "construction lien." 1987 Mont. Laws, ch. 202 (codified in §§ 71-3-521 to 542, MCA); see generally Joint Interim Committee on Lien Laws, Creditor's Rights v. Debtor's Shields: A Report to the 50th Legislature 8-12 (1986). A construction lien is, as a general matter, one against real property which arises from the furnishing of services or materials used to produce a change in the physical condition of that property. §§ 71-3-522(2), 71-3-522(5), 71-3-523, MCA. The amount of the lien is limited to the unpaid portion of the amount agreed upon by the contracting owner, defined as "a person who owns an interest in real estate and who, personally or through an agent, enters into an express or implied contract for the improvement of the real estate[,] and the person furnishing the services or materials." §§ 71-3-522(3), 71-3-522(4), 71-3-526, MCA. A notice of right to claim a lien must ordinarily be delivered or mailed to the contracting owner and, within five business days of such delivery or mailing, filed with the clerk and recorder of the county in which the improved property is located as a condition precedent to filing a construction lien. §§ 71-3-531(2), (4), (5), MCA. The notice's content is statutorily prescribed and intended to warn the property owner that a lien may attach as a result of the services or supplies furnished and that the owner should take precautions to avoid the possibility of double payments with respect to the improvements. § 71-3-532(3), MCA. The statutory form of the notice does not provide for acknowledgement. The contents of and filing requirements for the actual construction lien are separately set forth in sections 71-3-535 and 71-3-536, MCA.

Title 70, chapter 21, MCA, deals broadly with the recordation of instruments or judgments affecting title to or possession of real property. See § 70-21-201, MCA. Section 70-21-203, MCA, mandates that all such instruments, with specified exceptions inapplicable here, be acknowledged as provided under Title 1, chapter 5, parts 1 through 3, before recordation by a county clerk and recorder. I need not determine whether a clerk and recorder's obligation to accept a notice of

right to claim a lien for "filing" constitutes a duty to "record" such document since, for those reasons stated below, I conclude the notice is not an "instrument" subject to the acknowledgment requirements of section 70-21-203, MCA.

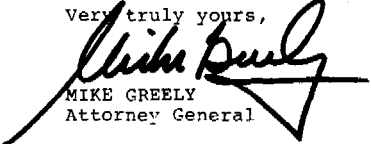
It must be emphasized that the recordation provisions in Title 70, chapter 21 are intended to govern the recordation of only certain kinds of instruments or judgments, and therefore do not control, or even authorize, the recordation of other documents. The types of instruments subject to these provisions are described more fully in section 70-21-301, MCA, which defines the term "conveyance" to include "every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered or by which the title to real property may be affected, except wills." Although this term appears only in sections 70-21-301 to 309, MCA, it seems clearly intended to have a meaning coterminous with that of "instrument" in section 70-21-201, MCA; any other interpretation would necessarily limit the provisions in Title 70, chapter 21, part 3, which detail the effects of recordation, to a lesser group of instruments than otherwise allowed to be recorded under such chapter--a result directly at odds with the object of those provisions. When the meaning of the term "instrument" is so amplified, it becomes obvious a notice of right to claim a lien does not fall within its scope because such notice has no impact, either as an encumbrance or in some other manner, on title to or possession of the involved real property. A notice instead serves merely to alert a property owner that construction services or supplies have been, or are being, furnished and that the owner should take various steps to ensure payments he makes to one contractor, which are to be used in whole or in part to satisfy obligations to a subcontractor, are actually utilized for their intended purposes.

THEREFORE, IT IS MY OPINION:

A notice of right to claim a lien filed with a county clerk and recorder pursuant to section

71-3-531, MCA, is not subject to the acknowledgment requirements of section 70-21-203, MCA.

Very truly yours,



MIKE GREELY  
Attorney General

VOLUME NO. 42

OPINION NO. 54

COUNTIES - Publication of annual statement of financial condition;  
MONTANA CODE ANNOTATED - Sections 1-2-101, 7-5-2123, 7-5-2123(1)(b);  
OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 77 (1982);  
MONTANA LAWS OF 1985 - Chapter 193, section 1.

HELD: The county clerk's annual statement of financial condition must be published annually in a newspaper in full. It may not be published in summary form or by reference.

11 January 1988

Arnie A. Hove  
McCone County Attorney  
McCone County Courthouse  
Circle MT 59215

Dear Mr. Hove:

You have requested my opinion on the following question:

Whether the county clerk's annual statement of the county's financial condition may be published in a newspaper in summary form by reference, or whether it must be published in full.

The pertinent statute is section 7-5-2123, MCA, which reads:

Publication of board proceedings and annual financial statement. (1) The board of county commissioners has jurisdiction and power, under such limitations and restrictions as are prescribed by law, to cause to be published in a newspaper:

(a) at the adjournment of each session of the board, in full and complete detail or in summary form or by reference, with the full

and complete text made available on request, a complete list of all claims ordered paid for all purposes, showing the name, purpose, and amount, and a fair summary of the minutes and records of all of its proceedings;

(b) annually, the county clerk's annual statement of the financial condition of the county.

(2) publication in full, in summary, or by reference of such minutes and records of proceedings must be made within 21 days after the adjournment of the session. Publication of the financial statement must be made within 30 days after the presentation of the same to the board. The board shall not allow or order paid any claim for any such publication of minutes and records of proceedings or annual financial statement unless made within the time herein prescribed therefor.

In 1985, subsections (1)(a) and (2) were amended, in chapter 193, section 1. Prior to the amendment subsection (1)(a) read:

[A]t the adjournment of each session of the board, a complete list of all claims ordered paid for all purposes, showing the name, purpose, and amount, and a fair summary of the minutes and records of all of its proceedings[.]

Subsection (2) read in part:

Publication of such minutes and records of proceedings must be made within 21 days after adjournment of the session.

The effect of the 1985 amendment was to enable the board of county commissioners to publish in a newspaper in summary form or by reference, claims ordered paid by the county, which prior to the amendment had to be published in full. It did not expand the commissioners' authority to publish the annual financial statement in summary form or by reference. See Minutes of Local Government Committee, hearing on House Bill 379, Feb. 7, 1985; (Rep. Garcia, sponsor, stated that the bill provides

optional publication requirements for the minutes and the claims ordered paid by boards of county commissioners).

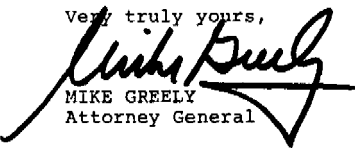
Section 7-5-2123(1)(b), MCA, which provides for annual publication of "the county clerk's annual statement of the financial condition of the county," was not affected by the 1985 legislation. There is no language in the statute that permits the county commissioners to summarize or publish by reference the annual financial statement. The rules of statutory construction require me to ascertain and declare the terms and substance of the statute, and in doing so I may not insert what has been omitted or omit what has been inserted therein, § 1-2-101, MCA; Chennault v. Sager, 187 Mont. 455, 610 P.2d 173, 176 (1980). If the Legislature had intended to extend the commissioners' authority to summarize the annual financial statement or publish it by reference, it would have done so. I therefore conclude that the county commissioners may not publish the county's annual financial statement in summary form or by reference.

Finally, it should be noted that in 39 Op. Att'y Gen. No. 77 at 296 (1982), I held that the language of section 7-5-2123, MCA, is mandatory rather than directory. My holding was based on the rationale that taxpayers of the county are entitled to know, by such publications, how, for whom, and for what their tax money is being spent. I also noted the public policy to give broad public exposure to matters pertaining to the expenditure of public money. The board of county commissioners is thus obligated to publish in full the county's annual financial statement.

THEREFORE, IT IS MY OPINION:

The county clerk's annual statement of financial condition must be published annually in a newspaper in full. It may not be published in summary form or by reference.

Very truly yours,



MIKE GREELY  
Attorney General

VOLUME NO. 42

OPINION NO. 55

CITIES AND TOWNS - Authority to license poker, bingo, and keno games and poker and keno machines, as well as the premises on which these games are conducted;  
GAMBLING - Authority to license poker, bingo, and keno games and poker and keno machines, as well as the premises on which these games are conducted;  
LICENSES - Authority to license poker, bingo, and keno games and poker and keno machines, as well as the premises on which these games are conducted;  
MONTANA CODE ANNOTATED - Title 23, chapter 5, parts 3, 4, 6; sections 7-1-112(5), 23-5-321, 23-5-322, 23-5-421, 23-5-422, 23-5-615;  
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 6 (1987), 37 Op. Att'y Gen. No. 67 (1977), 35 Op. Att'y Gen. No. 86 (1974).

- HELD: 1. The authority granted cities and towns in Montana to license card games, bingo or keno games, and video draw poker or keno machines extends only to licensing individual games, tables, and machines; it does not extend to licensing the premises on which these games of chance are conducted. Pursuant to sections 23-5-322 and 23-5-422, MCA, cities and towns may regulate the premises on which gambling occurs by means other than licensing of premises. The amounts of the license fees for card games, bingo or keno games, and keno machines are within the sound discretion of the city or town. The license fee for each video draw poker machine may not exceed \$100.
2. 35 Op. Att'y Gen. No. 86 (1974) is overruled insofar as it conflicts with the holding of this opinion.

12 January 1988

Robert G. Dwyer  
Dillon City Attorney  
125 North Idaho Street  
Dillon MT 59725

Dear Mr. Dwyer:

You have requested an opinion concerning:

The nature and extent of the authority granted to cities and towns to establish and collect license fees under the Montana Card Games Act (Tit. 23, ch. 5, pt. 3, MCA), the Bingo and Raffles Law (Tit. 23, ch. 5, pt. 4, MCA), and the Video Draw Poker Machine Control Law of 1985 (Tit. 23, ch. 5, pt. 6, MCA). This question relates to both licenses for gaming establishments and licenses for individual games or machines.

The Montana Supreme Court set the parameters for answering questions such as yours in 1978.

[T]he Montana Legislature expressly chose to regard the question of gambling as a matter of statewide, as contrasted with local, concern. In effect, the legislature has preempted the field with regard to the authorization of certain forms of gambling and card games. In State ex rel. City of Libby v. Haswell, 147 Mont. 492, 414 P.2d 652 (1966), a case concerning a conflict, such as the instant one, in the area of liquor control, this Court recognized the applicable principle:

"[W]hen the state has exercised a power through its statutes which clearly show that the state legislature deems the subject matter of the legislation to be a matter of general statewide concern rather than a purely local municipal problem, the city is then without the essential authority or power to pass or adopt any ordinance dealing with that subject matter." 147 Mont. 495, 414 P.2d 654.

See also: City of Billings v. Herold, 130 Mont. 138, 296 P.2d 263 (1956); State ex rel. Wiley v. District Court, 118 Mont. 50, 164 P.2d 358 (1945).

....

It is axiomatic that legislative intent is first to be ascertained from the language of the lawmakers. Green v. City of Roundup, 117 Mont. 249, 157 P.2d 1010 (1945). We conclude, from the plain language of the gambling acts, that the legislature intended to grant minimal power to the local governments regarding regulation of gambling, such power being confined to a discretionary licensing power.

DeLong v. Downes, 175 Mont. 152, 156-57, 573 P.2d 160, 162, 163 (1977).

Examining the statutes granting this discretionary licensing power (§§ 23-5-321, 23-5-322, 23-5-421, 23-5-422, 23-5-615, MCA), I find that they do not grant cities and towns authority to license the premises on which these types of gambling are conducted. I am aware that an opinion of my predecessor, 35 Op. Att'y Gen. No. 86 at 219 (1974), holds the contrary. I overrule that portion of the opinion, based on the Montana Supreme Court's holding in DeLong v. Downes, *supra*. The discussion in my recent opinion, 37 Op. Att'y Gen. No. 67 at 271A (1977), should also be read in light of that case. See also 42 Op. Att'y Gen. No. 6 (1987).

The discretionary licensing powers referred to above are identical for the Montana Card Games Act and the Bingo and Raffles Law, which also covers keno machines. The pertinent language from these laws is:

Issuance of licenses by local governing bodies. (1) Any city, town, or county may issue licenses for games of chance provided for in this part to be conducted on premises which have been licensed for the sale of liquor, beer, food, cigarettes, or any other consumable products. Within the cities or towns, such licenses may be issued by the city or town council or commission. ... When a license has been required by any city, town,

or county, no game of chance as provided for in this part may be conducted on any premises which have been licensed for the sale of liquor, beer, food, cigarettes, or any other consumable product without such license having first been obtained.

(2) Any governing body may charge an annual license fee for each license so issued under this part, which license fee, if any, shall expire on June 30 of each year, and such fee shall be prorated.

§§ 23-5-321, 23-5-421, MCA.

Regulations of governing body. (1) The governing body authorized to issue gambling licenses pursuant to this part may establish by ordinance or resolution regulations governing the qualifications for the issuance, suspension, and revocation of such gambling licenses.

....

(2) Additional regulations may also be adopted for the purpose of the protection of the public health, welfare, and safety of the citizens of the state of Montana and to assure compliance with the intent of this part.

§§ 23-5-322, 23-5-422, MCA.

I find no indication that the Legislature intended to authorize both premises licensing and individual game licensing. First, looking to the words of the statute as the prime indicator of legislative intent (Thiel v. Taurus Drilling, Ltd. 1980-II, 42 St. Rptr. 1520, 1522, 710 P.2d 33, 35 (1985)), I find that the only premises license contemplated is for "the sale of liquor, beer, food, cigarettes, or any other consumable products." If the Legislature had intended that cities and towns be authorized to establish a further level of licensing for these establishments, they would have indicated this. They did not, and I find no indication in the legislative history of these laws of that intent. I have also examined sections 23-5-322 and 23-5-422, MCA, which authorize cities and towns to adopt additional

regulations for the purposes of protecting the public health, welfare, and safety. I find none of these purposes would be advanced by the addition of another level of premises licensing beyond the licensing of individual games or machines. However, the statutes clearly contemplate other methods of regulation. See below. Thus, the holding in my opinion, 37 Op. Att'y Gen. No. 67 at 217A (1977), wherein I concluded that a city may restrict by ordinance the hours of licensed gambling, remains valid.

It should be noted that the grants of authority to local governments to regulate gambling contained in sections 23-5-322 and 23-5-422, MCA, permit local governments to establish regulations for premises on which such gambling occurs. This regulation may not take the form of restrictions on licenses for premises, but it may take any other form allowed by law.

The following statute dealing with video draw poker machines states more unequivocally:

(1) Any city, town, or county governing body may issue to a person who meets the qualifications of 23-5-611 a license for each video draw poker machine to be used on the premises of a licensed establishment. A machine may be licensed by a city or town if located in the city or town or by the county if the machine is not located in a city or town.

(2) In addition to the license fee paid under 23-5-612, a governing body may charge an annual license fee for each license issued under this section. ...

(3) Such license fee may not exceed \$100.

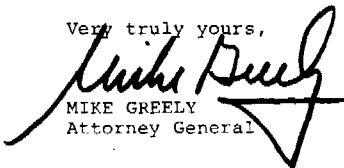
§ 23-5-615, MCA. This statute clearly grants cities and towns the authority to issue licenses only for individual games and machines. The only financial limitation imposed on local governments issuing licenses for these games or machines is that video draw poker machine license fees may not exceed \$100, § 23-5-615(3), MCA.

Questions have arisen as to whether cities and towns with self-government powers possess any additional authority to regulate gambling. These questions have been answered both by statute (§ 7-1-112(5), MCA) and by case law (Tipco Corp. Inc. v. City of Billings, 39 St. Rptr. 600, 603, 642 P.2d 1074, 1077 (1982)). Cities and towns with self-government powers possess no additional power to regulate gambling. See also 42 Op. Att'y Gen. No. 6 (1987).

THEREFORE, IT IS MY OPINION:

1. The authority granted cities and towns in Montana to license card games, bingo or keno games, and video draw poker or keno machines extends only to licensing individual games, tables, and machines; it does not extend to licensing the premises on which these games of chance are conducted. Pursuant to sections 23-5-322 and 23-5-422, MCA, cities and towns may regulate the premises on which gambling occurs by means other than licensing of premises. The amounts of the license fees for card games, bingo or keno games, and keno machines are within the sound discretion of the city or town. The license fee for each video draw poker machine may not exceed \$100.
2. 35 Op. Att'y Gen. No. 86 (1974) is overruled insofar as it conflicts with the holding of this opinion.

Very truly yours,



MIKE GREELY  
Attorney General

VOLUME NO. 42

OPINION NO. 56

COUNTY OFFICERS AND EMPLOYEES - Fees charged by district court clerk for petitions for legal separation and dissolution;

COUNTY OFFICERS AND EMPLOYEES - Fee charged by district court clerk when decree of legal separation is converted to decree of dissolution;

MARRIAGE AND DIVORCE - Fees charged by district court clerk for petitions for legal separation and dissolution;

MARRIAGE AND DIVORCE - Fee charged by district court clerk when decree of legal separation is converted to decree of dissolution;

MONTANA CODE ANNOTATED - Sections 1-2-101, 25-1-201, 25-1-201(1)(a), 40-4-103, 40-4-103(2) and (3), 40-4-105, 40-4-105(1) and (3), 40-4-108.

HELD: The district court clerk may not charge a fee for filing a petition for dissolution under section 25-1-201(1)(a), MCA, when a motion is made under section 40-4-108(2), MCA, to convert a decree of legal separation to a decree of dissolution.

13 January 1988

Larry J. Nistler  
Lake County Attorney  
Lake County Courthouse  
Polson MT 59860

Dear Mr. Nistler:

You requested my opinion on the following question:

When a decree of legal separation is converted to a decree of dissolution under section 40-4-108, MCA, is the district court clerk required to charge a fee of \$100 for filing a petition for dissolution of marriage?

Section 25-1-201, MCA, sets forth the various fees of the clerk of the district court. It provides in pertinent part:

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(1) The clerk of the district court shall collect the following fees:

(a) at the commencement of each action or proceeding, except a petition for dissolution of marriage, from the plaintiff or petitioner, \$60; for filing a complaint in intervention, from the intervenor, \$60; and for filing a petition for dissolution of marriage, a fee of \$100[.] [Emphasis added.]

Under this statute, a fee of \$60 must be collected for filing a petition for legal separation, and a fee of \$100 for a petition for dissolution of marriage.

Section 40-4-108, MCA, provides a method for obtaining a decree of dissolution of marriage after a decree of legal separation has been issued. Under this section, at least six months after a decree of legal separation has been entered, the court, on motion of either party, shall convert the decree of separation to a decree of dissolution of marriage. The question is whether the motion is a "petition for dissolution" filed at the "commencement" of an action or proceeding under section 25-1-201(1)(a), MCA.

Under sections 40-4-103(2) and (3), MCA, the petition is the initial pleading for a dissolution or legal separation and is followed by a "response." Under section 40-4-105, MCA, the petition must be verified and must contain specific information enumerated in that section. The petition must be served according to the rules of civil procedure. § 40-4-105(3), MCA. These statutes provide the exclusive method for commencing an action for a legal separation or dissolution.

The procedure in section 40-4-108(2), MCA, does not entail commencement of a new action. The motion for converting the decree is a continuation of the initial cause of action for legal separation. The motion certainly cannot be equated with a verified petition in sections 40-4-103 and 40-4-105, MCA. None of the enumerated information in section 40-4-105(1), MCA, is included in the motion because the information is already contained in the petition for legal separation. Moreover, no time for a responsive pleading to the motion is provided for in the statute because the court

has no discretion to deny the motion. See  
Commissioner's Note to section 40-4-108(2), MCA.

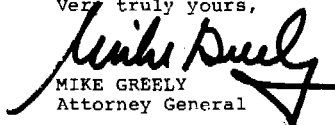
It is evident, therefore, that the Legislature intended to provide a simple procedure for converting a legal separation into a dissolution without the necessity of proceeding through a separate action.

Section 25-1-201(1)(a), MCA, requires payment of filing fees "for filing a petition for dissolution of marriage." As I have already concluded, a motion under section 40-4-108, MCA, is not a petition for dissolution. I cannot construe the section to require payment of a filing fee for a motion for conversion, where the Legislature did not so provide. § 1-2-101, MCA.

THEREFORE, IT IS MY OPINION:

The district court clerk may not charge a fee for filing a petition for dissolution under section 25-1-201(1)(a), MCA, when a motion is made under section 40-4-108(2), MCA, to convert a decree of legal separation to a decree of dissolution.

Very truly yours,

  
MIKE GREELY  
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

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

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

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

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

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

Use of the Administrative Rules of Montana (ARM):

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

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 1987. This table includes those rules adopted during the period September 30, 1987 through December 31, 1987 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 1987, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1987 or 1988 Montana Administrative Register.

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