MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 23

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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 January 7, 1989, 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) (a) through (w) will remain the same.

(x) having been convicted of violating any state or federal narcotic law, subject to chapter 1, part 2, of this title;

(y) having been convicted of a felony. A certified copy of the judgment of conviction is conclusive evidence of the conviction. This subsection is subject to chapter 1, part 2 of this title."

Auth: 37-1-131, 37-1-136, 37-19-202, 37-19-311, 37-19-404, MCA Imp: 37-1-136, 37-19-311, 37-19-404, MCA

REASON: Recent experience suggests that conviction of felonies and violating narcotic laws would be appropriate grounds for license discipline for the protection of the public. There have been difficulties with licensees being convicted for conduct related to funeral home facilities and equipment, but which was not prohibited by board rules.

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 January 5, 1989.

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 January 5, 1989.

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 26 based on the 268 licensees in Montana.

BOARD OF MORTICIANS
GUY W. MISER, CHAIRMAN

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

Certified to the Secretary of State, November 28, 1988.

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

In the matter of the repeal of rules concerning traffic education	))))	NOTICE OF THE PROPOSED REPEAL OF RULES 10.13.301 - 10.13.306, PROGRAM STANDARDS AND COURSE REQUIREMENTS FOR TRAFFIC EDUCATION

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Parties

1. On January 16, 1989, the Superintendent of Public Instruction proposes to repeal rules outlining program standards and course requirements for traffic education.

2. The rules proposed for repeal follow. Full text of the rules is located at pages 10-168 through 10-173, Administrative Rules of Montana.

10.13.301 The Program
10.13.302 Teacher Qualification
10.13.303 Application and Reimbursement Procedures
10.13.304 Driver Examination Procedure Requirements
10.13.305 Traffic Education Vehicle Requirements
10.13.306 Student Enrollment and Learner License(s)

Auth: 20-7-502 MCA IMP: 20-7-503 MCA

3. The Superintendent proposes to repeal these rules because new traffic education rules are in the process of being adopted. The new rules will be adopted on January 16, 1989.

4. Interested persons may submit their data, views or arguments concerning the proposed repeal in writing to the Office of Public Instruction, State Capitol, Room 106, Helena, Montana 59620 no later than January 5, 1989.

5. If a person who is directly affected by the proposed repeal 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 Office of Public Instruction, State Capitol, Room 106, Helena, Montana 59620 no later than January 5, 1989.

6. If the Superintendent receives requests for a public hearing on the proposed repeal from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed repeals and amendments, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date.

Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 20.

Superintendent of Public Instruction

By: Marilyn Miller
Marilyn Miller
Executive Assistant

Certified to the Secretary of State November 28, 1988.

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of rules 24.9.202 Definitions, 24.9.222 and 24.9.224 Investigation, 24.9.225 Procedure on finding of no cause, 24.9.230 Certification, 24.9.263 and 24.9.264 Right to sue letters; the repeal of rule 24.9.262 Issuance of right to sue letter; and the adoption of Rule I Issuance of right to sue letter.	NOTICE OF THE PROPOSED AMENDMENT OF RULES 24.9.202 DEFINITIONS, 24.9.222 AND 24.9.224 INVESTIGATION, 24.9.225 PROCEDURE ON FINDING OF NO CAUSE, 24.9.230 CERTIFICATION, 24.9.263 AND 24.9.264 RIGHT TO SUE LETTERS; THE PROPOSED REPEAL OF RULE 24.9.262 ISSUANCE OF RIGHT TO SUE LETTER; AND THE PROPOSED ADOPTION OF RULE I ISSUANCE OF RIGHT TO SUE LETTER.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On January 21, 1989, the human rights commission proposes to amend rules 24.9.202, 24.9.222, 24.9.224, 24.9.225, 24.9.230, 24.9.263, and 24.9.264. These rules relate to removal of cases to district court from the administrative process. The Commission proposes to repeal rule 24.9.262 which is found on page 24-400 of the ARM, and to adopt rule I. These rules deal with the issuance of a right to sue letter.

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

24.9.202 DEFINITIONS (1) The following definitions shall apply throughout this chapter:

(a) "Act" means the Human Rights Act, Title 49, Chapter 2, MCA.

(b) "Administrator" or "division administrator" means the administrator of the human rights division of the department of labor and industry. The administrator is the chief executive officer employed by the human rights commission and is responsible for the supervision of the commission staff.

(c) "Charging party" means any person who files a complaint with the human rights commission.

(d) "Code" means the Governmental Code of Fair Practices, Title 49, Chapter 3, MCA.

(e) "Commission" means the human rights commission as established by section 2-15-1706, MCA.

(f) "Commissioner" means a member of the human rights commission.

(g) "Division" means the human rights division of the department of labor and industry. The division is the staff of

the human rights commission and is answerable directly to the commission.

(h) "Hearing examiner" means a hearing examiner appointed by the commission or any one commissioner acting as hearing examiner for the commission.

(i) "Person" includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated employees, employers, employment agencies, or labor organizations (section 49-2-101, MCA), and includes any group or organization which qualifies as an aggrieved person in accordance with ARM 24.9.204.

(j) "Respondent" means any person against whom a complaint is filed.

(k) "Right to sue letter" means a document which removes a complaint filed with the commission to district court by entitling the charging party or aggrieved person to file his discrimination action in district court.

(l) "Staff" or "commission staff" means the human rights division, which is the staff of the human rights commission.

AUTH: 49-2-204, 49-3-106, MCA; IMP: 49-2-101, 49-2-201, 49-2-509, 49-3-101, 49-3-312, MCA

24.9.222 INVESTIGATION; FAILURE OF CHARGING PARTY OR AGGRIEVED PERSON TO COOPERATE OR KEEP THE COMMISSION ADVISED OF CHANGES IN ADDRESS (1) Whenever any charging party or (in the case of a complaint filed on behalf of anyone) any person alleged to be aggrieved shall refuse to comply with a request by the division for information or evidence reasonably necessary for the investigation, conciliation, or litigation of the complaint, the division administrator may dismiss the case and issue a right to sue letter for failure of the charging party (or aggrieved person) to cooperate with the division, or may dismiss so much of the complaint as relates to that charging party or aggrieved person.

(2) Whenever any charging party or aggrieved person fails to advise the commission of a change of address so that the commission staff is unable to locate the charging party or aggrieved person, the division administrator may dismiss the case and issue a right to sue letter or may dismiss so much of the complaint as relates to that charging party or aggrieved person.

AUTH: 49-2-204, 49-3-106, MCA; IMP: 49-2-504, 49-2-509, 49-3-307, 49-3-312, MCA

24.9.224 INVESTIGATION; DETERMINATION REGARDING CAUSE (1) When a complaint is assigned to a member of the staff for investigation, the staff investigator shall undertake a prompt, thorough, and impartial investigation of the allegations of the complaint to determine if there is substantial evidence (reasonable cause) to believe that an act

of discrimination has taken place. When the investigation is complete, or is sufficiently complete to justify a finding, the staff shall issue a finding that there is or is not substantial evidence (reasonable cause) to credit the allegations of the complaint. A lack of reasonable cause finding may also be based upon a determination that the commission lacks jurisdiction over the complaint.

AUTH: 49-2-204, 49-3-106, MCA; IMP: 49-2-504, 49-3-307, MCA

24.9.225 PROCEDURE ON FINDING OF NO CAUSE (1) If a finding of ~~no~~ lack of reasonable cause is made by the division in regard to any complaint, notice of the finding shall be served on all parties. The notice shall include a statement of the reasons for the finding. The notice ~~may~~ shall be accompanied either by a dismissal order and right to sue letter in accordance with the provisions of ARM 24.9.263, or ~~in the alternative, the notice shall be accompanied~~ by a statement explaining the right of the charging party or aggrieved person to request a hearing, before the commission. The determination whether to dismiss the complaint and issue a right to sue letter or allow the charging party or aggrieved person an opportunity for hearing before the commission shall be within the sound discretion of the administrator. If the administrator elects to allow the charging party or aggrieved person an opportunity for hearing before the commission, the ~~The~~ notice shall specify the time in which the charging party or aggrieved person must file a written request for hearing ~~or for a for a right to sue letter~~ which in no case shall be less than 14 days from the date the notice of the finding was mailed to the parties.

(2) If a charging party or aggrieved person in a case in which the division has found ~~no~~ lack of reasonable cause makes a written request for hearing in response to the statement accompanying the lack of reasonable cause finding ~~cause is certified for hearing, it shall be heard by the commission in the same manner in which it hears other contested cases,~~ the administrator shall certify the case for hearing in accordance with ARM 24.9.230.

(3) If no written request for hearing ~~or right to sue letter~~ is made ~~in the time stated in the notice,~~ in response to the statement accompanying the lack of reasonable cause finding, the staff shall issue ~~an order on behalf of the commission in which the no cause finding is adopted as the final order of the commission and the case is dismissed with prejudice. Notice of the dismissal order shall be sent to all parties~~ a dismissal order and right to sue letter in accordance with the provisions of ARM 24.9.263. ~~Notice of the dismissal order shall be sent to all parties.~~

~~(4) The issuance of the dismissal order adopting the no cause finding as the final order of the commission completes the administrative process with regard to the complaint or with~~

~~regard to those allegations of the complaint in regard to which no cause is found.~~

AUTH: 49-2-204, 49-3-106, MCA; IMP: 49-2-504, 49-2-505, 49-2-509, 49-3-307, 49-3-308, 49-3-312 MCA

24.9.230 CERTIFICATION OF A CASE TO COMMISSION FOR HEARING (1) Whenever the division has issued a finding that substantial evidence (reasonable cause) exists to believe that a respondent has engaged in a discriminatory practice in violation of the act or code and that conciliation efforts have been unsuccessful, the administrator shall notify the commission that the case should be set for hearing. ~~In addition, if~~ If the division has issued a finding that no substantial evidence (~~no~~ lack of reasonable cause) exists to believe that a respondent has engaged in a discriminatory practice in violation of the act or code, but the charging party or aggrieved person ~~nevertheless wishes to proceed to~~ has requested a hearing before the commission in accordance with ARM 24.9.225, the case shall also be certified for hearing. ~~unless the division has issued a right to sue letter.~~

AUTH: 49-2-204, 49-3-106, MCA; IMP: 49-2-505, 49-2-506, 49-3-308, 49-3-312, MCA

RULE I ISSUANCE OF RIGHT TO SUE LETTER WHEN REQUESTED BY A PARTY (1) Any party to a case before the commission may request that the administrator issue a right to sue letter if the commission has not yet held a contested case hearing and 12 months have elapsed since the complaint was filed.

(2) The administrator may refuse to issue a right to sue letter if:

(a) The party requesting the issuance of the right to sue letter has failed to comply with the terms of a lawful subpoena issued during investigation;

(b) The party requesting the issuance of the right to sue letter has waived the right to request removal either by specific written waiver or by conduct constituting an implied waiver;

(c) The commission or its hearing examiner has scheduled a hearing to be held within 90 days of service of the notice of certification for hearing, unless the request is made within 30 days of service of the notice of certification for hearing; or

(d) The party requesting the issuance of a right to sue letter has unsuccessfully attempted through court litigation to prevent the commission staff from investigating the complaint.

(3) A party who requests issuance of a right to sue letter and is dissatisfied with a decision of the administrator to refuse to issue a right to sue letter may seek commission review of the decision by filing written objections within 14 days after the decision is served. The date of service is the date the decision is mailed.

(4) After receipt of written objections to a decision to refuse to issue a right to sue letter, the commission will set a time for consideration of the objections. Section 2-4-604, MCA, governs the commission's consideration of the objections.

(5) If the commission sustains the objections to the issuance of a right to sue letter, it will direct the administrator to issue a right to sue letter.

AUTH: 49-2-204, 49-3-106, MCA; IMP: 49-2-509, 49-3-312, MCA

24.9.263 CONTENTS OF RIGHT TO SUE LETTER (1) This section applies when the division administrator issues a right to sue letter pursuant to ARM 24.9.222, 24.9.225, or RULE I.

~~(1)~~ (2) Each right to sue letter issued by the division shall be issued to the charging party and shall set forth the following information:

(a) A statement ~~whether the letter was issued at the request of the charging party or respondent~~ of the reasons for issuance.

(b) A notice informing the charging party that in order to pursue the complaint of discrimination, the charging party must petition the district court in the district in which the alleged violation occurred for appropriate relief within 90 days of receipt of the letter. The notice shall conspicuously state that if the charging party fails to file a petition in district court within the 90 day period, the claim shall be barred.

(c) A notice informing the charging party of the court's discretion to award attorney's fees to the prevailing party in a discrimination action in district court.

(d) A notice informing the charging party of the effect of the issuance of the right to sue letter as provided in ARM 24.9.264.

(e) A statement certifying that the requirements ~~of section (2) of ARM 24.9.262~~ for issuance of a right to sue letter have been satisfied.

~~(2)~~ (3) The respondent shall be notified of the issuance of the right to sue letter by first class mail or hand-delivery.

~~(3)~~ (4) The right to sue letter shall be served upon the charging party either by hand delivery or by certified mail.

AUTH: 49-2-204, 49-3-106 MCA; IMP: 49-2-509, 49-3-312 MCA

24.9.264 EFFECT OF ISSUANCE OF RIGHT TO SUE LETTER

(1) The issuance of a right to sue letter pursuant to ARM 24.9.222, 24.9.225, or RULE I ~~24.9.262~~ shall constitute the completion of the administrative process with regard to any complaint of discrimination in which a right to sue letter is issued.

(2) A party who is dissatisfied with a decision to issue a right to sue letter may seek commission review of the decision by filing written objections within 14 days after the

decision is served. The date of service is the date the decision is mailed.

(3) After receipt of written objections to a decision to issue a right to sue letter, the commission will set a time for consideration of the objections. Section 2-4-604, MCA, governs the commission's consideration of the objections.

(4) If the commission sustains the objections to the issuance of a right to sue letter, it will reopen the case before the commission by remanding the case to the division for further investigation or to be certified for hearing.

(5) If the commission affirms the issuance of the right to sue letter, it will notify the parties of its decision in writing. The complainant will have 90 days after receipt of the commission's order affirming the issuance of the right to sue letter to petition the district court for appropriate relief.

~~(2)~~(6) If the court later finds that it does not have jurisdiction over the case in which the right to sue letter was issued because of the improper issuance of the letter, then the charging party may apply to reopen the complaint before the commission.

AUTH: 49-2-204, 49-3-106 MCA; IMP: 49-2-509, 49-3-312 MCA

3. The commission proposes the amendments and adoption in order to insure that the rules are consistent with the amendments to §§49-2-509 and 49-3-312, MCA, enacted by the 1987 Legislature.

4. The authority of the commission to make the proposed amendments is based on sections 49-2-204 and 49-3-106, MCA. The rules as amended implement sections 49-2-505, 49-2-509, 49-3-308 and 49-2-312, MCA. The authority of the commission to repeal rule 24.9.262 is based on sections 49-2-204 and 49-3-106, MCA. The rule implements sections 49-2-509 and 49-3-312, MCA. The authority of the commission to adopt rule RULE I is based on sections 49-2-204 and 49-3-106, MCA. The rule implements sections 49-2-509 and 49-3-312, MCA.

5. Interested parties may submit their data, views, or arguments on the proposed amendments, repeal and adoption in writing to Margery H. Brown, Chair, Human Rights Commission, P.O. Box 1728, Helena, Montana, 59624-1728 no later than January 13, 1989.

6. If a person who is directly affected by the proposed amendments, repeal and 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 Margery H. Brown, Chair, Human Rights Commission, P.O. Box 1728, Helena, Montana, 59624-1728, no later than January 13, 1989.

7. If the agency receives requests for a public hearing on the proposed amendments, repeal and adoption 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 upon the number of potential parties to cases in Montana.

MONTANA HUMAN RIGHTS COMMISSION
MARGERY H. BROWN, CHAIR

By: Anne L. MacIntyre
ANNE L. MacINTYRE
ADMINISTRATOR
HUMAN RIGHTS DIVISION

Certified to the Secretary of State November 28, 1988.

BEFORE THE DEPARTMENT OF STATE LANDS
OF THE STATE OF MONTANA

In the matter of the Proposed Adoption of Rules Pertaining to the Maintenance of State Lands' Ownership Records.	NOTICE OF PROPOSED ADOPTION OF RULES PERTAINING TO THE DEPARTMENT OF STATE LANDS' RESPONSIBILITY TO MAINTAIN STATE LAND OWNERSHIP RECORDS NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On March 30, 1989, the Department of State Lands and the Board of Land Commissioners propose to adopt rules pertaining to the maintenance of State Lands ownership records, pursuant to sections 77-1-701, et seq., MCA.

2. The proposed rules provide as follows:

RULE I PURPOSE (1) The following rules and procedures were developed to implement the provisions of Chapter 467, L. 1987, sections 77-1-701, et seq., MCA. These statutory provisions provide, with some exceptions, that ownership records pertaining to non-trust state-owned land administered by other state agencies be filed with the department of state lands and recorded in a centrally maintained filing system. (AUTH. 77-1-707 MCA; IMP. 77-1-703 and 704 MCA.)

RULE II DEFINITIONS Unless the context requires otherwise in these rules the following definitions apply:

(1) "Central record repository" means the site at the department of state lands at which all ownership records will be stored.

(2) "Department" means the department of state lands provided for in Title 2, Chapter 15, part 32, MCA.

(3) "Commissioner" means the commissioner of state lands provided for in 2-15-3202, MCA.

(4) "Board" means the board of land commissioners provided for in Article X, section 4, of the Constitution of this state. (AUTH. 77-1-701 MCA; IMP. 77-1-701 and 705 MCA.)

RULE III FILING OF OWNERSHIP RECORDS (1) As provided in 77-1-703 state agencies shall file with the department ownership records of state lands held or disposed of by the agency. (AUTH. 77-1-707 MCA; IMP. 77-1-703 AND 706 MCA.)

RULE IV DEPARTMENT TO MAINTAIN CENTRAL RECORD REPOSITORY (1) The department shall supervise a secure, and accessible central record repository for the ownership records of state lands.

(2) The department shall make available a copy of each state agency's land ownership no more than once a year to the administering agency. (AUTH. 77-1-707 MCA; IMP. 77-1-704 MCA.)

RULE V INDEX AND VERIFICATION OF OWNERSHIP RECORDS

(1) All state agencies within sixty (60) days of acquiring or disposing of state lands shall be required to provide to the department of state lands an accurate record of such transaction. At the same time an agency provides the department with ownership records regarding acquisition or disposal of state lands, they must also, on a form prescribed by the department, provide the following information:

(a) a legal description of the land;
(b) when the land was acquired or disposed of;
(c) name of the state agency administering or disposing of the land;
(d) name of the grantor and grantee of the land;
(e) a completed record of all subsurface and mineral rights on the land.

(2) In lieu of providing the above information on a written form, the department may require the state agency to provide the information into a computer data base in a format determined by the department.

(3) Prior to the department accepting any ownership records, the agency supplying such records must properly record them in the county wherein the lands are located.

(4) It shall be the responsibility of the transferring state agency to notify the department of any discrepancies to insure that all lands on record with the department are correct to the best of the state agency's knowledge. (AUTH. 77-1-707 MCA; IMP. 77-1-703, 704, 705 MCA.)

3. These rules are proposed to effectuate Chapter No. 467, Laws of 1987. The proposed rules are necessary in order to more clearly define the relative responsibilities of all state agencies, including the department of state lands, regarding the keeping of accurate and accessible ownership records of state-owned lands.

4. Interested parties may submit their data, views, or arguments concerning the proposed rules to Kelly Blake, Administrator, Lands Division, Department of State Lands, Capitol Station, Helena, Montana 59620, no later than 5:00 o'clock p.m. January 23, 1989.

5. If the board receives requests for a public hearing on the proposed adoption from either ten percent or 25, whichever is less, of those persons who are directly affected by the proposed adoption, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who will be directly affected, a public hearing will be held at a later date. Notice of the hearing will be published in the Montana

Administrative Register. Ten percent of those persons directly affected has been determined to be one (1) based on the number of state agencies.

Dennis Hemmer
Commissioner of State Lands

Certified to the Secretary of State November 21, 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 PROPOSED AMENDMENT of ARM 42.22.1311 relating to Industrial Machinery and Equipment Trend Factors

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On January 9, 1989, the Department proposes to amend ARM 42.22.1311 relating to Industrial Machinery and Equipment Trend Factors.

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

42.22.1311 INDUSTRIAL MACHINERY AND EQUIPMENT TREND FACTORS (1) The department of revenue will utilize the machinery and equipment trend factors that are set forth on the following tables. The trend factors will be used to value industrial machinery and equipment for ad valorem tax purposes pursuant to ARM 42.22.1306. The department uses annual cost indexes from Marshall Valuation Service. The current index is divided by the annual index for each year to arrive at a trending factor. Industries with similar trending factors are grouped. The schedules in the rule reflect an average of trend factors for each industry group. Where no index existed in the Marshall Valuation Service for a particular industry, that industry was grouped with other industries using similar equipment.

INDUSTRIAL MACHINERY AND EQUIPMENT TREND FACTORS
~~1987~~ 1988 = 100%

YEAR	TABLE 1	TABLE 2	TABLE 3	TABLE 4	TABLE 5	TABLE 6
~~1987~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~
~~1986~~	~~1.007~~	~~1.006~~	~~1.012~~	~~1.000~~	~~1.007~~	~~1.010~~
~~1985~~	~~1.016~~	~~1.012~~	~~1.029~~	~~1.016~~	~~1.015~~	~~1.019~~
~~1984~~	~~1.031~~	~~1.026~~	~~1.048~~	~~1.034~~	~~1.030~~	~~1.034~~
~~1983~~	~~1.057~~	~~1.050~~	~~1.073~~	~~1.063~~	~~1.059~~	~~1.061~~
~~1982~~	~~1.071~~	~~1.066~~	~~1.089~~	~~1.086~~	~~1.075~~	~~1.085~~
~~1981~~	~~1.123~~	~~1.126~~	~~1.141~~	~~1.137~~	~~1.125~~	~~1.131~~
~~1980~~	~~1.244~~	~~1.253~~	~~1.262~~	~~1.261~~	~~1.244~~	~~1.242~~
~~1979~~	~~1.379~~	~~1.380~~	~~1.394~~	~~1.400~~	~~1.377~~	~~1.361~~
~~1978~~	~~1.504~~	~~1.509~~	~~1.526~~	~~1.535~~	~~1.498~~	~~1.490~~
~~1977~~	~~1.617~~	~~1.622~~	~~1.642~~	~~1.653~~	~~1.607~~	~~1.617~~
~~1976~~	~~1.702~~	~~1.715~~	~~1.731~~	~~1.741~~	~~1.690~~	~~1.710~~
~~1975~~	~~1.799~~	~~1.819~~	~~1.849~~	~~1.849~~	~~1.786~~	~~1.840~~
~~1974~~	~~2.023~~	~~2.070~~	~~2.064~~	~~2.096~~	~~2.009~~	~~2.007~~
~~1973~~	~~2.373~~	~~2.435~~	~~2.392~~	~~2.450~~	~~2.357~~	~~2.272~~
~~1972~~	~~2.455~~	~~2.511~~	~~2.479~~	~~2.550~~	~~2.448~~	~~2.343~~

1971	2.535	2.603	2.577	2.643	2.544	2.420
1970	2.690	2.769	2.754	2.783	2.718	2.565
1969	2.860	2.949	2.949	2.977	2.910	2.730
1968	2.978	3.078	3.090	3.114	3.049	2.841
1988	1.000	1.000	1.000	1.000	1.000	1.000
1987	1.036	1.028	1.037	1.033	1.036	1.033
1986	1.044	1.035	1.049	1.042	1.044	1.043
1985	1.052	1.041	1.066	1.050	1.051	1.053
1984	1.068	1.056	1.086	1.069	1.067	1.068
1983	1.095	1.082	1.112	1.102	1.097	1.096
1982	1.110	1.100	1.128	1.124	1.113	1.120
1981	1.163	1.159	1.182	1.180	1.165	1.168
1980	1.288	1.289	1.308	1.310	1.288	1.283
1979	1.427	1.420	1.447	1.450	1.426	1.406
1978	1.557	1.549	1.582	1.589	1.551	1.541
1977	1.674	1.667	1.700	1.713	1.665	1.670
1976	1.758	1.762	1.806	1.803	1.749	1.764
1975	1.861	1.868	1.918	1.916	1.851	1.900
1974	2.093	2.125	2.141	2.168	2.083	2.072
1973	2.455	2.492	2.481	2.528	2.445	2.346
1972	2.538	2.581	2.571	2.628	2.537	2.420
1971	2.622	2.672	2.673	2.727	2.637	2.499
1970	2.788	2.842	2.857	2.888	2.817	2.648
1969	2.959	3.026	3.059	3.090	3.016	2.819

YEAR	TABLE 7	TABLE 8	TABLE 9	TABLE 10	TABLE 11
1987	1.000	1.000	1.000	1.000	1.000
1986	1.006	1.009	1.007	1.008	1.010
1985	1.012	1.016	1.013	1.015	1.022
1984	1.025	1.028	1.026	1.027	1.036
1983	1.047	1.051	1.054	1.055	1.067
1982	1.071	1.064	1.069	1.074	1.085
1981	1.131	1.111	1.112	1.125	1.135
1980	1.255	1.230	1.221	1.241	1.253
1979	1.378	1.339	1.356	1.363	1.372
1978	1.506	1.460	1.484	1.485	1.492
1977	1.627	1.572	1.580	1.603	1.603
1976	1.724	1.659	1.659	1.689	1.685
1975	1.845	1.793	1.738	1.797	1.795
1974	2.108	1.954	1.945	2.025	1.990
1973	2.429	2.287	2.329	2.354	2.304
1972	2.585	2.261	2.408	2.433	2.380
1971	2.588	2.346	2.478	2.514	2.460
1970	2.746	2.499	2.625	2.669	2.611
1969	2.921	2.639	2.781	2.838	2.777
1968	3.042	2.730	2.877	2.955	2.891
1988	1.000	1.000	1.000	1.000	1.000
1987	1.024	1.027	1.043	1.033	1.036
1986	1.031	1.036	1.049	1.042	1.047

1985	1.037	1.044	1.056	1.049	1.059
1984	1.050	1.056	1.069	1.061	1.074
1983	1.070	1.080	1.098	1.091	1.105
1982	1.095	1.092	1.115	1.110	1.124
1981	1.155	1.141	1.159	1.162	1.177
1980	1.282	1.263	1.272	1.282	1.298
1979	1.408	1.375	1.413	1.408	1.422
1978	1.540	1.499	1.546	1.534	1.546
1977	1.665	1.614	1.651	1.656	1.662
1976	1.764	1.703	1.722	1.746	1.746
1975	1.887	1.842	1.827	1.857	1.860
1974	2.158	2.006	2.045	2.093	2.063
1973	2.480	2.267	2.448	2.432	2.387
1972	2.563	2.322	.000	2.514	2.467
1971	2.648	2.409	.000	2.598	2.550
1970	2.810	2.566	.000	2.757	2.705
1969	2.989	2.710	.000	2.932	2.878

AUTH. 15-1-201, MCA; IMP. 15-6-138 and 15-8-111, MCA.

3. These tables are updated annually by rule in accordance with Judge Gordon Bennett's ruling in Minnesota Power and Light v. Department of Revenue.

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

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

no later than January 5, 1989.

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 January 5, 1989.

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.

DAVID W. WOODGERD, Director
Department of Revenue

Certified to Secretary of State 11/28/88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.17.105 relating to Computation of Withholding Income Tax.	NOTICE OF THE PROPOSED AMENDMENT of ARM 42.17.105 relating to Computation of Withholding Income Tax.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On January 9, 1989, the Department proposes to amend ARM 42.17.105 relating to Computation of Withholding Income Tax.

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

42.17.105 COMPUTATION OF WITHHOLDING (1) The amount of tax withheld per payroll period shall be calculated according to the following four-step formula:

(a) $Y = PZ$

where Z is the individual's gross earnings for the payroll period; and

Y is the individual's annualized gross earnings.

In these calculations, the quantity P (number of payroll periods during the year) has one of the following values:

Annual payroll period	P = 1
Monthly payroll period	P = 12
Semimonthly payroll period	P = 24
Biweekly payroll period	P = 26
Weekly payroll period	P = 52

(b) $T = Y - 1400N$

where T is the annualized net gross income; and

N is the number of withholding exemptions claimed.

If T in Step (b) is less than or equal to 0, then the amount to be withheld during the pay period is 0. If T is greater than 0, then the annualized tax liability is calculated using:

(c) $X = A + B(T-C)$ where X is the individual's annualized tax liability the parameters A, B and C are chosen from the following rate schedule:

~~ANNUALIZED NET GROSS INCOME T~~

At-least	But-less-than	A	B	C
$ 0	$-6,590	$ 0	2.9%	$ 0
6,590	14,600	191.11	4.8%	6,590
14,600	32,000	575.59	6.7%	14,600
32,000-and-over		1,714.39	7.2%	32,000

At Least	But Less Than	A	B	C
$ 0	$ 6,590	$ 0	2.6%	$ 0
6,590	14,600	171.34	4.4%	6,590
14,600	32,000	523.78	6.1%	14,600
32,000 and over		1,585.18	6.5%	32,000

(d) $W = \frac{X}{P}$

where W is the amount to be withheld for the payroll period;
X is the annualized tax liability; and
P is the number of payroll periods during the year.

(2) This rule is effective for ~~quarters~~ tax periods beginning ~~July 1, 1987~~ January 1, 1989. (AUTH, Sec. 15-30-305 MCA; IMP, Secs. 15-30-108 and 15-30-202 MCA)

3. The 1987 Legislature enacted a 10% surtax effective for 1987-1988 tax years. Effective January 1, 1989, withholding rates should reflect termination of the surtax.

In addition, a portion of the December, 1987 amendment to this rule was not incorporated into the rule. The change addressed the accelerated filer who is required to file more frequently than quarterly.

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

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

no later than January 5, 1989.

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 January 5, 1989.

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.

DAVID W. WOODGERD, Director
Department of Revenue

Certified to Secretary of State 11/28/88.

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

In the matter of the amendment of Rule 46.12.3803 pertaining to medically needy income standards	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.12.3803 PERTAINING TO MEDICALLY NEEDY INCOME STANDARDS

TO: All Interested Persons

1. On December 28, 1988, at 2:00 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 46.12.3803 pertaining to medically needy income standards.

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

46.12.3803 MEDICALLY NEEDY INCOME STANDARDS Subsections (1) and (2) remain the same.

(3) The following table lists the amounts of adjusted income, based on family size, which may be retained for the maintenance of SSI and AFDC-related families. Since families are assumed to have a shelter obligation, an amount for shelter obligation is included in each level.

MEDICALLY NEEDY INCOME LEVELS
FOR SSI and AFDC-RELATED INDIVIDUALS
AND FAMILIES

Family Size	One Month Net Income Level	Two Month Net Income Level	Three Month Net Income Level
1	~~$354~~ 368	$ ~~708~~ 736	~~$1,062~~ 1,104
2	383	766	1,149
3	408	816	1,224
4	433	866	1,299
5	507	1,014	1,521
6	580	1,160	1,740
7	654	1,308	1,962
8	727	1,454	2,181
9	762	1,524	2,286
10	795	1,590	2,385
11	826	1,652	2,478
12	854	1,708	2,562
13	882	1,764	2,646
14	907	1,814	2,721
15	930	1,860	2,790
16	951	1,902	2,853

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

3. This change is being made to ensure state policy coincides with Federal cost of living adjustment increases for the SSI program.

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 January 5, 1989.

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

/s/ [signature]
Director, Social and Rehabilitation Services

Certified to the Secretary of State Nov 28, 1988.

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

In the matter of the amendment of Rules 46.12.511, 46.12.512 and 46.12.513 pertaining to swing-bed hospitals	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 46.12.511, 46.12.512 AND 46.12.513 PERTAINING TO SWING-BED HOSPITALS

TO: All Interested Persons

1. On December 28, 1988, at 9:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of Rules 46.12.511, 46.12.512 and 46.12.513 pertaining to swing-bed hospitals.

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

46.12.511 SWING BED HOSPITALS, REQUIREMENTS Subsection (1) remains the same.

(a) The hospital must be certified by the federal health care financing administration and the state department of health and environmental sciences to provide ~~extended~~ long-term care services for skilled and intermediate care patients as described in 42 CFR ~~405.125~~ 409.20. The department hereby adopts and incorporates herein by reference 42 CFR ~~405.125~~ 409.20, which is a federal regulation defining ~~extended-care~~ skilled nursing services, copies of which may be obtained from the Department of Social and Rehabilitation Services, P.O. Box 4210, 111 Sanders, Helena, Montana 59604-4210.

Subsections (1)(b) and (1)(c) remain the same.

(d) The hospital must meet the ~~safety and health~~ conditions and standards of participation for skilled and intermediate care nursing homes, as stated in 42 CFR, part 405, subpart K and 42 CFR, part 442, subpart F. The department hereby adopts and incorporates herein by reference 42 CFR 405, subpart K and 42 CFR, part 442, subpart F, which are the federal medicare conditions of participation for skilled nursing facilities and the federal medicaid standards of participation for intermediate care facilities other than facilities for the mentally retarded, respectively. Copies of these federal regulations may be obtained from the Department of Social and Rehabilitation Services, P.O. Box 4210, 111 Sanders, Helena, Montana 59604-4210.

Subsections (1)(e) through (1)(h) remain the same.

AUTH: Sec. 53-6-113 and 53-2-201(h) MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 53-6-111, 53-6-141 and 53-2-201 MCA

46.12.512 SWING-BED HOSPITALS, PROCEDURES (1) The swing-bed hospital will have the responsibility of determining whether a skilled or intermediate nursing care bed is available to the medicaid patient within a ~~one--hundred--(100)~~ seventy (70) mile radius of the hospital before admitting a medicaid patient to a swing-bed. The hospital will be required to maintain written documentation consisting of written inquiries to nursing homes inquiring as to the present and future availability of a nursing home bed and indicating that if a bed is not available, the hospital will provide swing-bed services to the patient.

(2) A medicaid patient admitted to a swing-bed must be discharged to an appropriate nursing home bed within a ~~one hundred--(100)~~ seventy (70) mile radius of the swing-bed hospital within 72 hours of an appropriate nursing home bed becoming available.

(3) The department may retrospectively review the use of swing-bed services provided to medicaid patients and may deny payments when it is determined that a nursing home bed was available within ~~one-hundred-(100)~~ seventy (70) miles of the hospital that provided the swing-bed service.

(4) Medicaid applicants and recipients must be prescreened and meet the level of care requirements (skilled or intermediate) in order for the provider to be reimbursed by Medicaid. The level of care requirements are contained in ARM 46.12.1101 through 46.12.1106. It is the swing bed hospital's responsibility to make the referral for prescreening prior to placement in the swing bed and to ensure that a form SRS-EA-61 "screening notification" is completed by the prescreening team to document the level of care determination.

(5) A waiver of the seventy (70) mile requirement may be obtained by submitting written verification from the recipient's attending physician that either:

(a) The recipient's condition will be endangered by a transfer to another facility outside of the community; or

(b) The recipient's condition is terminal.

(i) The request for waiver and the written verification may be sent to the Medicaid Bureau, Department of Social and Rehabilitation Services, P.O. Box 4210, 111 Sanders, Helena, Montana 59604-4210.

AUTH: Sec. 53-6-113 and 53-2-201 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 53-6-111, 53-6-141 and 53-2-201 MCA

46.12.513 SWING-BED HOSPITALS, REIMBURSEMENT Subsection (1) remains the same.

(2) Reimbursement to swing-bed hospitals will only be made for medicaid patients when appropriate skilled or intermediate nursing care is not available within a ~~one--hundred~~

~~(100)~~ seventy (70) mile radius of the swing-bed hospital. ~~from which the patient is discharged.~~

Subsections (3) through (5) remain the same.

AUTH: Sec. 53-6-113 and 53-2-201 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87.
IMP: Sec. 53-6-111, 53-6-141 and 53-2-201 MCA

3. The current Medicaid rule for swing-bed reimbursement requires a swing-bed hospital to ensure that no skilled nursing or intermediate care hospital is available within a 100 mile radius. The amendment proposes to decrease the mileage radius requirements to 70 miles thereby: (1) alleviating the problems of transfer and separation of patient from family and friends; and (2) reducing the administrative burden on swing-bed providers because of a reduction in the number of facilities needed to be considered for availability of long term care beds.

The proposed amendment also incorporates current department policy allowing exceptions to the mileage radius requirement in those situations involving serious health consequences and trauma resulting from long distance transfers.

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 January 5, 1989.

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 Nov 28, 1988.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the repeal of ARM 2.21.8001 through 2.21.8009 and the adoption of new rules relating to grievances	) NOTICE OF THE REPEAL OF RULES 2.21.8001 THROUGH 2.21.8009) AND THE ADOPTION OF NEW RULES) RELATING TO GRIEVANCES

TO: All Interested Persons.

1. On October 13, 1988, the department of administration published notice of the proposed repeal of ARM 2.21.8001 through 2.21.8009 and the adoption of ARM 2.21.8010 through 2.21.8013, 2.21.8017, 2.21.8018, 2.21.8021 through 2.21.8023, and 2.21.8030 relating to grievances, at page 2055 of the 1988 Montana Administrative Register, issue number 19.

2. The rules have been repealed and new rules have been adopted with the following changes.

2.21.8013 EMPLOYEE GRIEVANCE (1) Same as proposed rule.
(2) A grievant shall not use paid working time to prepare and pursue a grievance. A grievant may request to use other appropriate paid leave, accrued compensatory time or leave of absence without pay to prepare a grievance. Use of leave or compensatory time shall be requested and approved consistent with administrative rules and agency policies relating to the type of leave requested. Time spent by the grievant attending a hearing is paid working time only during the grievant's regular work shift and shall not exceed eight (8) hours per day.
(3) Same as proposed rule.

2.21.8018 HEARING (1) - (6) Same as proposed rule.
(7) The grievant shall pay ~~all costs~~ fees and expenses of:
(7)(a) - (9) Same as proposed rule.

3. A public hearing was conducted on November 3, 1988, to receive comments on these proposed rules. Written comments and testimony are summarized below.

COMMENT: ARM 2.21.8012 (Rule III) defines employee too narrowly and should not exclude persons under collective bargaining agreements, or probationary or temporary employees.

RESPONSE: The department disagrees. The collective bargaining agreements which differ with administrative rules supercede those rules and should be followed in all cases. The reason an employer designates employees as probationary or temporary is to distinguish them from employees who have attained permanent status and the privileges which accrue from that status.

COMMENT: In ARM 2.21.8013, restricting grievances to the application of written laws, rules, policies and procedures is too limiting in view of the streamlined procedure created in ARM 2.21.8017 (Rule V.)

RESPONSE: The department disagrees. Most significant supervisory actions are covered in some manner by a written law, rule, policy or procedure. This rule creates a minimum standard for agencies to follow in adjusting grievances. An agency may adopt a policy which defines a grievance more broadly.

COMMENT: In ARM 2.21.8013, paid working time for an employee to attend a grievance hearing should be limited to time during an employee's regular work shift.
RESPONSE: The department agrees and has added this provision to the rule.

COMMENT: ARM 2.21.8013 (Rule IV) puts the grievant at a disadvantage because his witnesses who are state employees must take personal leave to attend a hearing, while management's witnesses receive their regular salary.

RESPONSE: The department believes the authority to approve or deny leave is fundamental to management and will not restrict that right by requiring management to approve leave in this case. This same requirement is typically found in collective bargaining agreements.

COMMENT: ARM 2.21.8017 (Rule V) allows agencies to require a standard form for filing a grievance. The rules should specify where agency grievance policies, forms and procedures will be available.

RESPONSE: The department agrees that employees need to be aware of an agency's grievance policies and procedures and will take steps to encourage agencies to inform employees. The department does not agree that there should be a specific requirement in the administrative rules.

COMMENT: In ARM 2.21.8018 (Rule VI), the rule should be more specific about the costs for which the grievant is responsible.

RESPONSE: The department has modified (7) of this rule by deleting "all costs" and adding "fees and expenses" to clarify the grievant's responsibility.

COMMENT: In ARM 2.21.8018 (Rule VI), a hearing should be provided for any suspension without pay instead of a suspension of more than 10 days.

RESPONSE: The department disagrees. The right to a hearing in this rule is reserved for disciplinary actions which are substantial and which have a significant effect on an employee's interest such as terminating or demotion. The department believes 10 days is appropriate in this case. The agency head, as part of a grievance review, may order a hearing for any grievance. Agencies also have the authority to adopt policies providing a hearing for shorter suspensions..

COMMENT: ARM 2.21.8018 (Rule VI) should not require that a hearings examiner be assigned by the attorney general's office.

RESPONSE: The department disagrees. The attorney general's office is an appropriate source of hearings examiners. A number of agencies currently request examiners from this source and wish to continue to do so. The Board of Personnel Appeals is provided as an alternative to the attorney general's office.

COMMENT: The rules should provide guidance as to whether they apply to current grievances or only to grievances filed after the new rules are effective.

RESPONSE: It is the department's opinion that grievances filed before the effective date of the new rules should be completed using the current rules. Grievances filed after the effective date of the new rules should be adjusted using the new policy.

Ellen Feaver, Director
Department of Administration

Certified to the Secretary of State November 28, 1988.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of rules relating to the grading of certified seed potatoes	))))	NOTICE OF AMENDMENT OF 4.12.3501, 4.12.3503, 4.12.3504, 4.12.3505

TO: All Interested Persons:

1. On October 13, 1988, the Department of Agriculture published a notice of proposed amendment of the above-stated rules at page 2062, 1988 Montana Administrative Register, issue number 19.

2. The Department of Agriculture amended the rules exactly as proposed.

3. No comments or testimony were received.

Keith Kelly
Director
Department of Agriculture

Certified to the Secretary of State, November 18, 1988

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

In the matter of the adoption of emergency rules pertaining to the implementation of the Medicare catastrophic coverage act of 1988.	)))))	NOTICE OF THE ADOPTION OF EMERGENCY RULES TO ASSURE THE ORDERLY IMPLEMENTATION AND CONVERSION OF MEDICARE SUPPLEMENT INSURANCE

TO: All Interested Persons.

(1) Statement of reason for emergency: These rules are proposed because the Medicare Catastrophic Coverage Act of 1988 (P. L. 100-360) becomes effective January 1, 1989. These rules require insurers to provide notice to insureds about the changes in their Medicare benefits and how those changes will affect the insureds Medicare supplement policies. Without the adoption of these rules prior to January 1, 1989, consumers may be sold additional Medicare supplement insurance without having the benefit of all relevant information necessary to make an informed decision. As an additional protection, no Medicare supplement insurance policy, contract or certificate in force in this state may contain benefits that duplicate benefits provided by Medicare.

Montana law requires insurers to issue insurance policies that contain certain provisions. 33-15-303, MCA. A policy includes all clauses, riders, and endorsements that are attached to the policy. 33-15-102(2), MCA. To comply with the Medicare catastrophic coverage act of 1988, insurers will have to issue riders or endorsements. Montana law permits the policy to be modified by a written rider or endorsement issued by the insurer. 33-15-302, MCA. To comply with 33-15-303, MCA, insurers must provide notice to the insureds of the changes provided in the riders or endorsements. These rules inform insurers how to properly make that notice.

Additional purposes of these rules are to assure the orderly implementation and conversion of Medicare supplement insurance benefits and premiums due to changes in the federal Medicare program; to provide for the reasonable standardization of the coverage, terms and benefits of Medicare supplement policies or contracts; to facilitate public understanding of those policies or contracts; to eliminate provisions contained in such policies or contracts which may be misleading or confusing in connection with the purchase of such policies or contracts; to eliminate policy or contract provisions which may duplicate Medicare benefits; to provide full disclosure of policy or contract benefits and benefit changes; and to provide for refunds of premiums associated with benefits duplicating Medicare program benefits.

(2) The text of the proposed rules are as follows:

RULE I APPLICABILITY AND SCOPE (1) [Rules I through VI] take precedence over other rules and requirements relating to

Medicare supplement policies or contracts only to the extent necessary to assure that benefits are not duplicated, that applicants receive adequate notice and disclosure of changes in Medicare supplement policies and contracts, that appropriate premium adjustments are made in a timely manner, and that premiums are reasonable in relation to benefits.

(2) Except as otherwise provided, [Rules I through VI] apply to:

(a) each Medicare supplement policy and contract delivered, or issued for delivery, or which is otherwise subject to the jurisdiction of this state on or after the effective date hereof; and

(b) each certificate issued under a group Medicare supplement policy as provided in subsection (2)(a).

AUTH: 33-1-313, 33-22-904, MCA IMP: 33-15-303 & 33-22-901 through 33-22-924, MCA

RULE II DEFINITIONS (1) For purposes of [Rules I through VI] the terms defined in 33-22-903, MCA, have the same meaning in [Rules I through VI] unless clearly designated otherwise.

AUTH: 33-1-313, 33-22-904, MCA IMP: 33-15-303 & 33-22-901 through 33-22-924, MCA

RULE III BENEFIT CONVERSION REQUIREMENTS (1) Effective January 1, 1989, no Medicare supplement insurance policy, contract or certificate in force in this State may contain benefits which duplicate benefits provided by Medicare.

(2) No later than 30 days prior to the annual effective date of Medicare benefit changes mandated by the Medicare Catastrophic Coverage Act of 1988, each insurer, health service corporation or other entity providing Medicare supplement insurance or benefits to a resident of this state shall notify its policyholders, contractholders, and certificateholders of modifications it has made to Medicare supplement insurance policies or contracts. The notice must be in a format prescribed by the commissioner or in the format adopted by the national association of insurance commissioners in June of 1988 if no other format is prescribed by the commissioner.

(a) The notice must include a description of revisions to the Medicare program and a description of each modification made to the coverage provided under the Medicare supplement insurance policy or contract.

(b) The notice must inform each covered person as to when a premium adjustment due to changes in Medicare benefits will be made.

(c) The notice of benefit modifications and any premium adjustments must be in outline form and in clear and simple terms so as to facilitate comprehension. The notice may not contain or be accompanied by any solicitation.

(3) No modification to an existing Medicare supplement contract or policy may be made at the time of or in connection with the notice requirements of [Rule I through VI] except to

the extent necessary to eliminate duplication of Medicare benefits and any modifications necessary under the policy or contract to provide indexed benefit adjustment.

(4) As soon as practicable, but no longer than 45 days after the effective date of the Medicare benefit changes, each insurer, health service corporation, or other entity providing Medicare supplement insurance or contracts in this state shall file with the commissioner, in accordance with the applicable filing procedures of this state:

(a) appropriate premium adjustments necessary to produce loss ratios as originally anticipated for the applicable policy or contract. Supporting documents as necessary to justify the adjustment must accompany the filing.

(b) any appropriate riders, endorsements, or policy forms needed to accomplish the Medicare supplement insurance modifications necessary to eliminate benefit duplications with Medicare. Any such riders, endorsements, or policy forms must provide a clear description of the Medicare supplement benefits provided by the policy or contract.

(5) Upon satisfying the filing and approval requirements of this state, each insurer, health service corporation, or other entity providing Medicare supplement insurance in this state must provide each covered person with a rider, endorsement, or policy form necessary to eliminate any benefit duplications under the policy or contract with benefits provided by Medicare.

(6) No insurer, health service corporation, or other entity may require a person covered under a Medicare supplement policy or contract which was in force prior to January 1, 1989, to purchase additional coverage under the policy or contract unless the additional coverage was provided for in the policy or contract.

(7) Each insurer, health service corporation or benefit, or other entity providing Medicare supplement insurance or benefits to a resident of this state shall make such premium adjustments as are necessary to produce an expected loss ratio under the policy or contract as will conform with minimum loss ratio standards for Medicare supplement policies and which is expected to result in a loss ratio at least as great as that originally anticipated by the insurer, health service corporation, or other entity for the Medicare supplement insurance policy or contract. No premium adjustment which would modify the loss ratio experience under the policy other than the adjustments described herein should be made with respect to a policy at any time other than upon its renewal date. Premium adjustments must be in the form of refunds or premium credits and must be made no later than upon renewal if a credit is given, or within 60 days of the renewal date if a refund is provided to the premium payer.

AUTH: 33-1-313, 33-22-904, MCA IMP: 33-15-303 & 33-22-901 through 33-22-924, MCA

RULE IV REQUIREMENTS FOR NEW POLICIES AND CERTIFICATES

(1) Effective January 1, 1989, no Medicare supplement insurance policy, contract or certificate may be issued or

issued for delivery in this state which provides benefits which duplicate benefits provided by Medicare. No such policy, contract or certificate may provide less benefits than those required under the existing Medicare supplement minimum standards act or rules except where duplication of Medicare benefits would result.

(2) Within 90 days of the effective date of [Rules I through VI], every insurer, health service corporation, or other entity required to file its policies or contracts with this state shall file new Medicare supplement insurance policies or contracts which eliminate any duplication of Medicare supplement benefits with benefits provided by Medicare and which provides a clear description of the policy or contract benefit.

(3) The filing required under Rule IV (2) must provide for loss ratios which are in compliance with all minimum standards.

(4) Each applicant for a Medicare supplement insurance policy, contract, or certificate shall be provided with an outline of coverage which simplifies and accurately describes benefits provided by Medicare and policy or contract benefits along with benefit limitations.

AUTH: 33-1-313, 33-22-904, MCA IMP: 33-15-303 & 33-22-901 through 33-22-924, MCA

RULE VI BUYER'S GUIDE (1) No insurer, health service corporation, or other entity may make use of or otherwise disseminate a Buyer's Guide or informational brochure that does not accurately outline current Medicare benefits and that has not been approved by the commissioner.

AUTH: 33-1-313, 33-22-904, MCA IMP: 33-15-303 & 33-22-901 through 33-22-924, MCA

RULE VII SEVERABILITY CLAUSE (1) If a part of [Rules I through IV] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [Rules I through IV] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

AUTH: 33-1-313, 33-22-904, MCA IMP: 33-15-303 & 33-22-901 through 33-22-924, MCA

The emergency action is effective November 28, 1988.

Andrea "Andy" Bennett
State Auditor and
Commissioner of Insurance

Certified to the Secretary of State this 28th day of November, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF NURSING HOME ADMINISTRATORS

In the matter of the amendment of 8.34.414 pertaining to examinations and 8.34.418 pertaining to fees	))))	NOTICE OF AMENDMENT OF 8.34.414 EXAMINATIONS AND 8.34.418 FEE SCHEDULE

TO: All Interested Persons:

1. On October 27, 1988, the Board of Nursing Home Administrators published a notice of proposed amendment of the above-stated rules at page 2269, 1988 Montana Administrative Register, issue number 20.

2. The Board has amended the rules as proposed with the following changes: (new matter underlined, deleted matter interlined)

"8.34.414 EXAMINATIONS (1) through (5) will remain as proposed.

(6) In the event of failure, the individual may retake the examination within the period of 1 year, by paying ~~only the examination fee~~ $75.00."

Auth: 37-1-134, 37-9-304, MCA Imp: 37-1-134, 37-9-304, MCA

"8.34.418 FEE SCHEDULE (1) will remain as proposed.

(2) Each applicant shall pay an examination and license fee of $100 for the May examination, and $120 for the November examination. The licenses granted at the May exam expire as of December 31 unless renewed. The licenses granted at the November exam remain in effect until December 31 of the following year and then must be renewed.

(3) through (12) will remain as proposed."

Auth: 37-1-134, 37-9-203, MCA Imp: 37-9-203, 37-9-304, MCA

3. Comments received and the Board's responses are as follows:

COMMENT: One comments was received from the staff of the Administrative Code Committee suggesting the cost of the retake examination be shown in ARM 8.34.414 and also to add the words "and license" in subsection (2) of ARM 8.34.418.

RESPONSE: The Board concurred with the comments and made the changes as shown above.

4. No other comments or testimony were received.

BOARD OF NURSING HOME
ADMINISTRATORS
CAROL ANN ANDREWS, CHAIRPERSON

BY: 
GEOFFREY L. BRAZIER, ATTORNEY
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 28, 1988.

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

In the Matter of Adoption of Rules on Pipeline Safety	)	NOTICE OF ADOPTION OF RULES ON PIPELINE SAFETY

TO: All Interested Persons

1. On October 13, 1988 the Department of Public Service Regulation published notice of the proposed adoption of rules regarding pipeline safety at pages 2207-2210 of the 1988 Montana Administrative Register Issue Number 19.

2. The Commission has adopted the following new rules as proposed:

Rule I. 38.5.2201 STATEMENT OF GENERAL POLICY

Rule II. 38.5.2202 INCORPORATION BY REFERENCE OF FEDERAL PIPELINE SAFETY REGULATIONS

Rule III. 38.5.2203 COMMISSION'S PROCEDURAL RULES TO APPLY

Rule IV. 38.5.2204 INSPECTIONS

Rule V. 38.5.2205 INFORMAL REPORT OF PROBABLE VIOLATION

Rule VI. 38.5.2206 FORMAL ENFORCEMENT PROCEDURE

Rule VII. 38.5.2207 RESPONSE TO ORDER TO SHOW CAUSE

Rule VIII. 38.5.2208 HEARING

Rule IX. 38.5.2209 COMMISSION DECISION

3. Comments: No comments were received.

Howard L. Ellis
HOWARD L. ELLIS, Vice Chairman

CERTIFIED TO THE SECRETARY OF STATE NOVEMBER 21, 1988.

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

In the matter of the amendment of Rules 46.12.503 and 46.12.505 pertaining to inpatient hospital services	)))	NOTICE OF THE AMENDMENT OF RULES 46.12.503 AND 46.12.505 PERTAINING TO INPATIENT HOSPITAL SERVICES

TO: All Interested Persons

1. On October 27, 1988, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.46.12.503 and 46.12.505 pertaining to inpatient hospital services at page 2295 of the 1988 Montana Administrative Register, issue number 20.

2. The Department has amended Rules 46.12.503 and 46.12.505 as proposed.

3. No written comments or testimony were received.

Director, Social and Rehabilitation Services

Certified to the Secretary of State November 28, 1988.

VOLUME NO. 42 OPINION NO. 123

APPROPRIATIONS - Use of budget amendment process and interaccount loan provisions where the only anticipated revenue is the possibility of a supplemental appropriation;
APPROPRIATIONS - Use of statutory appropriation provided for in section 10-3-312, MCA, and other funds to pay costs associated with a disaster;
BUDGET AMENDMENTS - Use of budget amendment process where the only anticipated revenue is the possibility of a supplemental appropriation;
DISASTER AND EMERGENCY SERVICES - Use of statutory appropriation provided for in section 10-3-312, MCA, and other funds to pay costs associated with a disaster;
STATE AGENCIES - Use of budget amendment process and interaccount loan provisions where the only anticipated revenue is the possibility of a supplemental appropriation;
MONTANA CODE ANNOTATED - Sections 5-12-102(1), 10-3-104(3), 10-3-111, 10-3-207 (Article V), 10-3-302, 10-3-303(1), 10-3-311, 10-3-312, 10-3-314, 10-3-405, 17-2-107, 17-2-107(2), 17-7-401(4), 17-7-402, 17-7-403.

HELD: 1. A disaster or emergency must be declared by the Governor before expenses may be incurred under section 10-3-312, MCA.

2. If a disaster is declared by the Governor under Title 10, chapter 3, MCA, the $1 million statutory appropriation provided for in section 10-3-312, MCA, need not be expended before any other funds may be used for expenses associated with the disaster.

3. The budget amendment process was not intended to permit a loan from the state's general fund, where the only anticipated revenue for repayment is the possibility of a subsequent appropriation of funds from the general fund.

4. Reliance on the possibility of a supplemental appropriation sometime in the future does not meet the reasonable-evidence-of-future-income requirement of the interaccount loan statute.

15 November 1988

Speaker Bob Marks
Montana House of Representatives
302 Lump Gulch
Clancy MT 59634

Dear Speaker Marks:

I have received your request for an opinion on the following questions:

1. What are the requirements for incurring liabilities under the disaster and emergency laws contained in Title 10, chapter 3, MCA? Specifically, must a disaster proclamation be issued before the state can incur those liabilities?

2. If a disaster is proclaimed, must the $1 million appropriated in section 10-3-312, MCA, be expended toward the payment of those liabilities before any funds, other than those provided through section 10-3-201, MCA, are used for that purpose?

3. May a budget be amended under Title 17, chapter 7, part 4, MCA, when the funds to be used for the amendment are to be supplied by the general fund?

   A. If the general fund can finance such a budget amendment, may unappropriated moneys in the general fund be so used?

   B. Is there any other authority for such a budget amendment?

4. Under section 17-2-107, MCA, or any other authority, may an interaccount loan be made to provide interim moneys for a special revenue account when there is no anticipated income which would be sufficient to repay the loan as required by section 17-2-107(2), MCA, other than the possibility of a supplemental appropriation by the next Legislature?

Your inquiry arises from the occurrence of widespread forest fires throughout the state this past summer. Your specific questions relate to the procedures

followed by the Governor in paying the state's share of costs (approximately $11.4 million) associated with the suppression of those fires. Although the validity of the expenses does not seem to be in dispute, your opinion request mentions the possible need for amending the statutes relied upon by the Governor.

I. DISASTER AND EMERGENCY SERVICES STATUTES.

Your first and second questions concern Title 10, chapter 3, MCA, which establishes the state's authority for providing disaster and emergency services. The answer to your first question as to when the state incurs liability under the disaster and emergency statutes depends upon what you mean by the term "liability." If you are referring to the incurring of expenses, the conditions set forth in section 10-3-311, MCA, must first be met, including a declaration by the Governor of a disaster or emergency. § 10-3-311(1), MCA.[1/] If, however, your use of the term "liability" includes the broad subject areas of tort and contract law, the question is inappropriate for an Attorney General's Opinion. It has been my policy to leave to the courts the determination of when and to what extent a party incurs civil liability, since such a determination depends upon extensive factual findings. I note that section 10-3-111, MCA, specifically addresses the state's immunity from tort liability during a disaster or catastrophe. See also § 10-3-207, MCA, at Article V.

Your second question involves section 10-3-312, MCA, which also requires, according to the plain language of the statute, that an emergency or disaster be declared by the Governor before expenditures may be made pursuant to this statutory appropriation. That statute provides:

[1/] See also Minutes of the House Appropriations Committee, March 21, 1983 (the Governor must declare a disaster in order to make money available--comments of Morris Brusett); Minutes of Senate and Claims Committee, April 12, 1983 (after declaring a disaster, it gives [the Governor] the authority to spend [the funds]--comments of Representative Driscoll). Authority for making such declarations is provided in sections 10-3-104(3), 10-3-302, and 10-3-303(1), MCA. I note that in the instant case the Governor did declare that a disaster had occurred in Montana. See Governor's Proclamation dated September 19, 1988.

> Maximum expenditure in biennium. Whenever an emergency or disaster is declared by the governor, there is statutorily appropriated to the office of the governor, as provided in 17-7-502, and he is authorized to expend from the general fund, an amount not to exceed $1 million in any one biennium.

You ask whether the $1 million statutory appropriation provided in section 10-3-312, MCA, must be expended for the costs associated with a disaster before any funds other than those provided in section 10-3-201, MCA, may be used.

There is no requirement in Title 10, chapter 3, MCA, that the funds authorized by the $1 million statutory appropriation be expended before any other funds may be spent on a disaster or emergency. Indeed, certain provisions in the disaster and emergency services statutes support the opposite conclusion. For example, sections 10-3-314 and 10-3-405, MCA, contemplate that local and federal funds may be used for emergency or disaster-related expenses. Neither of these provisions conditions the use of such funds on the state's first having depleted its $1 million emergency fund. On the contrary, it was understood by some members of the Legislature that local funds would be used before the state's emergency fund would be tapped. See Minutes of the House State Administration Committee, January 14, 1983, page 2.

II. BUDGET AMENDMENT STATUTES.

Your third question involves the budget amendment statutes, §§ 5-12-401, 5-12-402, 17-7-401 to 405, MCA. While the previously-discussed disaster and emergency statutes authorize spending by the Governor's Office, the budget amendment statutes involve the spending authority of any state agency that does not have funds available for necessary additional services. Some background on the budget amendment statutes is in order.

A "budget amendment" is defined in Title 17, MCA, as

> a legislative appropriation to increase spending authority for the special revenue fund, proprietary funds, or unrestricted subfund contingent on total compliance with all budget amendment procedures. [Emphasis added.]

§ 17-7-401(4), MCA. For purposes of the Legislative Finance Act, the definition is somewhat different.

> "Budget amendment" means a request submitted through the budget director to the [legislative finance] committee for executive branch agencies to expend funds in excess of those appropriated by the legislature.

§ 5-12-102(1), MCA. The budget amendment statutes, revised and expanded in 1983 (1983 Mont. Laws, ch. 536), require that an "appropriation to increase spending authority" be certified by an approving authority and submitted through the Legislative Fiscal Analyst to the Legislative Finance Committee before final approval may be given by the approving authority. The Finance Committee is afforded the opportunity to convey any concerns it may have to the approving authority prior to budget amendment approval.

In brief, these procedures provide for the following: a request for increased spending authority by the "requesting authority" (in this case the Montana Department of State Lands); certification by the approving authority (in this case the Governor) as to the need for the appropriation; review by the Legislative Fiscal Analyst for compliance with the budget amendment requirements and standards; comment by the Legislative Finance Committee; and final approval or denial of the amendment by the approving authority. The Legislative Finance Committee has no authority to approve or deny budget amendments, but may submit comments to the approving authority before the amendment is finally approved. See § 17-7-404(7), MCA; testimony of Representative Marks and Senator Aklestad on House Bill 548, Minutes of the Senate Finance and Claims Committee, March 11, 1983, pages 3 and 7.

The statutes expressly permit the budget amendment process to be used to authorize the spending of money in a special revenue fund for emergency situations. See §§ 17-7-402(1)(c), 17-7-403(3), MCA. However, certain criteria must be met before such a budget amendment may be approved. These criteria prompt your third question of whether the funds for a budget amendment may be supplied from the state's general fund.

Sections 17-7-402(1)(b) and 17-7-403(1)(d), MCA, prohibit the approval of a budget amendment if the amendment makes any "significant ascertainable commitment" for any present or future increased general fund support. This phrase is subject to different interpretations. The only effort to explain it during legislative hearings involved an example of purchasing some calculators for the Montana School for the Deaf and Blind, which would result in an increase in electricity

to be paid for by the general fund. Such an insignificant commitment for increased general fund support was deemed permissible. Testimony of Senator Van Valkenburg on House Bill 548, Senate Finance and Claims Committee, March 17, 1983, page 7. It is arguable that even a significant amount of funds for a budget amendment could come from the general fund if the transaction were treated as a loan, to be repaid from anticipated revenues due the "borrowing" agency. The basis for such an argument is that the use of general fund monies would be a temporary one, and would thus not run afoul of the "significant ascertainable commitment of increased general fund support" proscription.

Another theory which could be used to avoid problems with the "significant ascertainable commitment of increased general fund support" involves an interpretation of the disaster and emergency services statutes. Although section 10-3-312, MCA, puts a $1 million ceiling on the statutory appropriation for emergency expenses, section 10-3-311(1), MCA, permits the Governor to authorize the "incurring" of expenses to be paid from the general fund, "in the amount necessary" whenever a disaster is declared. One could argue that once expenses of $11.4 million were incurred, those expenses became obligations of the general fund under section 10-3-311(1), MCA. Thus, it could be said that at the time the budget amendment certification process began, the general fund was already obligated to pay valid emergency expenses and no additional significant commitment of general fund support would occur at that point. However, the legislative history of the budget amendment process and the facts of the case in question do not support either of these theories.

With respect to this past summer's forest fires, the materials submitted with your opinion request show that the Department of State Lands requested a budget amendment of $11,465,224 to pay the costs associated with the suppression of the fires. The statutory requirements were certified and submitted to the Legislative Fiscal Analyst. Although the Legislative Finance Committee expressed concerns as to whether the budget amendment process had been properly followed, the Governor approved the amendment. A state special revenue fund account was created to receive $11,465,224 from the state's general fund. The transaction was intended by the Governor to be treated as a loan from the general fund, to be repaid before April 30, 1989, with funds from a supplemental appropriation. See Inter-entity Loan Authorization, September 22, 1988, signed by Alan Christianson.

The transaction in question, then, could be described as follows: The Montana Department of State Lands borrowed $11,465,224 from the state's general fund, to be repaid by a subsequent appropriation of $11,465,224 from the same fund, i.e., the general fund. It is difficult to imagine how such a transaction would not result in a "significant ascertainable commitment" for present or future general fund support, whatever that phrase may mean. And, as already mentioned, such commitments of general fund support were not intended to be made through the budget amendment process. See §§ 17-7-402(1)(b), 17-7-403(1)(d), MCA.

Having concluded, however, that significant commitments of general fund support may not be made through the budget amendment process, it remains that the Legislature may be obligated to pay valid emergency expenses from the general fund. As mentioned above, section 10-3-311(1), MCA, authorizes the Governor to "incur" emergency expenses in any amount necessary, to be paid from the general fund. This authority to "incur" expenses is distinct from the statutory appropriation of $1 million found in section 10-3-312, MCA. Thus, although the budget amendment process is inapplicable in this instance, the Legislature may be bound by section 10-3-311(1), MCA, to appropriate money from the general fund to cover valid firefighting expenses.

III. STATE ACCOUNTING STATUTES.

Your fourth question involves the making of "interaccount loans," authorized by section 17-2-107, MCA. Interaccount loans provide funds for accounts, where expenses must be paid before the anticipated revenues are collected. See Discussion of House Bill 449, Senate Finance and Claims Committee, March 9, 1983, pages 3-4, and March 17, 1983, page 5. Examples of such accounts are: a payroll account which must make payouts every two weeks but which takes in revenues from fees only once or twice a year; a designated account of the university system which pays for inventory purchases, the costs of which are not recovered through user charges until a later date; and an account from which the Office of Public Instruction must distribute funds to schools but where the sources of funds are interest and income revenues not collected until after distribution is due. See Discussion of Senate Bill 2, Senate State Administration Committee, June 18, 1986, Exhibit No. 1. Most interaccount loans are either between two university accounts or between federal and earmarked accounts. Id., Exhibit No. 2, prepared by

Kathy Fabiano, Administrator, Accounting Division, Department of Administration.

Section 17-2-107(2), MCA, provides:

> When the expenditure of an appropriation is necessary and the cash balance in the account from which the appropriation was made is insufficient, the department of administration may authorize a transfer, as a temporary loan bearing no interest, of unrestricted moneys from other accounts, provided that there is reasonable evidence that the income will be sufficient to restore the amount so transferred within 1 calendar year and provided the loan is recorded in the state accounting records. The loan must be repaid within 1 calendar year of the date the loan is approved unless it is extended under subsection (3) or by specific legislative authorization. No account shall be so impaired that all proper demands thereon cannot be met even if the loan is extended. [Emphasis added.]

Your specific question is whether an interaccount loan may be made to a special revenue account when the borrower anticipates no income with which to repay the loan, other than the possibility of a supplemental appropriation sometime in the future. I conclude that reliance on the possibility of a supplemental appropriation does not meet the requirement of reasonable evidence of future income under the interaccount loan statute.

There are no restrictions in the interaccount loan statute on which sources of revenue may be used by the borrower to repay a loan. However, the legislative committee discussions of the statute, referred to above, suggest that the loan procedure was intended for accounts with insufficient cash balances who were awaiting funds presently due them, rather than funds which might or might not be due them in the future.

My conclusion is also supported by the statutory prerequisite that there be "reasonable evidence" of anticipated income for repayment of the loan. This requirement suggests that there be something more than a mere desire to receive income sometime in the future. The "reasonable evidence" language of section 17-2-107(2), MCA, is clear indication that the borrower must actually anticipate income to repay the loan. A

discussion of this language took place in the Senate Finance and Claims Committee on March 17, 1983.

> SENATOR SMITH: I would address this question to Morris Brussett [sic]: In my earlier comment, let's say you anticipated a certain amount of income within a calendar year and it is not generated. How do you expect to pay off the loan?
>
> MORRIS BRUSETT: We require a certification and documentation. Most of it is federal and they authorize that the federal is coming in, or a grant that is coming in. Many times it is merely a time delay. If we feel there is any possibility that the money might not come in then we do not make the loan. ...

Discussion of House Bill 449, Senate Finance and Claims Committee, March 17, 1983, page 4. See also the Committee discussion of March 9, 1983, page 6. The above-quoted discussion suggests that something more than the hope of a supplemental appropriation is needed to meet the reasonable-evidence-of-future-income requirement of the interaccount loan statute.

THEREFORE, IT IS MY OPINION:

1. A disaster or emergency must be declared by the Governor before expenses may be incurred under section 10-3-312, MCA.

2. If a disaster is declared by the Governor under Title 10, chapter 3, MCA, the $1 million statutory appropriation provided for in section 10-3-312, MCA, need not be expended before any other funds may be used for expenses associated with the disaster.

3. The budget amendment process was not intended to permit a loan from the state's general fund, where the only anticipated revenue for repayment is the possibility of a subsequent appropriation of funds from the general fund.

4. Reliance on the possibility of a supplemental appropriation sometime in the future does not meet the reasonable-evidence-of-future-income requirement of the interaccount loan statute.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 124

COUNTY ATTORNEYS - County attorney entitled to receive "actual traveling expenses" for attendance at annual convention of state officeholders association;
COUNTY OFFICERS AND EMPLOYEES - County travel policy subject to requirement that county attorneys, sheriffs, assessors, and justices of the peace are entitled to receive "actual traveling expenses" for attendance at annual convention for the office held;
MONTANA CODE ANNOTATED - Section 7-5-2145(3);
OPINIONS OF THE ATTORNEY GENERAL - 40 Op. Att'y Gen. No. 77 (1984).

HELD: In attending the annual state convention for the office held, a county attorney, sheriff, assessor, or justice of the peace is entitled to obtain "actual traveling expenses" which may exceed the levels established in a county travel policy.

16 November 1988

Lee Kerr
Treasure County Attorney
P.O. Box 72
Hysham MT 59038

Dear Mr. Kerr:

I have reviewed your recent opinion request in which you ask whether a county attorney, sheriff, assessor, or justice of the peace, in attending the annual state convention for the office which he holds, is limited in his travel expense reimbursement by a county travel policy or is entitled to "actual traveling expenses" pursuant to section 7-5-2145(3), MCA. Based upon 40 Op. Att'y Gen. No. 77 at 309 (1984), and the clear meaning of the statute, I conclude that, in the instance of attending the annual meeting of the officeholders for the office which each holds, these county officers are entitled to "actual traveling expenses," which may exceed the established county travel policy. I also find that the statute providing for "actual traveling expenses" is not limited solely to transportation costs, but includes normal expenses incident to travel such as lodging and meal costs.

Section 7-5-2145, MCA, states in relevant part:

> (3) County attorneys, sheriffs, assessors, and justices of the peace may attend their respective meetings or conventions held within the state and are allowed actual traveling expenses, not more often than once a year, for attending the same.

In 40 Op. Att'y Gen. No. 77 at 313, I concluded in part:

> Except as may otherwise be specified statutorily, a board of county commissioners with general governmental powers may adopt rules and regulations providing for payment or reimbursement of reasonable meal and lodging expenses incurred by county officers or employees in the performance of official duties. [Emphasis added.]

One of the statutory exceptions to this general conclusion, referred to specifically in my prior opinion, is section 7-5-2145(3), MCA, which allows for "actual traveling expenses" for attendance at the specified officer's annual convention. Other statutory exceptions are likewise noted in my previous opinion.

THEREFORE, IT IS MY OPINION:

> In attending the annual state convention for the office held, a county attorney, sheriff, assessor, or justice of the peace is entitled to obtain "actual traveling expenses" which may exceed the levels established in a county travel policy.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 125

COUNTY ATTORNEYS - Appointment of county attorney, procedure, eligibility;
COUNTY GOVERNMENT - Appointment of county attorney, procedure, eligibility;
COUNTY OFFICERS AND EMPLOYEES - Appointment of county attorney, procedure, eligibility;
PUBLIC OFFICERS - Appointment of county attorney, procedure, eligibility;
RESIDENCE - Change of;
MONTANA CODE ANNOTATED - Sections 7-4-2201, 7-4-2206, 7-4-2701, 7-4-2702, 13-1-111;
MONTANA CONSTITUTION - Article IV, sections 2, 4;
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 22 (1979).

HELD: 1. If no licensed attorney in Musselshell County wishes to be appointed county attorney, the board of county commissioners should proceed to fill the vacancy under section 7-4-2702, MCA, as though there were no licensed attorneys in the county.

2. If one or more licensed attorneys are residents of the county and wish to be appointed, but the county commissioners do not want to appoint one of them, the county commissioners may recruit and appoint an out-of-county attorney only if the attorney will be a county resident and meet other eligibility requirements by the time of appointment.

23 November 1988

Richard E. Walker, Chairman
Musselshell County Commissioners
Musselshell County Courthouse
Roundup MT 59072

Dear Mr. Walker:

You have requested my opinion on the following questions:

1. What is the procedure for filling a vacancy in the position of county attorney if no licensed attorneys in the county wish to be appointed?

2. What if more than one resident licensed attorney wishes to be appointed?

3. If one licensed attorney is a resident of the county and wishes to be appointed, but the county commissioners do not want to appoint him, may they appoint an out-of-county attorney who is willing to move into the county?

You have informed me that the Musselshell County Attorney has resigned effective November 10, 1988. I also understand Musselshell County has a population of less than 30,000 people. Therefore, the qualifications for county attorneys in certain counties provided in section 7-4-2701, do not apply to a county attorney serving Musselshell County.

There are, however, several provisions which do affect a licensed attorney's eligibility to be appointed Musselshell County Attorney. The office of county attorney is a public office. § 13-1-101(15), MCA. Article IV, section 4 of the Montana Constitution provides that any qualified elector is eligible to hold public office, subject to additional qualifications provided by the Legislature. Pursuant to Article IV, section 2 of the Montana Constitution and section 13-1-111, MCA, a qualified elector must be: registered to vote as required by law, at least 18 years of age, a resident of the state of Montana and of the county in which he offers to vote for at least 30 days, and a citizen of the United States. A felon may not be an elector while he is serving his sentence in a penal institution, nor may a person adjudicated to be of unsound mind unless he has been restored to capacity as provided by law. Mont. Const. Art. IV. § 2; § 13-1-111(2), (3), MCA.

Section 7-4-2201, MCA, which sets forth general qualifications for county office, restates certain qualifications required of any elector and adds that no person is eligible to hold a county office who at the time of his election is not "an elector of the county in which the duties of the office are to be exercised or for which he is elected." Section 7-4-2206, MCA, permits the county commissioners to appoint a person to fill any vacancy in a county office, except that of a county commissioner. However, it makes no mention of any requirement that the appointee meet the qualification requirement of elected county officers set forth in section 7-4-2201, MCA, i.e., that an appointed county officer be an elector of the county in which the duties of the office are to be exercised. See also

§ 7-4-2203, MCA (specifically applying to "elected or appointed"). I therefore conclude that the person appointed to be county attorney must be a qualified elector of this state, but he need not be an elector of the county where he is to serve prior to appointment. Cf. 38 Op. Att'y Gen. No. 22 at 76 (1979) (issue of whether appointed county attorney must be qualified elector of county at time of appointment discussed but not resolved).

The specific statutory provision concerning filling a vacancy in the office of county attorney, § 7-4-2702, MCA, provides:

> (1) Whenever a vacancy in the office of county attorney shall arise in any county and there is no licensed attorney residing in said county who is eligible to be appointed to fill said vacancy, the board of county commissioners is authorized and has the power to employ special counsel from without the county, who shall be designated and officially known as the "acting county attorney" and who during said employment shall be vested with all the powers and shall perform all the duties of the county attorney, including the filing of all complaints, informations, and/or other proceedings for and in which the county or state may be a party and the prosecution and defense of the same to the same extent and with the same force and effect as if he were the regular qualified county attorney. Said attorney shall be paid a monthly compensation not to exceed the monthly salary of the county attorney. Whenever any such attorney is employed, the county clerk of said county shall certify to the attorney general the name of such acting county attorney and the fact of his employment.
>
> (2) Whenever any licensed attorney shall establish residence in said county and become eligible to hold the office of county attorney, it shall be the duty of the board to appoint such attorney to fill said vacancy, and the employment of said special attorney shall thereupon cease.

Thus, a licensed attorney who is a resident of Musselshell County and a qualified elector as set forth in Article IV, section 2 of the Montana Constitution and section 13-1-111, MCA, is eligible to be appointed county attorney.

In answer to your first question, if none of the eligible licensed attorneys residing in the county wish to be appointed, they cannot be forced to serve. In that case, the board of county commissioners should proceed under section 7-4-2702, MCA, as though there are no licensed attorneys in the county.

Your second and third questions concern a choice to be made by the board of county commissioners as to which eligible attorney to appoint. The power to appoint to office carries with it discretion in the exercise of the power, and a valid appointment requires a choice by the appointing power of the person appointed. Horvath v. Mayor of City of Anaconda, 112 Mont. 266, 273, 116 P.2d 874, 878 (1941). The statutes provide no specific procedure for choosing which applicant to appoint; therefore, the board must provide a fair method of evaluating the eligible applicants before making a choice.

If there are eligible licensed attorneys residing in the county, the board may choose to appoint one of them. The issue is more complicated in a situation where the board of county commissioners does not wish to appoint any of the interested licensed attorneys residing in the county, but would rather recruit an out-of-county attorney who is willing to reside in Musselshell County. In my opinion, the board must appoint an eligible licensed attorney residing in the county unless an out-of-county attorney whom the board prefers to appoint will be able to satisfy the residency and eligibility requirements by the time of his appointment. In a similar situation in 38 Op. Att'y Gen. No. 22 at 76 (1979), I noted that the attorney under consideration had declared his intention to reside on a permanent basis in the appointing county and was actively seeking a permanent residence in the appointing county. He was also closing out his personal and business offices in the other county while simultaneously establishing a new residence in the appointing county. I held that those actions demonstrated a change in residence and an intent to permanently reside in the appointing county. If a licensed attorney under consideration becomes a resident of Musselshell County by the date of appointment, he will be eligible for appointment. If not, an eligible licensed attorney residing in the county must be appointed. § 7-4-2702, MCA.

THEREFORE, IT IS MY OPINION:

1. If no licensed attorney in Musselshell County wishes to be appointed county attorney, the board of county commissioners should proceed

to fill the vacancy under section 7-4-2702, MCA, as though there were no licensed attorneys in the county.

2. If one or more licensed attorneys are residents of the county and wish to be appointed, but the county commissioners do not want to appoint one of them, the county commissioners may recruit and appoint an out-of-county attorney only if the attorney will be a county resident and meet other eligibility requirements by the time of appointment.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 126

FIRE DISTRICTS - Application of property tax limitation in Title 15, chapter 10, part 4;
FIRE DISTRICTS - Lack of authority to issue bonds;
TAXATION AND REVENUE - Application of property tax limitation in Title 15, chapter 10, part 4;
TAXATION AND REVENUE - Election requirement for tax increase to be in effect for more than one year under section 15-10-412(9), MCA;
MONTANA CODE ANNOTATED - Sections 7-33-2104, 7-33-2109, 15-10-412(9);
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 80 (1988), 38 Op. Att'y Gen. No. 87 (1980).

HELD: 1. 38 Op. Att'y Gen. No. 87 (1980) is still valid insofar as it holds that rural fire districts may not issue bonds for fire district purposes.

2. A rural fire district's purchase of real property and construction of a fire hall fall within the contemplation of section 15-10-412(9), MCA.

3. Section 15-10-412(9), MCA, does not require an election to be held each year when the fire district proposes a long-term project that would entail the tax increase to be in effect for more than one year, so long as the voters are specifically notified of the type and extent of the increased tax liability when they vote on the increase.

29 November 1988

Thomas R. Scott
Beaverhead County Attorney
2 South Pacific, CL. #2
Dillon MT 59725-2713

Dear Mr. Scott:

You have requested my opinion concerning the following questions:

1. Is 38 Op. Att'y Gen. No. 87 (1980) still valid insofar as it holds that rural fire districts may not issue bonds for fire district purposes?

2. Do the purchase of real property and the construction of a fire hall fall within the contemplation of section 15-10-412(9), MCA?

3. If the answer to the second question is yes, is it necessary to hold an election each year with respect to a proposed long-term project?

Your questions arise from a proposal of the Beaverhead County rural fire district to purchase land and build a fire hall in conjunction with the city of Dillon. The establishment and operation of rural fire districts are governed by Title 7, chapter 33, part 21, MCA. Such districts may be operated by the county or by a board of trustees. § 7-33-2104, MCA. The county is authorized to levy a tax upon the properties in the rural fire district for the operation of the district. § 7-33-2109, MCA.

In 38 Op. Att'y Gen. No. 87 at 301 (1980), I held that rural fire districts are foreclosed by action of the Montana Legislature from issuing bonds to raise money for fire district purposes. I also held that fire districts have implied authority to secure financing for fire district equipment and facilities. I am unaware of any change in the law that would alter my opinion on those matters.

You have also inquired concerning the application of section 15-10-412(9), MCA, to the district's purchasing of real property and construction of a fire hall. That portion of the statute, which was enacted following the passage of Initiative No. 105 in 1986, provides:

> (9) The limitation on the amount of taxes levied does not apply in a taxing unit if the voters in the taxing unit approve an increase in tax liability following a resolution of the governing body of the taxing unit containing:
>
> (a) a finding that there are insufficient funds to adequately operate the taxing unit as a result of 15-10-401 and 15-10-402;
>
> (b) an explanation of the nature of the financial emergency;
>
> (c) an estimate of the amount of funding shortfall expected by the taxing unit;

(d) a statement that applicable fund balances are or by the end of the fiscal year will be depleted;

(e) a finding that there are no alternative sources of revenue;

(f) a summary of the alternatives that the governing body of the taxing unit has considered; and

(g) a statement of the need for the increased revenue and how it will be used. [Emphasis added.]

The Beaverhead County rural fire district is operated by a board of trustees, and is therefore a "taxing unit" for the purpose of this provision. 42 Op. Att'y Gen. No. 80 (1988). Thus, if the board of trustees determines that it must acquire the real property and construct a fire hall in order to "adequately operate" the fire district and requires funding in addition to that otherwise allowed under section 15-10-412, MCA, it may proceed under this subsection.

With regard to your last question, one of the procedural requirements under section 15-10-412(9), MCA, is that the governing body adopt a resolution and the voters approve the increase in taxes to be levied by the taxing unit. The statute, however, is silent as to whether there must be voter approval every year for a long-term project that would entail the tax increase to be in effect for more than one year.

The purpose of section 15-10-412(9), MCA, is to require voter notification and approval of increased tax liability when a taxing unit is in need of increased revenue. In cases such as yours, it would not make sense to allow approval of increased tax liability for a long-term financial obligation and then permit disapproval in subsequent years even though the financial obligation still exists. Thus, where voters are specifically notified of the type and extent of increased tax liability when they vote on the increased tax, the approval should be adequate for future years.

THEREFORE, IT IS MY OPINION:

1. 38 Op. Att'y Gen. No. 87 (1980) is still valid insofar as it holds that rural fire districts may not issue bonds for fire district purposes.

2. A rural fire district's purchase of real property and construction of a fire hall fall within the contemplation of section 15-10-412(9), MCA.

3. Section 15-10-412(9), MCA, does not require an election to be held each year when the fire district proposes a long-term project that would entail the tax increase to be in effect for more than one year, so long as the voters are specifically notified of the type and extent of the increased tax liability when they vote on the increase.

Very truly yours,

MIKE GREELY
Attorney General

BEFORE THE DEPARTMENT OF HIGHWAYS

OF THE STATE OF MONTANA

IN THE MATTER of the Application of Marvin L. Wagner and Jeanne M. Wagner for a Declaratory Ruling on the applicability of Title 27, Chapter 30, Part 2, MCA, Section 75-15-113, MCA, and ARM 18.6.261 and 18.6.262 to their Applications for Outdoor Advertising Permits.	)))))))	DECLARATORY RULING

BACKGROUND

On July 20, 1988, Marvin L. and Jeanne M. Wagner (Petitioners) submitted two applications for Outdoor Advertising Permits. Petitioners sought permits for two new outdoor advertising structures to be erected near Milepost 451 on Interstate Highway 90, Route 890, Yellowstone County, Montana. On July 26, 1988, the Department's representative denied the applications because issuance of the permits would violate the statutory spacing requirements for outdoor advertising signs. Specifically, the Department's representative determined that Outdoor Advertising Permit No. 01588 was issued for an outdoor advertising structure located near Milepost 450.68 and the permitted sign was less than 500 feet distance from the proposed site of the Petitioners' signs. On September 19, 1988, the Department received the Petitioners' Petition for Declaratory Ruling.

ISSUE

Whether the provisions of Sections 27-31-201, et. seq., and 75-15-113, MCA, and ARM 18.6.261 and 18.6.262 must be construed and applied by the Department to require the cancellation of Outdoor Advertising Sign Permit No. 01588 and the granting of the Petitioners' applications for Outdoor Advertising Permits?

DISCUSSION

Outdoor advertising in Montana is controlled by the Montana Outdoor Advertising Act, Sections 75-15-101 through 75-15-134, MCA. The spacing of outdoor advertising structures is controlled, in part, by the provisions of Section 75-15-113, MCA, which provides in pertinent part:

"75-15-113. Standards for permitted advertising.

...

(7) No two signs shall be spaced less than 500 feet apart adjacent to an interstate highway or limited-access primary highway, except that signs may be erected closer than 500 feet if they are separated by buildings or other obstructions in such a manner that only one sign facing located within the above spacing distance is visible from the highway at any one time.

..."

The Petitioners concede that the site for their proposed signs is less than 500 feet from the site of the sign issued Permit No. 01588. However, the Petitioners contend Permit No. 01588 must be cancelled by the Department as an abandoned sign under the provisions of ARM 18.6.261 and 18.6.262. The Petitioners further contend the abandoned sign issued Permit No. 01588 constitutes a public nuisance under the provisions of Section 75-15-113, MCA. Petitioners contend the Department possesses the authority under the provisions of Section 27-30-201, MCA, et seq., to abate such a public nuisance by destroying the sign issued Permit No. 01588.

ARM 18.6.261 provides a sign will be deemed abandoned and a permit may be cancelled when "... poles or a structure, which has been permitted as an outdoor advertising device, remains for a period of more than three months without a facing being attached ...". ARM 18.6.262 provides that a permit may be cancelled when "... a sign face has been blank or painted out for a period of six continuous months ...".

The Petitioners have represented to the Department that the sign for Permit No. 01588 remained blank for more than six months. However, the Department cannot verify the Petitioners' representations. The Department's records establish that the sign for Permit No. 01588 contained advertising on July 28, 1987. Based upon the Petitioners' representations, the Department inspected the sign on June 27, 1988, and determined that the sign was blank. However, on

July 28, 1988, the Department verified that advertising had been placed on the blank sign. In the absence of the Department being able to verify the sign was blank for six or more months, the Department is without sufficient grounds to exercise its discretion and cancel the permit under the provisions of ARM 18.6.262. Similarly, in the absence of the Department being able to verify the face of the sign was removed for more than three months, the Department is without sufficient grounds to exercise its discretion and cancel the permit under the provisions of ARM 18.6.261.

Even if the Department had been able to verify that the advertising structure was abandoned for three or more months, neither the provisions of Section 75-15-133, MCA, nor the provisions of Section 27-30-201, MCA, et seq., are authority for the Department summarily destroying the sign as a public nuisance. The provisions of Section 27-30-201, MCA, et seq., are general statutory provisions addressing public nuisance and the abatement of public nuisance. Section 75-15-131, MCA, is a provision of the Montana Outdoor Advertising Act and specifies the procedures which the Department must follow prior to the removal of unlawful advertising. Section 75-15-131, MCA, specifically requires the Department to give the Sign Owner and Site Owner written notice of the Department's intent to remove unlawful advertising and provide the opportunity for administrative hearing prior to the removal of the unlawful advertising. The Montana Administrative Procedure Act further provides for judicial review of a final agency decision issued after administrative hearing. The Department is without authority to remove unlawful advertising unless there is compliance with the provisions of Section 75-15-131, MCA. There is no authority for the Department to remove unlawful advertising under the general statutory provisions of Section 27-30-201, MCA, et seq. The Department must comply with the specific statutory provisions of Section 75-15-131, MCA. State ex rel. Jones v. Giles, 168 Mont. 130, 541 P.2d 355 (1975).

DECLARATORY RULING

There is an absence of competent, substantial evidence establishing abandonment of the sign issued Permit No. 01588. In the absence of competent, substantial evidence establishing abandonment of the sign, the Department is without authority to cancel the permit under the provisions of either ARM 18.6.261 or ARM 18.6.262. The specific provisions of Section 75-15-131, MCA, and not the general provisions of

Section 27-30-201, MCA, et seq., control the Department's authority to remove unlawful advertising. The sign issued Permit No. 01588 does not constitute unlawful advertising and there is no basis for removal of the sign by the Department. The spacing provisions of Section 75-15-113(7), MCA, prohibit the Department from granting the Petitioners' Applications for Outdoor Advertising Permits.

DATED this 10th day of November, 1988.

Gary J. Wicks
Director of Highways

By: Gary J. Wicks

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

IN THE MATTER of the Application of Montana-Dakota Utilities Company) to Revise the Language of Gas Transportation Rates 81, 82 and 97.)	UTILITY DIVISION DOCKET NO. 87.1.8

DECLARATORY RULING

On August 26, 1988, the Public Service Commission (Commission) received a Petition for Declaratory Ruling from Western Gas Processors (WGP) and Holly Sugar Company (Holly) in Docket No. 87.1.8. The question put by the Petitioners is as follows:

> Pending the Commission's decision in this docket, should Montana-Dakota Utilities Co. (MDU) continue, after October 17, 1988, to charge pursuant to Rate 97 for the transportation of natural gas from Western [WGP] to Holly Sugar?

It is Petitioners' position that MDU is obligated to charge pursuant to Rate 97 for transportation of natural gas from WGP to Holly as long as WGP remains a qualifying supplier and as long as Rate 97 is in effect.

The Commission issued a notice of the Petition on September 2, 1988. The deadline for submitting comments on the Petition was September 15, 1988. Timely comments were received from Montana-Dakota Utilities Co. (MDU). The Commission accepted late filed comments from the Montana Consumer Counsel (MCC). Western Sugar Company and Koch Hydrocarbons filed a motion to strike the Petition.

DISCUSSION AND RULING

The Commission has issued two previous declaratory rulings in this docket that relate to the application of Rate 97. See Declaratory Rulings issued on October 8, 1987 and July 26, 1988, in Docket No. 87.1.8. In response to both of the factual situations presented, the Commission responded essentially as follows: As long as MDU has a customer that qualifies for service under Rate 97, that customer should be served under Rate 97 for as long as that rate is in effect. WGP and Holly contend in this petition that Holly will remain qualified for service under Rate 97 after October 17, 1988, despite the expiration date of the present service agreement between MDU and Holly. WGP and Holly contend that WGP will remain a "qualifying supplier" after October 17, 1988, because of the terms of a service agreement between WGP and Williston Basin Interstate Pipeline Company (WBIP) concluded in August of 1983. MDU does not challenge these contentions but argues that the Commission should consider terminating Rate 97 on October 17, 1988, because "Petitioners' prayer, if granted, would establish for Holly an indefinite entitlement to Rate 97

service, absent any other Commission action." MCC argues that the Commission should terminate Rate 97 on October 17, 1988, because it may not cover incremental costs, resulting in other MDU ratepayers being responsible for the revenue shortfall.

The Commission will not, in response to this petition, declare that Rate 97 terminates on October 17, 1988. The Commission rules, consistent with its previous rulings, that MDU should charge Rate 97 to those customers that qualify for Rate 97. The service agreement that MDU has with Holly that is to terminate on October 17, 1988, has no bearing on whether Holly qualifies for service under Rate 97. MDU cannot, by separate agreement, disqualify a customer that otherwise qualifies under the terms of a Commission approved tariff. The Commission has from the inception of Rate 97 been concerned about the economic basis for the $.05 rate. However, the Commission has been unwilling to terminate Rate 97 until such time as a record is established which provides a basis for a different rate. Rate 97 is at issue in this docket and will be considered by the Commission in its final order.

The Motion of Western Sugar and Koch Hydrocarbons to strike the Petition is denied. 1) It is the nature of declaratory rulings to address problems that may arise. 2) Whether MDU should charge Holly pursuant to Rate 97 after October 17, 1988, is not an issue in Docket No. 87.1.8. Rate discrimination and the economic basis for Rate 97 are at issue. 3) The Commission agrees that the language of Rate 97 in its present form is relatively clear and unambiguous. It is for that reason, and the fact that Rate 97 is under review in this docket, that the Commission has no difficulty making this ruling.

Done and Dated this 11th day of October, 1988 by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

CLYDE JARVIS, Chairman

DANNY OBERG, Commissioner

TOM MONAHAN, Commissioner

ATTEST:

Carol Frasier
Commission Secretary

(SEAL)

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 September 30, 1988. This table includes those rules adopted during the period September 30, 1988 through December 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 September 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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