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MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 4

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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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STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF REALTY REGULATION

In the matter of proposed rules pertaining to timeshare sales.	)	NOTICE OF PUBLIC HEARING ON PROPOSED NEW RULES I THROUGH XVI PERTAINING TO THE LICENSURE OF TIMESHARE BROKERS AND SALESPERSONS AND THE REGISTRATION OF TIMESHARE OFFERINGS

To: All Interested Persons

1. On Friday, March 18, 1988, at 9:00 a.m., a public hearing will be held in the downstairs conference room of the State of Montana Department of Commerce building located at 1424 9th Avenue, Helena, Montana, to consider the adoption of proposed new rules pertaining to the licensure of timeshare brokers and salespersons and the registration of timeshare offerings.

2. The proposed new rules provide as follows:

"I. APPLICATION OF RULES--SUB-CHAPTER DISTINCTION (1) In this chapter, sub-chapter 4 primarily applies to real estate brokers and salespersons and sub-chapter 6 primarily applies to timeshare sales licensing and registration, except where, by statute or rule, the provisions of either sub-chapter are otherwise made applicable."

Auth: 37-51-203, 37-53-104, MCA Imp: 37-51-203, 37-53-104, MCA

REASON: This rule is needed to clarify the application of the sub-chapters and parts of the board's rules to minimize the possibility of misunderstanding or confusion caused by similar or identical terminolgy.

"II. LICENSURE--LICENSED REAL ESTATE BROKERS AND SALESPERSONS (1) Pursuant to 37-53-301, MCA, a person licensed as a real estate broker or real estate salesperson under Title 37, chapter 51, MCA, need not obtain a separate or additional license to act as a timeshare broker or salesperson, but must obtain a certificate of completion from the board.

(2) Certificates of completion may be obtained by written request to the board accompanied by satisfactory proof of successful completion of an approved course of education and payment of the required fee."

Auth: 37-1-131, 37-53-104, MCA Imp: 37-53-301, MCA

REASON: This rule is needed to provide the procedure through which certificates of completion may be obtained by applicants who are licensed real estate brokers or salespersons.

"III. LICENSURE--TIMESHARE BROKERS (1) In addition to the definition of "timeshare broker" contained in 37-53-102(15), "timeshare broker" shall mean a timeshare licensee designated by a developer to supervise a sales staff.

(2) Except as provided in (Rule II) applications for licensure as a timeshare broker shall be made on a completed form provided by the board accompanied by satisfactory proof of successful completion of an approved course of education and examination, a personal disclosure statement, and payment of the required fee."

Auth: 37-1-131, 37-53-104, MCA Imp: 37-53-102, 37-53-301, MCA

REASON: This rule makes it clear that a designated timeshare licensee supervisor of timeshare salespersons shall be considered to be a timeshare broker under the act. This rule is needed to establish the procedure through which licenses may be obtained by applicants for a timeshare broker's license.

"IV. LICENSURE--TIMESHARE SALESPERSONS (1) Except as provided in (Rule II) applications for licensure as a timeshare salesperson shall be made on a completed form provided by the board accompanied by satisfactory proof of successful completion of an approved course of education and examination, a personal disclosure statement, and payment of the required fee."

Auth: 37-1-131, 37-53-104, MCA Imp: 37-53-301, MCA

REASON: This rule is needed to establish the procedure through which licenses may be obtained by applicants for a timeshare salesperson's license.

"V. LICENSURE--PERSONAL DISCLOSURE STATEMENT (1) Except as provided in (Rule II) applicants for licensure as a timeshare broker or salesperson shall file, with application for licensure, a typewritten or printed personal disclosure statement, which shall contain, in the following order and in detail, including accurate dates, specific locations, and complete names, addresses, and phone numbers of persons having information, the following, for the 10 years preceding application:

(a) a detailed narrative of the experience that the applicant has had in relation to the purchase and sale and negotiations for the purchase and sale, on the applicant's own behalf or the behalf of others, of timeshare, condominium, subdivision, and real estate interests;

(b) any and all licenses, certifications, registrations, and permits held by the applicant, including by a business organization of which the applicant had or has a director or management interest, which authorized or authorizes using a title, or practicing an activity, related to the registration, sale, purchase, lease, or other disposition of a timeshare, condominium, subdivision, or real estate;

(c) any and all violations by the applicant, including by a business organization of which the applicant had or has a director or management interest, of any timeshare,

condominium, subdivison, real estate, or consumer protection law or regulation, whether such violation resulted in criminal, civil, or administrative action;

(d) any and all of applicant's convictions of a felony for any reason;

(e) any and all civil actions, in law or equity, related to timeshare, condominium, subdivision, real estate, consumer protection, or contract, in which the applicant or a business organization of which the applicant had a director or management interest was named as a defendant, cross-defendant, or counterclaim defendant;

(f) any and all voluntary or involuntary bankruptcy proceedings in which the applicant, including a business organization of which the applicant has or had a director or management interest, was named as a debtor;

(g) a narrative summary of the applicant's credit history and a current credit report, including three references for verification;

(h) three personal references; and

(i) three professional references, being persons that have been in a supervisory capacity over the applicant or persons that are not, and have not been, directly affiliated with the applicant."

Auth: 37-1-131, 37-53-104, MCA Imp: 37-53-104, 37-53-301, 37-53-302, MCA

REASON: This rule is needed to provide a means, for the protection of the public, whereby the board may obtain information on the applicant to use in evaluation of his or her competence to practice.

"VI. LICENSURE--NON-RESIDENTS (1) Non-residents may license in this state by meeting the qualifications of the statutes and rules. An irrevocable consent to service of process, in form prescribed by and available from the board, shall be required of each non-resident license applicant."

Auth: 37-1-131, 37-53-104, MCA Imp: 37-1-131, 37-53-104, 37-53-301, MCA

REASON: This rule recognizes the rights of non-residents to practice in this state. It is necessary that jurisdiction over non-resident licensees be and remain readily obtainable.

"VII. LICENSURE--COURSE OF EDUCATION (1) Each applicant for licensure or certificate of completion shall have successfully completed a course, or courses, of education related to the timeshare industry and approved by the board. An approved course of education under section 37-53-301, MCA, shall consist of 20 classroom hours of instruction in subjects approved in advance by the board.

(2) Request for advance approval shall be made in writing and must contain all relevant available information about the course content and the instructors or administrators of the courses, sufficient to enable the board to evaluate timeshare relatedness and to confirm attendance and successful completion. No course will be approved for an applicant if

attended more than two years prior to the application for certificate of completion or licensure."

Auth: 37-1-131, 37-53-104, 37-53-301, MCA Imp: 37-53-301, MCA

REASON: Statutes recognize and experience has shown that education improves the licensee's knowledge and practical abilities. It is necessary that the licensees have appropriate knowledge in regard to the timeshare industry to be competent to provide services and protect the public.

"VIII. LICENSURE--EXAMINATION (1) Examinations shall be administered by persons designated by the board at times and places designated by the board. Information about the examinations may be obtained from the board office.

(2) Application to take the examination shall be made to the board in writing and shall be received no less than 15 days prior to the date of examination, accompanied by a fee of $35, which is not refundable.

(3) Successful completion of the examination shall be by obtaining a score of 80% or greater on each subject tested.

(4) For purposes of application for licensure, the examination score will qualify for two years."

Auth: 37-1-131, 37-53-104, MCA Imp: 37-53-301, MCA

REASON: Examination is required by statute and it is a generally accepted method of measuring competence to practice.

"IX. LICENSURE--RENEWAL (1) Licenses and certificates of completion for timeshare brokers and salespersons shall be renewed annually in the month of December, postmarked no later than December 31 of the year preceding that for which the renewal is requested, include payment of the required fee, and, except as contained in (Rule II) shall include a typewritten, or printed, and sworn update to the personal disclosure statement.

(2) The license held by a licensee who fails to submit a complete renewal request prior to the date set forth above shall lapse on January 1 of the new license year. The lapsed license may be reinstated by payment of the renewal fee and the late renewal fee at any time within 45 days from the renewal deadline. The late renewal fee shall be $50.

Auth: 37-1-131, 37-53-104, MCA Imp: 37-1-131, 37-53-104, MCA

REASON: It is necessary that a procedure for renewal be provided and that a means of monitoring changes in licenses and circumstances be maintained.

"X. REGISTRATION--APPLICATION (1) Application for registration of a timeshare offering shall be made on a form provided by the board and include the required documents and the required fee."

Auth: 37-53-104, MCA Imp: 37-53-104, 37-53-202, MCA

REASON: This rule is needed to provide the procedure for applications for registration.

"XI. REGISTRATION--DISCLOSURE DOCUMENT (1) The right to cancel any agreement for the purchase of a timeshare, as required in the disclosure document pursuant to 37-53-303, MCA, shall, in addition to the statutory requirements, include the the correct mailing address of the developer or the developer's agent, the correct street address of the developer or the developer's agent, and shall be accompanied by a prepared legal document that will effectively cancel the agreement."

Auth: 37-53-104, 37-53-303, MCA Imp: 37-53-303, MCA

REASON: This rule provides prospective purchasers with a less burdensome, legally acceptable, and readily available method of cancelling with a readily determinable designation of the proper address for delivery by mail or in person.

"XII. REGISTRATION--CONDITIONS OF REGISTRATION (1) It shall be a condition of registration that the registrant assures purchasers quiet enjoyment of the timeshare unit by providing satisfactory guarantee to the purchaser that all promises made that are yet to be performed or remain executory are covered by a performance bond, a trust, an escrow, or similar arrangement."

Auth: 37-53-104, 37-53-212, MCA Imp: 37-53-104, 37-53-212, MCA

REASON: This rule spells out the means whereby purchasers of timeshare units may be assured of quiet enjoyment under the statutes. The rule is needed to adequately protect purchasers in relation to promises remaining to be performed at the time of purchase.

"XIII. REGISTRATION--ALTERNATIVE DOCUMENTS ACCEPTABLE (1) Subject to paragraph 2, any document or set of documents actually filed with, or actually compiled in accordance with, a rule of any agency of the United States or any other state shall be acceptable alternatives to the documents required to be filed with an application for registration of a timeshare offering under section 37-53-202, MCA.

(2) If, in the boards discretion, the alternative documents do not provide reasonably equivalent material and recent information required by section 37-53-202, MCA and any applicable rule, the board may require that the alternative documents be supplemented accordingly."

Auth: 37-53-104, 37-53-204, MCA Imp: 37-53-104, 37-53-204, MCA

REASON: This rule implements section 37-53-204, MCA, and spells out the alternative means whereby registrants may register without unreasonable duplication of effort, yet, allows for supplementation in the event that adequate documentation does not exist.

"XIV. REGISTRATION--RENEWAL (1) Application for renewal of a registered timeshare offering shall be made on form provided by the board including attachment of the required documents and payment of the required fee."

Auth: 37-53-104, MCA Imp: 37-53-104, 37-53-203, MCA
REASON: The rule provides a procedure for renewal of timeshare offering registrations.

"XV. REGISTRATION--AMENDMENT FOR ADDITIONAL INTERVALS (1) Amendment to an application for registration or renewed registration shall be made on a form provided by the board and accompanied by the required attached documents and payment of the required fee."
Auth: 37-53-104, MCA Imp: 37-53-103, MCA
REASON: The rule provides a procedure for amendment of registrations.

"XVI. REGISTRATION--AMENDMENT FOR MATERIAL ADVERSE CHANGE (1) Amendment to application for registration or renewed registration shall be made on a form provided by the board and accompanied by the required attached documents and payment of the required fee."
Auth: 37-53-104, MCA Imp: 37-53-203, MCA
REASON: The rule provides a procedure for amendment of registration.

3. The reason, or rationale, for each proposed rule is set forth following each rule in paragraph 2 above.

4. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to the Montana Board of Realty Regulation, Department of Commerce, State of Montana, 1424 9th Avenue, Helena, Montana, 59620, no later than Friday, March 25, 1988.

5. Martin Jacobson, Staff Attorney, Montana Board of Realty Regulation, Department of Commerce, State of Montana, 1424 9th Avenue, Helena, Montana, 59620, phone (406) 444-4290, has been designated to preside over and conduct the hearing.

6. The specific statutory authority of this agency to make the rules and the specific statutes being implemented by the rules are noted following each rule in paragraph 2 above.

JOHN DUDIS, CHAIRMAN
BOARD OF REALTY REGULATION

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

Certified to the Secretary of State February 16, 1988.

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

In the matter of the amendment of rule 8.79.301 regarding licensee assessments	)	NOTICE OF PROPOSED AMENDMENT OF RULE 8.79.301 LICENSEE ASSESSMENTS - NO PUBLIC HEARING CONTEMPLATED
	)	DOCKET #82-88

TO: All Interested Persons:

1. On April 15, 1988 the department of commerce proposes to amend rule 8.79.301 relating to an assessment to be levied upon licensees subject to 81-23-202, MCA. The proposed amendment will become effective July 1, 1988.

2. The purpose of the amendment is to change the amount of the assessment and the effective date of the rule as it applies to the assessments. The rule as proposed to be amended would read as follows:

"8.79.301 LICENSEE ASSESSMENTS

(1) Pursuant to section 81-23-202, MCA, the following assessments for the purpose of deriving funds to administer and enforce the Milk Control Act during the fiscal year beginning July 1, ~~1987~~ 1988 and ending June 30, ~~1988~~ 1989, are hereby levied upon the Milk Control Act licensees of this department.

(a) A fee of ~~nine cents ($0.09)~~ eight cents ($0.08) per hundredweight on the total volume of all milk subject to the Milk Control Act produced and sold by a producer-distributor.

(b) A fee of ~~nine cents ($0.09)~~ eights cents ($0.08) per hundredweight on the total volume of all milk subject to the Milk Control Act sold in this state by a distributor home based in another state. Said fee is to be paid either by the foreign distributor or his jobber who imports such milk for sale within this state.

(c) A fee of four ~~and one half~~ cents ($0.045) per hundredweight on the total volume of all milk subject to the Milk Control Act sold by a producer.

(d) A fee of four ~~and one half~~ cents ($0.045) per hundredweight on the total volume of milk subject to the Milk Control Act sold by a distributor, excepting that which is sold to another distributor."

3. Interested persons are asked to note that the amount of the assessments proposed for fiscal year 1989 will be $0.08 per c.w.t. The amendment also changes the effective dates from July 1, 1987 through June 30, 1988 to be July 1, 1988 through June 30, 1989.

4. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Department of Commerce, 1520 East Sixth Avenue - Rm 50, Helena, Montana, no later than March 28, 1988.

5. If a person who is directly affected by the proposed amendments 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 along with any written comments he has to the above address no later than March 28, 1988.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10 percent (10%) or twenty-five (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 (10%) of those persons directly affected has been determined to be 34 persons based on an estimate of 336 resident and nonresident producers and distributors, and producer-distributors subject to this assessment.

7. The authority of the agency to make the proposed amendment is based on section 81-23-104 and 81-23-202, MCA, and implements section 81-23-202, MCA.

KEITH COLBO, DIRECTOR
DEPARTMENT OF COMMERCE

By: William E. Ross
William E. Ross, Bureau Chief
Montana Milk Control Bureau

Certified to the Secretary of State February 16, 1988.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the adoption of Student Assessment	)	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION OF RULE I, STUDENT ASSESSMENT

TO: ALL Interested Persons

1. On March 24, 1988, at 2:00 p.m., or as soon thereafter as it may be heard, a public hearing will be held in the Helena High School Library, 1300 Billings Avenue, Helena, Montana, in the matter of the proposed adoption of Rule I, Student Assessment.

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

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

(2) The board recognizes that the primary purpose of student assessment is to improve the quality of education and that there are a variety of assessment tools. Because, at the state level, it is useful to know how Montana students generally compare to students from other states, all accredited schools will annually administer norm-referenced tests selected from a list of such tests approved by the board and provided by the office of public instruction, except that schools that on the effective date of this rule are either:

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

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

(c) using only parts of the approved norm-referenced tests, have until July 1991 to comply with this subsection. The tests will be administered to students in grades three, eight and eleven in reading, writing, math, science and social studies. The test will be given in the month of April, and all scores will be sent to the office of public instruction by June 30 in a format specified by the office and approved by the board of public education.

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

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

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

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

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

AUTH: Sec. 20-2-121 MCA

IMP: Sec. 20-2-121 MCA

3. The board is proposing this rule to comply with the mandate of the 1987 legislature set forth in 20-2-121(12).

4. Interested persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or argument may also be submitted to Alan Nicholson, Chairman, Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59620, no later than March 25, 1988.

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

Alan Nicholson

ALAN NICHOLSON, CHAIRMAN
BOARD OF PUBLIC EDUCATION

BY: Claudette Morton

Certified to the Secretary of State February 16, 1988.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of Rule 11.14.102 pertaining to defining group facilities established chiefly for educational purposes	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 11.14.102 PERTAINING TO DEFINING GROUP FACILITIES ESTABLISHED CHIEFLY FOR EDUCATIONAL PURPOSES

TO: All Interested Persons

1. On March 17, 1988, at 1:00 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 11.14.102 pertaining to defining group facilities established chiefly for educational purposes.

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

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

Subsection (1) remains the same.

(2) "Group facility established chiefly for educational purposes" means a facility which serves no child under five years of age for more than three hours per day, and which services no child five years of age for more than six hours per day, and which follows a preschool curriculum or course of study designed to enhance the educational development of the children in attendance at the facility.

Subsections (2) through (20) are renumbered but otherwise remain the same.

AUTH: Sec. 53-4-503, MCA
IMP: Sec. 53-4-501, MCA

3. Rationale: The proposed amendment is necessary because some child care providers are circumventing the mandatory child care licensing/registration law by calling their day care facility a "program established chiefly for educational purposes." These are facilities operating eight to ten hours a day, serving children of any age and providing little specialized educational program. The intent of the legislature when it passed the day care bill in 1981 was to exempt those preschool facilities that offer part-day, educational programs. The legislature did not intend to exempt from

licensure or registration any day care facility that cares for children during the parents' working hours.

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 Family Services, P.O. Box 8005, Helena, Montana 59604, no later than March 24, 1988.

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

Director, Department of Family Services

Certified to the Secretary of State February 16, 1988.

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

In the matter of the rules regulating the sale of progeny of raptors	)))))	NOTICE OF PROPOSED AMENDMENT OF RULE 12.6.1406 TO ALLOW FOR THE SALE OF THE PROGENY OF RAPTORS UNDER CERTAIN CONDITIONS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On April 15, 1988, the Department of Fish, Wildlife and Parks proposes to amend Rule 12.6.1406 to allow for the sale of progeny of raptors under some circumstances.

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

12.6.1406 TRANSFER, PURCHASE, SALE OR BARTER OF RAPTORS OR, RAPTOR EGGS, RAPTOR SEMEN OR RAPTOR PROGENY (1) A permittee may transfer any lawfully possessed raptor, raptor egg or raptor semen to another permittee or transfer any raptor to a falconer who holds a valid state falconry permit if no money or other consideration is involved.

(2) A permittee may purchase, sell or barter any captive-bred raptor's progeny which is banded with a numbered seamless marker provided or authorized by the U.S. Fish and Wildlife Service (service), subject to the following conditions:

(a) when the permittee purchases from, sells to, or barters with any person in the United States, that person must be authorized by the service to purchase, sell or barter the progeny of captive-bred raptors;

(b) when the permittee purchases from, sells to or barters with any person in a foreign country, that person must be authorized by the wildlife management authority of that country to purchase, sell or barter the progeny of captive-bred raptors.

(3) ~~(2)~~ No raptor progeny may be ~~traded or~~ transferred, purchased, sold or bartered until it is two weeks old and only after it is properly banded with a nonreusable marker provided or authorized by the service, unless it is transferred to a state or federal wildlife management agency for conservation purposes.

(4) A permittee may not purchase, sell or barter the progeny of any raptor taken from the wild.

AUTH: 87-5-210, MCA
AUTH EXT: Sec. 4, Ch. 532, L. 1987
IMP: 87-5-206, MCA

3. Rationale: With House Bill 530, the 1987 legislative session amended 87-5-206(4), MCA, and 87-5-210(4), MCA, to allow the sale of the progeny of raptors, subject to regulation by the department. House Bill 530 also requires the department to report the results of the program regulating the sale of the progeny of raptors to the 51st legislature. Current regulations do not allow for the sale of progeny of raptors.

4. Interested parties may submit their data, views or arguments concerning the proposed amendments, in writing to Eileen Shore, Staff Attorney, Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620, no later than March 25, 1988.

5. If a person who is directly affected by the proposed amendments wishes to express data, views, and arguments orally or in writing at a public hearing, he must make a written request for a hearing and submit this request along with any written comments he has to Eileen Shore, Staff Attorney, Department of Fish, Wildlife and Parks, 1420 East Sixth Avenue, Helena, Montana 59620, no later than March 25, 1988.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendments; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected by the proposed amendment has been determined to be seven persons, based on seventy-four individuals who currently are permitted to possess and propagate raptors in Montana.

Richard L. Johnson
Deputy Director
Department of Fish,
Wildlife and Parks

Certified to the Secretary of State February 16, 1988.

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

In the matter of the adoption of proposed new rules I through XII concerning procedures for administration of the WIC supplemental food program	))))	NOTICE OF PUBLIC HEARING ON PROPOSED NEW RULES (Women, Infants & Children)

To: All Interested Persons

1. On May 4, 1988, at 1:30 p.m., a public hearing will be held in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the proposed rules on procedures for eligibility and participation in the federal Women, Infants & Children (WIC) program administered by the Montana Department of Health and Environmental Sciences.

2. The proposed new rules read as follows:

NEW RULE I PURPOSE OF RULES (1) The purpose of the rules in subchapters 1 and 2 of this chapter is to provide a clear procedural framework under which the department administers the federal special supplemental food program for women, infants, and children, the so-called "WIC" program which is sponsored by the food and nutrition service (FNS) of the United States department of agriculture (USDA) and which has been administered in Montana by the department of health and environmental sciences since approximately 1976.

AUTHORITY: 50-1-202, MCA
IMPLEMENTING: 50-1-202, MCA

NEW RULE II PROGRAM ADMINISTRATION AND GUIDANCE (1) As the state agency to which the USDA has delegated the administration of the WIC program, the department is responsible for the effective and efficient administration of the program in accordance with the USDA program regulations set forth in 7 CFR Part 246, USDA's regulations governing nondiscrimination (7 CFR Parts 15, 15a, and 15b), and USDA's regulations governing the administration of grants (7 CFR Part 3015).

(2) In addition to the documents referred to in section (1) above, the department, as the state agency to which the USDA has delegated the WIC program, also receives numerous policies, forms, guidelines, and instructions from the USDA food and nutrition service (FNS) issued under the FNS directives management system. The department has assembled such policies, forms, guidelines, and instructions (and the state forms and guidelines required by such directives) into two department documents:

(a) the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1987 edition), which is a comprehensive summary of applicable

federal regulations (all of which are elsewhere incorporated in this chapter), procedures, and forms used by the department, and which is distributed to each participating local agency and is to be followed by each local agency in administering the program; and

(b) "Guidelines on Financial Management of the WIC Program in Montana" (January 1988 edition), a series of instructions, guidelines, and interpretations developed by the USDA and periodically received by the department, to which the department refers in resolving financial management issues under the WIC program. This document (which is available to local agencies) is advisory in nature and does not establish mandatory requirements upon local agencies, food vendors, or program participants.

(3) The department hereby adopts and incorporates herein by reference the following:

(a) 7 CFR Part 246, which are USDA regulations governing nondiscrimination (7 CFR Parts 15, 15a, and 15b);

(b) 7 CFR Part 3015, which are USDA regulations governing the administration of grants; and

(c) the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1988 edition), which is a department handbook setting forth procedures, practices, and forms used for the implementation of the federal WIC program in Montana.

(d) Copies of these materials may be obtained from the Family/Maternal and Child Health Services Bureau, WIC Program, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTHORITY: 50-1-202, MCA
IMPLEMENTING: 50-1-202, MCA

NEW RULE III NUTRITION SERVICES STANDARDS (1) Standardized nutritional risk assessment procedures as developed and defined in "Nutritional Problems, Codes, Criteria and References for Public Health Nutrition Services" (December 1986 edition) and "Weighing and Measuring Children: A Training Manual for Supervisory Personnel" must be used by all participating local WIC agencies, in a form and manner prescribed by the department as included in the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1987 edition), which is a comprehensive summary of applicable federal regulations (all of which are elsewhere incorporated in this subchapter), procedures, and forms used by the department.

(2) Local agencies shall arrange for standard nutrition education contacts between local agencies and participating clients, which include appropriate type and number of contacts for high risk and lower risk participants as described in the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1987 edition), and shall utilize nutrition education materials which have met the criteria in "E.M.P.O.W.E.R. -- Evaluate Materials to Promote Optimal Use of WIC Education Resources" (April 1985 edition).

(3) Policies and procedures for authorizing specific WIC foods based on cost, availability, nutritional value, and participant acceptance are set forth in the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1987 edition).

(4) The department hereby adopts and incorporates herein by reference the following documents:

(a) "Nutritional Problems, Codes, Criteria and References for Public Health Nutrition Services" (December 1986 edition), which is a document developed to provide uniform nutrition risk criteria classification in the state of Montana, for use in the Montana WIC program to record assessment of client nutrition conditions and to determine eligibility for program benefits;

(b) the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1987 edition);

(c) "Weighing and Measuring Children: A Training Manual for Supervisory Personnel", which is a federal department of health and human services reference publication concerning standardized methods for weighing and measuring children; and

(d) "E.M.P.O.W.E.R. -- Evaluate Materials to Promote Optimal Use of WIC Education Resources" (April 1985 edition), which is a Massachusetts department of public health publication concerning evaluation of nutrition education materials.

(e) Copies of these documents may be obtained from the Family/Maternal and Child Health Services Bureau, WIC Program, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTHORITY: 50-1-202, MCA
IMPLEMENTING: 50-1-202, MCA

NEW RULE IV DEFINITIONS Unless otherwise indicated, the following definitions apply throughout this chapter:

(1) "Administrative and program services costs" means those direct and indirect costs, exclusive of food costs, as defined in 7 CFR 246.14(c), which the department determines to be necessary to support local agency program operations. Administrative and program services costs include, but are not limited to, the costs of program administration, start-up, monitoring, auditing, the development of and accountability for food delivery systems, nutrition education, outreach, certification, and developing and printing food instruments.

(2) "Affirmative action plan" means that portion of the department plan which describes how the program will be initiated and expanded within the department's jurisdiction in accordance with 7 CFR 246.4(a).

(3) "Breastfeeding women" means women up to one year postpartum who are breastfeeding their infants.

(4) "Caseload" means the number of persons certified by the local agencies, eligible and participating in the WIC program at any point in time. Persons certified eligible but wait-listed are not considered to be participating in the WIC program, and therefore are not included when the department assigns caseload limits or tallying caseload being carried at a point in time.

(5) "Categorical eligibility" means persons who meet the definitions of pregnant women, breastfeeding women, postpartum women, or infants or children.

(6) "Certification" means the application of criteria and procedures to assess and document each applicant's eligibility for the program.

(7) "Children" means persons who have had their first birthday but have not yet attained their fifth birthday.

(8) "Client" means a WIC program participant.

(9) "Clinic" means a facility where applicants are certified.

(10) "Competent professional authority" means an individual on the staff of the local agency authorized to determine nutritional risk and prescribe supplemental foods. The following persons are the only persons the department may authorize to serve as a competent professional authority: physicians, nutritionists (bachelor's or master's degree in nutritional sciences, community nutrition, clinical nutrition, dietetics, public health nutrition, or home economics with emphasis in nutrition), dietitians, registered nurses, physician's assistants (certified by the national committee on certification of physician's assistants, or certified by the state medical certifying authority), or state or local medically trained health officials. This definition also applies to an individual who is not on the staff of the local agency but who is qualified to provide data upon which nutritional risk determinations are made by a competent professional authority on the staff of the local agency.

(11) "Days" means calendar days.

(12) "Disqualification" means the act of ending the program participation of a participant, authorized food vendor, or local agency, whether as a punitive sanction or for administrative reasons.

(13) "Dual participation" means simultaneous participation in the program in one or more than one WIC clinic.

(14) "Fair hearing" means the procedure through which an individual may appeal a department or local decision which results in denial of program participation, or suspension or termination from the program.

(15) "Family" means a group of related or non-related individuals who are not residents of an institution but who are living together as one economic unit.

(16) "Food costs" means the costs of supplemental foods, determined in accordance with 7 CFR 246.14(b).

(17) "Food delivery system" means the method used by the department and local agencies to provide supplemental foods to participants.

(18) "Food instrument" means a voucher, check, coupon, or other document which is used by a participant to obtain supplemental foods.

(19) "Food package" means supplemental foods prescribed by a competent professional authority for a WIC participant to meet demonstrated nutritional needs.

(20) "Food vendor" means a local grocer, dairy, or other

merchant who, through a signed agreement with the local agency, provides WIC foods in exchange for the WIC voucher.

(21) "Health services" means ongoing, routine pediatric and obstetric care (such as infant and child care and prenatal and postpartum examinations) or referral for treatment.

(22) "Infants" means persons under one year of age.

(23) "Initial visit" means the first time a person visits a WIC clinic to request program benefits, whether by an in-person inquiry or by a visit for an appointment previously established by telephone.

(24) "Local agency" means:

(a) a public or private, nonprofit health or human service agency which provides health services, either directly or through contract, in accordance with 7 CFR 246.5;

(b) an Indian health service unit;

(c) an Indian tribe, band, or group recognized by the United States department of the interior which operates a health clinic or is provided health services by an Indian health service unit; or

(d) an intertribal council or group that is an authorized representative of Indian tribes, bands, or groups recognized by the United States department of the interior, which operates a health clinic or is provided health services by an Indian health service unit.

(25) "Members of populations" means persons with a common special nutritional need who do not necessarily reside in a specific geographic area, such as off-reservation Indians or migrant farmworkers and their families.

(26) "Migrant farmworker" means an individual whose principal employment is in agriculture on a seasonal basis, and who has been so employed within the last 24 months, and who establishes, for the purposes of such employment, a temporary abode.

(27) "Monthly participation" means a total number of clients actually receiving benefits in any month.

(28) "Nonprofit agency" means a private agency which is exempt from income tax under the Internal Revenue Code of 1954, as amended.

(29) "Nutrition counseling" means individualized professional guidance to assist a person in adjusting his/her daily food consumption to meet his/her health needs.

(30) "Nutrition education" means individual or group education sessions and the provision of information and educational materials designed to improve health status, achieve positive change in dietary habits, and emphasize relationships between nutrition and health, all in keeping with the individual's personal, cultural, and socioeconomic preferences.

(31) "Nutrition services" means nutrition intervention planned for and provided to a client, such as assessment of nutritional health status, counseling, provision of nutrition information, prescription of a food package, referral to other health, financial, or social services, and evaluation of change in behavior and nutritional health status.

(32) "Nutritional risk" means:

(a) detrimental or abnormal nutritional conditions detec-

table by biochemical or anthropometric measurements;

(b) other documented nutritionally related medical conditions;

(c) dietary deficiencies that impair or endanger health; or

(d) conditions that predispose persons to inadequate nutritional patterns or nutritionally related medical conditions.

(33) "Nutritionist" means a professional who meets the academic and experience requirements described in section 37-25-102, MCA.

(34) "Participants" means pregnant women, breastfeeding women, postpartum women, infants, and children who are receiving supplemental foods or food instruments under the program.

(35) "Participation" means the number of persons who have received supplemental foods or food instruments during a reporting period.

(36) "Postpartum women" means women up to six months after termination of pregnancy.

(37) "Potential participants" means persons not certified on WIC but who are applying for WIC services, or who have been determined by some statistical means to be eligible for WIC services.

(38) "Poverty income guidelines" means the poverty income guidelines prescribed by the United States department of health and human services. These guidelines are adjusted annually by the department of health and human services, with each annual adjustment effective July 1 of each year. The poverty income guidelines prescribed by the department of health and human services are used for the Montana WIC program.

(39) "Pregnant women" means women determined to have one or more embryos or fetuses in utero.

(40) "Priority system" means the ranking applied to persons on a waiting list to ensure that those at highest nutritional risk are the first ones chosen to fill vacancies.

(41) "Program" means the special supplemental food program for women, infants and children (WIC), authorized by section 17 of the Child Nutrition Act of 1966, as amended.

(42) "Reallocation" means the process by which the USDA monies are moved from one state agency which is spending at a lower rate and given to another state agency that is able to spend the money more rapidly due to larger caseloads and a similar process used by the department among local agencies.

(43) "Registered dietitian" means a professional who meets the academic and experience requirements described in section 37-21-302, MCA.

(44) "Retail purchase system" means a system in which the participant obtains WIC foods through an authorized food vendor, i.e., grocer or dairy.

(45) "Satellite" means a WIC program operated by another WIC program which has primary administrative responsibility for a program and contracts directly with the department. A satellite differs from a site in that it is located outside the defined project area, i.e., county or reservation.

(46) "Site" means a single clinic offering services to WIC participants within a defined project area that may contain more than one clinic.

(47) "Staffing pattern" means the ratio of WIC staff needed to the number of participants served.

(48) "State plan" means the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1987 edition), a plan of program operation and administration that describes the manner in which the department intends to implement and operate all aspects of program administration within its jurisdiction in accordance with 7 CFR 246.4.

(49) "Supplemental foods" means those foods containing nutrients determined to be beneficial for pregnant, breastfeeding, and postpartum women, infants, and children, as prescribed by 7 CFR 246.10.

(50) "Voucher" means a check-like document which is traded by WIC participants for food at their local food vendors.

(51) "Waiting list" means a list of applicants waiting to be accepted in the WIC program when vacancies occur.

(52) The department hereby incorporates herein by reference the following:

(a) 7 CFR 246.4, which is a federal agency WIC regulation concerning state agency program operations and administration;

(b) 7 CFR 246.5, which is a federal agency WIC regulation concerning selection of local agencies;

(c) 7 CFR 246.10, which is a federal agency WIC regulation concerning the food delivery system;

(d) 7 CFR 246.14(b) and (c), which is a federal agency WIC regulation concerning the distribution of funds;

(e) 7 CFR Part 3015, which contains the United States department of health and human services' uniform federal assistance regulations. Part 3015 implements the policies established by the office of management and budget (OMB) in circulars A-21, A-87, A-102, A-110, and A-122, as well as OMB Guidance on Implementation of the Federal Grant and Cooperative Agreement Act of 1977.

(f) the poverty income guidelines contained in volume 52 of the Federal Register, issue 94 (May 15, 1987);

(g) section 17 of the Child Nutrition Act of 1966, 42 U.S.C. 1771, et seq., as amended; and

(h) the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1987 edition), which is a comprehensive summary of applicable federal regulations, procedures, and forms used by the department.

(i) Copies of the above materials may be obtained from the Family/Maternal and Child Health Services Bureau, WIC Program, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTHORITY: 50-1-202, MCA
IMPLEMENTING: 50-1-202, MCA

NEW RULE V SELECTION OF LOCAL AGENCIES (1) In selecting new local agencies, the department, will apply the criteria in 7 CFR 246.5(a) through (d) together with the following criteria:

(a) whether the program is located to be accessible to participants;

(b) whether the program exhibits sufficient financial integrity and solvency to assure its ability to continue program operations; and

(c) whether there are documented, written procedures for making referrals to and coordinating with the following services and programs which are operating in the service area of the local agency: prenatal care, immunizations, postnatal care, family planning, well-child services, early periodic screening and development testing, schools, dental screening, private physicians, health maintenance organizations, hospitals, expanded food and nutrition education program, community relief agencies, USDA food stamp program, handicapped children's services, and maternal and child health services.

(2) The department hereby adopts and incorporates herein by reference 7 CFR 246.5(a) through (e), which is a federal agency rule setting forth requirements and procedures for local agency selection and the expansion, reduction, and disqualification of participating local agencies. Copies of 7 CFR 246.5(a) through (e) may be obtained from the Family/Maternal and Child Health Services Bureau, WIC Program, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTHORITY: 50-1-202, MCA
IMPLEMENTING: 50-1-202, MCA

NEW RULE VI AGREEMENTS WITH LOCAL AGENCIES (1) The department hereby adopts and incorporates herein by reference 7 CFR 246.6, which is a federal agency rule setting forth terms and requirements for agreements between the department and local agencies. Copies of 7 CFR 246.6 may be obtained from the Family/Maternal and Child Health Services Bureau, WIC Program, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTHORITY: 50-1-202, MCA
IMPLEMENTING: 50-1-202, MCA

NEW RULE VII PERIODIC REVIEW AND DISQUALIFICATION OF LOCAL AGENCIES (1) The department shall conduct periodic reviews of the qualifications of authorized local agencies under its jurisdiction. In conducting such reviews, the department shall consider the program's history of prior program performance and the factors listed in section (2) of this rule. Based upon the results of such reviews, the department may make appropriate adjustments among the participating local agencies, including the disqualification of a local agency when the department determines that another local agency can operate the program more effectively and efficiently. The department shall implement the procedures established in section (3) of this rule when disqualifying a local agency.

(2) The department may disqualify a local agency upon

consideration of:

(a) noncompliance with program rules;

(b) sufficiency of department funds to support the continued operation of all its existing local agencies at their current participation level;

(c) whether, following a review of local agency credentials in accordance with section (4) of this rule, another local agency can operate the program more effectively and efficiently;

(d) the availability of other community resources to participants and the cost efficiency and cost effectiveness of the local agency in terms of both food and administrative and program services costs;

(e) the percentages of participants in each priority level being served by the local agency and the percentage of need being met in each participant category;

(f) the relative position of the area or special population served by the local agency in the affirmative action plan;

(g) the local agency's place in the priority system established in 7 CFR 246.5(d)(1); or

(h) the capability of another local agency or agencies to accept the local agency's participants.

(3) When disqualifying a local agency under the program, the department shall:

(a) make every effort to transfer affected participants to another local agency without disruption of benefits;

(b) provide the affected local agency with written notice not less than 60 days in advance of the pending action, which notice shall include an explanation of the reasons for disqualification, the date of disqualification, and, except in cases of the expiration of a local agency's agreement, the local agency's right to appeal as set forth in 7 CFR 246.18; and

(c) ensure that the action is not in conflict with any existing written agreements between the department and the local agency.

(4) The department hereby adopts and incorporates herein by reference the following:

(a) 7 CFR 246.18, which is a federal agency rule setting forth the notice and hearing procedures for local agencies and food vendors who are denied participation or are disqualified from the program; and

(b) 7 CFR 246.5(d)(1), which is a federal agency rule setting forth the priority system for selection of local agencies.

(c) Copies of 7 CFR 246.18 and 7 CFR 246.5(d)(1) may be obtained from the Family/Maternal and Child Health Services Bureau, WIC Program, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTHORITY: 50-1-202, MCA
IMPLEMENTING: 50-1-202, MCA

NEW RULE VIII REQUIREMENTS FOR LOCAL AGENCY SELECTION OF FOOD VENDORS (1) In selecting food vendors to participate in the program, local agencies shall apply the requirements of 7 CFR 246.12(e) through (o), and the following criteria:

(a) whether the place of the vendor's business is permanent; no "rolling" stores may be allowed;

(b) whether the vendor stocks and maintains appropriate quantities of authorized WIC foods;

(c) whether the vendor is accessible to WIC clients;

(d) whether the vendor has been disqualified from the USDA food stamp program;

(e) whether the vendor has a valid, current license from each appropriate Montana state agency, as may be required by law.

AUTHORITY: 50-1-202, MCA
IMPLEMENTING: 50-1-202, MCA

NEW RULE IX PERIODIC REVIEW AND DISQUALIFICATION OF FOOD VENDORS (1) The department (or local agency in consultation with the department), before re-authorization, shall conduct periodic reviews of the operations of participating food vendors. In conducting such reviews, the department or local agency may utilize an "educational buy" or a "compliance buy" as described in the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1987 edition), and shall consider the following:

(a) a review of local agency monitoring reports;

(b) results of one or more on-site visits;

(c) shared information from the Montana food stamp officer-in-charge;

(d) file review of one-half of the total currently authorized vendors;

(e) on-site follow-up to subsections (2)(a) and (d) above when warranted by incomplete information or complaint;

(f) whether the vendor demonstrates ability to meet Montana WIC program requirements, as evidenced by performance during the current agreement; and

(g) whether patterns of participant use demonstrate compliance with the program.

(2) Based upon such review, the department may take an adverse action (other than a warning letter) against the vendor, including disqualification of the food vendor from participation in the program.

(3) When taking an adverse action (other than a warning letter) against a vendor, including disqualification of a food vendor from the program, the department shall provide the affected vendor with written notice not less than 15 days in advance of the pending action which notice must include the reasons for the adverse action, the date of adverse action, and, except in cases of the expiration of the vendor's WIC agreement, the vendor's right to appeal as set forth in 7 CFR 246.18.

(4) The department hereby adopts and incorporates herein by reference the following:

(a) the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1987 edition), a comprehensive summary of applicable federal regulations, procedures, and forms used by the department; and

(b) 7 CFR 246.18, which is a federal agency rule setting forth the notice and hearing procedures for local agencies and food vendors who are denied participation or are disqualified from the program.

(c) Copies of these documents may be obtained from the Family/Maternal and Child Health Services Bureau, WIC Program, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTHORITY: 50-1-202, MCA
IMPLEMENTING: 50-1-202, MCA

NEW RULE X AGREEMENTS WITH FOOD VENDORS (1) The department hereby adopts and incorporates herein by reference 7 CFR 246.12(f), which is a federal agency rule setting forth terms and requirements for agreements between the department and food vendors. Copies of this document may be obtained from the Family/Maternal and Child Health Services Bureau, WIC Program, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTHORITY: 50-1-202, MCA
IMPLEMENTING: 50-1-202, MCA

NEW RULE XI APPEALS BY PROGRAM PARTICIPANTS (1) An individual who has been denied participation or been disqualified from the program by the local agency may request a fair hearing by contacting either the local agency or the department no later than 60 days after the local agency's adverse action has been communicated to the individual.

(2) The processing of such requests and the conduct of such hearing shall be in accordance with 7 CFR 246.9 and applicable sections of the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1987 edition), a comprehensive summary of applicable federal regulations, procedures, and forms used by the department.

(3) The department hereby incorporates herein by reference the following:

(a) 7 CFR 246.9, which is a federal agency rule setting forth fair hearing procedures for individuals who are denied participation or disqualified from the program; and

(b) the fair hearing requirements of the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1987 edition), a comprehensive summary of applicable federal regulations, procedures, and forms used by the department.

(c) Copies of the above documents may be obtained from the Family/Maternal and Child Health Services Bureau, WIC Program, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTHORITY: 50-1-202, MCA
IMPLEMENTING: 50-1-202, MCA

NEW RULE XII APPEALS BY LOCAL AGENCIES AND FOOD VENDORS

(1) A local agency or a food vendor which is denied participation or, during the course of a contract or agreement, is disqualified or its participation is otherwise adversely affected may request a fair hearing before the department. Expiration of a contract or agreement with a food vendor or local agency is not subject to appeal.

(2) The issuance of notice of adverse action, the processing of fair hearing requests, and the conduct of such hearings shall be in accordance with the provisions of 7 CFR 246.18 and applicable sections of the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1987 edition).

(3) The department hereby adopts and incorporates herein by reference the following:

(a) 7 CFR 246.18, which is a federal agency rule setting forth the notice and hearing procedures for local agencies and food vendors who are denied participation or are disqualified from the program; and

(b) the fair hearing requirements for local agencies and food vendors set forth in the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1987 edition), a comprehensive summary of applicable federal regulations, procedures, and forms used by the department.

(c) Copies of 7 CFR 246.18 and the local agency and food vendor fair hearing provisions of the "1988 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (July 1987 edition) may be obtained from the Family/Maternal and Child Health Services Bureau, WIC Program, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTHORITY: 50-1-202, MCA
IMPLEMENTING: 50-1-202, MCA

3. Due to the growth and increasing complexity of the WIC program, the department is proposing these rules to provide a clear written procedural framework under which to administer the WIC program.

4. Interested persons may submit their data, views, or arguments concerning the proposed rules, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Robert L. Solomon, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, by no later than May 6, 1988.

5. Robert L. Solomon, at the above address, has been designated to preside over and conduct the hearing.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State February 16, 1988.

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

In the matter of the amendment of rule 16.32.501 concerning reportable tumors	)))	NOTICE OF PROPOSED AMENDMENT OF RULE NO HEARING CONTEMPLATED (Tumor Registry)

To: All Interested Persons

1. On March 29, 1988, the department proposes to amend ARM 16.32.501, concerning the reporting by hospitals and clinical laboratories of the incidence of tumors.

2. The rule, as proposed to be amended, appears as follows (new material is underlined):

16.32.501 REPORTABLE TUMORS

(1)-(4) Same as existing rule.

(5) In order for the department to maintain current reporting, hospitals shall submit to the department information on reportable tumors within six months from the date of discharge; independent laboratories shall submit to the department information on reportable tumors within six months from the date the laboratory service associated with the tumor was rendered.

AUTHORITY: 50-15-706, MCA
AUTH. EXT.: Sec. 1, Ch. 12, L. 1985
IMPLEMENTING: 50-15-703, MCA

3. The department is proposing this amendment to the rule because current rules do not specify a time frame for reporting cancer cases, and facilities have sometimes delayed filing case reports for as long as two years, making it impossible for the Montana central tumor registry to maintain accurate and current information on the incidence of tumors in Montana. The proposed six-month period is identical to the deadlines established by the American College of Surgeons for accredited cancer programs.

4. Interested parties may submit their written data, views, or arguments concerning this amendment to Robert L. Solomon, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than March 28, 1988.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views, and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Robert L. Solomon, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than March 28, 1988.

6. If the agency receives requests for a public hearing

under Section 2-4-315, MCA, on the proposed rule amendment, from either 10% or 25, whichever are fewer, 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 fewer 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 7 hospitals and/or clinical laboratories.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State February 16, 1988.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE REPEAL of ARM 42.6.121 through 42.6.123 relating to Child Support Collection Fees.	NOTICE OF THE PROPOSED Repeal of ARM 42.6.121 through 42.6.123 relating to Child Support Collection Fees.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On March 28, 1988, the Department proposes to repeal ARM 42.6.121 through 42.6.123 relating to child support collection fees.

2. The rules proposed to be repealed can be found on page 42-615 of the Administrative Rules of Montana.

3. The Department proposes to repeal these rules because the 1985 amendments to § 40-5-203(3), MCA no longer allow a collection fee to be charged to the applicant.

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

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

no later than March 24, 1988.

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 Cleo Anderson at the above address no later than March 24, 1988.

6. If the agency receives requests for a public hearing on the proposed repeal from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed repeal; from the Administrative Code Committee of the Legislature; from a governmental subdivision, or agency; or from an association have 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.

7. The authority of the Department to make the proposed repeal is based on § 40-5-203, MCA, and the rules implement § 40-5-203(3), MCA.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 2/16/88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMEND- MENT of ARM 42.25.1001, 42.25.1011, 42.25.1013, 42.25.1014, 42.25.1015, 42.25.1017 & 42.25.1021 42.25.1022 and 42.25.1023, the REPEAL of 42.25.1006, 42.25.1024, 42.25.1025 and 42.25.1026 and the ADOPTION of NEW RULES I through VII.	))))))))))	NOTICE OF PUBLIC HEARING on PROPOSED AMENDMENT, ADOPTION AND REPEAL of Net Proceeds Rules for the Natural Resource and Corporation Tax Division

TO: All Interested Persons:

1. On March 16, 1988, at 10:00 a.m., a public hearing will be held in the Fourth Floor Conference Room of the Mitchell Building, at Helena, Montana, to consider the amendment and repeal of the above-referenced administrative rules and the adoption of new rules I through VIII relating to Net Proceeds for the Natural Resource and Corporation Tax Division.

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

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

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

(3) "Development" means any activity at or near a well site which enhances or causes the continuation of production from a well. This includes but is not limited to such things as repairs, installing new equipment, pulling, cleaning, bailing, acidizing, and sandfracing which occur after the date of initial production for the well.

(4) "Arm's-length contract" means a contract or an agreement to sell that has been arrived at between independent, nonaffiliated parties of adverse economic interest not involving any consideration other than the sale. Contracts or agreements for the purpose of these rules will be defined to be non-arm's-length if the parties to the contract or agreements have business relationships other than the agreement between the buyer and seller which have influenced the sales price.

(5) "Contract price" means the price stated as per unit of production (e.g. mcf, gallon, barrel, ton, etc.) as determined from an arm's-length contract. Contract price shall include the value of all natural gas, (Btu adjusted) natural gas liquids, other products, stored gas, reimbursements, transportation and any other consideration received for the disposition of oil or natural gas as determined pursuant to the arm's-length contract.

(6) "Central facilities" are installations which are used to cool, heat, separate, dehydrate, compress, sweeten or gather natural gas at a point remote from the well or wells. These facilities do not include processing plants.

(7) "Delivery price adjustments" as used herein will include all expenses directly incurred in the operation and maintenance of "central facilities" such as direct labor, supplies and utilities. This will also include the amortization of the initial cost of the construction of the facility, determined on a straight-line basis for a period of ten consecutive years beginning the year in which the facility first began to operate. "Delivery price adjustments" are merely a reduction in price and are not meant to be a deductible expense beyond the well or to include "plant products price adjustments."

(8) "Delivery point" means a point past the wellhead.

(9) "Interstate pipeline" means a person engaged in the transportation of natural gas produced in Montana to points across the exterior boundaries of the State. This includes natural gas transported into Canada.

(10) "Intrastate pipeline" means a person engaged in the transportation of natural gas within the state of Montana, excluding gathering, and who may sell the gas to the ultimate consumer.

(11) "MCF" means 1,000 cubic feet of natural gas measured at a pressure of 14.73 pounds per square inch and a temperature of 60 degrees Fahrenheit.

(12) "Natural gas" means a mixture of hydrocarbon gases and other products which at atmospheric conditions of temperature and pressure are in a gaseous state.

(13) "Natural gas liquids" means all ethane, butane, propane, hexanes, heptanes and heavier gases which are removed for natural gas by processing.

(14) "Net-back method" means a method for calculating contract price at the well or lease by deducting from the ultimate sales price or gross sales proceeds for the oil or natural gas (including residue, stored gas, natural gas liquids, and other products extracted or processed) cost of transportation and/or processing.

(15) "Point of sale" means the point at which there has been a sale or transfer of natural gas to an intrastate or interstate pipeline.

(16) "Processing plant" is an installation designed to remove "Natural gas liquids" and "other products" from natural gas at a point remote from the well or wells. These include absorption, adsorption, or refrigeration.

(17) "Plant products price adjustments" as used herein will include all expenses directly incurred in the operation and maintenance of a 'processing plant' such as direct labor, supplies and utilities. This will also include the amortization of the initial cost of the construction of the plant, determined on a straight-line basis for a period of ten consecutive years beginning the year in which the plant first began to operate. "Plant products price adjustments" are merely a reduction in

price and are not meant to be a deductible expense beyond the well, or to include "delivery price adjustments."

(18) "Royalty unit value" means the same as contract price defined above.

(19) "Other products" means those products or elements, either solid or liquid form, other than residue or natural gas liquids, which are removed from natural gas by processing.

(20) "Residue gas" means the gas remaining after processing in a processing plant which removes liquid hydrocarbons and other gas products from the natural gas.

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

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

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

42.25.1011 TREATMENT OF ROYALTIES (1) Remains the same.

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

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

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

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

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

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

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

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

(4) ~~Superintendents~~ Superintendence shall be meant to include only the persons or officers actually engaged directly in the working of the well, lease, or unit or superintending the

management thereof. This deduction is not meant to include any personnel in a corporate or headquarters office who are not involved in the actual on site operations. Superintendence does not include salaries of engineers, geologists, maintenance and other technical personnel delineated in (3) above.

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

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

(7) These amendments apply to returns filed for production years 1987 and after.

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

42.25.1014 COSTS OF IMPROVEMENTS, REPAIRS, AND BETTERMENTS (1) All monies expended for improvements, repairs, and betterments necessary in and about the working of the well, lease, or unit may be deducted in computing net proceeds as provided under ARM 42.25.1002 and 42.25.1004.

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

(3) These amendments apply to returns filed for production years 1987 and after.

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

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

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

(7) These amendments apply to returns filed for production years 1987 and after.

AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 3, Ch. 642, L. 1985, Eff. 4/30/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-602, 15-23-603 and 15-23-604 MCA.

42.25.1017 ~~ADMINISTRATIVE AND~~ OTHER OPERATIONAL COSTS (1) All monies expended for supplies, tools, chemicals and additives

to the extent used in the development or production of a well, lease, or unit except as provided for in ARM 42.25.1015 may be deducted in computing net proceeds as provided under ARM 42.25.1002 and 42.25.1004. Chemicals and additives as used in this section are not meant to include chemicals and additives used in a tertiary recovery project. ~~Clerical and office expenses are allowed only to the extent that they relate to the actual production of the product.~~

(2) All money expended for fire insurance, liability and casualty insurance directly attributable to the operation and development of the well, workers' compensation insurance, and performance or indemnity bonds required by the laws or rules of this state, **and for payment by operators to welfare and retirement ~~funds when required by wage contracts between operators and employees~~** may be deducted in computing net proceeds as provided under ARM 42.25.1002 and 42.25.1004. Deductions for liability and casualty insurance, and performance or indemnity bonds are effective for production years beginning on or after January 1, 1985.

(3) and (4) will remain the same language but will be renumbered (9) and (10).

(5) will become (11) and is amended below.

(3) All monies expended for the removal and disposal of salt water from a well, lease or unit may be deducted. This deduction shall not include the costs of drilling a disposal well, as such cost should be deducted pursuant to ARM 42.25.1015.

(4) All monies expended for telephones to provide a communication link between wells, leases or units can be deducted. The telephones must be located at the well site, or the lease or unit. Mobile telephones and radios installed in vehicles which are deductible pursuant to 42.25.1012 (2) (a) and (2) (b) are deductible in the same prorated portion as the vehicle expense would be provided for therein.

(5) All monies expended to transport well repair parts, tools, materials and supplies may be deducted.

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

(7) All monies expended to transport personnel to and from the well location may be deducted. For expenses to be claimed herein the cost of services performed by such personnel must be deductible pursuant to 42.25.1013 and must not have been otherwise deducted under other provisions of these rules.

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

~~(5)~~(11) ~~**No miscellaneous items will be allowed.**~~ All deductions must be itemized.

(12) These amendments apply to returns filed for production years 1987 and after. Provided, however that the language deleted in subsection (1) applies to all production years open under the applicable statute of limitations.

AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 3, Ch. 642, L. 1985, Eff. 4/30/85 and Sec. 25, Ch. 644, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-602 and 15-23-603 MCA.

42.25.1021 NEW PRODUCTION REPORTING REQUIREMENT (1) ~~Effective July 1, 1985, an~~ An operator must report production from an oil or gas ~~lease~~ well on a quarterly basis if that ~~lease~~ well has not had production during the five year period immediately preceding the first month of production ~~and began new~~ production after March 31, 1987. The quarterly report must be submitted to the department on or before the last day of October, January, April, and July. If production from a ~~lease~~ well is required to be reported on a quarterly basis, such reporting requirement shall remain in effect throughout the duration of the ~~lease~~ well. ~~If a well is drilled on a currently producing lease, production from that well is not considered new production. However, once a lease qualifies as new production, all additional production from that lease will also qualify as new production. For purposes of this rule, the definitions of lease and unit shall be those set forth in ARM 42.22.1201.~~

AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 22, Ch. 695, L. 1985, Eff. 5/9/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-602 and 15-23-603 MCA.

42.25.1022 NET PROCEEDS COMPUTATION - QUARTERLY FILINGS (1) Net proceeds for purposes of new production from an oil or gas ~~lease~~ well are the equivalent of gross sales proceeds without a deduction for excise taxes on the product yielded from such lease for the period covered by the statement. There shall be deducted from the gross proceeds, the value of petroleum and other mineral or crude oil or cubic feet of natural gas produced and used in the operation of the ~~lease~~ well from which the petroleum or other mineral or crude oil or natural gas was produced.

~~The gross value shall not include the value of natural gas exempt from taxation under 15-23-612, MCA, nor the value of governmental royalties from oil and gas production which are exempt under 15-6-201, MCA.~~

AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 22, Ch. 695, L. 1985, Eff. 5/9/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-603 and 15-23-604 MCA.

42.25.1023 ~~COMMENCEMENT OF~~ NEW PRODUCTION EXEMPTION (1) ~~In determining whether production from a lease is deemed new production, the five year period of inactivity shall be calculated from the last day of the calendar month immediately preceding the month in which either:~~

~~(a) natural gas is placed into a natural gas distribution system, or~~

~~(b)--when production for sale from a crude oil well is pumped or flows.~~

New production as defined in 15-23-601, MCA is exempt from taxation for the first 12 months of production as provided in 15-23-612, MCA.

AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 22, Ch. 695, L. 1985, Eff. 5/9/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-601 and 15-23-612 MCA.

42.25.1006 NATURAL GAS EXEMPT FROM ONE-HALF THE NET PROCEEDS TAX IS HEREBY REPEALED.

AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Sec. 15-23-612 and 15-36-121 MCA.

42.25.1024 UNITIZED LEASES - NEW PRODUCTION DETERMINATION IS HEREBY REPEALED.

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

42.25.1025 PRODUCTION FROM NEW FORMATION OF CURRENTLY PRODUCING LEASE IS HEREBY REPEALED.

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

42.25.1026 CHANGES IN LEASES IS HEREBY REPEALED.

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

3. The new rules as proposed to be adopted are as follows:

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

(2) This rule applies to returns filed for production years 1987 and after.

AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 3, Ch. 642, L. 1985, Eff. 4/30/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-602 and 15-23-603 MCA.

RULE II DECLARATORY RULING PROCEDURE (1) When an operator is uncertain how these regulations will apply to a particular

circumstance that person may petition the Department for a declaratory ruling as to the applicability of the statute and/or these regulations to his activity or proposed activity. Section 2-4-501 provides the authority, and regulations 1.3.227 through 1.3.229 A.R.M. provides for the procedures to be used in requesting a ruling.

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

(2) This rule applies to returns filed for production years 1987 and after.

AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 3, Ch. 642, L. 1985, Eff. 4/30/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-602 and 15-23-603 MCA.

RULE III GROSS SALES PROCEEDS (1) The gross sales proceeds from the sale of oil and condensate shall be equal to the total production sold times the stated contract price for the oil and condensate, in no event will the stated price be less than the posted field price for similar oil.

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

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

(2) The gross proceeds of unprocessed natural gas are determined as provided for in this subsection.

(a) If unprocessed natural gas is sold pursuant to an arm's-length contract at the wellhead, the contract price multiplied by the volume of natural gas will be accepted as gross sales proceeds.

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

(c) If there is no contract or a non-arm's-length contract at the wellhead and the wellhead is not the point of sale, the gross sales proceeds from the no contract or non-arm's-length sale will be compared to the gross sales proceeds arrived at under comparable arm's length contracts for purchases, sales or other dispositions of like-quality gas in the same field. In determining comparability the following factors will be considered: time of execution, duration, market or markets served, terms, quality of gas, volume, and such factors as may be appropriate to reflect the value of the gas. The gross sales proceeds under the no contract situation or non-arm's-length contract may be used for net proceed purposes if both of the following conditions are met:

(i) the gross sales proceeds determined under the no contract situation or non-arm's-length contract are substantially equal to the gross sales proceeds in comparable arm's-length contracts and;

(ii) the arm's-length contract or contracts used in the comparison must represent more than 50% of the producing wells in the field;

(d) If (c)(i) and (ii) are not satisfied the gross sales proceeds will be based upon the first arm's-length sale prior to or at the delivery point. To the extent that the contract price includes additional value for gathering, compression, dehydration and sweetening the operator may adjust the contract price for delivery price adjustments attributed as follows:

(i) The total delivery price adjustment calculated for the tax period is divided by the total number of MCF's of natural gas of the operator, and other producers, if any, entering the central facilities. This quotient is the delivery price adjustment/MCF for each return filed pursuant to 15-23-602, MCA. The operator may adjust the contract price of each MCF reported by the delivery price adjustment/MCF.

(3) The gross proceeds of processed natural gas are determined as provided for in this subsection.

(a) If natural gas which normally would be processed is sold pursuant to an arm's-length contract at the wellhead, the contract price multiplied by the volume of natural gas will be accepted as gross sales proceeds. Natural gas that must be passed through a processing plant may be processed and/or sold pursuant to separate contracts or agreements for the residue, natural gas liquids and other products.

(b) When natural gas is processed pursuant to an arm's-length contract the contract price multiplied by the volume of natural gas determined will be accepted as gross sales proceeds.

(c) When natural gas is processed pursuant to a non-arm's-length contract the gross sales proceeds for the residue, natural gas liquids and other products will be determined as follows:

(i) If residue is sold pursuant to an arm's-length contract the gross sale proceeds for the residue will be the contract price multiplied by the quantity of residue.

(ii) If the residue is not sold pursuant to an arm's-length contract, the gross sales proceeds will be equivalent to the

contract price derived from, or paid under, comparable arm's-length contracts for purchases, sales or other dispositions of like-quality gas in the same field or area multiplied by the quantity of residue gas. In determining comparability the following factors will be considered: time of execution, duration, market or markets served, terms, quality of gas, volume, and such other factors as may be appropriate to reflect the value of the gas.

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

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

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

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

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

(A) The plant products price adjustment for the other product only divided by the total units produced for the operator, and other producers, if any. This quotient is the plant products price adjustments/unit. For each return filed pursuant to 15-23-602, MCA the operator may adjust the contract price of each unit reported by the plant products price adjustment.

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

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

(4) The gross sales proceeds of stored gas are determined as provided for in this subsection. When a part or all of the "natural gas" produced is stored rather than sold in a given period, the following methods can be used in calculating gross sales proceeds. (Contract price as mentioned herein will be based upon the same guidelines as for unprocessed and processed natural gas as stated previously.)

(a) The stored gas may be valued in the period of extraction by using the same contract price as received for the sold gas.

(b) The stored gas may be valued in the period that it is actually sold by using the contract price received at the time of the sale and applying first in, first out (i.e. the natural gas stored first will be considered to be sold first). If this method is used an inventory of stored and sold gas must be presented to this department using the following example (when this method is first employed the schedule must show a complete year by year inventory of the stored gas from the date of initial storage):

Beginning Inventory of Stored Gas	800 MCF's
Current Year Total Extracted	1000 MCF's
Current Year Total Sold	500 MCF's
Total Stored Gas Sold Current Year	300 MCF's

Beginning Inventory			800
Plus: Total Current Extraction	1000		
Less: Total Current Sales	500		
			500
Total Stored Gas Before Resale		1300	
Less: Stored Gas Sold Current Year		(300)	
Year End Inventory			1000

Gross Sale Proceeds Calculation:

Total MCF sold current year (from line 3 above)
500 X Contract Price Rec =

Total MCF stored gas sold current year (from line 5)
300 X Contract Price Rec =

Total MCF X Avg Contract Price = Gross Sales Proceeds

To be placed on Page 1 of Form NP3.

Exception:
Any gas that is to be stored that crosses interstate (including Canadian) borders to be stored, must be valued in the period of extraction as per 1 herein.

(5) If the gross sales proceeds for oil or natural gas cannot be reasonably determined by any method described herein then the Department may use or require the operator to use any

other method which reasonably measures the value of the oil or natural gas (including residue, natural gas liquids, other products and stored gas). This may include values determined under arm's-length contracts for like-quality gas in nearby fields or areas, posted prices for gas, prices received in arm's-length spot sales of gas, net-back method or other reliable sources of price or market information.

(6) This rule applies to returns filed for production years 1987 and after.

AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 3, Ch. 642, L. 1985, Eff. 4/30/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-602 and 15-23-603 MCA.

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

(2) This rule applies to returns filed for production years 1987 and after.

AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 3, Ch. 642, L. 1985, Eff. 4/30/85 and Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-602 and 15-23-603 MCA.

RULE V INTERIM PRODUCTION REPORTING REQUIREMENT (1) An operator must report production from an oil or gas well on a quarterly basis if that well has not had production during the five year period immediately preceding the first month of production and began interim production after June 30, 1985 and before April 1, 1987. The quarterly report must be submitted to the department on or before the last day of October, January, April, and July. If production from a well is required to be reported on a quarterly basis, such reporting requirement shall remain in effect throughout the duration of the well.

AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Sec. 15-23-602 MCA.

RULE VI INTERIM NET PROCEEDS COMPUTATION - QUARTERLY FILINGS (1) Net proceeds for purposes of new production from an oil or gas well are the equivalent of gross sales proceeds without a deduction for excise taxes on the product yielded from such well for the period covered by the statement. There shall be deducted from the gross proceeds, the value of petroleum and other mineral or crude oil or cubic feet of natural gas produced and used in the operation of the well from which the petroleum or other mineral or crude oil or natural gas was produced. The gross sales proceeds of governmental royalties from oil and gas production are exempt under 15-6-201, MCA.

AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, 15-23-602 and 15-23-603 MCA.

RULE VII COMMENCEMENT OF INTERIM PRODUCTION EXEMPTION (1) In determining whether production from a well is deemed interim production, the five year period of inactivity shall be calculated from the last day of the calendar month immediately preceding the month in which either:

(a) natural gas is placed into a natural gas distribution system, or

(b) when production for sale from a crude oil well is pumped or flows.

AUTH: Sec. 15-23-108 MCA; AUTH Extension, Sec. 25, Ch. 655, L. 1987, Eff. 5/13/87; IMP, Secs. 15-23-601, 15-23-603, 15-23-604 and 15-23-613 MCA.

4. The amendments and repeal of the above-captioned rules are being proposed because:

During 1987, the oil and gas industry expressed concerns to the Revenue Oversight Committee about the Department's procedures for valuing the net proceeds of oil and gas production. As a consequence of those discussions, and with the encouragement of the Revenue Oversight Committee, the Department and the industry undertook a series of meetings to clarify the rules guiding the administration of the net proceeds tax. The meetings involved the participation of both the Montana Petroleum Association and the Montana Oil and Gas Association.

Numerous meetings with the oil and gas industry representatives were held from the summer of 1987 into early 1988. Our objective in participating in this process was to determine the net proceeds rules that needed to be clarified and to also determine which policies of the Department were not clearly and concisely expressed in rule form. During this time we have received both oral and written comments from the industry and several trade associations which represent the industry, as well as comments from private citizens and state senators and representatives interested in these issues. In addition, we have presented several reports to the Revenue Oversight Committee, and staff from the Legislative Council have attended all our meetings.

We addressed the following items at the request of the industry:

Definition "development"	42.25.1001(3)
Provided other additional comprehensive definitions	42.25.1001(4) - (21)
Provide procedures to encourage request for declaratory rulings	Rule II
Gross sales proceeds - oil	Rule III(1)
Gross sales proceeds - gas	Rule III(2)
Treatment of Indian Royalties	42.25.1011
Total labor cost	42.25.1013(5)
Record keeping for labor costs	42.25.1013(6)
Workover costs	42.25.1014(2)
Capital expenditures	42.25.1015(6)

Chemicals additives	42.25.1017(1)
Salt water disposal	42.25.1017(3)
Telecommunications	42.25.1017(4)
Transportation or repair parts	42.25.1017(5)

In addition, the Department in response to industry comments, modified draft provisions on the following subjects:

Oil transportation	Rule III(1)(a)
Arm's-length contracts	42.25.1001(4)
Transportation of personnel	42.25.1017(7)

ARM 42.25.1001 is being amended to provide a significant number of additional definitions of terms that will be used in other rules. The original subpart (1), which defined "gross value", has been deleted and is replaced with new rules which define gross sales proceeds in greater detail.

The basic assumption in the rules is that the best measure of gross sales proceeds is a bona fide arm's-length contract at the wellhead. If this occurs the total consideration received by the operator for the sale of oil and/or gas will be accepted as gross sales proceeds. When the first bona fide arm's-length sale is at a point other than the wellhead the operator will need to determine a wellhead sales price. In addition, oil and gas may be sold in various other states of purity affecting how the oil or gas gross sales proceeds will be determined.

The definitions when used in the rules will clarify how an operator will determine gross sales proceeds when there are variable conditions to the sale.

ARM 42.25.1011 amendments are necessary to specifically state that royalties paid to Indian tribes from production on tribal land leased pursuant to the 1938 Indian Mineral Leasing Act is nontaxable. Previously such royalties were considered taxable. However, a recent U.S. Supreme Court decision in the Blackfeet v. Montana case has deemed such royalties to be nontaxable.

ARM 42.25.1013 amendments are necessary to clarify that labor costs related to pumping and metering are deductible. The department judges these costs to be directly related to extracting oil and/or gas from the ground and therefore are deductible under the net proceeds law. Various other provisions in these amendments are necessary to clarify what labor costs are deductible and under what circumstances. Like most deductions under the net proceeds law, labor costs are only deductible if the employee's services are performed at the site of the well. In addition, the amounts claimed as labor costs must be both verifiable and reasonable as compared with amounts paid for comparable services within Montana.

ARM 42.25.1014 amendments are necessary to clarify that workover costs are deductible. The only exception is for those

costs incurred in a tertiary recovery project which are specifically addressed in 15-23-603(s).

ARM 42.25.1015 is amended to adopt into regulation the policy of the Department to not allow as a deduction any costs to acquire a producing property (acquisition costs). However, the new owner can deduct any unamortized drilling costs and capital expenditures of the previous owner or owners.

ARM 42.25.1017 amendments are necessary to reflect recent court decisions and to respond to comments received from industry requesting further clarification on what are allowable deductions. As has been stated several times in the statute and regulations, only those direct onsite costs related to producing oil and gas are deductible. Therefore, the term "Administrative" has been deleted from the title of the section since there are no administrative costs which are directly relating to producing oil or gas.

The department has removed the term "materials" and replaced it with "tools, chemicals and additives" in order to further clarify what costs are deductible under subpart 1. In subpart 2, the reference to payments made by operators to welfare and retirement funds has been removed since was previously addressed in 42.25.1013 (5). Subparts 3 thru 8 have been added to further clarify the type of operational costs that may be deducted. The department has allowed these deductions to be claimed in the past, however, they have never been presented in regulation form. The main criteria for each of these deductions is that they be direct, on site expenses incurred in the production of oil and gas.

Amendments to ARM 42.25.1021, 42.25.1022 and 42.25.1023 are necessary because the 1987 Legislature changed the tax definition for new production and the dates for qualifying.

Repeal of ARM 42.25.1006, 42.25.1024, 42.25.1025 and 42.25.1026 are necessary because ch. 656, L. 1987 eliminated the one-half net proceeds exemption on deep gas wells and provided a 12 month exemption on all new gas wells.

5. Rules I through VII are necessary because:

Rule I is necessary to clarify the nature of the net proceeds tax and to set forth the general guidelines used by the department in determining allowable deductions under the net proceeds law. In the past there has been confusion about whether all expenses deductible for income tax purposes are also deductible for net proceeds purposes. This rule clearly states that the net proceeds tax is a property tax and not an income tax and that only those expenses directly related to extracting oil and gas from the ground and actually incurred and paid for are deductible for net proceeds purposes. This interpretation of the net proceeds law has been consistently upheld in numerous court decisions.

Rule II is necessary to explain how a taxpayer may petition the department for a declaratory ruling when he is uncertain as to how the statute and/or regulations would apply to his specific circumstance.

Rule III is necessary to define "gross sales proceeds" for net proceeds purposes. Since there has been considerable confusion over what is "gross sales proceeds" and how it should be determined, the Department felt it was necessary to revise and update the current regulations.

The various provisions in the rule describe how the gross sales proceeds will be determined in each specific case.

Rule IV is necessary to clarify what documentation will be required of the operator before the department will allow the deduction. Basically, records must be maintained that are supported by receipts, vouchers or other evidence to substantiate that an expense was actually incurred, was paid, and was a direct on site expense for production of oil or gas.

Rules V, VI and VII are necessary to implement the changes made by the 1987 Legislature. The term "interim" production replaced "new" and the word "lease" was changed to "well".

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

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

no later than March 24, 1988.

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

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 2/16/88.

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

In the matter of the amendment of Rules 46.12.204, 46.12.501, 46.12.502, 46.12.541, 46.12.602, 46.12.605, 46.12.902, 46.12.905 and 46.12.912 pertaining to Medicaid Optional Services	)	NOTICE OF PROPOSED AMENDMENT OF RULES 46.12.204, 46.12.501, 46.12.502, 46.12.541, 46.12.602, 46.12.605, 46.12.902, 46.12.905 AND 46.12.912 PERTAINING TO MEDICAID OPTIONAL SERVICES. NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On April 15, 1988, the Department of Social and Rehabilitation Services proposes to amend Rules 46.12.204, 46.12.501, 46.12.502, 46.12.541, 46.12.602, 46.12.605, 46.12.902, 46.12.905 and 46.12.912 pertaining to Medicaid Optional Services.

2. The following amendments are necessary to conform the Department's administrative rules with an order of the First Judicial District Court in Montana Low-Income Coalition, et. al., v. Gray, No. CDV-89-629, issued February 5, 1988.

3. The rules as proposed to be amended pursuant to the permanent restraining order issued February 5, 1988, provide as follows:

46.12.204 RECIPIENT REQUIREMENTS, CO-PAYMENTS Subsections (1) through (1)(f) remain the same.

(g) hearing aids, $.50 per service;

Subsections (1)(g) through (1)(q) remain the same in text but will be recategorized as (1)(h) through (1)(r).

(s) eyeglasses, $1.00 per service;

Subsections (1)(r) through (4) remain the same in text. However, subsections (1)(r) and (1)(s) will be recategorized as (1)(t) and (1)(u).

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-141 MCA

46.12.501 SERVICES PROVIDED Subsections (1) through (1)(e) remain the same.

(f) physician's services~~, except for eyeglasses and those services required for the dispensing of eyeglasses~~;

(g) podiatry services;

(h) outpatient physical therapy services;

(i) speech therapy, ~~and~~ audiology and hearing aids;

Subsections (1)(j) through (1)(o) remain the same.

(p) dental services ~~except for dentures and those services required for the provision of dentures~~;
(q) outpatient drugs;
(r) prosthetic devices and medical supplies;
(s) eyeglasses and optometric services~~, except for eyeglasses and those services required for the dispensing of eyeglasses~~;
Subsections (1)(t) through (2) remain the same.

AUTH: Sec. 53-2-201 and 53-6-113 MCA; AUTH Extension, Sec. 4, Ch. 329, L. 1987, Eff. 10/1/87
IMP: Sec. 53-6-101, 53-6-103 and 53-6-141 MCA

46.12.502 SERVICES NOT PROVIDED BY THE MEDICAID PROGRAM Subsection (1) remains the same.
(2) The following medical and nonmedical services are explicitly excluded from the Montana medicaid program except for those services covered under the health care facility licensure rules of the Montana department of health and environmental sciences when provided as part of a prescribed regimen of care to an inpatient of a licensed health care facility~~, except as allowed under the early periodic screening, diagnosis and treatment rule at ARM 46.12.515~~, and except for those services specifically available, as listed in ARM 46.12.1404, to persons eligible for home and community-based services:
~~(a) hearing aids;~~
~~(b) eyeglasses and those services required for the dispensing of eyeglasses;~~
~~(c) dentures and those services required for the provision of dentures;~~
Subsections (2)(d) through (2)(p) remain the same in text but will be renumbered. Sections (3)(a) - (d) remain the same.
AUTH: Sec. 53-2-201, 53-6-113 and 53-6-402 MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 4/24/87
IMP: Sec. 53-2-201, 53-6-103, 53-6-141 and 53-6-402 MCA

46.12.541 HEARING AID SERVICES, REQUIREMENTS (1) These requirements are in addition to those contained in ARM 46.12.301 through 46.12.308.
~~(2) Hearing aid services are available only to EPSDT-referred recipients.~~
Subsections (3) through (9) remain the same in text but will be renumbered (2) through (8).

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

46.12.602 DENTAL SERVICES, REQUIREMENTS Subsections (1) through (6)(e) remain the same.

(7) All full dentures must be prior authorized by the designated review organization. Requests for full dentures must show the approximate date of the most recent extractions, and/or the age of the present dentures. Dentures less than ten years old must be considered for relining or jumping. Tissue conditioners are considered a part of treatment. The following full denture services ~~are available only to EPSDT referred recipients and~~ must be provided by a dentist or prescribed by a dentist and provided by a licensed denturist:

Subsections (7)(a) through (7)(j) remain the same.

(8) The following partial denture services ~~are available only to EPSDT referred recipients and~~ must be provided by a dentist or prescribed by a dentist and provided by a licensed denturist; and all partial dentures must be prior authorized by the designated review organization:

Subsections (8)(a) through (14) remain the same.

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

46.12.605 DENTAL SERVICES, REIMBURSEMENT ~~(1) Dental services listed in this rule and marked with an asterisk are available only by EPSDT referred recipients.~~

[All asterisks will be removed from this rule's subsections].

Subsections (2) through (18)(m) remain the same in text but will be renumbered as (1) through (17)(m).

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

46.12.902 OPTOMETRIC SERVICES, REQUIREMENTS (1) Optometric services listed in ARM 46.12.905 ~~and marked with an asterisk~~ are available ~~only~~ to ~~EPSDT referred~~ Medicaid recipients.

Subsections (2) through (4)(b) remain the same.

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

46.12.905 OPTOMETRIC SERVICES, REIMBURSEMENT ~~(1) Optometric services listed in this rule and marked with an asterisk are available only to EPSDT referred recipients.~~

[All asterisks will be removed from this rule's subsections].

Subsections (2) through (19) remain the same in text but will be renumbered as (1) through (18).

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

46.12.912 EYEGLASSES, REQUIREMENTS ~~(1) Eyeglasses are available only to EPSDT referred recipients.~~

(1) ~~(2)~~ Each ~~EPSDT referred~~ recipient 21 years old or younger is limited to one pair of eyeglasses per state fiscal year and each recipient over 21 years old is limited to one pair of eyeglasses every two state fiscal years unless one of the following circumstances exists:

Subsections (2)(a) through (4) remain the same in text but will be recategorized as (1)(a) through (3).

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

4. These amendments are necessary to conform the Department's administrative rules with an order of the First Judicial District Court in Montana Low Income Coalition, et. al., v. Gray, No. CDV-87-629, issued February 5, 1988.

5. Interested parties may submit their data, views, or arguments concerning the proposed amendments in writing to the Office of Legal Affairs, Department of Social and Rehabilitation Services, 111 Sanders, P.O. Box 4210, Helena, Montana 59604, no later than March 24, 1988.

6. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a public hearing and submit this request, along with any written comments he has, to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana 59604, no later than March 24, 1988.

7. If the agency receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be 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 400 persons based on approximately 4,000 Medicaid recipients in Montana affected by the originally proposed cuts.

Director, Social and Rehabilitation Services

Certified to the Secretary of State February 16, 1988.

MAR Notice No. 46-2-530 4-2/25/88

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

In the matter of the adoption of rules I through VII and amendment of Rule 46.8.102 pertaining to the reporting and handling of incidents relating to recipients of developmental disability services	INTERIM NOTICE RESPONDING TO COMMENTS RECEIVED

TO: All Interested Persons

1. On January 14, 1988, the Department published MAR Notice No. 46-2-428 concerning the proposed adoption of rules I through VII and amendment of Rule 46.8.102 pertaining to the reporting and handling of incidents relating to recipients of developmental disability services at page 39 of the 1988 Montana Administrative Register, issue number 1.

2. Various individuals commented that the wording of the proposed rule changes and statement of reasonable necessity were confusing. In response to those comments, the Department proposes the following changes to the statement of reasonable necessity and the rules as originally proposed. [In these rule changes, new text is underlined, while text to be stricken is interlined.]

3. ARM 46.8.102 remains amended as proposed.

4. Proposed Rule II remains as proposed.

5. Rules I, III, IV, V, VI and VII are proposed to be adopted as follows:

RULE I INCIDENT REPORTING AND HANDLING, PURPOSE

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

(a) Incidents constituting abuse and neglect of a child as defined in 41-3-102 MCA or abuse, neglect and exploitation of an older person as defined in 53-5-503 MCA are subject to the statutory and rule provisions governing the reporting, investigation and protection of those persons.

(b) The roles of the department of family services in case management and protective services for developmentally disabled persons, abused and neglected children and abused, neglected and exploited older persons necessitate the provisions of these rules relating to those responsibilities.

(c) Incidents constituting abuse, neglect and exploitation of a developmentally disabled person are to be reported as provided for in 53-20-402 MCA, to the department of family services.

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

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

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

(3) Any suspected abuse and neglect of a child or suspected abuse, neglect and exploitation of a person 60 years of age or older must be reported to the department of family services case manager or designee and the county attorney.

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

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

(a) the department of family services case manager or designee;

(b) the division staff;

(c) the guardian, if any; and

(d) a designated advocate, if any.

(2) Notice must be given as follows:

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

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

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

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

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

(3) An incident involving suspected abuse and neglect of a child or suspected abuse, neglect and exploitation of a person 60 years of age or older must be investigated by the department of family services under the statutory and rule provisions governing those investigations. The department will cooperate in investigations as directed by law and participate in the investigation as may be agreed to by the department of family services.

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

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

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

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

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

(5) An incident of abuse and neglect involving a child is subject to the confidentiality provisions of 41-3-205 MCA. An incident of abuse, neglect and exploitation involving an older person is subject to the confidentiality provisions of 53-5-513 MCA.

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

RULE VII INCIDENT REPORTING AND HANDLING, CLIENT ABUSE OR CLIENT PROBLEM BEHAVIOR (1) In a situation where the provisions of either 41-3-101 MCA et seq., relating to child abuse or 53-5-501 MCA et seq., ~~MCA~~ relating to elder abuse are

determined to be applicable, the requirements of these rules may be followed only to the extent that they are not in conflict with the provisions of those laws and rules adopted to effectuate those laws.

(2) Problem behaviors of clients resulting in either harm to self, others or property or the threat of harm to self, others or property and requiring aversive procedures as defined in ARM 46.8.1204 for modification of those behaviors must be handled in accord with the aversive procedures rules at ARM 46.8.1201 et seq.

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

5. The statement of reasonable necessity is amended as follows:

These rules govern the reporting and handling of incidents relating to persons receiving state sponsored developmental disabilities services. The Department is adopting these rules because it administers the program and funding on behalf of the state that provides services to developmentally disabled persons. The Department of Family Services, because it provides case management and protective services for developmentally disabled persons and supervises protective services for children and older persons, is included in the reporting system of these proposed rules.

Incidents are actions or situations that, as defined in the rules, threaten to or, in fact, do harm to the physical or mental well being or the rights of a developmentally disabled person or of other persons due to the actions of a developmentally disabled person. Providers of developmental disability services are directed to establish policies to govern incident reporting and handling and to provide for incident training.

The proposed changes provide procedures for the reporting of incidents to the Department of Social and Rehabilitation Services and the Department of Family Services and for protecting the confidentiality of client information. The rule changes specify in several provisions the precedence over these rules of statutory and rule provisions governing incidents of abuse and neglect of children and abuse, neglect and exploitation of older persons.

6. The period within which the Department will accept comments regarding the proposed changes is extended to March 24, 1988.

Director, Social and Rehabilitation Services

Certified to the Secretary of State _____, 1988.

4-2/25/88 MAR Notice No. 46-2-531

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

In the matter of the amendment) NOTICE OF AMENDMENT OF 8.
of a rule pertaining to fees) 24.409 FEE SCHEDULE

TO: All Interested Persons:

1. On January 14, 1988, the Board of Landscape Architects published a notice of proposed amendment of the above-stated rule at page 45, 1988 Montana Administrative Register, issue number 1.

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

3. No comments or testimony were received.

BOARD OF LANDSCAPE ARCHITECTS
VALERIE TOOLEY, CHAIRPERSON

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

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

BEFORE THE DEPARTMENT OF HIGHWAYS
OF THE STATE OF MONTANA

In the matter of the adoption of a Rule certifying drivers of special vehicle combinations.)	)))	NOTICE OF THE ADOPTION OF 18.8.518 CERTIFYING DRIVERS OF SPECIAL VEHICLE COMBINATIONS

TO: All Interested Persons:

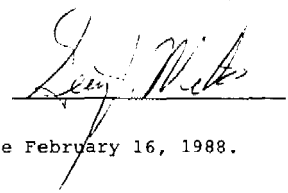
1. On January 14, 1988, the Department of Highways published notice of a proposed rule concerning certifying drivers of special vehicle combinations at page 31 of the 1988 Montana Administrative Register, issue number 1.

2. The agency has adopted the rule as proposed.

3. One comment was received from the Administrative Code Committee requesting further clarification for the necessity of the rule. The reason this rule was adopted is for safety of the public by requiring additional training and skills for drivers of special vehicle combinations.

4. The authority for the rule is Section 61-10-129, MCA, and the rule implements section 61-10-124(6), MCA.

Gary J. Wicks
Director of Highways

By: 

Certified to the Secretary of State February 16, 1988.

BEFORE THE DEPARTMENT OF INSTITUTIONS
OF THE STATE OF MONTANA

In the matter of the Adoption of Amendment to Rule 20.2.201.	)))	NOTICE OF AMENDMENT OF ARM 20.2.201

To All Interested Persons:

1. On December 24, 1987, the Department of Institutions published notice to adopt an amendment to the existing rules relative to the department's overall rules. The notice was published on December 24, 1987, in the Montana Administrative Register, No. 24 at page 2341.

2. The Department of Institutions has adopted the amendment as proposed.

3. No comments or testimony were received.

Carroll South, Director
Department of Institutions

Certified to Secretary of State February 5th, 1988.

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

IN THE MATTER OF Amendment of Rule 24.12.204 establishing qualifications for daycare providers for the New Horizons Program	))))))	NOTICE OF THE AMENDMENT OF ARM 24.12.204, ESTABLISHING QUALIFICATIONS OF DAYCARE PROVIDERS FOR THE NEW HORIZONS PROGRAM

TO: All Interested Persons

1. On January 14, 1988, the Department of Labor and Industry published notice of a proposed amendment to rule 24.12.204 concerning qualifications for daycare providers for the New Horizons Program, at page 33 of the 1988 Montana Administrative Register, issue number 1.

2. The agency has amended the rule as proposed.

3. All comments received by the Department were in support of the proposed amendment. No comments were received in opposition.

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

MARY M. HARTMAN
Commissioner
Department of Labor & Industry

Certified to the Secretary of State February 16, 1988

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 32.3.220 Regulating the Importation of Bovine Semen	)))	NOTICE OF AMENDMENT OF ARM 32.3.220 REGULATING THE IMPORTATION OF BOVINE SEMEN

TO: All Interested Persons:

1. On December 24, 1987 the Board of Livestock published a Notice of Proposed Amendment of Rule(s) for the purpose of amending ARM 32.3.220 at pages 2345 and 2346 of the Montana Administrative Register, Issue Number 24.
2. The Board of Livestock acting through the Department of Livestock has adopted the rule amendment(s) exactly as proposed with the following changes: (new matter underlined, deleted matter interlined).

32.3.220 BOVINE SEMEN SHIPPED INTO MONTANA; PERMIT REQUIRED
(1) remains the same
(2) remains the same
(a) Semen treated to achieve a final concentration of 50 micrograms tylosin, 250 micrograms gentamycin, and 150/300 micrograms Lineo-spectrin per milliliter of frozen semen as described by Lorton and Shin to the National Association of Animal Breeders (NAAB), 1986 (Lorton, 1986; Shin, 1986; 11 NAAB Technical Conference, 1986) or
(b) remains the same
(3) and (4) remain the same

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

3. No comments or testimony were received.

NANCY ESPY, Chairman
Board of Livestock

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

Certified to the Secretary of State February 16, 1988.

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the adoption of rule for the establishment of a State Meat and Poultry Inspection Program	))))	NOTICE OF ADOPTION OF A RULE FOR THE ESTABLISHMENT OF A STATE MEAT AND POULTRY INSPECTION PROGRAM - ARM 32.6.712

TO: All Interested Persons:

1. On December 24, 1987 the Board of Livestock published a Notice of Proposed Adoption of Rules for the establishment of a State Meat and Poultry Inspection Program at pages 2342, 2343 and 2344 of the Montana Administrative Register, Issue Number 24.

2. The Board of Livestock acting through the Department of Livestock has adopted the rule exactly as proposed as they exist as of this particular date with the following changes: (new matter underlined, deleted matter interlined)

32.6.712 FOOD SAFETY AND INSPECTION SERVICE (MEAT, POULTRY)

The Department of Livestock hereby incorporates by reference 9CFR 301 through 9CFR ~~381.371~~ 320.7; 9CFR 325 through 9CFR 325.21; 9CFR 352 through 9CFR 362.5, 9CFR 381 through 9CFR 301.37; 9CFR 381.45 through 9CFR 381.95; 9CFR 381.115 through 9CFR 381.182; 9CFR 381.190 through 9CFR 381.194; 9CFR 381.300 through 9CFR 381.311 which sets forth the federal rules on meat and poultry inspection with the following exceptions and clarifications thereto:

(1) through (15) remains the same

(16) Any reference to "Inspector in Charge, Meat & Poultry Inspection Program, Food Safety & Inspection Service, U.S.D.A." will mean "Chief Inspector in Charge, Meat & Poultry Inspection Program, Montana Department of Livestock."

(17) remains the same

(18) Any reference to the "Department of Agriculture or divisions thereof in Washington, D.C." will mean "Montana ~~Department of Livestock~~ Board of Livestock acting through the Montana Department of Livestock in Helena, Montana.

(19) Any reference to "Compliance Staff, Meat & Poultry Inspection Field Operations, Food Safety & Inspection Service, U.S.D.A., Washington, D.C. 20250" will mean "~~Compliance Staff~~, Chief Inspector in Charge, Meat & Poultry Inspection Program, Montana Department of Livestock, Capitol Station, Helena, Montana 59620.

(20) through (23) remains the same

(24) Any reference to "Secretary" will mean the "Montana ~~Department~~ Board of Livestock or it s delegate."

(25) Any reference to "Food Safety and Inspection Service" will mean the "Chief Inspector in Charge, Meat & Poultry Inspection Program, Montana Department of Livestock."

(26) remains the same

(27) Any reference to "Hearing Clerk of the Food Safety and Inspection Service" will mean "Chief Inspector in Charge, Meat & Poultry Inspection Program, Montana Department of Livestock".

(28) through (30) remains the same

(31) Any reference to the word "act" will mean the Montana "Meat and Poultry Inspection Act."

(32) Any reference to the term "Administrator" will mean the "Chief Inspector in Charge. Meat & Poultry Inspection Program, Montana Department of Livestock."

(33) Any reference to the term "Program" will mean the Montana "Meat & Poultry Inspection Act."

(34) Any reference to the term "Circuit supervisor" will mean the meat inspector designated to inspect meat in a particular "circuit" or "area"

(35) Any reference to specific provisions of federal law will mean specific provisions of corresponding laws of the State of Montana.

AUTH. 81-9-220 IMP. 81-9-220

3. No comments or testimony were received.

Nancy Espy
NANCY ESPY, Chairman
Board of Livestock

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

Certified to the Secretary of State February 16, 1988.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT) of ARM 42.15.311 and) 42.17.103 relating to With-) holding from Retirement Plan) Benefits.)	NOTICE OF THE AMENDMENT of ARM 42.15.311 and 42.17.103 relating to Withholding from Retirement Plan Benefits.

TO: All Interested Persons:

1. On August 27, 1987, the Department of Revenue published notice of the proposed amendment of ARM 42.15.311 and 42.17.103 relating to Withholding from Retirement Plan Benefits at page 1430 of the 1987 Montana Administrative Register, issue no. 16.

2. A public hearing was held on September 24, 1987 where written and oral comments were received. Upon request of the American Council of Life Insurance, an extension of time in which to file written comments was extended to October 23, 1987.

3. As a result of the comments received the Department has adopted ARM 42.15.311 as proposed and amended ARM 42.17.103.

42.17.103 WAGES (1) through (3)(a) remain as proposed in the original notice. (b) is amended as follows:

(b) The recipient of any distribution made up in whole or in part of contributions made pursuant to subsection (a) OR SOLELY OF EMPLOYER CONTRIBUTIONS may elect to have the payor withhold.

(c)(i) and (ii) are amended and a new (iii) is added as follows:

(c)(i) ~~If the recipient elects withholding the payor shall withhold and remit to the department as provided in 42.17.111 through 42.17.116.~~ A RECIPIENT OF ANY DESIGNATED DISTRIBUTION MAY ELECT TO HAVE THE PAYOR WITHHOLD STATE INCOME TAX FROM SUCH PAYMENTS BY FILING A WRITTEN ELECTION WITH THE PAYOR. SUCH TAX WITHHOLDING ELECTION SHALL SPECIFY A FLAT DOLLAR AMOUNT OF INCOME TAX TO BE WITHHELD BY THE PAYOR FROM EACH DESIGNATED DISTRIBUTION. SUCH ELECTION SHALL ALSO SPECIFY THE NAME, CURRENT ADDRESS, AND TAXPAYER IDENTIFICATION NUMBER OF THE RECIPIENT. ANY CHANGE OR REVOCATION OF A PREVIOUSLY FILED ELECTION SHALL INCLUDE THE SAME INFORMATION AS REQUIRED IN THIS PARAGRAPH FOR AN INITIAL ELECTION EXCEPT THE PAYEE SHOULD INDICATE WHETHER A CHANGE OR REVOCATION OF A PREVIOUSLY FILED ELECTION IS BEING MADE.

(ii) ~~The recipient shall notify the payor of the election to have withholding by using the federal W4P form noted as filed for state purposes.~~ THE PAYOR HAS THE OPTION TO CHOOSE NOT TO WITHHOLD FROM ANY DESIGNATED DISTRIBUTION IF THE AMOUNT TO BE DEDUCTED AND WITHHELD IS LESS THAN TEN DOLLARS. ADDITIONALLY, INCOME TAX WITHHOLDING BY THE PAYOR FROM ANY DESIGNATED DISTRIBUTION SHALL NOT BE REQUIRED IF THE AMOUNT TO BE WITHHELD WOULD REDUCE THE NET AMOUNT OF SUCH DISTRIBUTION TO LESS THAN $10.

(iii) IF THE RECIPIENT ELECTS WITHHOLDING THE PAYOR SHALL REMIT TO THE DEPARTMENT AS PROVIDED IN 42.17.112 THROUGH 42.17.116.

(4) remains the same. The proposed subsection (a) will become (5) and is amended as follows:

(5) The payor of distributions made up in whole or in part of contributions made pursuant to section 3(a) OR SOLELY OF EMPLOYER CONTRIBUTIONS shall notify the recipients of the availability of state withholding, and the requirements for the payment of state income tax on the taxable portion of a distribution.

Subsection (b) will become (a) with a new (b) added as follows:

(b) SAMPLE NOTIFICATION AND ELECTION FORMS:

(i) NOTIFICATION - PAYOR TO NOTIFY RECIPIENT AT THE TIME OF DISTRIBUTION AND YEARLY THEREAFTER:

YOU MAY BE LIABLE FOR PAYMENT OF STATE INCOME TAX ON THE TAXABLE PORTION OF YOUR PENSION PAYMENT. YOU MUST CONTACT THE STATE(S) WHERE YOU EARNED INCOME FOR SPECIFIC INFORMATION.

THE FOLLOWING ARE STATES YOU MAY NEED TO CONTACT:

MONTANA - YOU MAY ELECT TO HAVE WITHHOLDING BY FILING A STATE ELECTION FORM (ENCLOSED, ATTACHED).

(ii) STATE ELECTION FORM - MUST CONTAIN THE FOLLOWING INFORMATION:

NAME
CURRENT ADDRESS
SOCIAL SECURITY NUMBER
FLAT DOLLAR AMOUNT TO BE WITHHELD PER PAYMENT

(iii) THE DEPARTMENT WILL PROVIDE PAYEES WITH A TELEPHONE NUMBER AND ADDRESS THAT RECIPIENTS CAN USE TO CONTACT THE DEPARTMENT CONCERNING MONTANA TAX QUESTIONS.

4. The proposed changes in ARM 42.17.103(3)(b) are being made because in the course of the Department's reviewing the proposed rule it was discovered that there are retirement distributions made up entirely of employer contributions. The changes are designed to cover those cases.

The proposed changes in ARM 42.17.103(3)(c) respond to industry requests for: (a) clarification of the withholding procedure, (b) deductions calculated in flat dollar amounts (as opposed to using percentage formulas), and (c) the ability for the payor to refuse to withhold de minimus amounts.

The change in ARM 42.17.103(3)(c)(iii) also corrects an incorrect reference to other rules.

The proposed addition to the language in ARM 42.17.103(5)(b) responds to industry objections that the procedure for notifying recipients was unclear, cumbersome, and complex. By providing a sample notice, the Department is making the notice procedure clear, straightforward, and simple. By providing uniform information on how potential taxpayers may contact the Department, the Department is easing the administrative burdens on the payors.

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

COMMENT: The Department of Revenue is without statutory authority to provide for voluntary withholding on pensions and annuities.

RESPONSE: The Department has the authority to adopt rules for voluntary withholding. Montana law specifically provides for tax withholding and requires the Department to adopt rules including rules on tax withholding from compensation for services. Contributions to deferred pension and annuity plans are compensation for services. They result from employment in Montana, and when received by an employee they are subject to tax and withholding.

COMMENT: The State of Montana's regulation is preempted by the Employee Retirement Income Security Act of 1974 (ERISA). The regulation violates the McCarran-Ferguson Act and the Supremacy Clause of the United States Constitution.

RESPONSE: The Department of Revenue's rule has no effect upon how a plan operates. Thus, the policy areas of ERISA do not apply to the rule. (Supporting case law: Northwest Airlines v. Roemer, 603 F.Supp. 8, 12 (D. Ct. Minn. 1984); Firestone Tire and Rubber et al. v. Neusser, 810 F.2d 550 (6th Civ. 1987); National Concerns Conference Committee v. Hiffernon, 454 F. Supp. 914 (D. Conn. 1978); General Motors v. California State Board of Equalization, 600 F. Supp. 76 (D. Cal. 1984)).

COMMENT: The Department of Revenue's regulation is arbitrary and capricious because it makes no legal, actual or administrative sense to impose the legal requirement on insurers to notify payees of the responsibility to report income received.

RESPONSE: The Department is amending the rule at the request of the American Council of Life Insurance and others. They contended the existing rule on mandatory withholding wasn't workable.

Every effort was made by the Department to receive and consider input from all interested parties. Numerous meetings were held and all information submitted was considered. In fact, language proposed by the Council was incorporated in the amendment.

The amended rule is the end product of a long and extensive process to reach a fair and equitable solution to the concerns of the interested parties.

The purpose of the notice to recipients is two fold: (1) to remind the recipient of the liability of state tax in the state where the income was earned; and (2) to provide information on voluntary withholding.

The requirement to notify recipients is a compromise. The insurance industry has stated that distributions can't be allotted to the source (state) of the earnings because the retirement benefits industry has not maintained adequate records for that purpose. Therefore, mandatory withholding isn't possible.

Without mandatory withholding, payment of income tax on the distribution is jeopardized. The compromise is to notify recipients of their responsibility to file a tax return with Montana if the income giving rise to the retirement benefits was originally earned in this state.

The rule also provides for voluntary withholding to accommodate recipients who prefer to pay the tax as they receive their distributions.

It is reasonable to place the notice and voluntary withholding requirements on the payors because they are the only existing link between the State of Montana and a group of taxpayers liable for Montana taxes.

COMMENT: The notice requirement of the regulation would place affected payors in legal jeopardy by requiring them to distribute income tax information to their payees. The opponents contend the notice requirement would create confusion among the payees, and that the requirements were costly.

RESPONSE: The Department will provide the notice language. The Department will also provide a Montana contact (phone and address) for questions related to the notice.

The Montana notification requirement is sent at the same time the federal notice is sent, alleviating the duplication of mailing costs.

Programming costs submitted by the insurance companies varied by $145,000 (from $5,000 to $150,000). The companies provide total costs without a detailed breakdown that could be evaluated. According to the Department of Administration contacted by Income Tax Division staff, Montana's retirement system (PERS) could accommodate a change such as a voluntary withholding for $5,000 - $10,000.

The Department has also attempted to alleviate payor's administrative costs through (a) making the process as simple and clear as possible, (b) allowing flat dollar withholding calculations, and exemption from de minimums withholding amounts, (c) a standard notice, and (d) a procedure directing recipient questions to a Department telephone or address. As much as possible, beginning with the change from mandatory to voluntary withholding, the Department has worked to ease the burden on payors. However, the burden cannot be removed entirely because the payor industry is the only link between the Department and citizens who have an obligation to pay Montana taxes, but may not be aware of that obligation.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 2/16/88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rule I (42.19.301) relating to the Clarification of Exception to Tax Levy Limit for the Property Assessment Division.	NOTICE OF ADOPTION of Rule I (42.19.301) relating to the Clarification of Exception to the Tax Levy Limit for the Property Assessment Division.

TO: All Interested Persons:

1. On November 12, 1987, the Department published notice of the proposed adoption of Rule I (42.19.301) relating to taxation of property at page 2071 of the 1987 Montana Administrative Register, issue no. 21.

2. The Department has adopted these rules as proposed.

3. A public hearing was held on December 2, 1987, to consider the proposed adoption of these rules.

The Department was represented by Dan Bucks, Deputy Director. Gordon Morris, Executive Director of the Montana Association of Counties; Bruce Moerer, Attorney, Montana School Boards Association; and Rick Bartos, Attorney, Montana Office of Public Instruction testified at the hearing.

Mr. Bucks began the hearing with an explanation of the rule. He noted that the purpose of the rule was simply to implement the Attorney General's Opinion 42 A.G. Op. 21 interpreting Ch. 654, L. 1987. He explained the subject of the rule which involves the exception to the I-105 freeze on individual property taxes allowed under 15-10-412 (7), MCA, in cases where a taxing jurisdiction's valuation falls by 5% or more in a year. In that instance, local governments are allowed to exceed the limit on individual taxpayers, but are still limited to the amount of property tax revenue they raised in tax year 1986. The Attorney General ruled that this exception was effective only for the year in which the valuation dropped and not for subsequent years. The Department had urged Attorney General to interpret this exception as being available to local governments for all future years after a 5% drop in valuation occurred. Through the proposed Rule I, the Department is complying with the Attorney General's interpretation.

Mr. Morris commented that he disagreed with the content of the rule, but understood that it was consistent with the Attorney General's opinion. He described hardships that local governments experiencing major declines in valuation would incur because the exception to I-105 would be available to them for only one year instead of for several years. He expressed support for a poll of legislators to determine if the rule and the Attorney General's opinion conformed to the intent of the Legislature.

Mr. Moerer commented that the rule and Attorney General's opinion were contrary to the intent of the law. He noted the hardship that the Columbia Falls schools and schools in the oil

and gas counties would experience because of the interpretation that an exception to I-105 would be available for only one year. He urged that the Revenue Oversight Committee conduct a poll of legislators to determine if the rule conformed to legislative intent.

Mr. Bartos opposed the rule for the same reasons cited by Mr. Moerer. He also urged a legislative poll.

RESPONSE: The Department agrees that the Attorney General's opinion and the rule create a hardship for local governments and schools experiencing major declines in taxable valuation. For that reason and because of its understanding of legislative intent, the Department had urged the Attorney General to adopt an alternative interpretation. However, the Department is required by law to follow the Attorney General's opinion.

The Department discussed the idea of a poll of legislators with the Revenue Oversight Committee on January 15, 1988. The Committee declined to conduct a poll, but chose to prepare legislation making the "5% decrease in valuation exception" available for all years following the decrease.

WRITTEN COMMENTS: The Department received written comments from the following Montana school superintendents:

Calvin Moore, Medicine Lake Public Schools
Gene Berg, Flaxville Public Schools
Doug Walsh, Plentywood Public Schools
Duane Denny, Powder River County High School and Elementary District 79J
Ryan D. Taylor, School District # 6, Columbia Falls
Dennis Williams, Conrad Public Schools
Jack Eggensperger, Lambert Public Schools
Dan Haugen, Chinook Public Schools
J. Jay Erdie, Roundup Public Schools
James Stanton, Baker City Schools

In addition, written comments were received from Marilyn Truscott, District Clerk and Business Manager, Forsyth Public Schools, on behalf of the Forsyth Board of Trustees, and from Eric Feaver, President, Montana Education Association.

The comments from the school district officials documented the hardship created by the Attorney General's opinion and the rule. These districts all experienced decreases in valuation between 1986 and 1987 that greatly exceeded 5%. The districts noted that if they were allowed an exception to the freeze on individual property taxes for only one year, they will experience major decreases in tax revenue in subsequent years. In general, the districts generally commented that the future decreases in tax revenue and budgets would have a major detrimental effect on the educational programs in their districts.

Many of the district officials noted that their cash reserves were inadequate to alleviate the potential hardship. Superintendent Erdie stated that the "reserves are depleted" for the Roundup Public Schools. Superintendent Haugen reported that there are zero reserves available for Chinook High School.

In general, several districts offered data on the percentage declines in valuation they had experienced or their projected revenue losses if they were not allowed a continuing exception to the I-105 freeze.

The following summarizes the data on the percentage declines in taxable valuation for the districts between tax years 1986 and 1987:

Medicine Lake Public Schools	64%
Baker City Schools	
Elementary	48%
High School	51%
Forsyth Public Schools	48%
Roundup Public Schools	
District 55 (elem.)	35%
District 55H (high sch.)	24%
Columbia Falls, District # 6	
Elementary	30.3%
High School	18.9%
Chinook Public Schools	
Elementary	28%
High School	24%
Conrad Public Schools	24%
Lambert Public Schools	
Elementary	24%
High School	19%

Superintendent Taylor, Columbia Falls, noted that the 18.9% valuation drop for his high school and the same drop for the elementary schools was attributable to "legislative approval of a tax reclassification for Columbia Falls Aluminum Company."

The following summarizes the projected revenue losses that the school districts anticipate by FY 1989 if the exception to the tax freeze is not available for future years. Unless otherwise noted, the district projections represent decreases from FY 1988 to FY 1989:

Baker City Schools	
Elementary General Fund	$ 428,000
High School General Fund	438,000
Columbia Falls Schools	299,361
Plentywood Public Schools	213,500
Powder River Schools	
Elementary	101,377
High School	178,692
Conrad Schools (FY '87 to FY '89 decrease)	
Elementary	128,428
High School	101,286
Lambert Schools (FY '87 to FY '89 decrease)	
Elementary	54,404
High School	58,316

In addition, Superintendent Erdie, Roundup Public Schools, projected that without a continuing exception to the tax freeze,

the Roundup High School general fund would experience a "deficit of $76 367.49" for FY '89. He projected for the Roundup Elementary School general fund a "deficit of $79,429.37."

The district officials generally interpreted the impact of the impending revenue losses in harsh terms. They often noted that their districts had already cut budgets in response to stringent economic conditions and that the state had mandated continuing cost increases for their districts for certain items (worker's compensation costs were most frequently cited.) The following is a sample of the comments.

"We trimmed an already bare-bones budget this year to help do our part in shouldering the burden of our state's economic problems. This kind of cooperation, apparently, only decreases our chances of surviving."

-- Superintendent Berg, Flaxville

"Columbia Falls has always operated a conservative educational system. We have among the highest student to principal ratios in the state. Our class size (student to teacher) is also among the highest in the state. In summary, we have no fat, further reductions will adversely affect our educational programs.

-- Superintendent Taylor
Columbia Falls

" . . . the resulting affect (of the Attorney General's opinion and Rule I) on our educational programs would be disastrous . . ."

-- Superintendent Haugen, Chinook

Noting past budget cuts already made before the anticipated future cuts: "We accomplished this by reducing our staff by 2 principals, 2 1/2 teachers, an aide, a part time secretary and a custodian."

-- Superintendent Williams, Conrad

"I sincerely hope that some measures can be taken to alleviate the 'wreck' that I see coming, resulting in irreparable damage to instructional programs. The end result is that students suffer."

-- Superintendent Erdie, Roundup

"We all realize the economy of Montana is not in great shape but from the few figures I have mentioned . . ., if there is not special legislation forthcoming, our School District along with several others, will be closing our doors."

-- Superintendent Stanton, Baker

Superintendent Taylor, Columbia Falls, also "petitioned" the Department to support legislation to amend 15-10-412 to correct the problems he cited.

In addition to these school district comments, Eric Feaver of the Montana Education Association asked that the rule be amended to say "five percent (5%) of the 1986 value" instead of "five percent (5%) of the previous year's value."

RESPONSE TO WRITTEN COMMENTS: The Department agrees that the projected declines in taxable valuation ranging from 20% to 50% or more will have a serious, if not devastating, impact on various school districts and other local governments. Clearly,

15-10-412 (7) as written and interpreted by the Attorney General yields an absurd result for many local governments in Montana. However, the Department is bound by the Attorney General's opinion and cannot amend Rule I to achieve a more reasonable result. Legislative action is necessary to correct the problems cited by the school officials.

Mr. Feaver's suggestion cannot be adopted because it is contrary to the Attorney General's opinion.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 2/16/88.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rule I (42.26.280) through Rule VII (42.26.286) relating to Airline Regulations for Corporation License Tax.	NOTICE OF THE ADOPTION of Rule I (42.26.280) through Rule VII (42.26.286) relating to Airline Regulations for Corporation License Tax.

TO: All Interested Persons:

1. On November 12, 1987, the Department published notice of the proposed adoption of Rules I through VII relating to airline regulations for corporation license tax at page 2073 of the 1987 Montana Administrative Register, issue no. 21.

2. The Department has adopted these rules as proposed.

3. A public hearing was held on December 4, 1987, to consider the proposed adoption of these rules. Persons attending the hearing were: Tom Hopgood, Counsel for Northwest Airlines/Air Transport Association; James DeLaHunt, Representing ATA Carriers Serving Montana; Lynn Chenoweth and Jeff Miller of the Montana Department of Revenue, Natural Resource and Corporation Division.

4. Mr. James DeLaHunt, Director of Finance for Northwest Airlines, Inc. submitted the following comments:

COMMENT: Using the weighted departures in the revenue factor is inequitable and arbitrary for two reasons: (a) the cost of the aircraft does not always bear a direct relationship to the relative capacity of the aircraft, and (b) even if it did, the mere departures of a certain number of seats and cargo capacity does not bear a direct relationship to the amount of revenue that is being earned from a flight.

RESPONSE: The cost of an aircraft does have a reasonable relationship to its capacity. From the schedule provided by NW, it can be shown that as the capacity of the aircraft increased, so did its costs. The relative increase in cost to capacity was not the same for each type of aircraft due to several factors, but it can be clearly shown there is a reasonable relationship.

The number of departures does have a reasonable relationship to the income producing activity of an airline in the state. These rules do not assume that every passenger seat is sold or that the cargo capacity is full on each flight that departs from a Montana airport. The rules do assume that the number of people and amount of cargo on an aircraft that takes off in Montana is similar to the average throughout the system. This is a very reasonable assumption to make for the following reason: If Montana flights are substantially below the system average, the taxpayer will either remove the service from the state or use a smaller aircraft. This has happened consistently in Montana over the years. If the number of tickets sold on Montana flights is higher than the system average, the taxpayer will most likely bring in more flights. Therefore, using the cost

weighted departures method of determining portions of the apportionment formula does appear to be a reasonable method of determining Montana income.

COMMENT: Using cost weighted departures to allocate flight crew payroll is inequitable and arbitrary because it fails to recognize the number of flight crew members on board and their probable earnings level.

RESPONSE: The proposed rule does reasonably reflect the differences in number of flight personnel and compensation paid for each type of aircraft. From the schedule provided by Northwest Airlines, as the cost of the aircraft increases, so does the number of flight attendants.

COMMENT: There is no direct relationship between departures and the way an airline earns its income.

RESPONSE: The number of departures, weighted by the cost of the aircraft, has a very direct relationship to how an airline earns income. The only way an airline earns income is by transporting people and cargo from one location to another. In order for the transportation to take place, there must be a departure. There are numerous other methods of apportioning income of an airline. However, this method does have a reasonable relationship to the income producing activity of an airline. In addition, this method has been adopted, either formally or informally, by at least seven other states.

COMMENT: The proposed rule results in a significant increase in taxes without an increase in activity in the State by the airline.

RESPONSE: The proposed rule is a fair method of apportioning income of an airline and one that is most accepted by other states. It was not proposed by the Department because it produced the most revenue for the State. Montana could have chosen other methods that would produce more revenue. For example, using stopdown revenue miles in the apportionment formula to allocate mobile property, payroll and sales would result in a substantially larger tax liability. Instead, the Department chose to adopt a method that was researched, developed and recommended by the Multistate Tax Commission and adopted by several other states. In addition, this method of apportionment was selected by the Department in the interest of promoting uniformity, consistency and certainty among the Department, the taxpayers and other states.

COMMENT: The proposed rule penalizes carrier engaged in the acquisition of new, modern, fuel efficient and quiet aircraft.

RESPONSE: UDITPA requires that all assets, includable in the apportionment formula, be included at cost. This rule merely follows that requirement. Obviously, any asset purchased today will have a higher cost than a similar asset purchased ten years ago. However, that does not invalidate the formula.

COMMENT: Taxpayers subject to this rule will have an increase in tax liability that cannot be justified.

RESPONSE: The proposed rule sets forth a procedure that will result in a reasonable reflection of a taxpayer's presence in the State. It does not systematically produce an increased tax relative to other methods that have been used to apportion

airline income. The method may either increase or decrease an airline's tax liability relative to other methods. The purpose of the rule is simply to apportion income reasonably. It is not designed to produce a revenue result.

Mr. DeLaHunt also submitted written testimony from William Dowd, dated December 6, 1982, in opposition to the proposed rules. These comments had originally been presented to the Multistate Tax Commission at the time the rules were being developed by the Commission.

COMMENT: Mr. Dowd first stated that the proposed rules will not result in a fair reflection of the income earned by a taxpayer in the State because a mileage factor is not included in the formula. Since an airline is in the business of transporting people and cargo from one location to another, mileage must be considered.

RESPONSE: The proposed rules will determine the presence (and therefore the amount of income) of a taxpayer in the State by the number of takeoffs in the State weighted by the cost of each plane. This is a very valid determinant of a taxpayer's presence in the State. If an individual boards a plane in Billings, it should not matter, from the standpoint of state taxes, whether that individual flew to Seattle or New York. The fact is, the airline picked-up a passenger and then departed. That is the activity that took place in Montana and that is what should be reflected in the apportionment formula.

COMMENT: Mr. Dowd also stated that he felt the proposed rules would fail the constitutional test because using only departures would not adequately reflect the economic activity of an airline in a particular state.

RESPONSE: The proposed rules do properly reflect the economic activity of an airline in the State for all the reasons previously stated. Therefore, the rules are constitutional. The use of this method by several other states suggests that officials elsewhere also consider the method constitutional.

JOHN D. LaFAVER, Director
Department of Revenue

Certified to Secretary of State 2/16/88.

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

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

TO: All Interested Persons

1. On January 14, 1988, the Department of Social and Rehabilitation Services published notice of the proposed repeal of Rule 46.12.201 pertaining to eligibility requirements for medical assistance at page 35 of the 1988 Montana Administrative Register, issue number 1.

2. The Department has repealed Rule 46.12.201 as proposed.

3. The Department has thoroughly considered all commentary received:

COMMENT: A staff person from the Administrative Code Committee commented that the statement of reasonable necessity was not sufficient and should be clarified in the second notice.

RESPONSE: The Department has proposed to repeal the rule because the first sentence unnecessarily repeats statutory language at 53-6-141 MCA. The second sentence of the rule is not a complete sentence and makes no sense. Since the rule language is unclear, the intent is unclear. The most likely intention of the rule, as discerned by the Department representative, expresses a priority for services that is not authorized by statute and, therefore, not legally implementable.

Director, Social and Rehabilitation Services

Certified to the Secretary of State January 14, 1988.

VOLUME NO. 42 OPINION NO. 61

COUNTIES - Deliberations of county tax appeal board, notice of meetings;
OPEN MEETINGS - Deliberations of county tax appeal board, notice of meetings;
PROPERTY, REAL - Deliberations of county tax appeal board, notice of meetings;
PUBLIC OFFICERS - Deliberations of county tax appeal board, notice of meetings;
RIGHT TO KNOW - Deliberations of county tax appeal board, notice of meetings;
TAXATION AND REVENUE - Deliberations of county tax appeal board, notice of meetings;
MONTANA CODE ANNOTATED - Sections 2-3-202, 2-3-203, 15-15-101 to 5-15-103;
MONTANA CONSTITUTION - Article II, section 9;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 42 (1987), 38 Op. Att'y Gen. No. 33 (1979).

HELD: 1. The deliberations of a county tax appeal board regarding an application for reduction in property valuation must be open to the public unless the presiding officer determines that the discussion relates to a matter of individual privacy and that the demands of individual privacy clearly exceed the merits of public disclosure.

2. Adequate notice must be given of any meeting of a county tax appeal board, including the board's deliberations which involve the convening of a quorum to hear, discuss, or act upon an appeal.

3 February 1988

Mike Salvagni
Gallatin County Attorney
Law and Justice Center
615 South 16th Street
Bozeman MT 59715

Dear Mr. Salvagni:

You requested my opinion on two issues:

1. May a county tax appeal board close to the public its deliberations regarding an application for reduction in valuation of property?

2. If such deliberations are to be open to the public, what notice procedures should be followed if the deliberations are held at a time different from the examination required by section 15-15-103, MCA?

The county tax appeal boards described in section 15-15-101, MCA, are comprised of three county residents appointed by the county commissioners. These residents are paid for their work on the board with state funds. A county tax appeal board is charged with the duty of hearing all taxpayers' appeals from property tax assessments. § 15-15-101, MCA. It is given the power to change an assessment or to fix an assessment at some other level. § 15-15-101(3), MCA.

Section 15-15-102, MCA, provides that, before a county tax appeal board can make a reduction in property valuation, a written application must be filed by the party affected by the valuation. That section states:

> No reduction may be made in the valuation of property unless the party affected or his agent makes and files with the county tax appeal board on or before the first Monday in June or 15 days after receiving a notice of classification and appraisal from the department of revenue, whichever is later, a written application therefor. The application shall state the post-office address of the applicant, shall specifically describe the property involved, and shall state the facts upon which it is claimed such reduction should be made.

Section 15-15-103, MCA, requires that the board must examine on oath, at a recorded hearing, any person making such an application. You have asked whether the deliberations conducted by a county tax appeal board, following such examination of applicants, may be closed to the parties involved and the public.

Article II, section 9 of the Montana Constitution provides that a person has the right to observe the deliberations of "all public bodies or agencies of state government and its subdivisions." Likewise, section 2-3-203, MCA, found in Montana's open meeting law, requires that the meetings of all "public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds must be open to the public." As stated above, county tax appeal boards are state-funded boards assigned the governmental task of receiving input from the public and, thereafter, fixing property tax assessments. Thus they are public or governmental boards as referred to in section 2-3-203, MCA. See 42 Op. Att'y Gen. No. 42 (1987).

The fact that a county tax appeal board has finished hearing testimony pursuant to section 15-15-103, MCA, does not mean that its meeting has necessarily ended. The crucial question is whether there is still a "meeting," as defined in section 2-3-202, MCA.

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

Thus, where a board's deliberations involve the convening of a quorum to hear, discuss, or act upon an appeal, there is a "meeting" within the above definition, and the public must be allowed. The exception, of course, is where the presiding officer of a meeting makes a determination, according to section 2-3-203(3), MCA, that the demands of individual privacy require that the meeting be closed. See Mont. Const. art. II, § 9.

I previously held in 38 Op. Att'y Gen. No. 33 at 115 (1979) that the deliberations of the Montana Human Rights Commission, a quasi-judicial body, are subject to Montana's open meeting law. In addressing the concern

that a determination regarding individual rights be conducted in a "judicial atmosphere," I stated:

> Our Open Meeting Act specifically addresses this problem by allowing the closure of any proceeding in which the individual's right to privacy outweighs the public's right to know. In such cases, which may be common before the Human Rights Commission, the attributes of a "judicial atmosphere" can be preserved. In the case of other quasi-judicial bodies which consider questions of broader public impact, the expansive intent in our Constitution and statutes favoring public disclosure can be preserved. If this inhibits frank discussion of views and issues by board members, that is a price demanded by our Constitution and our Legislature so that the people of Montana do not "abdicate their sovereignty to the agencies which serve them."

38 Op. Att'y Gen. No. 33 at 118.

Such reasoning is applicable to the deliberations of a county tax appeal board. Even if characterized as a quasi-judicial board, its meetings must still be open generally, and may be closed after a determination regarding individual privacy, pursuant to section 2-3-203, MCA. And even if a meeting is closed to the general public, the taxpayer who is appealing has the right to attend. See Jarussi v. Board of Trustees, 40 St. Rptr. 720, 725, 664 P.2d 316, 320 (1983).

Your second question relates to notice to the public of deliberations, where such deliberations take place at a date and/or time different from when testimony was heard pursuant to section 15-15-103, MCA. Section 15-15-101, MCA, specifically sets out the notice requirements for a county tax appeal board hearing:

> (3) In connection with any such appeal, the county tax appeal board may change any assessment or fix the assessment at some other level. The county clerk shall publish a notice to taxpayers, giving the time the county tax appeal board will meet to hear protests concerning assessments and the latest date the county tax appeal board may take

> applications for such hearings. The notice shall be published in a newspaper if any is printed in the county or, if none, then in such manner as the board may direct. The notice shall be published at least 7 days prior to the first meeting of the county tax appeal board.

Therefore, a county tax appeal board must follow the requirements of section 15-15-101(3), MCA, in giving notice of a meeting to hear protests. Such notice requirements may also apply when the board meets to discuss and deliberate about such protests and any applications made pursuant to section 15-15-102, MCA.

Montana's open meeting law also requires that adequate notice be given to the public. Board of Trustees v. County Commissioners, 186 Mont. 148, 606 P.2d 1069 (1980). If notice has been given under section 15-15-101(3), MCA, but the board meets at another time and/or place after initially hearing a protest, adequate notice must again be given.

THEREFORE, IT IS MY OPINION:

1. The deliberations of a county tax appeal board regarding an application for reduction in property valuation must be open to the public unless the presiding officer determines that the discussion relates to a matter of individual privacy and that the demands of individual privacy clearly exceed the merits of public disclosure.

2. Adequate notice must be given of any meeting of a county tax appeal board, including the board's deliberations which involve the convening of a quorum to hear, discuss, or act upon an appeal.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 62

AGRICULTURE, DEPARTMENT OF - Department required to comply with MEPA for grasshopper spraying program;
MONTANA ENVIRONMENTAL POLICY ACT - Department of Agriculture required to comply with MEPA for grasshopper spraying program;
MONTANA ENVIRONMENTAL POLICY ACT - Emergency exception to MEPA allowed only when immediate action required and not reasonably foreseeable;
PESTICIDES - Pesticide spraying for grasshopper control requires compliance with MEPA where state participates with funding and expertise;
MONTANA CODE ANNOTATED - Title 10, chapter 3; Title 75, chapter 1; Title 80, chapter 7, part 5; sections 10-3-405, 75-1-103, 75-1-201;
ADMINISTRATIVE RULES OF MONTANA - Title 4, chapter 2, sub-chapter 3; sections 4.2.303, 4.2.307, 4.2.308.

HELD: 1. The participation of the State of Montana in a grasshopper spraying program in which the state pays up to one-third of the costs and provides financial management and technical expertise, is a major state action in which compliance with the terms of the Montana Environmental Policy Act is required.

2. While an emergency situation is a legitimate exception to the requirements of MEPA, the Montana Department of Agriculture should, in the future, comply with MEPA before participating in a grasshopper spraying program, if the need for such program is reasonably foreseeable.

5 February 1988

Keith C. Kelly, Director
Department of Agriculture
Scott Hart Building
303 Roberts
Helena MT 59620

Dear Mr. Kelly:

On June 1, 1987, Governor Schwinden issued a proclamation declaring that an infestation of grasshoppers constituted an emergency in the State of Montana. The effect of the proclamation was to make available up to $200,000 of state disaster and emergency funds for expenditure under the provisions of Title 80, chapter 7, part 5, MCA. That part of Title 80 provides authority for the Montana Department of Agriculture (hereinafter the Department) to participate with counties in a program of cropland spraying for the purpose of controlling insect infestations.

In this instance, the Department adopted a set of emergency rules setting forth the specific requirements for counties and individuals to participate in the program. Each county had to elect participation and was required to levy two mills pursuant to authority contained in section 10-3-405, MCA. Further rules pertaining to landowners established the dates by which applications must be made and the reimbursement procedures. The state, through the Disaster and Emergency Services Division of the Department of Military Affairs, provided financial management of the program. The state also limited its total financial participation to one-third of the overall cost of the program or $200,000, whichever was less.

The emergency rules also required participating counties to enter into a pest management agreement with the Department. Neither the emergency rules nor the pest management agreement clearly stated the division of authority between the state, the county, and the landowner. The basic plan was that the landowner could either do his own spraying or contract for the spraying of grasshoppers by an independent contractor. The landowner could then be reimbursed for a portion of his costs by the county and the state depending on the amount of funds that each had available and the number of participating landowners. The Department also made available technical expertise in pest management and conducted the survey to document the extent of the grasshopper infestation.

The Montana Environmental Policy Act (Tit. 75, ch. 1, MCA) (hereinafter MEPA), mandates that "it is the continuing responsibility of the state of Montana to use

all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources" in order to attain certain goals. § 75-1-103(2), MCA. Among the goals enumerated are to

> (b) assure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings; [and]
>
> (c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences[.]

§ 75-1-103(2), MCA.

In order to assure that these values are reflected in the decisions of government agencies, the Legislature has required that the agency shall, "to the fullest extent possible[,]" include an environmental impact statement (hereinafter EIS) "in every recommendation or report on proposals for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment[.]" § 75-1-201(1)(b)(iii), MCA.

MEPA gives no further guidance on what constitutes "major state action." However, in implementing MEPA the Department itself has adopted certain procedural rules (Tit. 4, ch. 2, sub-ch. 3, ARM), one of which addresses the determination of whether an environmental impact statement is required:

> (3) The following are categories of actions which normally require the preparation of an EIS:
>
> (a) actions which may significantly affect environmental attributes recognized as being endangered, fragile, or in severely short supply;
>
> (b) actions which may be either significantly growth inducing or growth inhibiting;

(c) actions which may substantially alter environmental conditions in terms of quality or availability; or

(d) actions which will result in substantial cumulative impacts.

§ 4.2.303(3), ARM.

There has been very little judicial interpretation of MEPA requirements in Montana. However, the Montana Supreme Court has indicated that federal interpretations of parallel provisions of the National Environmental Policy Act (hereinafter NEPA) may be looked to for guidance. Kadillak v. Anaconda Co., 184 Mont. 127, 602 P.2d 147, 153 (1979).

The subject of pesticide spraying is indisputably one which most courts have found to be within the ambit of NEPA since such spraying may well have "an impact on man's environment". (§ 75-1-201(1)(b)(i), MCA). See Annot., 74 A.L.R. Fed. 249. See also Alaska Survival v. Weeks, 18 Env't Rep. Cas. (BNA) 1814 (Alaska 1981); State of Wisconsin v. Butz, 389 F. Supp. 1065 (E.D. Wis. 1975). The more critical inquiry is whether the state involvement in the grasshopper spraying program constitutes "major state action" sufficient to trigger the requirements of MEPA.

As outlined earlier, the state's role in the spraying program was to provide a maximum of one-third of the cost of the program and to supervise the financial administration of the program. Certain technical expertise was also provided. The actual spraying was done by landowners contracting with local businesses to provide the service or doing it themselves.

The only Montana Supreme Court case which has dealt with the application of MEPA to programs involving different levels of government and the private sector is Montana Wilderness Association v. Board of Health and Environmental Sciences, 171 Mont. 477, 559 P.2d 1157 (1976). Under the facts of that case and without delineating any test to aid in future determinations, the Court found that the subdivision review process, conducted pursuant to the Montana Subdivision and Platting Act, was essentially a local process and was not within the scope of MEPA. By its terms, MEPA

applies to "all agencies of the state" (§ 75-1-201, MCA), and not to local government entities. Montana Wilderness Association is thus of limited value to the issue presented here because it did not involve any financial participation by the state.

This paucity of authority in Montana again leads to a review of decisions interpreting the federal act. In the analogous area of categorical grants by the federal government to local and state governments, one commentator has stated that "[s]tate and local projects that receive federal financial assistance are subject to NEPA." D. Mandelker, NEPA Law & Litigation § 5.13 (1984). The leading case in this area appears to be Save the Courthouse Committee v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975). In that case, the court determined that the participation of the United States Department of Housing and Urban Development in a local urban renewal plan was sufficient to require an EIS. The federal agency had participated financially by giving grants and loan guarantees although there was local decisionmaking by both private entities and local government units. Other cases have reached the same result where the participating federal agency made a loan to a nonfederal entity (Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973)) and where federal mortgage insurance was available (Wilson v. Lynn, 372 F. Supp. 934 (D. Mass. 1974)).

In NORML v. U.S. Drug Enforcement Administration, 545 F. Supp. 981 (D.D.C. 1982), the issue was whether the federal Drug Enforcement Administration (DEA) had to prepare an EIS for a paraquat spraying program undertaken by the State of Florida. The court found that while the federal agency gave general assistance grants for law enforcement to the State of Florida, none of the money was earmarked for the spraying program. The State of Florida said it would do the spraying even without federal involvement. Since it found no direct financial assistance by the federal agency to the spraying program, the court ruled that there was no "major federal action."

In State of Alaska v. Andrus, 591 F.2d 537 (9th Cir. 1979), the court similarly underscored that federal financial participation is often the touchstone for finding that NEPA applies to the federal action. The court stated:

> There can be major federal action when the primary actors are not federal agencies, but rather state or local governments, or private parties. Most courts agree that significant federal funding turns what would otherwise be a local project into a major federal action. See Homeowners Emergency Life Protection Committee v. Lynn, 541 F.2d 814 (9th Cir. 1976) (per curiam) (federal disaster-relief funding for municipal dam and reservoir project).

591 F.2d at 540.

This review of federal decisions interpreting NEPA indicates that federal financial participation in a nonfederal project is usually sufficient to bring the agency's action under NEPA. As stated in NEPA Law & Litigation § 8.25:

> In most cases in which a federal agency makes a direct categorical grant for a nonfederal project, the use of federal funds for the project is sufficient to bring it under NEPA.

Applying these precedents to the facts under review here, it is clear that the participation of the State of Montana in providing up to one-third of the funding for the grasshopper spraying program together with financial management and technical expertise is a major state action for MEPA purposes.

Another aspect of this matter is the proclamation of emergency issued by the Governor of Montana pursuant to his authority under Title 10, chapter 3, MCA. You have inquired whether MEPA applies to state action that involves an emergency.

The MEPA rules adopted by the Department of Agriculture deal with the issue of emergency. Section 4.2.308, ARM, provides as follows:

> (1) Emergencies. The department of agriculture may take or permit action having a significant impact on the human environment in an emergency situation without preparing an EIS. Within 30 days following initiation of the action, the department of agriculture

> shall notify the governor and the EQC as to the need for such action and the impacts and results of it. Emergency actions shall be limited to those actions necessary to control the immediate impacts of the emergency.

In this instance the Department did not follow the directive of that rule in filing a report with the Governor and the Environmental Quality Council, perhaps because it felt its action was not covered by MEPA even in a nonemergency situation.

It is, of course, necessary that MEPA be construed to allow for an exception to its requirements in emergency situations since it would otherwise deter the state's ability to respond to situations of great need. However, the emergency exception should not be used to avoid the provisions of MEPA.

I am reluctant to determine whether the emergency exception was properly invoked here because all of the pertinent facts are not before me. I nonetheless note that, because severe grasshopper infestations have occurred during the last three years, the Department is adequately on notice that future spraying may be necessary. Further reliance on the emergency exception, therefore, appears inappropriate. The emergency exception must be used sparingly and only when (1) immediate action is required, and (2) the necessity or nature of the action was not reasonably foreseeable.

Finally, I note that under the Department's rules it has authority to adopt a so-called programmatic EIS. § 4.2.307, ARM. The programmatic EIS is designed to review ongoing programs of the Department and actions which it may be required to undertake in the future. The virtue of the programmatic EIS is that it is done before the Department is confronted with an emergency situation, and yet it provides for a consideration of the values embodied in MEPA. It appears that the programmatic EIS may be the desirable way for the Department to meet the requirements of MEPA and be able to respond readily when confronted by an immediate need to deter a grasshopper infestation.

THEREFORE, IT IS MY OPINION:

1. The participation of the State of Montana in a grasshopper spraying program in which the state pays up to one-third of the costs and provides financial management and technical expertise, is a major state action in which compliance with the terms of the Montana Environmental Policy Act is required.

2. While an emergency situation is a legitimate exception to the requirements of MEPA, the Montana Department of Agriculture should, in the future, comply with MEPA before participating in a grasshopper spraying program, if the need for such program is reasonably foreseeable.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 63

COURTS - Distribution of fees, fines, penalties, forfeitures;
COURTS, JUSTICE - Distribution of charge created by section 46-18-236, MCA;
CRIMINAL LAW AND PROCEDURE - Distribution of charge created by section 46-18-236, MCA;
FEES - Charge created by section 46-18-236, MCA, not a fee;
JUDGES - Distribution of fees, fines, penalties, forfeitures;
TREASURER, STATE - Distribution of fees, fines, penalties, forfeitures;
MONTANA CODE ANNOTATED - Sections 3-10-601, 3-10-601(1), 7-4-2502, 7-4-2503, 7-4-2505, 46-18-236;
MONTANA LAWS OF 1987 - Chapter 557;
MONTANA LAWS OF 1986 - Chapter 17, section 3;
MONTANA LAWS OF 1985 - Chapter 719, section 1.

HELD: The charge imposed upon criminal defendants by section 46-18-236, MCA, is a penalty or a forfeiture and is to be collected and distributed pursuant to section 3-10-601(2), (3), and (4), MCA.

8 February 1988

Wm. Nels Swandal
Park County Attorney
Park County Courthouse
Livingston MT 59047

Dear Mr. Swandal:

You have requested my opinion on a question which I have phrased as follows:

> What is the proper disposition of funds collected by a justice court pursuant to section 46-18-236, MCA?

As your question arises from the recent amendments to sections 46-18-236 and 3-10-601, MCA, some discussion of the history of these statutes may be of assistance.

In 1985, the Legislature enacted Senate Bill 116, which revised the salary structure for prosecuting attorneys, required the State to pay a portion of the salaries of deputy county attorneys, and provided for the imposition of a charge to be assessed upon persons who are convicted of a crime or who forfeit bail or bond, amending sections 7-4-2502, 7-4-2503, and 7-4-2505, MCA, and creating section 46-18-236, MCA. The latter section provides in part:

> (1) Except as provided in subsection (2), there must be imposed by all courts of original jurisdiction on a defendant upon his conviction for any conduct made criminal by state statute or upon forfeiture of bond or bail a charge that is in addition to other taxable court costs, fees, or fines, as follows:
>
> (a) $10 for each misdemeanor charge; and
>
> (b) the greater of $20 or 10% of the fine levied for each felony charge.

Subsection (2) provides for the waiver of the charge by the court in hardship cases. The section specifically stipulates that the charge imposed by the section is not a fine. § 46-18-236(3), MCA.

The original disposition of funds collected by justice courts pursuant to section 46-18-236, MCA, was to the county treasurer, who could retain up to 10 percent of the funds with the balance to be remitted to the state treasurer for deposit to the state general fund. 1985 Mont. Laws, ch. 719, § 1. In a special session of the Legislature in 1986, the statute was amended to direct that all funds collected as a result of the charge should be retained by the county treasurer and utilized for salaries in the office of the county attorney, with any excess to be utilized for other county salaries. 1986 Mont. Laws, ch. 17, § 3. Finally, in 1987, the statute was amended to exempt justice courts from the disposition scheme set out in section 46-18-236, MCA. This amendment was a part of a comprehensive bill, House Bill 740, the purpose of which was stated in the title as follows:

AN ACT TO RELIEVE JUSTICES OF THE PEACE FROM OVERLY BURDENSOME BOOKKEEPING AND OTHER ADMINISTRATIVE DUTIES IN REGARD TO FINES, PENALTIES, AND FORFEITURES PAID IN THEIR COURTS, TO REVISE THE METHOD OF DISTRIBUTING THE FINES, PENALTIES, AND FORFEITURES[.]

1987 Mont. Laws, ch. 557. In lieu of numerous directions found in provisions scattered throughout the Montana Code Annotated with respect to the transmittal of moneys collected by justice courts, distribution is now governed by section 3-10-601, MCA.

Section 3-10-601(1), MCA, requires the justice of the peace to collect the fees prescribed by law and to deposit them into the county treasury to be credited to the county general fund. The section further provides that fines, penalties, and forfeitures are to be paid to the county treasurer, who then remits half to the state treasurer for distribution among several distinct funds. § 3-10-601(2), (3), (4), MCA.

The answer to your question concerning the disposition of the charge created by section 46-18-236, MCA, thus depends upon whether the charge is in the nature of a fee or in the nature of a fine, penalty, or forfeiture. As above noted, the section expressly states the charge is not a fine. A "fine" is defined as "[a] pecuniary punishment imposed by lawful tribunal upon person convicted of crime or misdemeanor" or "[a] pecuniary penalty." Black's Law Dictionary 569 (5th ed. 1979). Similarly, a "penalty" is "a sum of money which the law exacts payment of by way of punishment for doing some act which is prohibited or for not doing some act which is required to be done." Id. at 1020 (citing Hidden Hollow Ranch v. Collins, 146 Mont. 321, 326, 406 P.2d 365, 368 (1965)). A "forfeiture" is "loss of some right or property as a penalty for some illegal act." Black's Law Dictionary 585. The concept of punishment is common to fines, forfeitures, and penalties. In contrast, a "fee" is "[a] charge fixed by law for services of public officers or for use of a privilege under control of government." Id. at 553. The charge created by section 46-18-236, MCA, is imposed solely upon those who are convicted of a criminal offense or who forfeit bond or bail. The charge, therefore, fits most logically within the definition of a penalty or a forfeiture.

THEREFORE, IT IS MY OPINION:

The charge imposed upon criminal defendants by section 46-18-236, MCA, is a penalty or a forfeiture and is to be collected and distributed pursuant to section 3-10-601(2), (3), and (4), MCA.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 64

EMPLOYEES, PUBLIC - Availability for public inspection of original applications to Public Employees' Retirement System for purpose of compiling mailing list;
PRIVACY - Availability for public inspection of original applications to Public Employees' Retirement System for purpose of compiling mailing list;
RETIREMENT - Availability for public inspection of original applications to Public Employees' Retirement System for purpose of compiling mailing list;
STATE GOVERNMENT - Availability for public inspection of original applications to Public Employees' Retirement System for purpose of compiling mailing list;
MONTANA CODE ANNOTATED - Sections 2-6-109, 2-6-109(3), 33-19-201;
MONTANA CONSTITUTION - Article II, sections 9, 10;
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 59 (1979), 38 Op. Att'y Gen. No. 1 (1978); 37 Op. Att'y Gen. No. 107 (1978).

HELD: Original documents submitted by applicants to the Public Employees' Retirement Division of the Department of Administration contain private information about third parties and thus are not open to public inspection for the purpose of compiling a mailing list.

10 February 1988

Beda J. Lovitt
Chief Counsel
Department of Administration
Sam W. Mitchell Building
Helena MT 59620

Dear Ms. Lovitt:

On behalf of the Public Employees' Retirement Board you have requested an opinion on the following issue:

> Are the original documents or applications prepared by members of the Public Employees' Retirement System and submitted to the Public Employees' Retirement Division of the

> Department of Administration open to public inspection for the purpose of compiling a mailing list?

Distribution or sale of mailing lists by agencies of Montana state government is controlled by section 2-6-109, MCA. This statute makes it unlawful for any agency to sell or distribute any mailing list without first securing the permission of those on the list. Among the several exceptions to this general prohibition is the following:

> Except as provided in 30-9-403, this section does not prevent an individual from compiling a mailing list by examination of original documents or applications which are otherwise open to public inspection.

§ 2-6-109(3), MCA. Section 30-9-403, MCA, is part of the Uniform Commercial Code and does not concern us here.

In the context of section 2-6-109(3), MCA, your question becomes whether original applications submitted to the Public Employees' Retirement Division are "applications which are otherwise open to public inspection." In answering this question, I look first to the following rights enumerated in Montana's Constitution:

> Right to know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.
>
> Right of privacy. The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Mont. Const. art. II, §§ 9, 10. The legislative history of section 2-6-109, MCA, shows clearly that in passing that law, the Legislature was concerned with balancing these two fundamental rights. See Minutes of the Montana Senate, State Administration Committee, Jan. 31,

1979, pp. 4-6; Feb. 9, 1979, pp. 1-3. Minutes of the Montana House of Representatives, State Administration Committee, Mar. 1, 1979, pp. 2, 3.

Opinions of the Montana Supreme Court and the Montana Attorney General have also spoken of the need to reconcile these two rights. Based on the Constitution and the statutes, the following balancing test for dealing with these questions has been developed:

> [P]roper application of this balancing test involves the following steps: (1) determining whether a matter of individual privacy is involved, (2) determining the demands of that privacy and the merits of publicly disclosing the information at issue, and (3) deciding whether the demand of individual privacy clearly outweighs the demand of public disclosure.

37 Op. Att'y Gen. No. 107 at 462 (1978). See also Missoulian v. Board of Regents, 41 St. Rptr. 110, 116, 120, 675 P.2d 962, 967, 970 (1984).

The Montana Supreme Court has spoken several times of a party's subjective expectation of privacy and whether society considers that expectation reasonable. Montana Human Rights Division v. City of Billings, 39 St. Rptr. 1504, 1509, 649 P.2d 1283, 1287 (1982); Missoulian v. Board of Regents, 675 P.2d at 967. My reading of the Supreme Court's test has been that "[i]nformation which reveals facts concerning personal aspects of an individual's life necessarily involve[s] individual privacy." 38 Op. Att'y Gen. No. 1 at 4 (1978). I conclude that applicants to the Public Employees' Retirement System (PERS) have an expectation that the information provided about beneficiaries in their original applications will remain private. See also Missoulian v. Board of Regents, 675 P.2d at 969. Does society consider this expectation reasonable? I believe it does. Because PERS is in part an insurance plan (§§ 19-3-1002, 19-3-1201, MCA), Montana's Insurance Information and Privacy Protection Act (§§ 33-19-101 to 409, MCA) is an indication of public policy in this area. See, for example, section 33-19-201, MCA, which restricts the use of information gathered for insurance transactions. Also, the policy of the Social Security Administration on the disclosure of information about

individuals, 20 C.F.R. § 401.300, is directed toward protecting against "clearly unwarranted invasion of personal privacy."

Passing to the second step of the test set forth above, I must determine the comparative demands of individual privacy and the merits of public disclosure. Because information about beneficiaries involves the "disclosural privacy" of third persons, I believe a significant demand of individual privacy is involved. See 37 Op. Att'y Gen. No. 107 at 463 (1978). On the other hand, because the compilation of a mailing list is involved, I do not believe that the merits of public disclosure are substantial. See 38 Op. Att'y Gen. No. 59 at 212 (1979); see also legislative history of § 2-6-109, MCA, supra. I note that this analysis appears consistent with the policy of the Social Security Administration: "[S]ince there is usually little or no public interest in disclosing information for disputes between two private parties or for other private or commercial purposes; we generally do not share information for these purposes." 20 C.F.R. § 401.300.

Applying the final part of the three-part test, I conclude that in this case the demand of individual privacy clearly outweighs the demand of public disclosure.

THEREFORE, IT IS MY OPINION:

> Original documents submitted by applicants to the Public Employees' Retirement Division of the Department of Administration contain private information about third parties and thus are not open to public inspection for the purpose of compiling a mailing list.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 65

APPROPRIATIONS - Moneys for salary increases arising under collective bargaining agreements;
CITIES AND TOWNS - What constitutes transfer or salary increase in excess of appropriated amounts under section 7-6-4236, MCA;
LABOR RELATIONS - Municipal appropriations for salary increases arising under collective bargaining agreements;
MUNICIPAL GOVERNMENT - What constitutes transfer or salary increase in excess of appropriated amounts under section 7-6-4236, MCA;
SALARIES - What constitutes increase in excess of appropriated amounts under section 7-6-4236, MCA;
MONTANA CODE ANNOTATED - Title 7, chapter 6, part 42; sections 7-6-4221, 7-6-4224 to 7-6-4228, 7-6-4231, 7-6-4235, 7-6-4236, 7-6-4251, 7-6-4252, 39-31-208;
MONTANA LAWS OF 1931 - Chapter 121.

HELD: Section 7-6-4236, MCA, does not prohibit a municipality from using funds separately appropriated for the purpose of satisfying salary increases which may arise from collective bargaining negotiations ongoing at the time of a final budget's adoption to pay such increases.

17 February 1988

Jim Nugent
Missoula City Attorney
291 West Spruce
Missoula MT 59802-4297

Dear Mr. Nugent:

You have requested my opinion concerning the following question:

> Does section 7-6-4236, MCA, prohibit use of funds within a separately appropriated account established for the purpose of satisfying salary increases which may arise from collective bargaining negotiations ongoing at

the time of a final budget's adoption to pay such increases?

I conclude that use of such funds to pay the collectively bargained salary increases constitutes neither a "transfer" within the scope of section 7-6-4236, MCA, nor an increase in affected employees' salaries over amounts appropriated for those salaries.

The City of Missoula is a party to eight collective bargaining agreements with labor organizations certified under section 39-31-208, MCA, as the representative of certain groups of the City's employees. All agreements presently have a duration of one or two years, and all commence on July 1. Various of these agreements were the subject of collective bargaining negotiations last summer, and some of the negotiations extended beyond the date by which the City's final budget for fiscal year 1988 was required to be completed. See §§ 7-6-4226 to 4232, MCA. In anticipation that the negotiations would likely result in fiscal year 1988 salary increases, the city council included within the final budget an appropriation for such possible increases. The appropriated moneys were placed within the "wages and salaries" classification of either a general nondepartmental account or, in two instances, a specific departmental account, and their purpose was expressly identified. The funds have been used exclusively to satisfy salary increases provided under collective bargaining agreements entered into after adoption of the final budget. The City's auditors have questioned whether this use of the funds contravenes the prohibition in section 7-6-4236, MCA, against intra-classification transfer of moneys whose effect is to increase a salary above the amount appropriated therefor.

The basic framework of the municipal budget process in chapter 7, part 42 was established in 1931. 1931 Mont. Laws, ch. 121. In summary, these provisions, as amended, require various municipal officials to submit to the city clerk by July 10, on Department of Commerce forms, estimates of expenditures which will occur during the fiscal year and of revenue which will be received. § 7-6-4221, MCA. The clerk thereafter prepares from these estimates a tabulation "showing the complete expenditure program of the municipality for the current fiscal year and the sources of revenue by which it is to

be financed." § 7-6-4224(1), MCA. The tabulation's estimated expenditures must be classified under one of six categories which include, most importantly, "salaries and wages." § 7-6-4225(1)(a), MCA. This tabulation must be presented to the municipal council or commission by July 20, which has until July 25 to make any changes it deems appropriate. § 7-6-4226, MCA. The tabulation, together with any amendments by the municipal governing body, constitutes the city's preliminary budget. § 7-6-4226(2), MCA. Notice that the preliminary budget has been fixed is then published, and a public hearing concerning the budget must take place on the Wednesday preceding the second Monday in August. §§ 7-6-4227, 7-6-4228, MCA. Following the hearing a final budget is approved. § 7-6-4231, MCA.

Once adopted, final budgets can be modified only under limited circumstances. Section 7-6-4231(3) and (4), MCA, permits reductions in appropriated amounts when revenue shortfalls occur or when savings arise from unanticipated adjustments in projected expenditures. Sections 7-6-4251 and 7-6-4252, MCA, provide procedures for additional expenditures because of public emergencies. Municipal officials are otherwise "limited in the making of expenditures or incurring of liabilities to the amount of such detailed appropriations and classifications" (§ 7-6-4235(2), MCA) except that, "[u]pon a resolution adopted by the council at a regular or special meeting and entered upon its minutes, transfers or revisions within or among the general class or classes of salaries and wages, maintenance and support, and capital outlay may be made, provided that no salary shall be increased above the amount appropriated therefor" (§ 7-6-4236, MCA). Consequently, before section 7-6-4236, MCA, can be deemed to proscribe the City's practice here, there must be a transfer of moneys within or among expenditure classifications and such transfer must result in a salary increase "above the amount appropriated therefor." Neither a transfer nor a prohibited salary increase, however, has occurred.

First, a transfer under section 7-6-4236, MCA, is presumably effected only when moneys appropriated for one purpose are used for another. Presently, though, the funds have been specifically appropriated for the purpose of satisfying salary increases under collective bargaining agreements which, at the time of final budget

approval, have not been consummated. That the funds, as a general matter, were not allocated in the final budget to a particular employee classification or departmental account does not mean a transfer under section 7-6-4236, MCA, must take place to use them since such an interpretation would essentially require a reappropriation of moneys for the same purpose to which they have already been appropriated. See State ex rel. Toomey v. State Board of Examiners, 74 Mont. 1, 7, 238 P. 316, 320 (1925) ("[t]he word 'appropriation' is defined by Webster as 'the act of setting apart or assigning to a particular use or person'"); accord State ex rel. Tipton v. Erickson, 93 Mont. 466, 472, 19 P.2d 227, 229 (1933) (per curiam). While the budget provisions are obviously designed to ensure that final budgets are adopted only after careful consideration and represent, to the greatest extent possible, the best estimate of the municipal governing body with respect to anticipated income and expenditures, the Legislature could not have intended to require needlessly redundant action by that governing body. See generally 4 C. Antieau, Local Government Law § 43.10 (1987) ("[t]he object of a county appropriation is to enable the taxpayers to compel the application of county funds to the purposes for which they were appropriated, to prevent the application of such funds to other purposes, and to prevent the expenditure of greater sums of money than necessary for legitimate county purposes"). Use of moneys from the appropriation at issue is thus no different from use of funds set aside for overtime payments--funds which ordinarily cannot be allocated to a specific employee classification in a final budget because of the uncertainty associated with the need for or distribution of overtime work during the fiscal year. No question exists, of course, as to the inapplicability of section 7-6-4236, MCA, to utilization of such overtime compensation appropriations.

Second, even if a transfer subject to section 7-6-4236, MCA, is deemed to have occurred, the salary expenditure is not in excess of appropriated amounts. As stated above, the purpose of an appropriation is to provide funds for a particular use during a specified period. Here the city council has appropriated moneys to be devoted solely to payment of salaries whose amounts are, in most instances, known but, in others, contingent upon the outcome of ongoing collective bargaining negotiations. That the precise salary of a given

employee classification cannot be identified until completion of those negotiations does not affect either the validity of the appropriation from which the additional compensation increases will be paid or result in a salary increase "above the amount appropriated therefor." See generally 15 McQuillin Municipal Corporations § 39.66 (1985 rev. ed.) ("appropriations for contingent expenses in several departments of a city, which are small when considered in connection with the total appropriations, and which appear reasonable in amount, will not be held invalid because not more particularly itemized") (footnote omitted). Nothing in the statutes prohibits a municipality from raising an employee's rate of compensation to the extent moneys have been properly earmarked for such use. In this latter regard, it must be emphasized that section 7-6-4236, MCA, does not proscribe salary increases: It instead only limits the amount which may be paid to a particular employee classification to that appropriated for such purpose. Use of moneys from the separately appropriated fund here to pay salary increases arising under collective bargaining agreements negotiated after adoption of the final budget accordingly does not constitute a salary increase in excess of appropriated amounts.

THEREFORE, IT IS MY OPINION:

Section 7-6-4236, MCA, does not prohibit a municipality from using funds separately appropriated for the purpose of satisfying salary increases which may arise from collective bargaining negotiations ongoing at the time of a final budget's adoption to pay such increases.

Very truly yours,

MIKE GREELY
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

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

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

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

Definitions:

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

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

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter

1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute Number and Department

2. Go to cross reference table at end of each title which list MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

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

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

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

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