MONTANA ADMINISTRATIVE REGISTER

1988 ISSUE NO. 5
MARCH 10, 1988
PAGES 446-550

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 5

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing, and where written comments may be submitted.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

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.21.1301 through 2.21.1306 and the adoption of a new rule relating to sexual harassment prevention	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF ARM 2.21.1301 THROUGH 2.21.1306 AND THE ADOPTION OF A NEW RULE RELATING TO SEXUAL HARASSMENT PREVENTION

TO: All Interested Persons.

1. On April 5, 1988, at 12:15 p.m., in Room 136, Mitchell Building, Helena, Montana, a public hearing will be held to consider the amendment of ARM 2.21.1301 through 2.21.1306 and the adoption of a new rule relating to sexual harassment prevention.

2. The proposed new rule provides as follows:

RULE I OTHER COMPLAINT FILING OPTION (1) An employee may concurrently file a complaint of unlawful discrimination with the human rights commission. The complaint must be filed either:

(a) within 180 days of the alleged incident, or

(b) if the employee initiates action to resolve the alleged sexual harassment in accordance with an agency or contract grievance procedure, within 300 days of the alleged incident. (Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

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

2.21.1301 SHORT TITLE (1) This sub-chapter may be cited as the sexual harassment prevention policy.

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

2.21.1302 POLICY AND OBJECTIVES (1) It is the policy of the state of Montana ~~to prohibit sexual harassment of state employees. This prohibition applies to management and non-management employees.~~ as an employer:

(a) to provide state employees with a working environment free from sexual harassment;

(b) to communicate the state's sexual harassment prevention policy and reporting procedures to employees and supervisors, and

(c) to recognize the unique nature of complaints of sexual harassment, to encourage early reporting by employees, and to resolve complaints promptly, confidentially, and at the lowest management level possible.

~~(2) It is not the purpose of this policy to intrude upon the personal lives of employees or to interfere with social relationships. Sexual harassment, however, is unacceptable~~

~~behavior when carrying out the business of state government and will not be condoned or tolerated.~~

~~(3) Any employee who believes he or she is being subjected to sexual harassment by anyone connected with his or her work is encouraged to report the matter promptly, as provided in this policy.~~

~~(4) Substantiated violations of this policy by any state employee will result in discipline.~~

~~(5)~~ (2) It is the objective of this policy to develop guidelines for the state and for agency sexual harassment prevention programs in compliance with governor's executive order no. 7-82, the Montana human rights act, and sec. 703 of title VII of civil rights act of 1964.

(3) It is not the purpose of this policy to intrude upon the personal lives of employees or to interfere with social relationships. Sexual harassment, however, is unacceptable behavior when carrying out the business of state government and will not be condoned or tolerated.

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

2.21.1303 DEFINITIONS As used in this sub-chapter, the following definitions apply:

(1) "Sexual harassment" means: ~~any unsolicited comments, gestures or physical contact of a sexual nature when:~~

(a) sex discrimination within the meaning of title VII of the civil rights act of 1964 and the Montana human rights act, and

(b) unwelcome sexual advances, requests for favors and other verbal or physical contact of a sexual nature when:

~~(a)~~ (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

~~(b)~~ (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

~~(c)~~ (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(2) "Intimidating, hostile, or offensive working environment" means a workplace in which:

(a) unwelcome sexually-oriented jokes, innuendoes, obscenities, pictures or any action with a sexual connotation makes an employee feel uncomfortable in the workplace, or

(b) any aggressive, harassing behavior in the workplace or that affects the workplace, whether or not sexual in connotation, is directed toward an employee based on the employee's sex.

(3) "Equal employment opportunity (EEO) officer" means a person appointed by the agency head who has the authority to develop the agency's EEO program and work with managers to implement the program.

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

2.21.1304 AGENCY POLICY STATEMENT (1) Each agency of the executive branch shall ~~within 90 days of the effective date of this policy,~~ adopt a policy statement prohibiting sexual harassment in the agency. The department of administration shall review and approve the policy statement prior to its adoption, in compliance with ARM 2.21.1203.

~~(2) The policy statement shall be adopted over the signature of the agency head.~~

(2) The policy statement shall contain at a minimum the following:

(a) a statement prohibiting sexual harassment in the agency;

(b) a definition of sexual harassment, which is contained in ARM 2.21.1303 (1); and

(c) a statement encouraging early reporting of complaints by employees and informing employees about the reporting procedure.

~~(3) The policy statement shall be reviewed and approved by the Personnel Division, Department of Administration.~~

~~(4) The policy statement shall be disseminated to all agency employees.~~

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

2.21.1305 ~~COMPLAINT~~ REPORTING PROCEDURE (1) ~~Each agency of the executive branch shall within 90 days of the effective date of this policy, adopt a procedure to receive and investigate complaints of sexual harassment.~~ Each agency of the executive branch shall adopt a procedure to receive, investigate and resolve complaints of sexual harassment. The department of administration shall review and approve the procedure prior to its adoption, in compliance with ARM 2.21.1203.

(2) ~~This procedure must be reviewed and approved by the Personnel Division, Department of Administration.~~ The procedure is a management problem-solving device to be used to intervene when an employee alleges that sexual harassment has taken place. Because sexual harassment is sex discrimination, management is obligated to investigate when reports are received. The agency equal employment opportunity officer shall be informed of the report when it is received. The EEO officer may be consulted by management and the employees at any time. The reporting procedure shall contain at a minimum the following steps:

(a) Employee's responsibility:

(i) an employee who believes he or she has been the victim of sexual harassment may bring the problem to the attention of any or all of the following:

(A) the harasser and request that the action stop immediately;

(B) the immediate supervisor or to the first level supervisor who is not involved in the alleged harassment, or

(C) the EEO officer.

(ii) the employee shall assist the EEO officer or other designated management representative in investigating and verifying the report.

(b) Management's responsibility:

(i) When management receives a report of sexual harassment, management shall promptly inform the agency equal employment opportunity officer of the report. The EEO officer shall initiate the investigation or recommend another appropriate management representative to initiate the investigation. The investigation shall include verification of the report, a course of action, and documentation of implementation of the action. Management shall assist the EEO officer, as requested.

(ii) A report of sexual harassment, its investigation, the outcome of the investigation, and any action(s) taken relating to a specific employee or employees is confidential. Dissemination of confidential information shall be limited to persons with a need to know to conduct an investigation.

(iii) The investigation may include interviews with the employee who made the complaint, with the alleged harasser, with other employees, including former employees, with knowledge of the actions, and may include gathering other materials related to the complaint;

(iv) Any actions taken by management to resolve the complaint shall be based on facts verified during the investigation. Actions may include disciplinary action, as provided in the discipline policy, ARM 2.21.6505, et seq. Other actions may include, but are not limited to, educating the harasser about sexual harassment, counseling, increasing office awareness about sexual harassment and its prevention, disseminating the agency's policy and procedure, and taking action with respect to acts of non-employees which result in reports of sexual harassment of employees in the workplace; and

(v) management should document steps taken to resolve the complaint.

~~(3) The procedure shall contain, at a minimum, the following steps:~~

~~(a) An employee who believes he or she has been the subject of sexual harassment must within 10 calendar days bring the alleged act to the attention of the immediate supervisor, to the first level supervisor who is not involved in the alleged act, or to the agency Equal Employment Opportunity officer.~~

~~(b) Management must investigate, and respond to the complaint within 30 calendar days of notification.~~

~~(c) When a supervisor is notified of a complaint, the supervisor shall also notify the agency Equal Employment Opportunity officer, who may participate in the investigation.~~

~~(d) The supervisor or the Equal Employment Opportunity officer shall prepare a report and shall make a non-binding recommendation to the agency head as a result of the investigation.~~

~~(e) The agency head shall make the final determination on the proposed action to be taken.~~

~~(f) The report and the agency head's decision shall be made known to the employee making the complaint, to the employee about whom the complaint is made, the division administrator(s) who supervise the employees involved, and the Equal Employment Opportunity officer. Otherwise, the report and decision made as a result of the internal investigation shall remain confidential.~~ Employees who are not personally victims of sexual harassment, but observe actions which they have interpreted to be harassment, may bring such actions to the attention of the EEO officer.

~~(4) Agency heads shall post the complaint procedure in each bureau where the agency conducts business.~~

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

2.21.1306 VIOLATIONS OF POLICY (1) Substantiated violations of this policy ~~shall~~ may result in disciplinary action in compliance with the discipline handling ~~rules as set forth in Title 2, chapter 21, sub chapter 65, ARM.~~ policy, ARM 2.21.6505, et seq. Appropriate discipline may include discharge, if the initial violation is sufficiently severe or if lesser violations are repeated.

(2) ~~An employee has a right in the Grievance rules as set forth in Title 2, chapter 21, sub chapter 80, ARM, to file a grievance concerning disciplinary actions.~~ If disciplinary action is taken as the result of a report of sexual harassment, an employee may file a grievance under the grievance policy, ARM 2.21.8001 et seq., or through a grievance procedure available through collective bargaining agreements or statute.

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

4. It is necessary to amend the rules and to adopt a new rule to incorporate a legal decision which addresses the question of what constitutes an "intimidating, hostile or offensive working environment," to respond to problems raised by state agencies with the existing complaint procedure and to reflect changes made in the Human Rights Act with respect to filing deadlines for complaints. The agency equal employment opportunity officers (EEO officers) have been involved in the development of the proposed rules and they reviewed the proposed rules prior to their publication.

5. In 1980, the Equal Employment Opportunity Commission (EEOC) adopted guidelines defining sexual harassment as unlawful sex discrimination. On August 6, 1982, Governor Ted Schwinden issued Executive Order No. 7-82, which in part says that sexual harassment in the workplace in state government will "not be condoned or tolerated." The Department of Administration developed a policy on sexual harassment, which was adopted July 15, 1983, (ARM 2.21.1301 et seq.). Legal decisions and comments recommending changes from agencies implementing the policy have resulted in the proposed amendment.

On July 19, 1986, the U.S. Supreme Court in the case Meritor Savings Bank, FSB, v. Vinson held that a claim of "hostile environment" sexual harassment is a form of sex discrimination. ARM 2.21.1303 is proposed to be amended to establish a definition of "intimidating, hostile or offensive working environment" for use in investigating reports of sexual harassment.

ARM 2.21.1305, Complaint Procedure, is proposed to be amended to rename the rule Reporting Procedure and to revise the existing complaint procedure by adding specific responsibilities for employees and management. Agency EEO officers who have used this procedure have identified two significant problems with this rule and have suggested alternatives. First, the current rule requires the victim of alleged sexual harassment to report the harassment within 10 days, but, this is unnecessarily restrictive. Second, management and the EEO officer are to investigate and recommend a resolution to the agency head, who has the final authority, but resolution often can be achieved at a lower management level.

Due to the sensitive nature of the complaint or the fact that the victim may not initially understand that the actions of the harasser are unlawful, EEO officers report that complaints may not be made within 10 days. Failure by an employee to report an incident within 10 days does not remove management's responsibility or liability to investigate or resolve the matter when it does learn of it. The 10-day deadline was intended to encourage early reporting, but it could be misinterpreted to mean that management did not have to act if the deadline had passed. EEO officers recommend and the department proposes a procedure which encourages early reporting, but does not place a deadline in the rule.

The complaint procedure in the current rule is similar to a traditional grievance procedure with steps ending in final resolution by the agency head. Experience has shown that a contested situation is inappropriate for investigating complaints of sexual harassment. EEO officers have found that many reports of sexual harassment are more effectively resolved by the employees involved, by lower-level management or with the assistance of the EEO officer. The EEO officers recommend and the department proposes a rule which places more authority with the EEO officer for investigating and resolving complaints, because of their expertise in this area. Where appropriate, the agency head could become involved in the resolution.

Rule I, Other Complaint Filing Option, is proposed for adoption to inform employees of an alternative to the reporting procedure in this policy and time frames for filing.

6. Interested parties may submit their data, views or arguments concerning the proposed adoption of a new rule and

amendment of rules in writing to: Laurie Ekanger, Administrator, State Personnel Division, Department of Administration, Room 130, Mitchell Building, Helena, Montana 59620, no later than April 8, 1988.

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

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

BY: Ellen Feaver
Ellen Feaver, Director
Department of Administration

Certified to the Secretary of State February 29, 1988.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF MEDICAL EXAMINERS

In the matter of the proposed adoption of new rules regarding licensing, conduct and fees for nutritionists	))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION OF NUTRITION PRACTICE RULES

TO: All Interested Persons:

1. On March 31, 1988, at 10:00 a.m., a public hearing will be held in the downstairs conference room of the Department of Commerce building located at 1424 - 9th Avenue, Helena, Montana, to consider the proposed adoption of the above-stated rules.

2. The proposed rules will read as follows:

"I. DEFINITIONS As used in this subchapter the following definitions apply:

(1) The term "act" means Chapter 25 of Title 37, Montana Code Annotated, sometimes called "the Dietetics-Nutrition Practice Act of the State of Montana."

(2) Further, for the purpose of this subchapter, the definitions contained in subchapter 4 of the rules of the Montana State Board of Medical Examiners apply."

Auth: 37-1-131, 37-25-201, MCA Imp: 37-25-201, MCA

REASON: To clarify what Act is referred to in this part of the rules.

"II. LICENSURE APPLICATION (1) Application forms will be provided to applicants by the Board."

Auth: 37-1-131, 37-25-201, MCA Imp: 37-25-302, MCA

REASON: The rule is necessary to provide a procedure for applying for licensure.

"III. INITIAL LICENSE (1) Each application for an initial license as a nutritionist under the Act must be accompanied by:

(a) A completed application form;

(b) The initial license fee;

(c) A copy of the registration by the Commission;

(d) A copy of the diploma from an accredited college or university in the field of dietetics, food and nutrition or public health nutrition;

(e) A recent photograph, taken within one year of application."

Auth: 37-1-131, 37-25-201, MCA Imp: 37-25-302, MCA

REASON: The rule is necessary to provide a procedure for applying for licensure.

"IV. LICENSE RENEWAL (1) Forms of application for renewal of licenses will be mailed to all licensees by the board 30 days prior to expiration of existing licenses.

(2) Completed applications for renewal, together with renewal fees and proof of current registration by the Commission must be received no later than 30 days after expiration of the existing license.

(3) License fees will be treated as delinquent and subject to a late charge or fee on all renewal applications postmarked more than 30 days after expiration of existing license.

(4) Failure to renew within 30 days after expiration of the existing license will be treated as a violation of a rule of the board and grounds for disciplinary action, under Section 37-25-308(4), MCA."

Auth: 37-1-131, 37-25-201, MCA Imp: 37-25-307, MCA

REASON: The rule is necessary to provide a procedure for renewing licenses and to clarify the significance of failure to renew.

"V. PROFESSIONAL CONDUCT AND STANDARDS OF PROFESSIONAL PRACTICE (1) A licensee shall conform to generally accepted principles and standards of dietetic practice which are those generally recognized by the profession as appropriate for the situation presented, including those promulgated or interpreted by or under the association or commission, and other professional or governmental bodies.

(2) A licensee shall maintain knowledge and skills required for continuing professional competence."

Auth: 37-1-131, 37-25-201, MCA Imp: 37-25-201, MCA

REASON: The rule is necessary to provide post licensing professional conduct standards of licensees for the protection of the public.

"VI. FEES (1) The board has adopted the following fee payment schedule:

(a) Initial fee - $45.00
(b) Renewal fee - 20.00
(c) Late fee - 10.00"

Auth: 37-1-134, 37-25-201, MCA Imp: 37-1-134, 37-25-201, 37-25-302, 37-25-307, MCA

REASON: To establish a fee schedule that reflects program area costs.

"VII. UNPROFESSIONAL CONDUCT (1) For the purposes of implementing the provisions of Section 37-25-308(2), MCA, the board defines "unprofessional conduct and gross incompetence" as follows:

(a) Incompetence, negligence or use of any practice or procedure in the field of nutrition which creates an unreasonable risk of physical or mental harm or serious financial loss to the consumer.

(b) Misrepresentation or fraud in any aspect of the provision of nutrition-related services.

(c) Advertising in a false, fraudulent or misleading manner.

(d) Accepting or performing occupational responsibilities which the licensee knows that he/she is not competent to perform.

(e) Aiding and abetting the practice of nutrition by a person not licensed to practice nutrition or by a person whose license has been suspended.

(f) Resorting to fraud, misrepresentation, or deception in applying for or in securing a license.

(g) Permitting or allowing another person to use his/her nutritionist license for any purpose.

(h) Failing to report to the board facts known to the individual regarding incompetence, unethical or illegal practice of any licensed health care professional, or unlicensed person practicing nutrition.

(i) Suspension, revocation or restriction of the individual's license to practice nutrition by competent authority in any state, federal or foreign jurisdiction, for conduct that would be grounds for such sanction in this jurisdiction.

(j) Habitual intemperance or excessive use of narcotic drugs, alcohol or any other drug or substance to the extent that impairs the licensee's ability to practice.

(k) Use of alcohol or drugs in any manner other than for legitimate or therapeutic purposes.

(l) Violation of any drug law in the practice of the profession.

(m) Conviction of an offense involving moral turpitude in practice-related circumstances. For this purpose, the judgement of the conviction, unless pending an appeal, is conclusive evidence of unprofessional conduct.

(n) Willful disobedience of the rules of the board.

(2) Practicing nutrition as a registered or licensed nutritionist in this state without a current active Montana license shall be grounds for refusing to license that individual if application is made subsequent to such conduct."

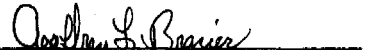
Auth: 37-1-131, 37-25-201, MCA Imp: 37-25-308, MCA

REASON: The rule is necessary to define unprofessional conduct for the protection of the public.

3. 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 Board of Medical Examiners, 1424 9th Avenue, Helena, Montana 59620, no later than April 7, 1988.

4. Geoffrey L. Brazier of Helena, Montana, has been designated to preside over and conduct the hearing.

BOARD OF MEDICAL EXAMINERS
THOMAS J. MALEE, M.D.
PRESIDENT

BY: 
GEOFFREY L. BRAZIER, ATTORNEY
DEPARTMENT OF COMMERCE

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

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of rules and the amendment of Rule 11.7.306 pertaining to recovery of foster care or day care overpayments	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF RULES AND THE AMENDMENT OF RULE 11.7.306 PERTAINING TO RECOVERY OF FOSTER CARE OR DAY CARE OVERPAYMENTS

TO: All Interested Persons

1. On March 31, 1988, at 10:00 a.m., a public hearing will be held in the conference room of Department of Family Services, 48 North Last Chance Gulch, Helena, Montana to consider the adoption of rules and the amendment of Rule 11.7.306 pertaining to recovery of foster care or day care overpayments.

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

RULE I FOSTER CARE OVERPAYMENTS AND UNDERPAYMENTS

(1) The department is entitled to promptly recover the amount of any foster care overpayment made to a foster care provider. Recovery will be accomplished by the provider making payment of the overpayment within 30 days of notification of the overpayment. If the provider fails to repay the overpayment within 30 days, the department may reduce future foster care maintenance payments until the overpayment is recovered in full.

(2) Where an underpayment of foster care maintenance payments is made it will be corrected by increasing the payment for the following month to cover the underpayment.

(3) The provider shall promptly notify the department of any overpayment or underpayment.

AUTH: 41-3-1103(2)(c), MCA; AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87
IMP: 41-3-1103(1) and (3), MCA

RULE II DAY CARE OVERPAYMENTS AND UNDERPAYMENTS

(1) The department is entitled to promptly recover the amount of any day care overpayment made to a day care provider. Recovery will be accomplished by the provider making payment of the overpayment within 30 days of notification of the overpayment. If the provider fails to repay the overpayment within 30 days, the department may reduce future day care payments until the overpayment is recovered in full.

(2) Where an underpayment of day care payments is made

it will be corrected by increasing the payment for the following month to cover the underpayment.

(3) The provider shall promptly notify the department of any overpayment or underpayment.

AUTH: 53-4-503, MCA
IMP: 53-4-514, MCA

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

11.7.306 RIGHT TO FAIR HEARING (1) Any person denied substitute care placement or foster care maintenance payments by the department or against whom a foster care overpayment recovery is demanded by the department may request a hearing as provided in ARM ~~46.2.202~~ 11.2.203 within 90 days of the notice of denial.

AUTH: Sec. 2-4-201 and 41-3-1103(2)(c), MCA, AUTH Extension, Sec. 113, Ch. 609, L. 1987, Eff. 10/1/87
IMP: Sec. 41-3-302 and 41-3-1103(1) and (3), MCA

4. Rationale: The legislature mandated that the department be responsible for payments to youth care facilities for substitute care of children and to day care facilities for eligible children. In performing that function, the department needs a means by which it can recover overpayments that are erroneously made to providers. The department needed guidelines for withholding the amount of the overpayments from later payments.

5. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Family Services, P.O. Box 8005, Helena, Montana 59604, no later than April 7, 1988.

6. 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 29, 1988.

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

In the matter of the amendment of rules 16.44.303, 16.44.306, 16.44.325, 16.44.327, & 16.44.334, regarding definition of hazardous wastes, requirements for recyclable materials, reclassification to a material other than a waste, reclassification as a boiler, and regulation of certain recycling activities.	NOTICE OF PUBLIC HEARING FOR AMENDMENT OF RULES
* * * * * * * * * * *	
In the matter of an information statement pertaining to ARM Title 16, Chapter 10, regarding the availability of information.	(Hazardous Wastes)

To: All Interested Persons

1. On April 13, 1988, at 9:00 a.m., the department will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the above-captioned rules, which pertain to identification and listing of hazardous wastes.

2. The proposed amendments are intended to adopt minor changes in order to achieve parity with federal regulations. Passage of these amendments is necessary for authorization from the Environmental Protection Agency (EPA) to the state of Montana to independently operate a hazardous waste program.

3. The rules, as proposed to be amended, appear as follows (new material is underlined; material to be deleted is interlined):

16.44.303 DEFINITION OF HAZARDOUS WASTE

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

(3)(a) Same as existing rule.

(b) The following wastes are not hazardous even though they are generated from the treatment, storage, or disposal of a hazardous waste, unless they exhibit one or more of the characteristics of hazardous waste:

(i) waste pickle liquor sludge generated by lime stabilization of spent pickle liquor from the iron and steel industry; and

(ii) wastes from burning any of the materials exempted from regulation under ARM 16.44.306(1)(c)(iv), (v), (vii), or (viii).

(4) Same as existing rule.

AUTHORITY: 75-10-405, MCA
IMPLEMENTING: 75-10-403, 75-10-405, MCA

16.44.306 REQUIREMENTS FOR RECYCLABLE MATERIALS (1)-(2) Same as existing rule.

(3)(a) Unless exempted in (1)(b) and (1)(c) above, owners or operators of facilities that store recyclable materials before they are recycled are regulated under all applicable provisions of Subparts B through L of 40 CFR Parts 264 and 265 (except subpart H of each Part and except for 40 CFR 264.75 and 40 CFR 265.75), subparts C through G of 40 CFR Part 266, and subchapters 1, 6, 7, and 8 of this chapter. (The recycling process itself is exempt from regulation.)

(b) Same as existing rule.

(4) Same as existing rule.

AUTHORITY: 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.325 RECLASSIFICATION TO A MATERIAL OTHER THAN A WASTE (1) In accordance with the standards and criteria in ARM 16.44.326 and the procedures in ARM 16.44.328, the department may determine on a case-by-case basis that the following materials are not wastes:

(a)-(b) Same as existing rule.

(c) materials that have been reclaimed but must be reclaimed further before the materials are completely recovered ~~for their original uses~~.

AUTHORITY: 75-10-404, 75-10-405, MCA
IMPLEMENTING: 75-10-405, MCA

16.44.327 RECLASSIFICATION AS A BOILER (1) In accordance with the standards and criteria in ARM 16.44.202 (definition of "boiler"), and the procedures in ARM ~~16.44.326~~ 16.44.328, the department may determine on a case-by-case basis that certain enclosed devices using controlled flame combustion are boilers, even though they do not otherwise meet the definition of boiler contained in ARM 16.44.202, after considering the following criteria:

(a)-(f) Same as existing rule.

AUTHORITY: 75-10-405 MCA
IMPLEMENTING: 75-10-405, MCA

16.44.334 ADDITIONAL REGULATION OF CERTAIN HAZARDOUS WASTE RECYCLING ACTIVITIES ON A CASE-BY-CASE BASIS (1) The department may decide on a case-by-case basis that persons accumulating or storing the recyclable materials described in ARM 16.44.306(1)(b)(iv) should be regulated under ARM 16.44.306(2) and (3). The basis for this decision is that the materials are being accumulated or stored in a manner that ~~jeopardizes~~ does not protect human health and the environment because the materials or their toxic constituents have not been adequately contained, or because the materials being accumulated or stored together are incompatible as further explained in 40 CFR Part 265, Appendix V. (Reference to 40 CFR Part 265, Appendix V, is not intended to be exclusive or formal authority for what is incompatible but is included here for illustrative purposes.)

In making this decision, the department will consider the following factors:

(a)-(e) Same as existing rule.

(2)-(3) Same as existing rule.

AUTHORITY: 75-10-405, MCA

IMPLEMENTING: 75-10-405, MCA

4. To comply with requirements imposed by the EPA for authorization of the state program, DHES has committed to an agreement with EPA for assisting members of the public to obtain information from DHES as required by ARM Title 16, Chapter 10. Although public notice is not required, DHES chooses to publish the following statement for public review and comment at the public hearing on April 13, 1988:

> The Department of Health and Environmental Sciences ("DHES") will make every reasonable effort to assist in the identification and description of records sought by members of the public under ARM Title 16, Chapter 10, and to assist the requestor in formulating his request including, if necessary, narrowing the scope of the request. All non-exempt records will be made available to the public to the fullest possible extent under Montana law regardless of whether the requestor has stated a reason or a need for the records.
>
> Insofar as confidential business information, if appropriate, a provider of information to DHES may deem information submitted to DHES as confidential under the Uniform Trade Secrets Act, Section 30-14-401, et seq., MCA. It should be emphasized that under ARM 16.44.1008, claims of confidentiality of business information must be made at the time of submission of the information to DHES; any information which is not legally confidential under the Trade Secrets Act or otherwise will be disclosed to members of the public by DHES upon request. DHES will be advising providers of information to DHES that where there is a question of confidentiality, pursuit of a protective order under the Uniform Trade Secrets Act prior to submission of the information may be appropriate. Within 10 days of the request, DHES may inform a person who has submitted a request under ARM 16.44.1009 that the information requested is confidential or that a claim of confidentiality is in the process of being resolved. At the time of denial of the request for information, DHES is obligated to state the reason for the denial under ARM 16.44.1009 including, if applicable, the reason that DHES has denied the request in order to resolve claims of business confidentiality. If and when the information is deemed not to be confidential, DHES will notify the requestor that the information is available.

In order to comply with the oversight objectives of the EPA, DHES will keep a log or files of denials of requests which have been sent to requestors.

5. Interested persons may submit their data, views, or arguments concerning the proposed amendments and the above information statement, 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, no later than April 13, 1988.

6. 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 29, 1988.

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

In the matter of the amendment of rules 16.8.701, 16.8.806, 16.8.815, 16.8.821, 16.8.921, 16.8.924, 16.8.925, 16.8.936, and 16.8.1007, regarding definitions of PM-10, PM-10 emissions and total suspended particulate, high-volume measurement method for lead, ambient air quality standards for PM-10, significant emission rates for PM-10, and ambient air increments for total suspended particulate	NOTICE OF PUBLIC HEARING FOR AMENDMENT OF RULES (Air Quality)

To: All Interested Persons

1. On April 15, 1988, at 9:00 a.m., the board will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, (a) to consider the amendment of ARM 16.8.701, 16.8.821, 16.8.921, 16.8.925, and 16.8.936, which amendments incorporate PM-10 and total suspended particulate definitions, ambient air quality standards for PM-10, significant emission rates for PM-10 which establish when a source modification requires permit review, ambient air increments for total suspended particulates, and the level of PM-10 concentration at which a major stationary source or a major modification is exempt from review; (b) to consider the amendment of 16.8.806, 16.8.815, 16.8.921, and 16.8.1007, which effect minor changes for purposes of clarification; and (c) to consider changes to the State Implementation Plan ("SIP") which changes include the amendments below in paragraph 3.

2. The proposed amendments effect changes necessary to achieve parity with federal regulatory changes, and to maintain EPA approval of the SIP. The amendments also implement changes which remove internal inconsistencies and clarify interpretation of the rules.

3. The rules, as proposed to be amended, appear as follows (new material is underlined; material to be deleted is interlined):

16.8.701 DEFINITIONS As used in this and subsequent subchapters, unless indicated otherwise, the following definitions apply:

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

~~(6) "Existing equipment" means equipment installed prior to November 23, 1968.~~

~~(7)~~-~~(11)~~(6)-(10) Same as existing rule, but renumbered.

~~(12) "New equipment" means:~~

~~(a) Any equipment, installation, construction, article, machine or contrivance constructed or installed after Novem-~~

~~ber-23,-1968.~~

~~(b) Any--equipment--replaced--or---altered--or--processes changed-in-such-a-manner-after-November-23,-1968-as-to-have-any substantial-effect-on-the-production-or-control-of-air-contaminants.~~

~~(c) Any--equipment--moved--after--November--23,--1968--to another-premise-involving-a-change-of-address.~~

~~(d) Any-equipment--purchased--and--to--be--operated-after November-23,--1968-by--a-new-owner-or-when-a-new-lessee-desires to-operate-such-equipment.~~

~~(13)~~(11) Same as existing rule, but renumbered.

~~(14)~~(12) "Opacity" means the degree, expressed in percent, to which emissions reduce the transmission of light and obscure the view of an object in the background. Where the presence of uncombined water is the only reason for failure of an emission to meet an applicable opacity limitation contained in this chapter, that limitation shall not apply. For the purpose of this chapter, opacity determination shall follow all requirements, procedures, specifications, and guidelines contained in ~~Method-9,-Appendix-A,--Part-60,275--(Test-Methods-and Procedures),-Title--40,-Code-of-Federal-Regulations,-as-revised July-1,-1977,~~ 40 CFR Part 60, Appendix A, method 9 (July 1, 1987 ed.), or by an in-stack transmissometer which complies with all requirements, procedures, specifications and guidelines contained in ~~Performance--Specification-1,-Appendix-B, Part-60,275-(Test-Methods--and-Procedures),--Title-40,--Code-of Federal-Regulations--as-revised--July-1,--1977~~ 40 CFR Part 60, Appendix B, performance specification 1 (July 1, 1987 ed.).

~~(15)-(16)~~(13)-(14) Same as existing rule, but renumbered.

(15) "PM-10" means particulate matter with an aerodynamic diameter of less than or equal to a nominal 10 micrometers as measured by a reference method based on 40 CFR Part 50, Appendix J, (52 FR 24664, July 1, 1987) and designated in accordance with 40 CFR Part 53 (52 FR 24727, July 1, 1987), or by an equivalent method designated in accordance with 40 CFR Part 53 (52 FR 24727, July 1, 1987).

(16) "PM-10 emissions" means finely divided solid or liquid material, with an aerodynamic diameter less than or equal to a nominal 10 micrometers emitted to the ambient air as measured by an applicable reference method or alternative method as specified in Appendix C of the PM-10 SIP development guideline manual entitled, "Guidelines for Source Testing for Size Specific Particulate Emissions" or by a test method approved by the department.

(17)-(25) Same as existing rule.

(26) "Total suspended particulate" means particulate matter as measured by the method described in 40 CFR Part 50, Appendix B (July 1, 1987 ed.).

~~(26)-(27)~~(27)-(28) Same as existing rule, but renumbered.

(29) The department hereby adopts and incorporates herein by reference the following sections of the federal regulations:

(a) 40 CFR Part 60, Appendix A, Test Method 9 (July 1, 1987 ed.), which sets forth a method for visual determination of the opacity of emissions from stationary sources;

(b) 40 CFR Part 50, Appendix J (52 FR 24664, July 1, 1987), which contains reference methods for the determination of particulate matter as PM-10 in the atmosphere;

(c) 40 CFR Part 53 (52 FR 24727, July 1, 1987), which pertains to ambient air monitoring reference methods and equivalent methods;

(d) Appendix C of the PM-10 SIP development guideline manual entitled, "Guidelines for Source Testing for Size Specific Particulate Emissions", which pertains to alternative methods for testing PM-10 emissions; and

(e) 40 CFR Part 50, Appendix B (July 1, 1987 ed.), which contains the reference method for the determination of suspended particulate matter in the atmosphere (high-volume method).

(f) A copy of the above sections is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana 59620; or from EPA's Public Information Reference Unit, 401 M Street SW, Washington, DC 20460.

AUTHORITY: 75-2-111, MCA
IMPLEMENTING: Title 75, chapter 2, MCA

16.8.806 DEFINITIONS In this subchapter, the following words and phrases shall have the following meanings:

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

~~(24)---"Particulate--matter"--means--any--material,-except water-in--an-uncombined--form,-that-is-or-has-been-airborne-and exists-as-a-liquid-or-a-solid-at-standard-conditions.~~

~~(25)-(34)~~(24)-(33) Same as existing rule, but renumbered.

AUTHORITY: 75-2-111, 75-2-202, MCA
IMPLEMENTING: 75-2-202, MCA

16.8.815 AMBIENT AIR QUALITY STANDARD FOR LEAD

(1) Same as existing rule.

(2) ~~Measurement-method.~~--For determining compliance with this rule, lead shall be measured by the ~~atomic-absorption method,-as-more-fully-described-in-Title-40,--Part-50-(Appendix G),-Code--of-Federal--Regulations-(1979),--or-by-an-approved-equivalent-method.~~ high-volume method as more fully described in 40 CFR Part 50, Appendix B, (July 1, 1987 ed.) and by the atomic absorption method as more fully described in 40 CFR Part 50, Appendix G, (July 1, 1987 ed.) or by an approved equivalent method.

(3) The department hereby adopts and incorporates herein by reference the following sections of the federal regulations:

(a) 40 CFR Part 50, Appendix B (July 1, 1987 ed.), which contains the reference method for the determination of suspended particulate matter in the atmosphere (high-volume method); and

(b) 40 CFR Part 50, Appendix G (July 1, 1987 ed.), which contains the reference method for the determination of lead in suspended particulate matter collected from ambient air.

(c) A copy of the above sections is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400

Broadway, Helena, Montana 59620; or from EPA's Public Information Reference Unit, 401 M Street SW, Washington, DC 20460.
AUTHORITY: 75-2-111, 75-2-202, MCA
IMPLEMENTING: 75-2-202, MCA

16.8.821 AMBIENT AIR QUALITY ~~STANDARDS~~ STANDARD ~~FOR TOTAL SUSPENDED PARTICULATE MATTER~~ FOR PM-10 (1) No person ~~shall~~ may cause or contribute to concentrations of ~~particulate matter~~ PM-10 in the ambient air which exceed ~~any of~~ the following standards:

(a) Twenty-four hour average: ~~260~~ 150 micrograms per cubic meter of air, 24-hour average, ~~not to be exceeded more than once per year~~ with no more than one expected exceedance per calendar year.

(b) Annual average: ~~75~~ 50 micrograms per cubic meter of air, expected annual average, not to be exceeded.

(2) For the purpose of this rule, expected exceedance and expected annual average shall be determined in accordance with 40 CFR Part 50, Appendix K (52 FR 24667, July 1, 1987).

~~(2)~~(3) ~~Measurement method:~~ ----For determining compliance with this rule, ~~total suspended particulate matter~~ PM-10 shall be measured by ~~the high volume method as more fully described in Title 40, Part 50, (Appendix B) Code of Federal Regulations (1979), or by an approved equivalent method~~ an applicable reference method based on 40 CFR Part 50, Appendix J (52 FR 24664, July 1, 1987), and designated in accordance with 40 CFR Part 53 (52 FR 24727, July 1, 1987) or by an equivalent method designated in accordance with 40 CFR Part 53 (July 1, 1987 ed.).

(4) The department hereby adopts and incorporates herein by reference the following sections of the federal regulations:

(a) 40 CFR Part 50, Appendix J (52 FR 24664, July 1, 1987), which contains reference methods for the determination of particulate matter as PM-10 in the atmosphere;

(b) 40 CFR Part 50, Appendix K (52 FR 24657, July 1, 1987), which contains an interpretation of national ambient air quality for particulate matter; and

(c) 40 CFR Part 53 (52 FR 24727, July 1, 1987), which pertains to ambient air monitoring reference methods and equivalent methods.

(d) A copy of the above sections is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana 59620; or from EPA's Public Information Reference Unit, 401 M Street SW, Washington, DC 20460.
AUTHORITY: 75-2-111, 75-2-202, MCA
IMPLEMENTING: 75-2-202, MCA

16.8.921 DEFINITIONS For the purpose of this subchapter, the following definitions apply:

(1) The board hereby adopts and incorporates by reference ARM 16.8.1423 which sets forth standards of performance for new stationary sources; ARM 16.8.1424 which sets forth emission standards for hazardous air pollutants; 40 CFR ~~Sec.~~ 81.327

which sets forth air quality attainment status designations for the state of Montana; and "Standard Industrial Classification Manual, ~~1972~~1987," ~~as--amended--by--the-1977-supplement,-U.S.-Government-Printing-Office-stock-numbers-4101-0066-and-003-005-00176-0,--respectively,~~ which sets forth classification codes for air pollution sources. A copy of ARM 16.8.1423, ARM 16.8.1424, 40 CFR ~~Sec.~~ 81.327 or "Standard Industrial Classification Manual, ~~1972~~1987," ~~as--amended,~~ may be obtained from the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620.

(2)-(6) Same as existing rule.

(7) "Best available control technology" (BACT) means an emission limitation, including a visible emission standard, based on the maximum degree of reduction for each pollutant subject to regulation under the Federal Clean Air Act or the Montana Clean Air Act which would be emitted from any proposed major stationary source or major modification which the department, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

(8)-(29) Same as existing rule.

(30)(a) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate
(same list, with following addition)
PM-10: 15 tpy

(b)-(c) Same as existing rule.

(31) Same as existing rule.

AUTHORITY: 75-2-111, 75-2-203, MCA
IMPLEMENTING: 75-2-203, MCA

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

(5) Any area other than an area to which ARM 16.8.923 refers may be redesignated as Class III if:

(a)-(c) Same as existing rule.

(d) Any permit application for any major stationary source or major modification subject to provisions established in ARM ~~16.8.933~~16.8.927 which could receive a permit only if the area in question were redesignated as Class III, and any material submitted as part of that application, were available, insofar as was practicable, for public inspection prior to any public hearing on redesignation of any area as Class III.

(6)-(7) Same as existing rule.

AUTHORITY: 75-2-111, 75-2-203, MCA
IMPLEMENTING: 75-2-202, 75-2-203, MCA

16.8.925 AMBIENT AIR INCREMENTS (1) The maximum allowable increases over the baseline concentrations for sulfur dioxide or particulate matter are:

(a) For any Class I area: Micrograms per cubic meter ($\mu g/m^3$)

~~Particulate matter~~ Total suspended particulate:

Annual Geometric mean	5
Twenty-four hour maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
Twenty-four hour maximum	5
Three-hour maximum	25

(b) For any Class II area: ($\mu g/m^3$)

~~Particulate matter~~ Total suspended particulate:

Annual geometric mean	19
Twenty-four hour maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
Twenty-four hour maximum	91
Three-hour maximum	512

(c) For any Class III area: ($\mu g/m^3$)

~~Particulate matter~~ Total suspended particulate:

Annual geometric mean	37
Twenty-four hour maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
Twenty-four hour maximum	182
Three-hour maximum	700

(2) Same as existing rule.

AUTHORITY: 75-2-111, 75-2-203, MCA
IMPLEMENTING: 75-2-202, 75-2-203, MCA

16.8.936 EXEMPTIONS FROM REVIEW

(1) Same as existing rule.

(2) The department may exempt a major stationary source or major modification from the requirements of ARM 16.8.933 or 16.8.934 with respect to monitoring for a particular pollutant if:

(a) The net emissions increase from the source or modification would cause, in any area, air quality impacts less than the following amounts:

(i)-(iii) Same as existing rule.

(iv) PM-10 - 10 $\mu g/m^3$, 24-hour average;

~~(iv)~~-~~(xiii)~~(v)-(xiv) Same as existing rule, but renumbered.

(b)-(c) Same as existing rule.

(3) Same as existing rule.

AUTHORITY: 75-2-111, 75-2-203, MCA
IMPLEMENTING: 75-2-202, 75-2-203, MCA

16.8.1007 VISIBILITY MONITORING

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

(5) The department may waive the requirements of ARM 16.8.1007(1), (2), and (3) if the value of "V" in the equation below is less than 0.50 or, if for any other reason which can be demonstrated to the satisfaction of the department, an analysis of visibility is not necessary.

V = (Emissions)$^{\frac{1}{2}}$/Distance

Where: Emissions = emissions from the major stationary source or modification of nitrogen oxides, ~~particulates~~ particulate matter, or sulfur dioxide, whichever is highest, in tons per year.

Distance = distance, in kilometers, from the proposed major stationary source or major modification to each federal Class I area.

AUTHORITY: 75-2-111, 75-2-203, MCA
IMPLEMENTING: 75-2-203, 75-2-204, MCA

4. Interested persons may submit their data, views, or arguments concerning the proposed amendments, 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, no later than April 15, 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 29, 1988.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the adoption of rule pertaining to fees for filing federal tax liens and amending fees for filing documents.	))))	NOTICE OF PROPOSED ADOPTION OF RULE I AND AMENDMENT FOR RULE 44.6.105 - Fees for filing federal tax liens and fees for filing documents.

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On April 11, 1988, the Secretary of State proposes to adopt and amend rules pertaining to fees for filing federal tax liens and fees for filing documents.

2. The proposed rule provides as follows:

RULE I FEES FOR FILING FEDERAL TAX LIEN (1) Effective May 1, 1988, the secretary of state and the county clerk and recorder shall charge and collect for:

(a) filing a notice of federal tax lien, $7.00;

(b) filing any amendment, $5.00;

(c) filing a certificate of release/termination statement, no fee; and

(d) issuing a certificate of federal tax lien from the filing officer, $7.00.

AUTH: Sec. 71-3-206, MCA IMP: Sec. 30-9-403, MCA

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

44.6.105 FEES FOR FILING DOCUMENTS -- UNIFORM COMMERCIAL CODE (1)(a) thru (1)(h) remains the same.

(i) issuing a certificate from the filing officer ~~showing that an effective financing statement is on file~~, $7.00,

(j) thru (l) remains the same.

AUTH: Sec. 30-9-403, MCA IMP: Sec. 30-9-403, MCA

4. The rules are being proposed and amended to establish fees for filing federal tax liens and fees for filing documents. The fee charged for the filing requirements are commensurate with costs.

5. Interested persons may present their data, views or arguments concerning the adoption in writing to Larry Akey, Chief Deputy, Secretary of State, Room 225, State Capitol, Helena, Montana, 59620, no later than April 11, 1988.

6. If a person who is directly affected by the proposed rules wishes to present data or express his 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 Larry Akey, Chief Deputy, Secretary of State, Room 225, State Capitol, Helena, Montana, 59620, no later than April 11, 1988.

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

Dated this 29th day of February, 1988.

JIM WALTERMIRE
Secretary of State

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.2.810(2) and 2.21.814(8) relating to the Sick Leave Fund	) NOTICE OF THE AMENDMENT OF) ARM 2.21.810(2) AND) 2.21.814(8) RELATING TO THE) SICK LEAVE FUND.

TO: All Interested Persons.

1. On January 14, 1988, the department of administration published notice of the proposed amendment of ARM 2.21.810(2) and 2.21.814(8) relating to the Sick Leave Fund at page 1 of the 1988 Montana Administrative Register, issue number 1.

2. The rules have been amended as proposed.

3. One comment offering no objection was received.

By: Ellen Feaver
Ellen Feaver, Director
Department of Administration

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

BEFORE THE TEACHERS' RETIREMENT BOARD

OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.44.517	)	NOTICE OF AMENDMENT OF ARM 2.44.517 PERTAINING TO TEACHERS' RETIREMENT SYSTEM

TO: All Interested Persons

1. On December 24, 1987, Teacher's Retirement Board published notice of proposed amendment of rule 2.44.517 at page 2277 of Issue No. 24 of the Montana Administrative Register. A public hearing was held January 15, 1988 at 9:00 a.m.

2. At the hearing a representative of the MEA, Tom Bilodeau, presented a letter from the association voicing its view in support of the proposed amendment. MEA supports the change based on the limited impact, equity consideration of younger and older retirees and TRS funding. Mr. Bilodeau requested that every effort be made to give adequate notification to members.

Two letters were received from members, one retired and one active, voicing opposition because they could not include it in considerations for retirement.

3. The Board has amended the rule as proposed.

4. The authority for the rules is 19-4-201, MCA and the rules implement statutes as indicated in the notice.

By: 
DAVID L. SENN, EXECUTIVE SECRETARY
TEACHERS' RETIREMENT DIVISION

Certified to the Secretary of State February 29, 1988

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

IN THE MATTER OF AMENDMENT AND ADOPTION of rules concerning appeals from real and personal property tax appraisals.	) NOTICE OF AMENDMENT of Rule 2.51.307 Orders of the Board and ADOPTION of Rule 2.51.402 Decision of the Board.

TO: All Interested Persons.

1. On January 28, 1988, the State Tax Appeal Board published notice to amend and adopt rules 2.51.307 and 2.51.402 on pages 154-155 in issue #2 of the 1988 Montana Administrative Register.

2. No comments or testimony have been received by the Board.

3. The rules are amended or adopted as noticed.

STATE TAX APPEAL BOARD

for Mary E. Henglemen Vice Chair
Dale G. Dean, Chairperson

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF CHIROPRACTORS

In the matter of the amendment of a rule pertaining to unprofessional conduct, repeal of a rule pertaining to code of ethics and the adoption of new rules pertaining to disciplinary actions and evaluations-consultations	)	NOTICE OF AMENDMENT OF 8.12.607 UNPROFESSIONAL CONDUCT, THE REPEAL OF 8.12.610 CODE OF ETHICS, AND ADOPTION OF NEW RULE I. (8.12.612) DISCIPLINARY ACTIONS AND II. (8.12.613) INDEPENDENT MEDICAL EVALUATIONS-CONSULTATIONS

TO: All Interested Persons:

1. On December 10, 1987, the Board of Chiropractors published a notice of proposed amendment, repeal and adoption of the above-stated rules at page 2215, 1987 Montana Administrative Register, issue number 23.

2. The Board amended, repealed and adopted the rules as proposed with the following changes:

3. ARM 8.12.607 will be amended to read as follows: (new matter underlined, deleted matter interlined)

"8.12.607 UNPROFESSIONAL CONDUCT For the purpose of implementing the provisions of section 37-12-321(14), MCA, the board defines "conduct unbecoming a person licensed to practice chiropractic or detrimental to the best interests of the public" as follows:

(1) ~~Constructive educational publicity is encouraged, licensees must refrain from u~~Using or causing to be used advertising matter which contains misstatements, falsehoods, misrepresentations, distorted and fabulous statements relative to cures, or in the wording of such advertisement any matter which may in any way reflect against a fellow licensee. Personal advertising in any media which deals with the particular abilities, features or accomplishments of the individual licenses or which either directly or by implication makes promise of a cure, offers free examination or consultations, claims special techniques or methods, ~~without first presenting documentation showing sufficient training in the specialty area to the board,~~ or implies superiority, in any manner over other licensees or other licensed health sciences shall be prima facie evidence of unethical conduct. Documentation showing sufficient training by the licensee in the speciality area, shall be presented to the board before advertising the specialty. Business type announcements should be limited to who, what and where.

(2) Engaging in or soliciting ~~inappropriate verbal sexual behavior;~~ sexual relations with a patient, sexual misconduct, sexual contact, sexual exploitation or a sex offense, as defined in section 45-2-101, MCA, when such act or solicitation ~~thereof~~ is related to the practice of ~~the licensee~~ chiropractic.

(3) ~~Violation of~~ Violating any state or federal statute or administrative rule regulating the practice of chiropractic

including any statute or rule defining or establishing standards of patient care or professional conduct of practice.

~~(4)--Using,-in-any-advertising,-the-terms,-'at-no--cost',-'free',---'reduced',--or-any-other-terms,-'at-no-cost',-without including-in-such-advertising-the-following--statement:---'THE PATIENT--AND--ANY--OTHER--PERSON-RESPONSIBLE-FOR-PAYMENT-HAS-A RIGHT-TO-REFUSE-TO-PAY-OR-CANCEL-PAYMENT-OR-BE-REIMBURSED--FOR PAYMENT--FOR--ANY--SERVICE,--EXAMINATION-OR-TREATMENT-WHICH-IS PERFORMED-AS-A-RESULT-OF,-OR-WITHIN-72-HOURS-OF,-RESPONDING-TO THIS--ADVERTISEMENT-OF-FREE-OR-REDUCED-SERVICE,-EXAMINATION-OR TREATMENT',--This-statement-must-appear-in-capital-letters-and be--distinguishable--in-written-advertising-and-audibly-stated on-television-or-radio-advertising.~~

~~(5)~~ (4) will remain the same as proposed.

~~(6)~~ (5) will remain the same as proposed.

~~(7)~~ (6) ~~Submit~~ Submitting to any third-party payer a claim for a service or treatment that contains a fee or charge greater than the customary or usual fee or outside the range of fees, the licensee customarily or usually charges for that type of service or treatment when rendered without third-party reimbursement.

~~(8)~~ (7) Engaging in, or providing services or treatments which are in excess of those warranted by either the patients' condition and response or the practice technique, methodology or modality applied and are not consistent with seriousness of diagnosis.

~~(9)~~ (8) will remain the same as proposed.

~~(10)~~ (9) Directly Rreferring a patient to a ~~health--care practitioner~~ person located in Montana who is not licensed or not regulated by the state of Montana.

~~(11)~~ (10) Defameing another chiropractor by falsely imputing dishonorable conduct or by falsely disparaging his or her business or practice methods.

~~(12)~~ (11) will remain the same."

Auth: 37-1-131, 37-12-201, MCA AUTH Extension, Sec. 4, Ch. 321, L. 1987, Eff. 4/1/87 Imp: 37-12-321, MCA

4. The comments received regarding 8.12.607 and the board's responses are as follows:

COMMENT: Comments were received from the staff of the Administrative Code Committee (ACC) that there were grammatical errors in the proposed unprofessional conduct rules.

RESPONSE: The board concurred and has changed the rules so that they are complete sentences.

COMMENT: Comments were also received regarding subsection (1) from the Montana Chiropractic Association stating that requiring documentation of specialties was not necessary.

RESPONSE: The purpose of the board is to protect the public and it is the board's concern that licensees may be advertising specialty areas in which they are not sufficiently

trained, therefore misrepresenting their services to the public. There are only a few chiropractic specialties, i.e., chiropractic orthopedics, chiropractic physiotherapy, chiropractic roentgenology.

COMMENT: The Montana Chiropractic Association objected to the reference to "verbal sexual behavior". They stated that it was redundant and vague. The staff of the ACC recommended adding reference to sexual offense as stated in criminal code section 45-2-101, MCA.

RESPONSE: The board concurred that the words "verbal sexual behavior" should not be in the rule and has deleted the reference. The board also added reference to "sexual offense" as recommended by the ACC.

COMMENT: A comment was received from the staff of the ACC stating that subsection (4) was beyond the authority of the board. A comment was also received from the Montana Chiropractic Association that this subsection was unnecessary and agreed with the ACC that it was beyond the authority of the board to adopt this subsection.

RESPONSE: The board concurred and has deleted subsection (4) as shown above.

COMMENT: The Montana Chiropractic Association objected to prohibition of fees higher than the customary range in subsection 6 as not being reasonably necessary.

RESPONSE: The board feels that a problem exists in licensees bilking insurance companies. The board feels that if a chiropractor is charging a higher fee of patients, then accepting payment from the insurance carrier as full payment, the practice is fraudulent. If this is done systematically for all patients, the chiropractor is overstating his fee. The board adopted the amendment as proposed.

COMMENT: The Montana Chiropractic Association objected to references to excessive treatments in subsection 7 as being nebulous and not reasonably necessary. It stated that the Association's Code of Ethics is more explicit in dealing with this particular issue. The Association recommended the board revise the rule to include response to treatment to satisfy the criteria of accountability by the chiropractic.

RESPONSE: The public member on the board suggested this rule because of the concerns expressed to him by the public on the number of excessive treatments they received, which did not necessarily benefit the patient. The board concurred that "response" should be included in the rule and the only time this rule will be used is when complaints are received of extreme cases of overutilization. The board also stated that overutilization is addressed in the Association's Code of

Ethics and it seemed illogical that the Association would argue this rule is not necessary.

COMMENT: The Montana Chiropractic Association objected to registration of research projects in subsection 8 as being unreasonably necessary.

RESPONSE: In 1987 the Federation of Chiropractic Licensing Boards recommended that all state take action to register research projects to prevent scam operations that are cropping up in many areas. These so-called "research projects" contact "volunteers" through telemarketing and advertising. Then, when the "volunteers" work with the researcher they are charged for chiropractic services during the so-called research. This scam is being used as a practice-building method in some states. The board is also aware that all legitimate research is being performed under the auspices of chiropractic colleges and not in the small chiropractic office and moved to adopted the amendment as proposed.

COMMENT: The Montana Chiropractic Association objected to referrals to unlicensed persons in subsection 9 as not being reasonably necessary and suggested revisions from the Code of Ethics of the Association.

RESPONSE: The board concurred with the Association and has changed the wording to "Directly referring" as shown above and amended the reference to "health care practitioner" to "person" to eliminate concerns with other health care practitioners who are legitimate.

5. ARM 8.12.613 will be amended to read as follows: (new matter underline, deleted matter interlined)

"8.12.613 INDEPENDENT MEDICAL EVALUATIONS-CONSULTATIONS (1) Any licensee Engaging in 'insurance consultation' or 'independent medical evaluations' 'claims review' involving the review of other licensees' treatment, charges or practices, shall--~~without~~ registering with the board prior to commencement of such activity, listing the name(s), addresses, and contact persons of the insurance company to which the above services are provided."

Auth: 37-1-131, 37-12-201, MCA AUTH Extension, Sec. 4, Ch. 321, L. 1987, Eff. 4/1/87 Imp: 37-12-321, MCA

6. The following comments along with the board's responses were received regarding new rule 8.12.613:

COMMENT: The Montana Medical Association requested that the board change "Medical" evaluations to "chiropractic" evaluations but were not opposed to the rule.

RESPONSE: The board used the term "medical" in a generic sense in this context as that is the standard of the insurance

industry whether the review is of dental, chiropractic, optometric or traditional medical services and elected to leave the term as proposed.

COMMENT: The Montana Chiropractic Association objected to this rule because it believed that the rule was not reasonably necessary in order to carry out statutory authority; that there may be repercussions or chastisement as a result of peers knowing who is doing the evaluations or consultant work; that the rule restricts freedom of trade; and that if registration is required, then insurance companies may hire other health care professions to review chiropractic claims.

COMMENT: Intercorp, a provider of medical review services, opposed the rule on the grounds that it would be beyond the scope of authority of the board; that it will violate the constitutional rights of licensed chiropractors, that it will result in unlawful restraint of trade; that it will invade the consultants' privacy and professional relationships and invite harassments; and that it attempts to force disclosure without judicial order of Intercorp's proprietary information.

RESPONSE: The board notes that the vast preponderance of complaints and problems that come before the board are confidential and unknown to the Montana Chiropractic Association or Intercorp or its representatives, and that the Association and Intercorp are not in a position to be aware of the complexity nor the types of issues confronted by the board. Without this knowledge, the Association and Intercorp are ill-equipped to understand the complexity and necessity for this rule. This rule requires registration only. No fee will be charged. The rule will not prohibit chiropractors from reviewing claims. The board also noted that some licensees who have served as consultants in performing insurance reviews have been involved in disciplinary actions under board jurisdiction. The board feels this rule provides a three-fold benefit, as it protects the insurance company from hiring licensees whose license may be under investigation; it protects the chiropractor from being involved in litigious situations; and it provides the patient with quick and proper claims processing. The registration will be used to assure that the licensees have a current license devoid of any pending complaints or disciplinary actions. The board further noted that the statutes require the board to set and enforce standards and rules governing the licensing, certification, registration and conduct of the members of its profession.

COMMENT: Comments were received from the staff of the ACC stating that the rule was not a complete sentence and that the board did have the authority to register consultants.

RESPONSE: The board concurred with the recommendation of the ACC. The rule has been amended and is now a complete sentence.

COMMENT: Staff of the Administrative Code Committee recommended adding reference to the Authority Extension granted the board in the last legislature.

RESPONSE: The board concurred and Authority Extension Sec. 4, Ch. 321, L. 1987 with an effective date of 4/1/87 has been added to the rule as shown above. Section 37-1-131, MCA has also been added as an authority section.

7. The board has added section 37-1-131, MCA as an authority section and also added Authority Extension Sec. 4, Ch. 321, L. 1987, Eff. 4/1/87 to ARM 8.12.613.

8. The board received comments from six (6) chiropractors who are members of the Association, Rep. Paula Darko and Senator Eleanor Vaughn in support of the proposed rules.

9. No other comments or testimony were received.

BOARD OF CHIROPRACTORS
DEBBIE SORENSON, D.C.
PRESIDENT

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

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

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

In the matter of the adoption of rules establishing a statewide pooling arrangement with a quota plan as a method of payment of milk producer prices	)	NOTICE OF ADOPTION OF RULES 8.86.501, 8.86.511 AND 8.86.521
	)	POOLING RULES
	)	DOCKET # 80-87

TO: ALL LICENSEES UNDER THE MONTANA MILK CONTROL ACT (SECTION 1-23-302, MCA, AND FOLLOWING), AND ALL INTERESTED PERSONS:

1. On October 5, 1987, the Montana Board of Milk Control published notice of the proposed adoption of rules 8.86.501, 8.86.511, and 8.86.521, to establish a statewide pooling arrangement with a quota as a method of payment of milk producer prices. An amendment to the original petition that was the subject of the notice was offered and incorporated into the notice as a separate petition. Notice was published at page 1737 of the 1987 Montana Administration Register, issue no. 19, as MAR NOTICE 8-86-21.

2. The hearing was held November 6, 1987 at 9:00 a.m. in the SRS auditorium and it was continued to 9:00 a.m. November 16, 1987 in the department of highways' auditorium. A total of eighty-one people attended the hearing. Seventeen persons offered testimony and comment on the proposed rules. Of those offering testimony, nine persons spoke in favor of the petition, six spoke in opposition to the petition and two persons were neutral. Of those persons favoring the petition, seven were in favor of the pooling petition only while two others were only in favor of the pooling petition if the pooling of freight was incorporated into the proposal.

3. The board received twenty-four written comments concerning the two proposals. Of those comments, nineteen were in favor of the pooling proposals, five were in opposition. Of the nineteen persons in favor, fifteen were in favor only if the pooling of freight was part of the proposal.

4. After thoroughly considering all of the testimony and comments received, the board adopts the rules as follows, contingent upon passage of the referendum on these rules required by 81-23-302 (14)(a), MCA. The amended petition which was filed to the original petition, and is incorporated as Subsection 3 of Rule 8.86.511 and the original petition will be submitted as separate issues on the referendum submitted to those affected producers, producer-distributors and distributors. If the issues on the referendum passes, then rules are effective on May 1, 1988.

"8.86.501 STATEWIDE QUOTA AND POOLING DEFINITIONS The following definitions apply in ARM 8.86.501, 8.86.511 and 8.86.521, unless the context requires otherwise:

(1) "Pool area" includes all territory within the borders of the state of Montana.

(2) "Pool plant" means any milk plant located within the pool area which is approved by the Montana department of livestock and licensed by the milk control bureau for the receipt and disposition of grade A milk at which grade A milk is received and/or processed during the month.

(3) "Non-pool plant" means any milk processing, packaging, or receiving plant which is not a pool plant.

(4) "Producer", as defined in 81-23-101(1)(n), MCA, means a person who produces milk for consumption in this state, selling it to a distributor.

(5) "Pool dairyman" means any dairy farmer, except a producer-handler, who produces milk (within the state of Montana) which is marketed to or through a pool handler.

(6) "Pool handler" means any person who operates one or more pool plants, or an association of milk producers which is incorporated as a cooperative association and which has been approved by the milk control bureau for the marketing of milk produced by pool dairymen.

(7) "Producer-handler" means any person who operates a dairy farm, and produces milk on such farm, which milk is received and processed and/or packaged in a milk plant operated by such person, and disposed of to retail or wholesale outlets in the pool area during the month, provided that the producer-handler receives no dairy products in fluid form during the month from another person, except for milk and/or fluid milk products received from a pool plant, and such receipts are not in excess of 2500 pounds, or five percent of the producer-handler's class I milk dispositions, whichever is less.

(8) "Pool milk" means all of the milk produced by pool dairymen, under licenses issued by the milk control bureau, which is received at pool plants or marketed to a non-pool plant by a pool handler.

(9) "Non-pool milk" means any milk received or marketed by a pool handler, other than pool milk.

(10) "Pool administrator" means the bureau chief of the milk control bureau of the state of Montana.

(11) "Utilization value" means a sum of money computed for each pool handler with respect to the butterfat and skim milk contained in pool milk received from pool dairymen and disposed of or utilized during the month, such sum to be computed, using the class prices therefor and the classification thereof, as established pursuant to ARM 8.79.101, and subject to any interplant hauling, reclassification, or other charges or credits which are established under rules of the milk control bureau.

(12) **"Pool settlement reserve"** means a reserve fund of money belonging to pool dairymen which the pool administrator shall retain on a revolving basis for the purpose of receiving monies from or in paying monies to pool handlers, as provided in ARM 8.86.511.

(13) **"Base period marketings"** means the pounds of milk as determined by the pool administrator for each dairy farmer who was a producer under ARM 8.79.101, during each of the three months immediately preceding the effective date of these rules, by computing the total pounds of grade A milk marketed by such dairy farmer during the months of September 1986 through August 1987, provided, however, that the pounds of grade A milk marketed shall be deemed to include any grade A milk involved in the foregoing computations by any other dairy farmer whose milking herd has been acquired in its entirety by the dairy farmer for whom this computation is made.

(14) **"Quota percentage"** means a figure established by the pool administrator for each dairy farmer who qualified under paragraph (13) hereof by computing a percentage which is a figure calculated by dividing the total pounds of producer milk assigned to class I and class II (as determined under ARM 8.79.101) by the total pounds of milk purchased from grade A dairy farmers during the base period marketings for the milk plant or plants to which the farmer marketed milk during the said period and adding 12% thereto. (In the case of any pool handler who operated more than one plant during the base period marketings, the percentages shall be computed on the basis of a combined utilization for all such plants.)

(15) **"Quota milk"** means that share of the pool milk received during the month from a pool dairyman which falls within the limits of a figure computed by multiplying such pool dairyman's quota by the number of days in the month.

(16) **"Quota price"** means the weighted average price for all quota milk testing 3.5% butterfat as computed for the month by the pool administrator in accordance with the procedures specified in ARM 8.86.511.

(17) **"Excess milk"** means all of the pool milk received from a pool dairyman during the month which is in excess of his quota milk.

(18) **"Excess price"** means the price for excess milk testing 3.5% butterfat as computed for the month by the pool administrator in accordance with the procedures specified in ARM 8.86.511.

(19) **"Quota"** means a figure expressed in pounds of milk as computed in accordance with ARM 8.86.521 (1)(a) and as adjusted thereafter pursuant to ARM 8.86.521 (3)(4)(5) and recorded pursuant to ARM 8.86.521(1)(b).

(20) "Immediate family" means a spouse, father, mother, son, daughter, brother or sister. The term also includes a corporation, partnership, or other entity of which at least half interest therein is owned by one or more of the aforementioned individuals."

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

"8.86.511 REPORTS, RECORDS, PRICE COMPUTATIONS AND PAYMENTS (1) Reports and records.

(a) On or before the eighth business day after the end of each month, each pool handler shall report for such month, to the pool administrator with respect to the pool plant(s) operated by such pool handler, and/or for all pool milk marketed to non-pool plants, on forms provided by the pool administrator, the following:

(i) the quantities and butterfat content of milk received or marketed from the farms of pool dairymen during the month, the location of the plant where the milk was first received, and the pounds thereof which qualified as quota milk;

(ii) the quantities and butterfat content of milk and fluid milk products received from other pool plants during the month together with the classification of such products as agreed upon with the operator of the pool plant from which received, provided that if a classification is not agreed upon, such milk shall be assigned to class III, to the extent such use is available, and thereafter in sequence to class II and class I;

(iii) the quantities and butterfat content of any other receipts of non-pool milk, the pounds, and butterfat and skim milk content of all other dairy products received during the month (except non-fluid milk products disposed of in the form in which received without further processing);

(iv) the quantities and butterfat and skim milk content of all inventories of milk and other dairy products on hand in the pool plant at the beginning of the month;

(v) the quantities and butterfat and skim milk content of all milk and milk products disposed of from the pool plant during the month, and in the case of any such products transferred in fluid form to the pool plants of other pool handlers, the classification of such products as agreed upon with the operator of the other pool plants, provided that if no agreement is reached, a classification shall be assigned in accordance with paragraph (1)(a)(ii) hereof;

(vi) the quantities and butterfat and skim milk content of all milk and other dairy products utilized in the processing or manufacturing of dairy products in the pool plant during the month, together with the same information for the products produced;

(vii) the disposition made of any pool milk marketed by the pool handler during the month which was not received at his pool plant(s), and the utilization made of such milk;

(viii) the quantities, together with the butterfat and skim milk content of inventories of all milk and dairy products on hand in the pool plant at the end of the month.

(b) Each producer-handler shall report to the pool administrator complete information with respect to his receipt or purchase of milk and dairy products during the month, and the disposition or use thereof. Such report shall be made at the times and in such manner as may be required by the pool administrator, and the producer-handler shall maintain records of his operations as required under the rules of the milk control bureau, and present them for audit by the pool administrator when so requested by him.

(c) Each pool handler shall maintain complete records and accounts of all pool milk received or marketed, and all other milk and dairy products received at each of his pool plants, and the use or disposition of such milk and dairy products for each month together with payments received or made therefor, and shall retain records of the foregoing transactions and other records as required under the rules of the milk control bureau and present them for audit by the pool administrator as required by him.

(2) Computation of price for quota milk and excess milk. On or before the 12th day of each month, or the first business day thereafter, the pool administrator shall compute a quota price and an excess price for the preceding month as follows:

(a) combine into one figure the utilization values for all pool handlers for the month, as computed under ARM 8.86.501(11), and add thereto one-half of the remaining balance in the pool settlement reserve;

(b) add or subtract a value computed by multiplying the weighted average value of butterfat in pool milk times the pounds by which the total butterfat in all pool milk is less, or more respectively, than the pounds obtained by multiplying the total pounds of pool milk by .035;

(c) subtract an amount arrived at by assigning the total quantity of excess milk to the classes of utilization in series, beginning with the total pool milk assigned to class III, and then as necessary to the remaining pool milk in sequence beginning with class II and then class I, and multiplying the quantities so assigned to classes by the appropriate class prices, combining the resulting values, and subtracting any hauling or other cost with respect to pool milk that was deducted in computing pool handlers' obligations for such milk. The sum so arrived at shall be divided by the total pounds of excess milk and the resulting figure, rounded to the nearest whole cent, shall be the excess price for milk testing 3.5% butterfat;

(d) subtract an amount of money equal to five-cents per hundredweight of quota milk, and adjust this figure upward or downward (after making the computations under paragraph (2)(e) hereof) as necessary to offset the fractional balance resulting from rounding the quota price. The amount so computed shall be deposited into the pool settlement reserve.

(e) Compute a quota price by dividing the remaining balance by the total hundredweight of quota milk for the month, and rounding the resultant price to the nearest whole cent;

(f) announce to all interested persons on or before the 13th day of each month, or the first business day thereafter, the quota and excess prices for milk testing 3.5% butterfat as computed pursuant to paragraphs (2)(c) and (2)(e) hereof, and a butterfat differential for quota and excess milk as provided for producer milk under ARM 8.86.301 to adjust for differences in butterfat content of the milk.

(3) Procedures to calculate uniform farm-to-plant haul charges:

(a) The pool administrator will compute a uniform hauling charge poolwide to be charged producers for moving their milk from farm-to-plant at the same time as a uniform blend price is calculated for pool milk.

(b) To compute a uniform hauling charge, the pool administrator will verify the accuracy of charges submitted by each hauler, combine all charges from all haulers into one value and calculate a uniform hauling charge per c.w.t. Each pool plant will deduct the amount of the hauling charge from each producer and transmit it along with any other obligation due the pool administrator for deposit in the producer settlement fund.

(c) The pool administrator will cause a check to be issued to the hauler for services rendered after all charges have been verified by the pool administrator and payment for hauling has been submitted by the pool plant into the producer settlement fund.

(4) Procedures for pooling of returns from pool milk. As soon as possible after completing the computation of the quota and excess prices the pool administrator shall:

(a) compute the net pool obligation of each pool handler by subtracting from his utilization value the amount of money due pool dairymen from such pool handler, based on the quota and excess prices for milk as adjusted for the butterfat test thereof, and other charges as required or permitted under the rules of the milk control bureau;

(b) on or before the 13th day of the month provide written notice to each pool handler of the price and butterfat differential for quota and excess milk for the preceding month, the pool handler's utilization value, and the minimum amount owed pool dairymen for pool milk received or marketed;

(c) on or before the 13th day of the month, notify each pool handler of the amount if any by which his utilization value for the preceding month exceeds the amount due pool dairymen with respect to the pool handler's pool milk, based on the appropriate quota and excess prices. The amount of such difference must then be paid by such pool handler to the pool administrator on or before the 15th of the month, or the first business day thereafter, for deposit into the pool settlement reserve;

(d) pay to each pool handler on or before the 14th day of the month or as soon as funds are available, any sum by which the pool handler's utilization value for the preceding month is less than the amount due those from whom he received pool milk during the preceding month, based on the quota and excess prices as adjusted for the butterfat content of such pool milk.

(5) Payments to pool dairymen and adjustment of accounts. Each pool dairyman must be paid twice each month by the appropriate pool handler(s) for the pool milk received or marketed from such pool dairyman during the month as follows:

(a) A partial or advance payment approximately equal to the value of the pool milk marketed during the first two weeks of the month, less one-half of the approximate monthly deductions herein sanctioned, must be paid to the pool dairyman, or his authorized agent, not later than 30 days after the first day of each month. Such payment need not be accompanied by an itemized statement.

(b) Payments must be made to each pool dairyman, or his authorized agent, not later than 15 days after the end of the month for the pool milk of such pool dairyman for such month. This payment must be at the appropriate quota and/or excess price as adjusted for butterfat content (the rate of such adjustment to be based on the weighted average value of butterfat in the different classes of utilization), and subject to deductions for partial payments under paragraph (4)(a) hereof, administrative assessments, hauling and other deductions authorized under ARM 8.79.101(4), and it must be accompanied by a statement to each pool dairyman setting forth the information required in ARM 8.79.101(11).

(c) As soon as possible after each monthly computation of quota and excess prices is completed, the pool administrator must audit the books and records of each pool handler, and determine whether there have been proper accounting for and payment of the amount owed the pool administrator and/or individual pool dairymen, or cooperative associations from whom the pool handler has received pool milk. If errors are found in the accounting or payments of the pool handler, the pool administrator must notify him thereof promptly, and if there were underpayments by the pool handler, the additional amounts due must be paid within 10 days after notice thereof is given. Money paid to adjust for

underpayments to the pool administrator must be deposited into the pool settlement reserve. In the case of overpayments by a pool handler to the pool administrator, the pool administrator must promptly remit the amount due to such pool handler."

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

"8.86.521 PROCEDURES FOR DETERMINATION AND ADJUSTMENT OF QUOTAS (1) The following provisions must be followed by the pool administrator in assigning quotas:

(a) On or before the 20th day after these rules have been filed with the secretary of state, compute a quota assignable to each eligible dairy farmer in accordance with the following provisions:

(i) Compute the base period marketings of each dairy farmer who is qualified under ARM 8.86.501(13) hereof.

(ii) Determine a quota percentage pursuant to ARM 8.86.501(14), for each dairy farmer for whom a base period marketing has been computed.

(iii) Quota percentages which exceed 100 must be reduced to that figure, and quota percentages which are less than 90 must be increased to the latter figure. And

(iv) multiply the base period marketings computed for each dairy farmer under paragraph (1)(a)(i) hereof by his quota percentage as determined under paragraphs (1)(a)(ii) and (1)(a)(iii) hereof.

(v) For dairy farmers who were producing grade A milk on the first of September 1986, divide the result obtained under paragraph (1)(a)(iv) hereof by 365. For dairy farmers who commenced producing grade A milk after September 1, 1986, divide any figure computed under paragraph (1)(a)(iv) hereof by the number of days from the date milk production was commenced until the end of August 1987, or by 180, whichever is larger.

(vi) The figure computed pursuant to paragraph (1)(a)(v) hereof must be rounded to the nearest whole number and assigned to each respective dairy farmer as a quota, except no such assignment shall be made to any dairy farmer who elects within 21 days after receiving notice pursuant to paragraph (1)(b) hereof to refuse quota assignment under this paragraph.

(b) As soon as possible after completion of the foregoing computations, the pool administrator must provide written notification to each dairy farmer for whom a quota has been computed, of his quota pounds computed pursuant hereto, and must enter such information on the official records of the milk control bureau and continue thereafter to maintain a record of the quota pounds held by each pool dairyman, whether the quota was received pursuant to paragraph (1)(a)(iv) or another paragraph of this rule, or through transfer from another person.

(2) Additional assignments to quota milk.

(a) A pool dairyman who holds no quota and has not transferred quota to another person during the preceding year, shall have a portion of his marketings of pool milk assigned to quota milk each month in accordance with the following schedule of percentages for the respective months of the year:

MONTH	PERCENTAGE TO BE ASSIGNED TO QUOTA MILK
April through August	20
All Other Months	35

(b) A pool dairyman who holds no quota except that assigned him under paragraph (5)(c) of this rule shall have a percentage of his excess milk assigned to quota during the respective months at the rates specified in paragraph (2)(a) hereof.

(3) A quota may be transferred in whole or in part pursuant to the following rules:

(a) Transfer of quota may not be made to any person, except a pool dairyman, or a person who becomes a pool dairyman within 31 days after the effective date of the transfer.

(b) Transfers of quota may be made in units of no less than 100 pounds, or the total quota held by the pool dairyman, whichever is less.

(c) A pool dairyman who acquires quota through transfer may not transfer quota to another person during the six-month period following any such acquisition except in the case of an emergency as recognized by the pool administrator.

(d) Transfers of quota must be based on written notice to the pool administrator. Such notice shall specify the name and address of the person to whom the transfer is to be made and the pounds of quota to be transferred. It must be signed by the transferring pool dairyman and authenticated by a notary public.

(e) A transfer of quota will become effective on the first day of the month next following the date the aforesaid notice is received by the pool administrator.

(4) Hardship adjustments involving quota or forfeiture of quota:

(a) Subject to the provisions of paragraph (4)(b) hereof, adjustments in quota or the forfeiture of quota provided for under paragraph (5)(a) hereof, may be made by the pool administrator if he determines, after due investigation by the hardship review board, that a pool dairyman suffered severe hardship because of circumstances beyond the pool dairyman's control, which adversely affected his milk marketings during periods on which the relevant calculations were based.

(b) The pool administrator must appoint, with the approval of the director of the Montana department of commerce, a hardship review board consisting of five pool dairymen representing different interests and regions of the state, to investigate written complaints received from pool dairymen which allege, and include substantial evidence that their milk production has been adversely affected by unavoidable hardship. The board must consider the complaint, obtain relevant facts as deemed necessary, and submit a report, which must include recommended findings, to the pool administrator within a time limit to be set by him. No adjustment to be made by the pool administrator may be greater than that recommended by the hardship review board.

(5) Other adjustments in quota:

(a) Pool dairymen whose marketings of pool milk during the months of seasonally low milk production fall below the levels specified herein must forfeit quota in accordance with the following computations, which are to be made by the pool administrator on or before the first December 20th after these rules have been in effect for at least six months, and on or before each succeeding December 20th thereafter:

(i) compute the total pounds of pool milk marketed by each pool dairyman during the immediately preceding months of September, October and November;

(ii) compute the pounds of quota held by each pool dairyman on the first day of each of the same three months, multiply the quota pounds so determined by the number of days in the respective months, and combine the results into one figure. Multiply this figure by 0.90;

(iii) in the case of each pool dairyman for whom the figure computed under (5)(a)(ii) hereof exceeds that computed under (5)(a)(i) hereof, compute the difference, and divide the resulting figure by 91; and

(iv) reduce the quota holdings of each pool dairyman for whom a figure was computed under (5)(a)(iii) hereof by the number so computed, effective on January 1st, next following.

(b) The quota of any pool dairyman who discontinues the delivery of pool milk must be forfeited effective at the end of the 61st day after his last delivery, unless such quota has been duly transferred prior to that time.

(c) On or before the 1st day of July 1988 and before each July 1st thereafter, the pool administrator shall calculate for each pool dairyman the additional quota to be assigned in accordance with the following computations:

(i) Compute the total pounds of class I and class II milk of all pool plants (including all plants that would have qualified as pool plants had these rules been in effect) during the 12 month period ending May 31 immediately proceeding, and subtract therefrom the total pounds of class I and class II milk of all such plants during the 12 month period ending May 31 one year earlier.

(ii) Divide any positive figure resulting from the foregoing computation by 365.

(iii) Determine the total pounds of quota that has been forfeited during the proceeding 12 month period pursuant to paragraphs (5)(a) and (5)(b) hereof or for any other reason.

(iv) Combine the pounds determined pursuant to paragraphs (5)(c)(ii) and (5)(c)(iii) hereof with any pounds carried over from the previous year in accordance with paragraph (5)(c)(v) hereof.

(v) The resulting pounds shall be prorated to all pool dairymen on the basis of their average daily marketings of all pool milk during the proceeding months of September through November, and the assigned to them as quota effective on August 1st next following. If the quota to be assigned is less than five-tenths of one percent (0.5%) of the quota held by all pool dairymen, the entire quota pounds to be assigned shall be carried over until the following year, and combined with any other quota for assignment at that time."

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

5. Principle reasons for the adoption of the rules are as follows:

(a) Reserve supplies of milk are necessary for processors to stay in business to guarantee an adequate supply of milk to the consumers of Montana. Pooling spreads the burden of providing the reserve supply equally among all producers.

(b) Unregulated reserve supplies will cause unnecessary expansion of supplies leading to speculation and waste in the marketplace.

(c) A quota plan will prevent that unnecessary expansion, because it is more responsive to the supply.

(d) Pooling permits costs and investments to be better gauged in relation to the supply because the total market is more directly correlated to the total supply.

(e) Pooling will eliminate uncertainty and instability in the marketplace because it will permit the sharing of reserve supplies and it will eliminate competitive pressures caused by the need for distributors to insure their producers a stable or growing share in the market.

(f) Quotas offer additional security by preserving a producer's market if his plant goes out-of-business. It fosters investment in dairying.

(g) Pooling of freight will eliminate possible incentives for producers to switch plants under the pooling plan, and will help individual plants keep adequate supplies of milk by permitting them to retain the producers they now have.

6. Principal reasons stated against adoption of the proposed rules were as follows:

(a) Pooling does not guarantee a market for all the milk and some producers will still be left without a market for their milk.

(b) Pooling does nothing to encourage producers who are overproducing to reduce production and those producers will still continue to overproduce.

(c) The pooling plan does not insure that production will be tailored to supply because the effect is blended over many producers and because historically base building periods have resulted in surplus.

(d) Under the plan, plants lack flexibility in encouraging new producers, who currently are not economically viable, to grow into a position of viability. This could result in individual plant shortages.

(e) The pooling plan fails to address enough of the dairymen's problems to make it a productive program.

(f) The pooling plan lacks flexibility in assuring plants will be able to purchase adequate supplies of milk at reasonable prices because the quota system will restrict entry of new producers into the marketplace.

(g) The pooling of freight will create a lack of incentive for producers to locate farms near the plant, thus encouraging producers to incur unnecessary transportation charges which will be inefficient.

(h) The "reserved rights" feature of the original petitioner's plan in Rule 3 contains a proposal for restricting entry of new producers into the plan, which would be an unconstitutional denial of equal protection.

(i) The "non-pool milk" feature of amendments proposed by Waldner and others contain a proposal for extending Montana price regulation outside state borders in violation of the "commerce" clause of the federal constitution.

7. The principal reasons for denying objections were as follows:

(a) The board rejects contentions that the pooling plan is not a viable and workable plan, because it believes that the pooling plan will provide for more stable marketing of raw milk by insuring producers a stable market for their milk while discouraging inefficient and unnecessary overproduction.

(b) The board rejects contentions that the pooling plan will not provide an adequate supply of milk because it feels that, as a result of relating total supply to total market, producers will be better able to gauge costs and investments to the market. The quota plan encourages milk production during the time period when it's most needed.

(c) The board rejects the contention that the pooling plan would not assure producers a continuing market for their milk because the quota plan does not permit new producers free and unbridled entry into the class I market without quota.

(d) The board rejects the contention that producers will continue to overproduce under the pooling and quota plan because evidence has demonstrated that producers are not able to profit at class III prices.

(e) The board rejects the contention that the pooling plan lacks flexibility in assuring an adequate supply of milk at reasonable prices because the proposed plan is geared to the total market and the penalty provisions will encourage producers to maintain necessary supplies.

(f) The board rejects the contention that all dairymen are not afforded the opportunity to participate because there are provisions in the plan that permit new producers to enter the market.

(g) The evidence warrants the establishment of a statewide pooling arrangement with a provision of freight from farm-to-plant.

(h) The board considers the objections to the proposed "reserved rights" provision and the "non-pool milk" provision to be well taken. Therefore the board declines to incorporate the same in the statewide pooling arrangement it proposes to establish. They adopted the rules for a statewide pooling arrangement and pooling of freight as proposed except that it defeats the proposed "reserved rights" and "non-pool milk" features.

MONTANA BOARD OF MILK CONTROL
CURTIS C. COOK, CHAIRMAN

BY: Curtis C. Cook
CURTIS C. COOK, Chairman
Montana Board of Milk Control

Certified to the Secretary of State February 29, 1988

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE MONTANA SCIENCE AND TECHNOLOGY DEVELOPMENT BOARD

In the matter of the adoption of new rules, amendment of rules 8.122.101 and 8.122.203 and repeal of rules pertaining to investments by the Montana Science and Technology Development Board	))))))	NOTICE OF ADOPTION OF NEW RULES PERTAINING TO INVESTMENTS, AMENDMENT OF RULES AND REPEAL OF RULES

TO: All Interested Persons:

1. On November 12, 1987, the Montana Science and Technology Development Board published a notice of public hearing on the proposed adoption, amendment and repeal of the above-stated rules at page 2018, 1987 Montana Administrative Register, issue number 21.

2. The Board has adopted, amended and repealed the rules as proposed with one change to ARM 8.122.203 as follows:

"8.122.203 DEFINITIONS In addition to the definitions set forth in section 90-3-102 and 90-3-403, MCA, the following definitions shall apply for purposes of these rules.

(1) through (5) will remain the same.

(6) ~~"Investment committee" means the committee composed of board members appointed by the board chairman which makes technological and financial evaluations of technology development projects proposed to the board for a technology investment.~~ "Portfolio company" means a seed, start-up or an expansion stage company which has received a technology investment from the board or from a capital company pursuant to the provisions of this act and these rules.

(7) through (11) will remain the same."

Auth: 90-3-203, MCA AUTH Extension, Sec. 25, Ch. 461, L. 1987, Eff. 4/13/87 Imp: 90-3-203, MCA

3. The information interlined above was inadvertently omitted in the original proposed notice. The information underlined above was shown in the original proposed notice.

4. The new rules will appear under sub-chapter 4 entitled Investments and will be numbered as follows: (new rule numbers are in parenthesis) I. (8.122.401) through VII. (8.122.407); VIII. (8.122.411) through XIV. (8.122.417); XV. (8.122.421) through XXI. (8.122.427); XXII. (8.122.431) through XXIX. (8.122.438); XXX. (8.122.441) through XXXIV. (8.122.445).

4. No comments or testimony were received.

MONTANA SCIENCE AND TECHNOLOGY
DEVELOPMENT BOARD
R. STEPHEN BROWNING, CHAIRMAN

BY: 
GEOFFREY L. BRAZIER, ATTORNEY
DEPARTMENT OF COMMERCE

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

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

In the matter of the repeal of rules 12.6.201 through 12.6.204 comprising the department's field trial regulations.	))))	NOTICE OF THE REPEAL OF RULES 12.6.201 through 12.6.204 COMPRISING THE DEPARTMENT'S FIELD TRIAL REGULATIONS

TO: All Interested Persons:

1. On January 14, 1988, the Department of Fish, Wildlife and Parks gave notice of the proposed repeal of Rules 12.6.201 through 12.6.204 comprising the department's field trial regulations on page 28 of the Montana Administrative Register, issue number 1.

2. No public hearing was held nor was one requested. The department has received no written or oral comments concerning these rules.

3. Based on the foregoing, the department hereby repeals the rules as proposed.

James W. Flynn, Director
Department of Fish,
Wildlife and Parks

Certified to the Secretary of State February 29, 1988.

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

In the matter of adoption of New Rules establishing Guidelines for the sale of Excess Fish Eggs	)))	NOTICE OF ADOPTION OF NEW RULES ESTABLISHING THE PROCEDURE THE DEPARTMENT WILL FOLLOW IN THE SALE OF EXCESS FISH EGGS - 12.7.901 - 12.7.906

TO: All Interested Persons:

1. On January 14, 1988, the Department of Fish, Wildlife and Parks published notice of a proposed rule concerning procedures for the sale of fish eggs at page 19 of the 1988 Montana Administrative Register, issue number 1.

2. The Department has adopted the rule as proposed.

3. One comment was received from the Administrative Code Committee staff, questioning the rulemaking authority of the department to promulgate the rule. The Department agrees that there is a technical defect that could make the rules unenforceable. However, the department decided to promulgate the rule in order to give interested persons notice and an opportunity to comment on the procedures and to have those procedures a matter of public record.

James W. Flynn, Director
Department of Fish,
Wildlife and Parks

Certified to the Secretary of State February 29, 1988.

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

In the matter of rules 12.8.202 through 12.8.213 comprising the public use regulations for the department's designated recreation areas.	))))	NOTICE OF AMENDMENT OF OF RULES 12.8.202 through 12.8.213 COMPRISING THE PUBLIC USE REGULATIONS FOR THE DEPARTMENT'S DESIGNATED RECREATION AREAS

TO: All Interested Persons:

1. On January 14, 1988, the Department of Fish, Wildlife and Parks gave notice of the proposed amendment of Rules 12.8.202 through 12.8.213 comprising the public use regulations for the department's designated recreation areas, on page 21 of the Montana Adminstrative Register, issue number 1.

2. No public hearing was held nor was one requested. The department has received no written or oral comments concerning these rules.

3. Based on the foregoing, the department hereby adopts the rules as proposed with the following change:

12.8.203 ~~PETS~~ CONTROL OF ANIMALS (1) through (5) remain the same.

James W. Flynn, Director
Department of Fish,
Wildlife and Parks

Certified to the Secretary of State February 29, 1988.

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

In the matter of the amendment of Rule 12.8.504 concerning the department's cultural resources coordinator.	))))	NOTICE OF AMENDMENT OF RULE 12.8.504 CONCERNING THE DEPARTMENT'S CULTURAL RESOURCE COORDINATOR

TO: All Interested Persons:

1. On January 14, 1988, the Department of Fish, Wildlife and Parks gave notice of proposed adoption to Rule 12.8.504 concerning the department's cultural resource coordinator, on page 29 of the Montana Administrative Register, issue number 1.

2. No public hearing was held nor was one requested. The department has received no written or oral comments concerning this rule.

3. Based on the foregoing, the department hereby adopts the rule as proposed.

James W. Flynn, Director
Department of Fish,
Wildlife and Parks

Certified to the Secretary of State February 29, 1988.

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

In the matter of the amendment of rules 16.8.937, 16.8.1402, 16.8.1423, and 16.8.1424, regarding air quality models, fuel burning equipment, new source performance standards, & emission standards for hazardous air pollutants.	NOTICE OF AMENDMENT OF RULES, APPROVAL OF LEWIS & CLARK COUNTY RULE CHANGES, AND ADOPTION OF S.I.P. REVISIONS
* * * * * * * * * * *	
In the matter of the amendment of the Lewis and Clark County Clean Air Ordinance.	(Air Quality)

To: All Interested Persons

1. On November 27, 1987, at page 2135 of issue number 22 of the 1987 Montana Administrative Register, the board published notice of a public hearing to consider (a) proposed amendment of ARM 16.8.1402, to clarify the exclusion of residential stoves from this rule; (b) revisions to the State Implementation Plan (SIP), as well as additional changes regarding modification of stationary sources, which involved amendments to ARM 16.8.937, 16.8.1402, 16.8.1423, and 16.8.1424; and (c) proposed amendments to the Lewis and Clark County Clean Air Ordinance, pursuant to Section 75-2-301, MCA.

2. On January 15, 1988, the board conducted a public hearing to consider the above changes. The board approved the proposed amendment to the Lewis and Clark County Clean Air Ordinance, without alteration. With respect to the amendments to ARM 16.8.937 and 16.8.1402, the board adopted the amendments as proposed, with one minor alteration consisting of a deletion in ARM 16.8.937(1) of a room number from the address of the EPA Public Information Reference Unit in Washington, D.C. With respect to the amendments to ARM 16.8.1423 and 16.8.1424, the board considered the comments submitted by the EPA and incorporated the suggested changes such that the rules read as follows (new material is underlined and capitalized; material to be deleted is interlined):

16.8.1423 STANDARD OF PERFORMANCE FOR NEW STATIONARY SOURCES (1) ~~This rule applies to the owner or operator of any new stationary source for which a standard of performance is prescribed by section (2) of this rule.~~ FOR THE PURPOSE OF THIS RULE, THE FOLLOWING DEFINITION APPLIES:

(a) "STATIONARY SOURCE" MEANS ANY BUILDING, STRUCTURE, FACILITY, OR INSTALLATION WHICH EMITS OR MAY EMIT ANY AIR POLLUTANT SUBJECT TO REGULATION UNDER THE FEDERAL CLEAN AIR ACT, 42 U.S.C. §1857, ET SEQ., AS AMENDED IN 1977.

(2) THE TERMS AND ASSOCIATED DEFINITIONS SPECIFIED IN 40 CFR §60.2, JULY 1, 1987, SHALL APPLY TO THIS RULE.

~~(2)~~(3) ~~All owners or operators of new stationary sources defined in 40 CFR 51.18(j)(1)(i) applied in 40 CFR 60.1 or of~~

~~modifications as defined in 40 CFR 60.14 shall comply with the provisions of Title 40, Part 60, Code of Federal Regulations (CFR), July 1, 1987.~~ THE OWNER AND OPERATOR OF ANY STATIONARY SOURCE OR MODIFICATION, AS DEFINED AND APPLIED IN 40 CFR PART 60, JULY 1, 1987, SHALL COMPLY WITH THE STANDARDS AND PROVISIONS OF 40 CFR PART 60, JULY 1, 1987.

~~(3)~~(4) For the purpose of this rule, the board hereby adopts and incorporate by reference ~~Title 40, Section 51.18, Title 40,~~ 40 CFR Part 60, CFR JULY 1, 1987, which ~~sets forth~~ pertains to standards of performance for new stationary sources and modifications. ~~Title 40, Section 51.18(j)(1)(i) and~~ 40 CFR Part 60, CFR JULY 1, 1987, ~~is are~~ IS available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana; at EPA's Public Information Reference Unit, ~~Room 2922,~~ 401 M Street SW, Washington, DC 20460; and at the libraries of each of the ten EPA Regional Offices. Copies are also available as supplies permit from the U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; and copies may be purchased from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

16.8.1424 EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS

(1) ~~This rule applies to the owner or operator of any stationary source for which an emission standard for hazardous air pollutants is prescribed by section (2) of this rule.~~ FOR THE PURPOSE OF THIS RULE, THE TERMS AND ASSOCIATED DEFINITIONS SPECIFIED IN 40 CFR §61.02, JULY 1, 1987, SHALL APPLY.

(2) The owner or operator of any ~~stationary~~ EXISTING OR new STATIONARY source, as defined AND APPLIED in 40 CFR 61.01 PART 61, JULY 1, 1987, shall comply with the STANDARDS AND provisions of ~~Title 40, Part 61, Code of Federal Regulations (CFR)~~ 40 CFR PART 61, July 1, 1987.

(3) For the purpose of this rule, the board hereby adopts and incorporates by reference ~~Title 40, Part 61, CFR,~~ 40 CFR PART 61, JULY 1, 1987, which ~~sets forth~~ PERTAINS TO emission standards for hazardous air pollutants. ~~Title 40, Part 61, CFR,~~ 40 CFR PART 61, JULY 1, 1987, is available for public inspection and copying at the Air Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, 1400 Broadway, Helena, Montana 59620; at EPA's Public Information Reference Unit, ~~Room 2922,~~ 401 M Street SW, Washington, DC 20460; and at the libraries of each of the ten EPA Regional Offices. Copies are also available as supplies permit from the U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; and copies may be purchased from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

3. The changes as set out above clarify the intended definitions. The revisions to ARM 16.8.937 and 16.8.1402 as originally proposed and to ARM 16.8.1423 and 16.8.1424 as set forth in this final notice of adoption, having been properly noticed under 40 CFR 51.102, constitute SIP revisions.

4. Other than the EPA's suggested changes referred to and set out above, there were no other comments received regarding these rules.

JOHN J. DRYNAN, M.D., Director

Certified to the Secretary of State February 29, 1988.

BEFORE THE DEPARTMENT OF JUSTICE

OF THE STATE OF MONTANA

In the Matter of the Amendment of Rules 23.3.118 and 23.3.119, Vision Test and Vision Standards for Driver Licenses.	))))	NOTICE OF AMENDMENT OF RULES 23.3.118 AND 23.3.119

TO: All Interested Persons.

1. On July 16, 1987, the department of justice published notice of the proposed amendments of rules 23.3.118 and 23.3.119, ARM, concerning vision tests and vision standards for driver licenses at page 1002 of the 1987 Montana Administrative Register, issue number 13.

2. On September 24, 1987, the department of justice published an amended notice of proposed agency action, a notice of public hearing on the proposed amendments, at page 1611 of the 1987 Montana Administrative Register, issue number 18.

2. On October 27, 1987, at 10 a.m., in the auditorium of the Scott Hart Building, 303 Roberts, Helena, Montana, a public hearing was held on the proposed amendments.

3. The department has amended rule 23.3.118 as proposed with the following change:

23.3.118 VISION TEST (1) to (3)(a) remain as proposed.
(b) Nothing herein should be construed to prohibit the use of telescopic lenses or similar magnifying devices during the driving test or normal driving if the applicant is otherwise qualified.
(4) to (7) remain as proposed.

AUTH: 61-5-125, MCA IMP: 61-5-110, 61-5-111, MCA

4. The department has amended rule 23.3.119 as proposed with the following change:

23.3.119 VISION STANDARDS (1) to (4)(c)(iii) remain as proposed.
(iv) the applicant's past driving experience, if any.
(4)(d) to (10) remain as proposed.

AUTH: 61-5-125, MCA IMP: 61-5-110, 61-5-111, 61-5-113, MCA

5. The department has thoroughly considered all commentary received:

COMMENT: Jon Hesse, a Livingston attorney, introduced the witnesses and gave an overview of their testimony. Mr. Hesse compared the use of the telescopic lens to the use of hand controls for driving. He generally indicated that telescopic lens users should be licensed based upon their vision measured through their telescopic lenses or similar devices.

RESPONSE: While hand controls and telescopic lenses are both adaptive devices, hand controls are utilized by the handicapped individual full-time in normal operation of the vehicle while, by its nature, the telescopic lens is used by the driver 10% or less of the time, leaving the remaining 90% of driving to be accomplished with vision available through the carrier lenses. It is the department's position that a driver using a telescopic lens and carrier lenses is a driver with less visual acuity than a person who has met the basic license criteria of 20/40 vision in both eyes.

COMMENT: Low vision drivers were critical of the proposed amendments because they do not take into account past driving experience. They also commented that, even with the amendments, use of telescopic lenses is prohibited, and that each individual should be evaluated on his or her own merits.

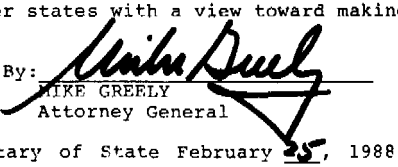
RESPONSE: The department has inserted language allowing consideration of past driving experience when establishing restrictions. The department will consider the individual and that individual's experience. Unexperienced low vision drivers may be more severely restricted, while restrictions may be relaxed over a period of years as the driver gains successful driving experience. The department has also inserted language in the rules clarifying that telescopic lenses or similar devices may be used during the driving test and during normal driving.

COMMENT: A staff optometrist from a low vision clinic advocated allowing use of the telescopic lens during tests of visual acuity. She suggested that the vision of low vision individuals be tested by specialists and that the individual have training in the use of the telescopic device by the specialist. She also suggested that specialists participate whenever a person using a telescopic device is given a driving test.

RESPONSE: The department will continue to use 20/100 vision through carrier lenses as the limit for licensing and will not at this time allow the use of a telescopic lens or similar device to pass the vision test. Experience with individuals with vision of 20/100 or better, whether they use a telescopic lens or not, indicates the system is adequate without requiring vision specialists to be involved in training or driver examinations. In fact, a vision specialist would have no expertise or training to determine whether or not an individual had passed a driving test. Of course, any driver wishing to use a telescopic lens or similar device is free to seek training in the use of that device from a specialist, and is encouraged to do so.

COMMENT: The department should utilize systems like those in Indiana and California for handling drivers who use telescopic devices.

RESPONSE: The department will further study information on these and other systems before a decision is made to establish any program allowing the use of telescopic lenses to meet visual acuity standards. It is the department's understanding based on contacts with California officials that the California program is currently being altered and the submitted information may no longer reflect California's program. The current amendments to the department's rules establish a more lenient and workable system for handling low vision drivers. The department will continue to review the programs and policies in other states with a view toward making further changes in the rules.

By: 
MIKE GREELY
Attorney General

Certified to the Secretary of State February 25, 1988.

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

In the matter of the amendment of Rule 46.12.1204 pertaining to nursing home payment rates	)))))	NOTICE OF THE AMENDMENT OF RULE 46.12.1204 PERTAINING TO NURSING HOME PAYMENT RATES

TO: All Interested Persons

1. On January 28, 1988 the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.1204 pertaining to nursing home payment rates at page 164 of the 1988 Montana Administrative Register, issue number 2.

2. The Department has amended Rule 46.12.1204 as proposed.

3. The Department received two written comments, both of which supported the proposed rule changes.

4. This rule change will be effective July 1, 1988.

Director, Social and Rehabilitation Services

Certified to the Secretary of State February 29, 1988.

VOLUME NO. 42 OPINION NO. 66

CONTRACTS - Application of public construction contract law to restoration of public property operated and maintained by private groups;
HISTORICAL SOCIETY - Responsibility for maintenance, restoration, and preservation of Daly Mansion;
PROPERTY, PUBLIC - Application of public construction contract law to restoration of public property operated and maintained by private groups;
PROPERTY, STATE - Application of public construction contract law to restoration of public property operated and maintained by private groups;
PUBLIC BUILDINGS - Legislative approval of restoration of Daly Mansion;
MONTANA CODE ANNOTATED - Sections 18-2-101 to 18-2-103, 72-16-445 to 72-16-450;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 42 (1987).

HELD: Restoration and repair of the state-owned Daly Mansion are subject to sections 18-2-102 and 18-2-103, MCA, regarding public construction contracts.

18 February 1988

Robert Archibald, Director
Montana Historical Society
225 North Roberts
Helena MT 59620-9990

Dear Mr. Archibald:

You have requested my opinion regarding the following issue:

> Do sections 18-2-102 and 18-2-103, MCA, regarding public construction contracts, apply to restoration and repair of the Daly Mansion?

The Marcus Daly Mansion and the 40 acres on which it is located near Hamilton, Montana, were deeded to the Montana Historical Society on December 31, 1986. The property was transferred pursuant to sections 72-16-445

to 450, MCA, which allow transfers of property with historical significance to the Historical Society as in-kind payment of inheritance and estate taxes.

According to an agreement entered into by the Historical Society and two local private groups, the two private groups have responsibility for the operation, stabilization, and restoration of the Mansion. The agreement also provides that the two groups must maintain a working relationship with the Historical Society and must accept direction from the Historical Society.

The Historical Society has the duty to maintain, repair, and preserve the Mansion as a historical place. See § 22-3-101, MCA. Even though it may contract with private parties for the fulfillment of some of these duties, the Historical Society retains power and responsibility with regard to the property. See 42 Op. Att'y Gen. No. 42 (1987). Thus, the Historical Society must arguably approve any contract for restoration or repair of the property.

Because the Daly Mansion is owned by the Historical Society, it is a "building" within the definition found in section 18-2-101, MCA. Any restoration or repair of the Mansion would be defined as "construction" according to section 18-2-101(3), MCA, which states:

> "[C]onstruction" includes the construction, alteration, repair, maintenance, and remodeling of a building and the equipping and furnishing of a building during construction, alteration, repair, maintenance, and remodeling[.]

See also Goodover v. Department of Administration, 201 Mont. 92, 651 P.2d 1005 (1982).

Sections 18-2-102 and 18-2-103, MCA, state, in part:

> 18-2-102. Authority to construct buildings. (1) Except as provided in subsection (2) of this section, a building costing more than $25,000 may not be constructed without the consent of the legislature. When a building costing more than $25,000 is to be financed in such a manner as not to require legislative

appropriation of moneys, such consent may be in the form of a joint resolution.

....

18-2-103. Supervision of construction of buildings. (1) For the construction of a building costing more than $25,000, the department of administration shall:

(a) review and accept all plans, specifications, and cost estimates prepared by architects or consulting engineers;

(b) approve all bond issues or other financial arrangements and supervise and approve the expenditure of all moneys;

(c) solicit, accept, and reject bids and award all contracts to the lowest qualified bidder considering conformity with specifications and terms and reasonableness of bid amount. However, any contract award that is protested or any contract that is awarded to a bidder other than the lowest bidder is subject to approval by the board of examiners.

(d) review and approve all change orders up to $5,000. Any other change order must be with the consent of the board of examiners. The board of examiners shall act within 14 working days after processing completion by the department.

(e) accept the building when completed according to accepted plans and specifications.

It is suggested that restoration and repair of the Daly Mansion need not be approved by the Legislature nor supervised by the Department of Administration because the Mansion project is being funded and operated by local private groups. As stated above, however, the Mansion is state property. Sections 18-2-102 and 18-2-103, MCA, apply to all construction of public buildings which costs over $25,000. If the funding need not come from a legislative appropriation, consent of

the Legislature may take the form of a joint resolution. § 18-2-102(1), MCA.

As stated above, the Daly Mansion property was transferred to the state pursuant to sections 72-16-445 to 450, MCA. There is no indication in those statutes that the Legislature intended to except property so transferred from the requirements of sections 18-2-102 and 18-2-103, MCA.

THEREFORE, IT IS MY OPINION:

> Restoration and repair of the state-owned Daly Mansion are subject to sections 18-2-102 and 18-2-103, MCA, regarding public construction contracts.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 67

COUNTIES - Clerk and recorder may not require proof of residence prior to registering voters;
COUNTY OFFICERS AND EMPLOYEES - Clerk and recorder may not require proof of residence prior to registering voters;
ELECTIONS - Clerk and recorder may not require proof of residence prior to registering voters;
RESIDENCE - Clerk and recorder may not require proof of residence prior to registering voters;
MONTANA CODE ANNOTATED - Sections 13-1-111, 13-2-202, 13-2-203;
MONTANA CONSTITUTION - Article II, section 13.

HELD: A county clerk and recorder may not request proof of residence of those intending to register to vote.

18 February 1988

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

Dear Mr. Swandal:

You have asked my opinion as to whether the county clerk and recorder may require proof of the information called for in the registration form to prove residence for voting purposes.

Section 13-2-202, MCA, sets out the procedure for registration by personal appearance. It provides:

> An elector may register by appearing before the registrar or a deputy registrar and:
>
> (1) answering any questions asked by the official concerning items of information called for in the registration form;

(2) signing and verifying or affirming the affidavit or affidavits on the form. [Emphasis supplied.]

Section 13-2-203, MCA, sets out the procedure for registration by mail. This section contains two subsections which are pertinent to this request:

(2) The election administrator shall send registration forms for mail registrations to all qualified individuals requesting them and shall, in addition, arrange for the forms to be widely and conveniently available within the county. The mail registration form shall be designed as prescribed by the secretary of state. A form prescribed by the secretary of state explaining voter registration qualifications, deadlines, and purge information shall be distributed with the mail registration form.

(3) The elector shall complete, sign, and ... either verify or affirm the mail registration form before a notary public or other officer empowered to administer oaths or complete and sign the form and obtain the signature, address, and voting precinct of at least one registered voter in the county who shall witness the facts stated on the registration form.

Section 13-1-111, MCA, sets forth the qualifications which must be met before an individual may vote, and which are, for all practical purposes, the foundational questions for the information required in the registration form referred to in section 13-2-202, MCA.

(1) No person may be entitled to vote at elections unless he has the following qualifications:

(a) He must be registered as required by law.

(b) He must be 18 years of age or older.

(c) He must be a resident of the state of Montana and of the county in which he offers to vote for at least 30 days.

(d) He must be a citizen of the United States.

(2) No person convicted of a felony has the right to vote while he is serving a sentence in a penal institution.

(3) No person adjudicated to be of unsound mind has the right to vote, unless he has been restored to capacity as provided by law.

§ 13-1-111, MCA.

Under section 13-2-202, MCA, an elector wishing to register is charged with the responsibility of answering any questions asked by the registrar concerning the items called for in section 13-1-111, MCA, including questions about residence. The statute makes no allusion to the requirement of proof. It only requires that the elector answer questions.

Montana's basic rule on statutory construction is applicable here. Section 1-2-101, MCA, provides that "[i]n the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."

The language of section 13-2-202(1), MCA, requires the elector to answer any questions. There is no provision in the statute permitting the registrar to require proof to support the elector's response. To insert this requirement into the statute would be to directly contravert the basic rule of statutory construction set out above.

A significant principle of election law is that registration laws should be construed to give electors the fullest opportunity to vote that is consistent with reasonable precaution against fraud at the polls. 29 C.J.S. Elections § 37. City of Coronado v. San Diego Unified Port District, 38 Cal. Rptr. 834, 227 C.A.2d 455, appeal dismissed, 380 U.S. 125 (1965). No law should be so strictly construed as to prohibit from voting those otherwise qualified to exercise the privilege. In re Interrogatories of the United States District Court Pursuant to Rule 21.1, 642 P.2d 496 (Colo. 1982). Both by constitutional design and

legislative dictate, courts must construe election and sufferage statutes in a manner which results in the registration of all legally qualified voters. Meyer v. Putnam, 526 P.2d 139 (Colo. 1974).

Montana's Constitution provides that "[a]ll elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of sufferage." Mont. Const. art. II, § 13. The Montana Supreme Court has adopted the following rule of statutory construction relating to this right:

> Statutes regulating the rights of citizens to vote are of great public interest and, therefore, are interpreted with a view to securing for citizens their right to vote ....

Keller v. Smith, 553 P.2d 1002, 1008, 170 Mont. 399, 408 (1976).

Montana's Constitution, case law, and basic rules of statutory construction, as well as the case law of other states, clearly establish that registration rules should be construed to permit the greatest number of qualified voters to exercise their rights. My holding that a county clerk and recorder may not require proof of residence of those intending to register to vote is consistent with that principle. Concerns regarding fraud may be addressed through other channels, principally the challenge procedures contained in sections 13-2-403, 13-2-404, and 13-13-301 to 311, MCA. These statutes permit the registration or vote of an elector to be challenged if the challenger has knowledge that the elector does not reside at the address where registered, or that other voter qualifications are not met.

THEREFORE, IT IS MY OPINION:

> A county clerk and recorder may not request proof of residence of those intending to register to vote.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 68

COUNTIES - Use of public funds to compensate reserve deputy sheriffs for time spent and expenses incurred;
PEACE OFFICERS - Use of public funds to compensate reserve deputy sheriffs for time spent and expenses incurred;
POLICE - Use of public funds to compensate reserve deputy sheriffs for time spent and expenses incurred;
POLICE DEPARTMENTS - Use of public funds to compensate reserve deputy sheriffs for time spent and expenses incurred;
PUBLIC FUNDS - Use of public funds to compensate reserve deputy sheriffs for time spent and expenses incurred;
SHERIFFS - Use of public funds to compensate reserve deputy sheriffs for time spent and expenses incurred;
CODE OF FEDERAL REGULATIONS - 29 C.F.R. §§ 553.100 to 553.106;
MONTANA CODE ANNOTATED - Sections 7-32-201(5), 7-32-212, 46-1-201(8), 46-6-401.

HELD: County public funds may be used to reimburse a reserve deputy sheriff's expenses, provide reasonable benefits, and pay nominal compensation, but the total amount of these provisions may not be given as a form of compensation tied to productivity.

19 February 1988

James Yellowtail
Big Horn County Attorney
Drawer L
Hardin MT 59034

Dear Mr. Yellowtail:

You have requested my opinion on the following question:

> May county public funds be used to compensate time spent and expenses incurred by reserve deputy sheriffs, in view of their status as volunteers under section 7-32-201(5), MCA?

A response to your question hinges on the definition of the term "volunteer" in section 7-32-201(5), MCA, which states:

> "Reserve officer" means a sworn, part-time, volunteer member of a law enforcement agency who is a peace officer as defined in 46-1-201(8) and has arrest authority as described in 46-6-401 only when authorized to perform these functions as a representative of the law enforcement agency.

While Montana has no statutory or case law defining "volunteer," a rather extensive definition is set out in the federal regulations accompanying the Fair Labor Standards Act, 29 C.F.R. §§ 553.100 to .106 (1987). The definition and explanations contained in these regulations are directly applicable to Montana's state and local governments under the 1985 United States Supreme Court decision, Garcia v. San Antonio Metropolitan Transit Authority, 105 U.S. 1005 (1985).

The federal regulations define a volunteer as:

> (a) An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered ....
>
> ....
>
> (c) Individuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer.

29 C.F.R. § 553.101(a), (c).

The federal regulations further explain that individuals, such as reserve police officers, who volunteer services to public agencies are considered volunteers and not employees of the public agencies "if their hours of service are provided with no promise[,] expectation, or receipt of compensation for the services rendered, except for reimbursement for expenses, reasonable benefits, and nominal fees, or a combination thereof ...." 29 C.F.R. § 553.104(a).

It is noteworthy that these regulations provide that volunteers may be paid expenses, reasonable benefits, a "nominal fee," or a combination of these, without losing their status as volunteers:

> Individuals do not lose their status as volunteers because they are reimbursed for tuition, transportation and meal costs involved in their attending classes intended to teach them to perform efficiently the services they provide or will provide as volunteers.

29 C.F.R. § 553.106(c). The regulations further explain that volunteer status is not lost if reasonable benefits are provided. The examples given of reasonable benefits include coverage of volunteers by group insurance plans, such as the workers' compensation provisions. 29 C.F.R. § 553.106(d).

The regulations clearly distinguish payment of a nominal fee from payment of compensation for services, and the effect of these on a volunteer's status:

> Individuals do not lose their volunteer status if they receive a nominal fee from a public agency. A nominal fee is not a substitute for compensation and must not be tied to productivity. However, this does not preclude the payment of a nominal amount on a "per call" or similar basis to volunteer firefighters. The following factors will be among those examined in determining whether a given amount is nominal: The distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year. An individual who volunteers to provide periodic services on a year-round basis may receive a nominal monthly or annual stipend or fee without losing volunteer status.

29 C.F.R. § 553.106(e).

As noted earlier, a combination of expenses, benefits and fees does not, by itself, preclude volunteer status. However, volunteer status can be jeopardized if the total amount of payments made (expenses, benefits, fees) is excessive in the context of the economic realities of the particular situation. 29 C.F.R. § 553.106(f).

It is apparent from these regulations that a reserve deputy sheriff may receive some nominal compensation for time spent and may be reimbursed for expenses without losing volunteer status, but these payments must not be a substitute for salaried compensation, nor may they be tied to productivity. These regulations, taken in conjunction with Montana's statute prohibiting a reduction in the number of full-time officers, § 7-32-212, MCA, also suggest that the above-listed forms of "encouragement" to volunteers cannot be abused to the extent that volunteer reserve officers are used in place of authorized full-time law enforcement officers.

THEREFORE, IT IS MY OPINION:

County public funds may be used to reimburse a reserve deputy sheriff's expenses, provide reasonable benefits, and pay nominal compensation, but the total amount of these provisions may not be given as a form of compensation tied to productivity.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 69

CITIES AND TOWNS - Definition of "day of wage loss" for purposes of calculating eligibility for workers' compensation;
CITIES AND TOWNS - Relationship of workers' compensation laws to statute requiring city to compensate injured policemen;
POLICE - Definition of "day of wage loss" for purposes of calculating eligibility for workers' compensation;
POLICE - Relationship of workers' compensation laws to statute requiring city to compensate injured policemen;
SALARIES - Definition of "day of wage loss" for purposes of calculating eligibility for workers' compensation;
SALARIES - Relationship of workers' compensation laws to statute requiring city to compensate injured policemen;
WORKERS' COMPENSATION - Definition of "day of wage loss" for purposes of calculating eligibility for;
WORKERS' COMPENSATION - Relationship of workers' compensation laws to statute requiring city to compensate injured policemen;
MONTANA CODE ANNOTATED - Sections 7-32-4131, 7-32-4132, 39-3-406(2)(p), 39-4-107(4), 39-71-736;
MONTANA CONSTITUTION - Article XII, section 2(2);
MONTANA LAWS OF 1987 - Chapter 464;
MONTANA LAWS OF 1979 - Chapter 290;
MONTANA LAWS OF 1977 - Chapter 451.

HELD: 1. Section 7-32-4132, MCA, requires a first- or second-class municipality to pay the full salary of a police officer injured while at work from the initial day of the injury.

2. Pursuant to section 39-71-736, MCA, a claimant is eligible for workers' compensation starting with the seventh day of wage loss; in the case of municipal and county employees, a day of wage loss is the loss of wages for eight hours of work.

24 February 1988

Jim Nugent
Missoula City Attorney
201 West Spruce
Missoula MT 59807-4297

Dear Mr. Nugent:

You have requested an opinion on the following questions:

1. Does section 7-32-4132, MCA, require a first- or second-class municipality to pay the full salary of a police officer who is injured while at work from the initial day of the injury or starting with the seventh day of wage loss, pursuant to section 39-71-736, MCA?

2. Pursuant to section 39-71-736, MCA, as amended by the 1987 Legislature, a claimant is eligible for workers' compensation starting with the seventh day of wage loss. What is the correct application of this provision to an employee who works a workweek other than five 8-hour shifts?

Section 7-32-4132, MCA, requires that an injured policeman who meets certain conditions "shall be paid by the municipality by which he is employed the difference between his full salary and the amount he receives from workers' compensation until his disability has ceased ... or for a period not to exceed 1 year, whichever shall first occur."

In order to answer your first question, I must examine both the Metropolitan Police Law (§§ 7-32-4131 to 4138, MCA) and recent revisions in Montana's workers' compensation laws (1987 Mont. Laws, ch. 464). Since 1927, Montana law has allowed cities and towns to compensate sick or injured policemen (§ 7-32-4131, MCA). In 1977, the Legislature supplemented that law with a statute requiring first- and second-class cities to compensate policemen injured in the performance of their

duties, in the manner described above (§ 7-32-4132, MCA). Laws were also added which clarified the relationship of this law to workers' compensation, police retirement, transfer to light duty status, and injury while on probationary status (1977 Mont. Laws, ch. 451). In 1979, the statutes passed in 1977 were amended to emphasize that payments by municipalities do no more than supplement workers' compensation payments in this scheme. Also, a new statute was added, clarifying certain aspects of the law concerning contributions by injured policemen to public employees' retirement plans (1979 Mont. Laws, ch. 290).

The legislative history of the statutes passed in 1977 establishes that the Legislature intended that injured policemen should be fully compensated for up to one year after their injuries. See Minutes of the Montana House of Representatives Labor and Employment Relations Committee, Feb. 16, 1977, at 2; Minutes of the Montana Senate Local Government Committee, Mar. 21, 1977, at 3. I find no indication that the 1979 amendments alter in any way the Legislature's intentions of 1977. See Minutes of the Montana House of Representatives Judiciary Committee, Jan. 30, 1979, at 1; Minutes of the Montana Senate Labor and Employment Relations Committee, Feb. 15, 1979, at 1. I conclude that throughout the course of the changes it has made to Montana's laws regarding the compensation of disabled policemen, the Legislature has shown no alteration in its intent, expressed in 1977, that a policeman "who is injured in the performance of his duties so as to necessitate medical or other remedial treatment and render him unable to perform his duties" shall be fully compensated as set forth in section 7-32-4132, MCA. Similarly, I find no indication that the Legislature intended that its recent changes to Montana's workers' compensation laws (1987 Mont. Laws, ch. 464) would alter this situation.

I believe that the concerns you have raised about the potential abuse of sections 7-32-4132, MCA, and the City of Missoula's sick leave policy for disabled policemen are best addressed in the context of collective bargaining. See §§ 39-31-305(2), 39-71-736(2), MCA.

Your second question concerns section 39-71-736, MCA. That statute states in part: "No compensation may be paid for the first 6 days' loss of wages due to an

injury." You ask if "6 days' loss of wages" means six working days or six calendar days. Although I find no legislative history directly on point, I believe, for several reasons, that it is the general intent of the Legislature that a day of wages contemplates eight hours of wages, rather than a "work day" or a "calendar day."

First, the Montana Constitution states in pertinent part:

> A maximum period of 8 hours is a regular day's work in all industries and employment except agriculture and stock raising.

Mont. Const. art. XII, § 2(2). This section also gives the Legislature permission to change the maximum period to promote the general welfare.

It has been the Legislature's general policy to allow employers and employees in certain types of employment a degree of flexibility in setting the lengths of shifts and work days within a seven-day period. This is specifically the case with municipalities and municipal employees. §§ 39-3-406(2)(p), 39-4-107(4), MCA. Giving proper effect to the intent of the Legislature, as discerned from the plain language of these statutes, I conclude that flexibility in setting municipal work days is to be encouraged. Thiel v. Taurus Drilling Ltd. 1980-II, 42 St. Rptr. 1520, 1522, 710 P.2d 33, 35 (1985).

An interpretation of section 39-71-736, MCA, in terms of "work days" would frustrate this intent, and thus is not a favored interpretation. State ex rel. Dick Irvin, Inc. v. Anderson, 164 Mont. 513, 525 P.2d 564 (1974). An interpretation of section 39-71-736, MCA, in terms of "calendar days" is logically inconsistent with a day of wages and would likewise not be favored. State Dept. of Highways v. Midland Materials Co., 40 St. Rptr. 666, 670, 662 P.2d 1322, 1325 (1983). I am aware that a strong argument can be made for an interpretation in terms of "calendar days" (see § 39-71-116(5), MCA). However, I find the legislative purpose of encouraging flexibility in setting municipal work hours to be more clearly expressed and thus more persuasive.

THEREFORE, IT IS MY OPINION:

1. Section 7-32-4132, MCA, requires a first- or second-class municipality to pay the full salary of a police officer injured while at work from the initial day of the injury.

2. Pursuant to section 39-71-736, MCA, a claimant is eligible for workers' compensation starting with the seventh day of wage loss; in the case of municipal and county employees, a day of wage loss is the loss of wages for eight hours of work.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 70

CITIES AND TOWNS - Payment for use of county jail;
COUNTIES - Payment for use of county jail by city or town;
PRISONERS - Payment for use of county jail by city or town;
MONTANA CODE ANNOTATED - Sections 3-11-102, 7-11-101 to 7-11-108, 7-32-2201, 7-32-2205, 7-32-4105, 7-32-4201, 7-32-4203;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 10 (1977);
REVISED CODES OF MONTANA, 1947 - Section 11-954.

HELD: 1. A county may charge a city or town for maintaining prisoners committed to the county jail at the request of a city or town police department in the course of enforcing city or town ordinances.

2. A county is responsible for maintaining prisoners committed to the county jail at the request of a city or town police department in the course of enforcing state laws. On the other hand, state law requires the consent of the county commission if a city or town uses a county jail for confinement or punishment.

3. State law does not preclude a county and a city or town from entering into an interlocal agreement wherein the county may charge a city or town for maintaining prisoners committed to the county jail at the request of municipal authorities for violating either state laws or municipal ordinances.

25 February 1988

Michael G. Alterowitz
Carbon County Attorney
Carbon County Courthouse
Red Lodge MT 59068

Dear Mr. Alterowitz:

You have requested my opinion on an issue which I have phrased as follows:

> Is the conclusion in 37 Op. Att'y Gen. No. 10 (1977), concerning the propriety of a county charging a city for use of the county jail, affected by the fact that the city charges all defendants under state rather than city law and the fact that the city receives revenue generated by prosecutions in city court, whether they be charged under state statute or city ordinance?

Pursuant to section 7-32-2201, MCA, it is each county's duty to provide and maintain a jail. This has long been the case. It has also long been the duty of the sheriff or other competent official to receive those committed to jail. § 7-32-2205, MCA. Cities and towns, on the other hand, are authorized (but not required) to establish and maintain jails for the confinement of persons who violate municipal ordinances. § 7-32-4201, MCA.

However, pursuant to section 7-32-4105, MCA, it is the duty of municipal police to enforce state law as well as city ordinances. Pursuant to section 3-11-102, MCA, city judges have jurisdiction concurrent with that of justices of the peace over all misdemeanors. Thus, city police and city judges may validly commit persons to jail for violation of state law as well as city ordinances.

There is no statutory provision regarding the maintenance of a city or town jail for prisoners charged by a city or town with violation of state law. Thus, county jails are the only required places of confinement for violations of state law.

Your question concerns the use by a city of a county jail and focuses at least somewhat on the revenue generated by city prosecutions of state law. The latter consideration is not determinative of whether the county may charge the city for jail costs. As stated above, a city may prosecute violations of state law, but is not required to maintain a jail for detainment of state law violators. Rather, the county has the responsibility to

maintain such a jail. The city has the power to use the county jail, pursuant to section 7-32-4203, MCA, which states:

> The city or town council has power to use the county jail for the confinement or punishment of offenders, subject to such conditions as are imposed by law and with the consent of the board of county commissioners. [Emphasis supplied.]

In 37 Op. Att'y Gen. No. 10 at 38 (1977) I considered the language of section 7-32-4203, MCA (then section 11-954, R.C.M. 1947), and concluded that, while a county may charge cities and towns for maintaining prisoners who are incarcerated for violating municipal ordinances, the counties are responsible for paying the costs of maintaining prisoners who are incarcerated at the request of municipal police for violations of state law.

However, I find nothing in the statutes that would preclude a city or town and a county from entering into an interlocal agreement, pursuant to sections 7-11-101 to 108, MCA, regarding jail use. While state law requires that county jails receive all persons committed for violating state laws, a county and a city or town may enter into an interlocal agreement that allows the county to charge the city or town for maintaining prisoners committed by municipal authorities for violating either state laws or municipal ordinances. The terms and conditions of that agreement must be arrived at by mutual consent, within the limits established by law.

THEREFORE, IT IS MY OPINION:

1. A county may charge a city or town for maintaining prisoners committed to the county jail at the request of a city or town police department in the course of enforcing city or town ordinances.

2. A county is responsible for maintaining prisoners committed to the county jail at the request of a city or town police department in the course of enforcing state laws. On the other hand, state law requires the consent of

the county commission if a city or town uses a county jail for confinement or punishment.

3. State law does not preclude a county and a city or town from entering into an interlocal agreement wherein the county may charge a city or town for maintaining prisoners committed to the county jail at the request of municipal authorities for violating either state laws or municipal ordinances.

Very truly yours,

MIKE GREELY
Attorney General

VOLUME NO. 42 OPINION NO. 71

COUNTY GOVERNMENT - Duties of county treasurer in accepting partial payment of property tax under section 15-16-102(5), MCA;
LOCAL GOVERNMENT - Collection of delinquent taxes by county treasurer under section 15-16-102(5), MCA;
PROPERTY, REAL - Method of acceptance of payment of taxes when outstanding delinquencies are partially paid under section 15-16-102(5), MCA;
TAXATION AND REVENUE - Collection by county treasurer of partial payment of outstanding tax delinquency under section 15-16-102(5), MCA;
MONTANA CODE ANNOTATED - Sections 15-16-102, 15-16-102(5), 15-17-324, 15-18-111, 15-18-201.

HELD: 1. The partial tax payment conditions of section 15-16-102(5), MCA, do not apply to taxpayers who tender complete payment of all delinquent taxes.

2. The "current tax year" for purposes of partial tax payments under section 15-16-102(5), MCA, is the current tax billing year which extends from the date the county treasurer mails notice of the tax due to the taxpayer until the following year's tax bill is sent.

26 February 1988

David L. Nielsen
Valley County Attorney
Valley County Courthouse
Glasgow MT 59230

Dear Mr. Nielsen:

You have requested my opinion on the following questions concerning implementation of section 15-16-102(5), MCA:

1. May a taxpayer make a complete payment of delinquent property taxes without having to pay both halves of the payment for the current tax year?

2. For purposes of partial payment of delinquent taxes, what constitutes the "current tax year" under section 15-16-102(5), MCA?

You have expanded your second question in several hypothetical examples of partial payment that differ in the time of tender of payment during the calendar year. I will first review the statutory subsection at issue and then answer your two questions. Finally, I will apply my analysis to your hypotheticals.

Every year thousands of Montana taxpayers fail to pay their taxes. Property owners routinely allow taxes to become delinquent for several years running. A property tax lien is sold at a tax sale conducted by the county following the first year of delinquency. § 15-17-122, MCA. Thereafter the property owner has three years within which to redeem the tax lien, § 15-18-111(1), MCA (18 months in the case of subdivided land, § 15-18-111(2), MCA). During this time the property continues to be assessed and the delinquencies accrue, § 15-17-324, MCA.

The 1987 Legislature attempted to address the growing problem of property tax delinquencies. The Revenue Oversight Committee introduced Senate Bill 162 which streamlined the tax sale and tax deed process. The bill in its original form expressly prohibited partial payment of outstanding tax delinquencies. Senate Bill 162 was amended following its January 31, 1987, Senate Taxation Committee hearing to provide for partial payment of delinquencies, subject to two conditions: (1) the partial payment tendered must consist of at least one full year's delinquent taxes; and (2) the partial payment has to be applied to the taxes that have been delinquent the longest. On February 16, 1987, the bill was further amended on second reading in the Senate to include a third condition: a partial payment could be accepted provided both halves of the current tax year's bill were paid. The legislation was passed by both houses as amended and the current subsection (5) of section 15-16-102, MCA, reflects the three conditions of acceptance of partial payment:

> If the taxes become delinquent, the county treasurer may accept a partial payment equal to the delinquent taxes, including penalty and

> interest, for one or more full taxable years, provided both halves of the current tax year have been paid. Payment of delinquent taxes must be applied to the taxes that have been delinquent the longest.

Section 15-16-102(1), MCA, establishes when a tax subjected to subsection (5) becomes delinquent. Subsection (2) allows taxes that have been assessed and levied for the year to be paid in two installments or "halves." One-half of the tax year's taxes are due November 30 or 30 days after tax notices are sent by the county treasurer and postmarked, whichever is later. As a usual matter, tax notices are forwarded by county treasurers on or about October 31 of each year. The second half of the tax payment for each year is due on or before May 31. Thus, tax payments become delinquent generally if either half of the payment is not made on time: by November 30 or 30 days after the tax notice is postmarked, whichever is later, for the first half payment and May 31 for the second half payment.

Without further legal analysis your first question concerning payment of all delinquencies is capable of resolution. The code subsection at issue, § 15-16-102(5), MCA, concerns partial payment of delinquent taxes. Hence, whenever a taxpayer tenders complete payment of all delinquencies as of the date of tender, that payment should be unconditionally accepted because subsection (5) is inapplicable. For example, assume a taxpayer did not pay the May 1988, second half payment of his 1987 property taxes. Further assume that the taxpayer is billed in late October 1988 for the first half of his 1988 property taxes. Although the taxpayer has been billed for 1988, that payment is not delinquent until 30 days following notice or November 30, whichever is later. § 15-16-102(1), MCA. During this time, before the delinquency arises, the taxpayer may tender payment of the prior 1987 delinquency (due in May 1988) without paying both halves of the current tax year, i.e., the 1988 taxes due in November 1988 and in May 1989. The taxpayer would be making a complete payment of all delinquencies as of the time of tender (the 1987 taxes due in May 1988) only. Enlarging on this hypothetical, if the taxpayer does not pay the first half of the 1988 taxes and waits until December 1988 to tender the 1987 tax delinquency (due in May 1988), then the conditions of subsection (5) are

invoked. This tender is a partial payment of delinquent taxes, because as of December 1988, the first half payment of the 1988 taxes is delinquent as well as the second half of the 1987 taxes. The taxpayer in December 1988 must pay both the past delinquencies to avoid the partial payment conditions of subsection (5), which in this example is the payment of both halves of the current tax year (November 1988 and the future May 1989 payment). Provided a tender is made of all prior delinquencies, including any current delinquency, the county treasurer must accept the payment unconditionally because subsection (5) does not apply.

I. Partial Payment and the Current Tax Year.

Your second question essentially asks the definition of "current tax year," as that phrase is used in section 15-16-102(5), MCA. The drafters of SB 162 did not expressly define the pivotal phrase within their legislation, nor is there an existing statutory definition within the Montana Code Annotated. Since there is no case law directly on point, my analysis and interpretation is directed toward the goal of giving subsection (5) the effect that was intended, though not clearly stated, by the Legislature. Where possible, the intention of the Legislature is to be pursued in the construction of a statute. § 1-2-102, MCA.

The Legislature in enacting subsection (5) sought to legalize partial payments of delinquencies. This fact is evidenced by the policy reversal previously described between the bill as introduced by the Revenue Oversight Committee and the one subsequently amended by the Senate. It is also clear that a county treasurer's authority to accept payment of partial delinquencies was deliberately qualified by certain conditions. The requirements that current taxes be paid and that partial payment be applied to the earliest full delinquent year, demonstrate the intent to assist a taxpayer delinquent for several years in "catching up."

Montana statutes define neither "tax year" nor "current tax year." The assessed year begins on January 1, which is statutorily recognized as the general assessment day. § 15-18-201, MCA. Property ownership as of that date determines the taxable value of property for the year. The two payment halves are considered tax payments for

the assessed year, even though the second half payment is due the following year.

The county treasurers of Montana have generally interpreted the "current tax year" provision of subsection (5) to mean the current tax billing year. This interpretation gives effect to the intent of the statute to permit partial payment of delinquencies. The billing year extends from one year's mailing of tax notices to the next year's mailing. During this time period the current billing is known by the taxpayer and the county treasurer's office such that current payments, as a precondition to past delinquent year partial payments, are possible. An alternative interpretation would use the assessed year, January 1 to December 31, as a reference. However, if this interpretation were adopted, partial payments could only be accepted after the current halves were billed and before the expiration of the assessed tax year, a period of two months. After that time period, between January 1 and the mailing of the next year's current tax bills (typically late October), a taxpayer would have no way of paying current tax halves because they would not yet be levied and assessed.

I find the treasurers' interpretation of subsection (5) reasonable given the context of the statute. It is apparent that the Legislature was referring to the payment of both halves of the current tax assessment as a condition to acceptance of partial payment of outstanding delinquencies. That bill is payable in a billing year that extends from the mailing of one year's bill to the following year's mailing. Thus, this time frame should be used as a reference for the taxpayer required to pay current bills as a precondition of partial tax delinquency payments. Consequently, I hold that the current tax year for purposes of section 15-16-102(5), MCA, extends from the date the county treasurer issues the tax bills in late October until issuance of the next year's bill one year later. This interpretation is limited solely to the construction of the statute in question, § 15-16-102(5), MCA.

II. Application of the Partial Payment Statute.

Your opinion request submits several hypothetical applications of the partial payment statute.

Example 1: The taxpayer is delinquent for the tax years 1984, 1985, and 1986. In other words, the taxpayer has failed to pay any taxes for the payments due November 1984 and May 1985 (1984 tax year), November 1985 and May 1986 (1985 tax year), and November 1986 and May 1987 (1986 tax year.) The taxpayer wants to pay the 1984 tax year delinquencies as a partial payment in June 1987 before the tax assessments for 1987 are completed. Analysis: Payment of one year of the total delinquencies constitutes partial payment and subsection (5) applies. Both halves of "the current tax year" must be paid. The current tax year for this taxpayer extends from mailing of the tax bills in late October 1986 to the mailing in October 1987. Thus, the taxpayer must pay both of the delinquent payments for the 1986 tax year (November 1986 half payment and May 1987 half payment) at the same time the 1984 tax year delinquencies are tendered.

Example 2: Taxpayer is delinquent for the tax years 1984, 1985, and 1986 as in Example 1. Similarly, the taxpayer wants to partially pay his delinquent 1984 taxes, but the time of his tendered payment is the middle of October 1987, after the 1987 assessments are compiled by the assessor, but before they have been received by the treasurer for mailing. Analysis: This tender of partial payment would be handled by the county treasurer in the same manner as Example 1. The taxpayer would have to remit both halves of the current tax year (1986) in addition to the 1984 delinquencies. Subsection (5) in both the foregoing examples does not permit acceptance of partial payment of only one year's delinquencies. The statute's conditions thwart such a payment: a partial payment has to be for at least a full year, the full current year has to be paid, and the partial payment must first apply to the tax year that has been delinquent the longest. A one-year payment is an impossibility.

Example 3: As in the prior examples, the same factual delinquency exists and an attempt to tender 1984 taxes is made. The time of payment, however, is following the mailing of the 1987 tax bills in late October 1987, but prior to receipt by the taxpayer. Analysis: In accordance with this opinion, the new current tax year begins upon mailing of the current tax year's bills. Thus, this partial payment may be accepted only if both halves of the current year are paid. The taxpayer must

pay not only the mailed November 1987 half payment, but also the May 1988 half payment, before the 1984 tax year payment will be accepted. Tender of partial payment during this time frame has the effect of accelerating the future May half payment.

Example 4: The taxpayer wants to make his 1984 partial payment on November 27, 1987, after the taxpayer has received his current tax bill but before the first half has become delinquent. Analysis: Same interpretation as Example 3.

Example 5: The taxpayer tenders his 1984 partial payment on May 30, 1988, just before the second half payment for that year is due, and assuming the first half payment is delinquent. Analysis: Same interpretation as Example 3.

THEREFORE, IT IS MY OPINION:

1. The partial tax payment conditions of section 15-16-102(5), MCA, do not apply to taxpayers who tender complete payment of all delinquent taxes.

2. The "current tax year" for purposes of partial tax payments under section 15-16-102(5), MCA, is the current tax billing year which extends from the date the county treasurer mails notice of the tax due to the taxpayer until the following year's tax bill is sent.

Very truly yours,

MIKE GREELY
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

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

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

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

Definitions:

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

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

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter

1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute Number and Department

2. Go to cross reference table at end of each title which list MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 1987. This table includes those rules adopted during the period December 31, 1987 through March 31, 1988 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through December 31, 1987, this table and the table of contents of this issue of the MAR.

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