MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 19

The Montana Administrative Register (MAR), is 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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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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RULE SECTION

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

In the matter of proposed amendment of Rule 8.86.301 (5)(6)(b),(g) as it relates to the formula for fixing class I wholesale, retail, jobber and institutional prices	))))))	NOTICE OF PUBLIC HEARING ON A PROPOSED AMENDMENT OF RULE 8.86.301(5)(6)(b),(g) PRICING RULES DOCKET #95-89

TO: ALL LICENSEES UNDER THE MONTANA MILK CONTROL ACT (SECTION 81-23-101, MCA, AND FOLLOWING), AND ALL INTERESTED PERSONS:

1. On Wednesday, November 15, 1989, at 9:00 a.m. or as soon thereafter as interested persons can be heard, a public hearing will be held in the SRS auditorium, 111 N. Sanders, Helena, Montana. The hearing will continue at said place from day to day thereafter until all interested persons have had a fair opportunity to be heard and to submit data, views or arguments.

2. The hearing will be held at the request of Country Classic Dairies, Inc., located in Bozeman, Montana, and Meadow Gold Dairies, Inc. with branches in Billings, Great Falls and Kalispell, Montana. The purpose for the hearing will be to try to eliminate incentives for retailers to purchase milk outside Montana for resale in Montana and to diminish the inefficiencies and inequities in current methods of marketing milk.

The board also proposes on its own motion to consider amending paragraph (6)(b) of the rule to make changes in the conversion factors to reflect current data and to entertain evidence relative to the merits of those changes. The base period on certain indexes in the formula has been changed in recent orders necessitating a revision in the conversion factors used. The board will also consider the effect of prices established by its December 20, 1988, order(Docket #89-88) adopting the language that presently is contained in ARM 8.86.301(6)(b), table II. The board's purpose in noticing and considering these subjects is to pass any cost savings realized in the distribution of milk back to the consuming public.

3. The Petitioners propose that the rule be amended as follows: (Full text of the rule is located at pages 8-2539 through 8-2549, Administrative Rules of Montana)(new matter underlined, deleted matter interlined)

"8.86.301 PRICING RULES

(1) through (4) remain the same as before proposed.

(5) Prices to public and/or state institutions. Prices to be paid for fluid milk sold to public and/or state institutions in the state of Montana are fixed by the board of milk control at ~~ninety-two~~ ninety-one percent ~~(92%)~~ (91%) of the ~~regular wholesale~~ retail price and such institutional prices are to be computed and made a part of the appropriate price announcement.

(6) through (a) remain the same as before proposed.

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

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

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

The following table will be used in computing distributor prices.

TABLE II

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

FORMULA INDEX		HANDLER INCREMENTAL DEVIATION
~~143.70-147.94~~	101.30-105.54	-$ 0.02
~~149.00-153.24~~	106.60-110.84	- 0.01
~~154.30-158.54~~	111.90-116.14	0.00
~~159.60-163.84~~	117.20-121.44	0.01
~~164.90-169.14~~	122.50-126.74	0.02
~~170.20-174.44~~	127.80-132.04	0.03
~~175.50-179.74~~	133.10-137.34	0.04
~~180.80-185.04~~	138.40-142.64	0.05
~~186.10-190.34~~	143.70-147.94	0.06
~~191.40-195.64~~	149.00-153.24	0.07
~~196.70-200.94~~	154.30-158.54	0.08
~~202.00-206.24~~	159.60-163.84	0.09
~~207.30-211.34~~	164.90-169.14	0.10
~~212.60-216.84~~	170.20-174.44	0.11
~~217.90-222.14~~	175.50-179.74	0.12
~~223.20-227.44~~	180.80-185.04	0.13
~~228.50-232.74~~	186.10-190.34	0.14
~~233.80-238.04~~	191.40-195.64	0.15
~~239.10-243.34~~	196.70-200.94	0.16
~~244.40-248.64~~	202.00-206.24	0.17
~~249.70-253.94~~	207.30-211.54	0.18
~~255.00-259.24~~	212.60-216.84	0.19
~~260.30-264.54~~	217.90-222.14	0.20
~~265.60-269.84~~	223.20-227.44	0.21
~~270.90-275.14~~	228.50-232.74	0.22
~~276.20-280.44~~	233.80-238.04	0.23
~~281.50-285.74~~	239.10-243.34	0.24
~~286.80-291.04~~	244.40-248.64	0.25

(c) through (f) remain the same as before proposed.

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

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

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

~~must be paid for within fifteen (15) days after invoicing.~~

(A) Full service wholesale prices for retail grocery stores. The minimum full service wholesale price for retail grocery stores will be calculated by multiplying the minimum retail prices by a factor of eighty-nine percent (89%). The minimum wholesale prices charged to retail grocery stores by distributors and paid by retail grocery stores to distributors shall be at this price if the distributor provides any ordering services, shelf-stocking services, outdated product credit services, or retail price marking services to the retail grocery store.

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

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

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

(B) Drop shipment wholesale prices for retail grocery stores. The minimum drop shipment wholesale price for retail grocery stores that purchase their fluid milk without the provision of any of the services outlined in subsection (A) shall be calculated by multiplying the minimum retail prices by a factor of eighty-four percent (84%). Distributors selling fluid milk to retail grocery stores at this price will be allowed to provide no services to the retail grocery stores other than to deliver the fluid milk products to the back room refrigerated storage area of the retail store. In the event the distributor or his agents provide any other service to the retail grocery store, the minimum wholesale price paid for the milk products by the retail grocery store to the distributor shall be the full service wholesale price as set forth in subsection (A) above.

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

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

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

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

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

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

(C) Payment. All fluid milk purchased by retail grocery stores pursuant to this subsection (i) must be paid within fifteen (15) days after invoicing.

(D) Retailers must limit purchases to one service level. Retailers are prohibited from purchasing fluid milk at both full service and drop shipment wholesale prices as

set forth in subsections (A) and (B) from any one distributor in any single billing period. Distributors are prohibited from selling fluid milk to any retail grocery store at both full service and drop shipment wholesale prices as set forth in subsections (A) and (B) to any one retailer in any single billing period.

(ii) Special wholesale prices for wholesale grocery distribution centers. The minimum wholesale price for fluid milk purchased by wholesale distribution centers will be calculated by multiplying the minimum retail price by a factor of seventy-three and one-half percent (73.5%). All fluid milk purchased by wholesale grocery distribution centers must be paid for within ten (10) days after invoicing. Delivery of such fluid milk shall be FOB the wholesale grocery distribution center's dock or distributor's dock. The minimum price of fluid milk resold by wholesale grocery distribution centers to retail stores will be either the full service or the drop shipment wholesale price as set forth above in subsections (i)(A) or (i)(B), whichever is applicable. Wholesale grocery distribution centers include any entity which purchases milk for distribution to retail stores.

(h) Jobber prices. Minimum jobber prices will be calculated by multiplying the ~~difference--between--the applicable-wholesale--price--and--raw--product--cost--times-a factor-of--55,59%-with--the-resulting--answer-being-added-to the-current--raw-product--cost~~ minimum retail prices by a factor of seventy-one percent (71%). The jobber prices so calculated will be the minimum jobber prices.

(i) through (j) remain the same as before proposed.

~~(k)----A-special-price--on--low--fat--milk--and--low-fat chocolate-milk--in-half--(1/2)-pints--purchased-by-elementary and-high-schools-is-hereby-established--by-applying--the-same differential-that-is-used-for-pricing-whole,-homogenized-milk to---schools---and---monthly---price---announcements--amended accordingly.~~

(7) . . ."

4. The board is considering amending the rule in the manner as follows: (Full text of the rule is located at pages 8-2539 through 8-2549, Administrative Rules of Montana.)(new matter underlined, deleted matter interlined)

"8.86.301 PRICING RULES

(1) through (6)(a) remain the same as before proposed.

(b) The flexible economic formula which shall be used in calculating minimum on-the-farm wholesale and retail, jobber, wholesale, institutional and retail prices of class I milk in the state of Montana utilizes a November 1969 base equalling 100, an interval of 5.3 and consists of five (5)

economic factors. It is used to calculate incremental deviations from the price which was calculated for the first quarter of 1974. The factors and their assigned weights are as follows:

	FACTOR	WEIGHT	CONVERSION FACTOR	
(i)	Weekly wages - total private revised	50%	.4035187	
(ii)	Wholesale price index (US)	28%	.260707	.7806202
(iii)	Pulp, paper and allied products (US)	12%	.1142857	.3299850
(iv)	Industrial machinery (US)	6%	.0556586	.1550846
(v)	Motor vehicle and equipment (US)	4%	.0376294	.0945103
		100%		

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

The following table will be used in computing distributor prices.

TABLE II

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

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175.50 - 179.74	0.04
180.80 - 185.04	0.05
186.10 - 190.34	0.06
191.40 - 195.64	0.07
196.70 - 200.94	0.08
202.00 - 206.24	0.09
207.30 - 211.34	0.10
212.60 - 216.84	0.11
217.90 - 222.14	0.12
223.20 - 227.44	0.13
228.50 - 232.74	0.14
233.80 - 238.04	0.15
239.10 - 243.34	0.16
244.40 - 248.64	0.17
249.70 - 253.94	0.18
255.00 - 259.24	0.19
260.30 - 264.54	0.20
265.60 - 269.84	0.21

270.90 - 275.14	0.22
276.20 - 280.44	0.23
281.50 - 285.74	0.24
286.80 - 291.04	0.25

(c) . . ."

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

(a) supplies of milk in adjacent and surrounding areas;

(b) actual prices being charged for unregulated milk in the marketplace in Montana;

(c) prices of milk in adjacent and surrounding areas;

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

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

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

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

TABLE A

Based on its most current cost survey of two major processing plants in Montana conducted by staff of the Milk Control Bureau, simple average dock costs with a raw product cost of $14.48 per c.w.t. for period November 1, 1987, through April 30, 1988, were as follows:

ITEM	RAW PROD COSTS	CRTN/INGR COSTS	PROCESS COSTS	GEN/ADMN COSTS	DOCK COSTS
WHOLE MILK					
1/2 Gal	.65181	.08073	.14443	.05470	.93167
Gallon	1.30362	.16178	.25537	.10940	1.83017
LOWFAT 2%					
1/2 Gal	.57459	.08071	.14443	.05470	.85443
Gallon	1.14918	.16245	.25537	.10940	1.67640
SKIM MILK					
1/2 Gal	.45544	.08874	.15391	.06046	.75855
Gallon	.91089	.17970	.24246	.09914	1.43219

TABLE B

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

ITEM	DOCK COST TABLE B	DROP DEL COSTS	TL DROP DEL COST	WHOLESALE* DEL COSTS	TL WHLS DEL COSTS
WHOLE MILK					
1/2 Gal	.93167	.07854	1.01021	.17569	1.10736
Gallon	1.83017	.15709	1.98726	.35139	2.18156
LOWFAT 2%					
1/2 Gal	.85443	.07854	.93297	.17569	1.03012
Gallon	1.67640	.15709	1.83349	.35139	2.02779
SKIM MILK					
1/2 Gal	.75855	.08902	.84757	.19912	.95767

*"Wholesale Del Costs" were applied to the units sold at dock, drop shipment, and full service prices.

TABLE C

Costs of processing and distributing milk as presented by Equity Supply Co. in Docket #93-89:

ITEM	RAW PROD COSTS	CRTN/INGR COSTS	PROCESS COSTS	DIST COSTS	TOTAL COSTS
Whole Milk					
Gallon	1.20110	.16513	.44930	.27200	2.08753
Lowfat 2%					
Gallon	1.03861	.16513	.44030	.26400	1.90804

TABLE D

Bid prices for sales to Malmstrom Air Force base for period October 1989 through March 1990:

	WHOLE MILK		LOWFAT MILK		SKIM MILK	
	1/2 Gal	Gal.	1/2 Gal	Gal.	1/2 Gal	Gal.
UNIT PRICE	.90	1.80	.82	1.64	.71	1.42

TABLE E

Country Classic milk prices on Wyoming program for Montana stores beginning October 1, 1989:

	WHOLE MILK-GALLON		LOWFAT MILK-GALLON	
	DARIGOLD	PRIVATE LABEL	DARIGOLD	PRIVATE LABEL
UNIT PRICE	$2.30	$2.155	$2.14	$2.02

Note: Freight of $.165 per gallon is included.

Note: Meadow Gold Dairies is no longer selling milk in the interstate milk program at unregulated milk prices. This relates to milk only consumed in the state of Montana.

TABLE F

Margins between retail prices and raw product costs for selected cities for the last week of July and first week of August 1989: (Comparison is made on a gallon of whole milk.)

	RETAIL PRICE	RAW PROD. COST	NET MARGIN
Kellogg, ID	$2.51	$1.09530	$1.41470
Spokane, WA	2.52	1.09530	1.42470
Moscow, ID	2.57	1.06083	1.50917
Twin Falls, ID	2.33	1.06083	1.26917
Boise, ID	2.29	1.06083	1.22917
Jackson, WY	2.42	1.09424	1.32576
*Sheridan, WY	2.63	1.20731	1.42269
*Gillette, Wy	2.84	1.16473	1.67527
*Rapid City, SD	2.65	1.17180	1.47820
*Cheyenne, WY	2.35	1.18493	1.16507
*Laramie, WY	2.49	1.18493	1.30507
*Casper, WY	2.39	1.18493	1.20507
*Powell, WY	2.58	1.20731	1.37269
*Montana	2.65	1.20731	1.44269
Montana	2.63	1.18921	1.44079

*August prices

TABLE G

Retail price comparisons on a gallon of whole milk for selected cities for the last week of July and first week of August 1989:

	HIGH VOLUME AVERAGE PRICE	LOW VOLUME AVERAGE PRICE	PRICE RANGE
Kellogg, ID	$2.51	$2.60	$2.49-2.60
Spokane, WA	2.52	2.61	2.47-2.89
Moscow, ID	2.57	2.43	2.35-2.61
Twin Falls, ID	2.33	2.21	2.15-2.69
Boise, ID	2.29	2.14	2.09-2.48
Jackson, WY	2.42	2.36	2.29-2.45
*Sheridan, WY	2.63	2.44	2.39-2.89
*Gillette, Wy	2.84	2.57	2.49-3.09
*Rapid City, SD	2.65	2.52	2.35-2.83
*Cheyenne, WY	2.35	2.35	2.17-2.49
*Laramie, WY	2.49	2.38	2.37-2.59
*Casper, WY	2.39	2.46	2.22-2.69
*Powell, WY	2.58	2.69	2.45-2.74
*Montana	2.65	----	----
Montana	2.63	----	----

*August price

7. The board takes official notice that Meadow Gold Dairies and Country Classic Dairies represent 82.14% of the total fluid milk volume for 1988.

8. The board takes official notice of changes in the marketplace and of the fact that Country Classic in August sold 46.85% of its total wholesale dollar volume through the grocery warehouse system.

9. The board takes official notice that the cost of transporting packaged milk 198 miles from Bozeman, Montana to Powell, Wyoming is approximately $0.043 per gallon, based on current freight charges submitted by Associated Food Stores to Country Classic Dairies, Inc.

10. The board takes official notice of the unrest which has been prevalent in the milk industry and continues to exert pressure on the market as evidenced by the requests for emergency relief made in March 1986, November 1987, and August 1988. In addition, the board takes notice of the fact that there have been numerous violations of ARM 8.86.301(6)(g)(i)(B)(I) and (C)(V), as they pertain to the $150 and 500 gallon minimum requirements. It should be noted these are unauthorized reductions in minimum prices.

11. The burden is on the Petitioners to prove that their requested amendment would be beneficial and in the public interest.

12. Interested persons may participate and present data, views, or arguments pursuant to Section 2-4-302, MCA, either orally or in writing at the hearing or by mailing the

same to the Milk Control Bureau, 1520 East Sixth Avenue, Room 50, Helena, MT 59620-0512, no later than November 13, 1989.

13. Mr. Geoffrey Brazier, 1424 Ninth Avenue, Helena, Montana, has been appointed as presiding officer and hearing examiner to preside over and conduct the hearing.

14. The authority of the department to amend the proposed rules is based on section 81-23-302, MCA, and implements section 81-23-302, MCA.

MONTANA DEPARTMENT OF COMMERCE

BY: _____
Michael L. Letson, Director

Certified to the Secretary of State October 2, 1989.

BEFORE THE BOARD OF CRIME CONTROL
OF THE STATE OF MONTANA

In the matter of the proposed amendment of Rule 23.14.404 and Rule 23.14.405	)	NOTICE OF PROPOSED AMENDMENT OF 23.14.404 GENERAL REQUIREMENTS FOR CERTIFICATION AND 23.14.405 REQUIREMENTS FOR THE BASIC CERTIFICATE
	)	
	)	
	)	
	)	
	)	NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On November 16, 1989, the Board of Crime Control proposes to amend the above stated rules.

2. The proposed amended rules should read as follows:

23.14.404 GENERAL REQUIREMENTS FOR CERTIFICATION

(1) remains the same

(2) To be eligible for the award of a certificate, each peace officer must be a full-time, paid and sworn peace officer employed by a law enforcement agency as defined by the board of crime control at the time the application for certification is received by the board.

(3) Full-time, paid and sworn peace officers known as special agents, investigators, inspectors, marshals and deputy marshals, patrol officers, deportation and detention officers, and special officers of the following designated federal agencies may apply for the award of a certificate if the applicant has met the requirements for such certification established by these rules. The designated federal agencies are:

(a) the federal bureau of investigation;
(b) the United States secret service;
(c) the United States immigration and naturalization service;
(d) the United States customs service;
(e) the United States marshal's service;
(f) the federal drug enforcement administration;
(g) the United States postal service;
(h) the federal bureau of alcohol, tobacco and firearms;
(i) the federal internal revenue service;
(j) the federal bureau of indian affairs;
(k) the federal bureau of land management;
(l) the United States forest service;
(m) the United States national park service;
(n) the United States border patrol;
(o) the federal general services administration;
(p) the United States fish and wildlife service;
(q) the United States department of agriculture;

(3) through (5) remain the same, but will be renumbered (4) through (6)

Auth: Sec. 44-4-301, MCA; Imp: 44-4-301, 44-11-301, 44-11-301, 44-11-303, 44-11-304, 44-11-305 (8), MCA.

23.14.405 REQUIREMENTS FOR THE BASIC CERTIFICATE

(1) and (2) remain the same.

(3) Peace officers with out-of-state experience and training and peace officers formerly employed by the designated federal agencies specified in Rule 23.14.404 who do not have basic certification and are employed by Montana law enforcement agencies:

(3)(a) through (4) remain the same.

Auth: Sec. 44-4-301, MCA; Imp: 7-32-303, 44-11-301, 44-11-302, 44-11-303, 44-11-304, 44-11-305, MCA.

3. The board is proposing to amend the rules regarding certification of peace officers to include certification of sworn officers of the federal law enforcement agencies. Federal agents, on a daily basis, work in conjunction with peace officers of this state either on a case by case basis or in general support of Montana peace officers. This action has been taken at the request of law enforcement professional associations, the United States District Attorney in Montana and the Montana Attorney General.

4. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to Mr. Clayton Bain, Executive Director, P.O.S.T. Advisory Council, 303 North Roberts, Helena, Montana 59620-1408 no later than November 9, 1989.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Mr. Bain no later than November 9, 1989.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; from the Administrative Code committee of the legislature; from a governmental sub-division or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 145 persons based on the number of peace offices registered with the P.O.S.T. Advisory Council.

Edwin L. Hall

Edwin L. Hall
Administrator

Certified to the Secretary of State September 25, 1989

BEFORE THE BOARD OF CRIME CONTROL
OF THE STATE OF MONTANA

In the matter of the proposed amendment of Rule 23.14.401, and the proposed adoption of Rule I, Rule II and Rule III	)	NOTICE OF PUBLIC HEARING FOR AMENDMENT OF RULE 23.14.401 ADMINISTRATION OF PEACE OFFICER STANDARDS AND TRAINING, FOR ADOPTION OF RULE I MINIMUM STANDARDS FOR THE EMPLOYMENT OF DETENTION OFFICERS, RULE II REQUIREMENTS FOR DETENTION OFFICER CERTIFICATION, AND RULE III REFERENCED RULES APPLY TO FULL-TIME AND PART-TIME DETENTION OFFICERS

TO: All Interested Persons

1. On November 1, 1989, at 10:00 a.m., a public hearing will be held in Room 470 of the Scott Hart Building, 303 North Roberts, Helena, Montana, to consider the amendment and adoption of the above stated rules.

2. The proposed amended rules should read as follows:

23.14.401 ADMINISTRATION OF PEACE OFFICERS STANDARDS AND TRAINING (1) Rules and regulations of the board of crime control on minimum standards for employment as a law enforcement officer and as a detention officer, for equipment and for procedures; requiring basic training for law enforcement and detention officers appointed after the effective date of this regulation; providing for the appointment of a peace officers standards and training advisory council; and providing for the administration of these rules and regulations and for the adoption of necessary regulations as provided by section 44-4-301, MCA.

(2) The objective of the board of crime control is to establish minimum standards for employment for all enforcement and detention officers and their equipment, procedures and training of professional character and to insure the fair and equal application of law enforcement throughout the state of Montana, all in the interest of the public safety and welfare.

(3) through (3)(k) remain the same.

(l) One member to be a detention center administrator or detention officer.

(4) and (5) remain the same.

(6) For the purposes of this regulation the terms "law enforcement officer" and "peace officer" shall mean the undersheriffs and deputy sheriffs of each county, the members of the police force of every organized city or town, the marshals of every town, state highway patrolmen, state fish and game wardens, campus security police of the state university system and the airport police organized by airport commissions or board

who are given general police powers to enforce the state laws and city ordinances, and are salaried, full-time employees of their law enforcement agencies. The terms "detention officer" and "detention center administrator" mean those defined in 44-4-301, MCA.

(7) through (10) remain the same.

(11) The council shall recommend to the board of crime control rules and regulations with respect to:

(a) Minimum standards of physical, educational, mental and moral fitness which shall govern the recruitment, selection and appointment of law enforcement and detention officers.

(b) The approval, or revocation of approval, of law enforcement and detention officer training schools administered by the state, county, municipal corporations, public school districts, vocational-technical school districts, and law enforcement zone schools.

(c) and (d) remain the same.

(e) The requirements of the minimum basic training which law enforcement and detention officers appointed to probationary terms shall complete before being eligible for permanent appointment, and the time within which such basic training must be completed following such appointment to a probationary term.

(f) The requirements of minimum basic training which law enforcement and detention officers not appointed for probationary terms but appointed on other than a permanent basis, shall complete in order to be eligible for continued employment or permanent appointment, and the time within which such basic training must be completed following such appointment on a non-permanent basis.

(g) through (11)(i) remain the same.

(12) through (13)(a) remain the same.

(b) Visit and inspect any law enforcement and detention officer training school approved by the board or for which application for such approval has been made;

(c) through (14) remain the same.

(15) The executive director shall have the following duties, to be exercised as directed by the board:

(a) To approve law enforcement and detention officer training schools administered by state, county, municipal corporations, public school districts, vocational-technical school districts, private institutions and law enforcement zone schools, hereinafter referred to as "law enforcement schools;"

(b) To certify as qualified instructors at approved law enforcement and detention officer training schools and to issue appropriate certificates to such instructors;

(c) To certify law enforcement and detention officers who have satisfactorily completed basic training programs and to issue appropriate certificates to such law enforcement and detention officers.

(d) To cause studies and surveys to be made relating to the establishment, operation, and approval of law enforcement and detention officer schools;

(e) To consult and cooperate with law enforcement and detention officer schools for the development of advanced in-

service training programs for law enforcement and detention officers;

(f) To consult and cooperate with universities, colleges, and institutes for the development of specialized courses of study in the state for law enforcement and detention officers in police science, police administration, corrections and corrections administration;

(g) To consult and cooperate with other departments and agencies of the state and federal government concerned with law enforcement and detention officer training;

(h) To perform such other acts as may be necessary or appropriate to carry out his powers and duties as set forth in this regulation; and,

(i) To report to the council at each regular meeting of the council and at such other times as the council may require.

(16) Nothing in sections 2 through 16, inclusive, of this regulation shall be construed to exempt any law enforcement officer, detention officer, or other officer or employee from the provisions of Title 7, chapter 32, MCA, 7-32-303, MCA or 44-4-301, MCA.

(17) No person shall, after the effective date of this regulation, receive an original appointment on a permanent basis as a law enforcement or a detention officer as defined in this regulation, unless such person has met the minimum employment standards established by the board and has previously been awarded a certificate by the board attesting to his satisfactory completion of an approved state, county, or municipal police or detention officer basic training program; and every person who is appointed on a temporary basis or for a probationary term or on other than a permanent basis as a law enforcement or a detention officer as defined in this regulation, shall forfeit his position as such unless he previously has satisfactorily completed, or within the time prescribed by regulations promulgated by the board of crime control, satisfactorily completes an approved basic training program at a law enforcement or a detention officer school and is awarded a certificate by the board attesting thereto and has met the minimum employment standards established by the board.

(18) through (21) remain the same.

Auth: 44-4-301, MCA Imp: 44-4-301, 7-32-303, MCA

3. The proposed rules to be adopted should read as follows:

RULE I MINIMUM STANDARDS FOR THE EMPLOYMENT OF DETENTION OFFICERS (1) Any person employed in the state of Montana by any detention center administrator to work as a detention officer in a detention center, after the effective date of this rule, must meet or exceed these minimum standards:

(a) be a citizen of the United States or may be a registered alien if unsworn;

(b) be at least 18 years of age;

(c) be fingerprinted and a search made of the local state and national fingerprint files to disclose any criminal record;

(d) not have been convicted of a crime for which he could have been imprisoned in a federal or state penitentiary;

(e) be of good moral character, as determined by a thorough background investigation;

(f) be a high school graduate or have passed the general education development test and have been issued an equivalency certificate by the superintendent of public instruction or by an appropriate issuing agency of another state or of the federal government;

(g) be examined by a licensed physician, who is not the applicant's personal physician, appointed by the employing authority to determine if the applicant is free from any mental or physical condition that might adversely affect performance by the applicant of the duties of a detention officer;

(h) successfully complete an oral examination conducted by the appointing authority or its designated representative to demonstrate the possession of communication skills, temperament, motivation, and other characteristics necessary to accomplishment of the duties and functions of a detention officer;

(i) possess a valid driver's license if driving a vehicle will be part of the detention officer's duties.

(2) The terms "detention officer, detention center and detention center administrator" are those defined in 44-4-301, MCA.

Auth: 44-4-301, MCA Imp: 7-32-303, 44-4-301, MCA

RULE II REQUIREMENTS FOR DETENTION OFFICER CERTIFICATION

(1) Detention officers must meet or exceed the minimum employment standards established for such officers.

(2) Detention officers must, within their first year of initial employment, complete a detention officers basic course as provided by MLEA or equivalent training as determined by the P.O.S.T. Advisory Council.

(3) Shall have served at least one (1) year with the present employing agency and has completed a 1-year probationary period and is satisfactorily performing his duties as attested to by the head of that agency.

(4) As a requirement for continuing employment, any detention officer employed before the effective date of this rule must, within 24 months of the effective date of this rule, complete the educational requirements of this rule or submit evidence of having completed an equivalent course as determined by the P.O.S.T. Advisory Council or forfeit the position of detention officer.

(5) A detention officer who has successfully met the employment standards and qualifications and the educational requirements of this section and who has completed a 1-year probationary term of employment shall, upon application to the P.O.S.T. Advisory Council, be issued a basic certificate by the Council certifying that the detention officer has met all the

basic qualifying detention officer standards of this state. Auth: 44-4-301, MCA Imp: 44-4-301, MCA

RULE III REFERENCED ADMINISTRATIVE RULES OF MONTANA APPLY TO FULL-TIME AND PART-TIME DETENTION OFFICERS (1) By reference the following Montana Administrative Rules of Montana apply to detention officer certification and training:

(a) Rule 23.14.404 General Requirements for Certification;

(b) Rule 23.14.411 Purpose of Certificates and Awards;

(c) Rule 23.14.412 Qualification for Certification of Law Enforcement Academy and Training Courses;

(d) Rule 23.14.413 Certification Requirements for Trainee Attendance and Performance;

(e) Rule 23.14.419 Instructor Certification Requirements.

(2) The term "detention officer" is that which is defined in 44-4-301, MCA.

Auth: 44-4-301, MCA Imp: 44-4-301, MCA

4. The board is proposing the amendment to the organizational rule and the adoption of the new rules to conform to the change in the statute which occurred in the 1989 legislative session authorizing the board to establish minimum standards for and the certification of detention officers.

5. Interested persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views and arguments may also be submitted to the Board of Crime Control, 303 North Roberts, Helena, Montana 59620-1408, no later than November 9, 1989.

6. Clayton Bain, Executive Director, POST Advisory Council, Helena, Montana, has been designated to preside over and conduct the hearing.

Edwin L. Hall

Edwin L. Hall
Administrator

Certified to the Secretary of State September 25, 1989

BEFORE THE BOARD OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of proposed amendment of rule pertaining to the voluntary transfer of a reserved water right	))))	NOTICE OF PROPOSED AMENDMENT OF RULE 36.16.118 NO PUBLIC HEARING CONTEMPLATED

To: All Interested Persons.

1. On November 20, 1989, the Board of Natural Resources and Conservation proposes to amend certain rule as above stated relating to the voluntary transfer of a reserved water right.

2. The proposed amendments will read as follows: (new matter underlined, deleted matter interlined)

"36.16.118 CHANGES AND TRANSFERS (1) Points of diversion and places of storage and use not indicated in the original public notice of the reservation, and otherwise not the subject of proceedings authorized in 85-2-316(10) and (11), MCA, may be included in the reservation at a later date if approved by the board.

(2) Only upon the request of a reservant may a A water reservation may be transferred to a new owner without loss of priority if the transferee is qualified to reserve water pursuant to 85-2-316(1), MCA, and if the transfer is approved by the board.

(3) All decisions regarding changes and transfers shall reflect a consideration of the decision criteria listed in ARM 36.16.107B."

AUTH: 85-2-113, MCA; IMP: 85-2-316, MCA

REASON: This change conforms this rule to the declaratory ruling issued by the board on April 11, 1989. The declaratory ruling held, in pertinent part, that the board does not have authority to involuntarily transfer a municipal water reservation.

3. Interested persons may submit their data, views, or arguments concerning the proposed amendment in writing to the Board of Natural Resources and Conservation, 1520 E. Sixth Ave., Helena, Montana, 59620, no later than November 14, 1989.

4. If a person who is directly affected by the proposed amendments wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Department of Natural Resources and Conservation, no later than November 14, 1989.

5. If the department receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments, from the Administrative Code

Committee of the Legislature; from a governmental subdivision, or agency; or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register and mailed to all interested parties. Ten percent of those persons directly affected has been determined to be 25.

Board of Natural Resources and Conservation

Certified to the Secretary of State, October 2, 1989.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF SPEECH PATHOLOGISTS AND AUDIOLOGISTS

In the matter of the amendment of a rule pertaining to non-allowable functions of aides	)))	NOTICE OF AMENDMENT OF 8.62.504 NONALLOWABLE FUNCTIONS OF AIDES

TO: All Interested Persons:

1. On May 25, 1989, the Board of Speech Pathologists and Audiologists published a notice of public hearing on the proposed amendment of the above-stated rules at page 645, 1989 Montana Administrative Register, issue number 10.

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

3. The Board has thoroughly considered all written and oral comments received. A total of six written comments was received and one oral comment was provided at the hearing. A reproduction of the oral testimony was provided by the individual giving it. Comments received and the Board's responses thereto are as follows:

COMMENT: The Montana Office of Public Instruction and Parents Lets Unite For Kids (PLUK), a statewide organization of parents of children with disabilities and chronic illnesses, and the Butte Public Schools submitted written comments in support of the rule amendment.

COMMENT: Three written comments received supported the rule amendment but expressed concerns regarding timelines graduate programs have for admission and admission requirements.

RESPONSE: The Board recognizes that the proposed rule amendment would not allow enough time for BA level speech/language pathologists currently working in the public schools to meet the deadlines for graduate level programs beginning summer of 1989. Therefore the Board will accept documentation from BA level speech/language pathologists indicating that they have attempted to obtain graduate level admission for the 1989 summer session. However, all BA level speech/language pathologists will be required to conform to the amendment as written effective summer of 1990.

COMMENT: A representative of the Special Education Advisory Panel provided oral testimony. This testimony was not in favor of the proposed rule amendment. Following is a list of concerns expressed and the Board's responses thereto.

1. At the present time, there are schools who are employing BA level speech therapists who would be classified as speech aides and would be greatly restricted in the job tasks they would be allowed to perform if the proposed rule changes were to be adopted. The BA level therapists are employed because there are no fully licensed persons available, or willing, to accept positions in some of the more remote areas of Montana. Some districts have been unable to hire any speech therapist and positions have gone unfilled.

It seems unwise, to this panel, that further restrictions would be applied in an area where there is still a serious shortage of highly trained personnel.

RESPONSE: The Board recognizes that there are a number of schools employing BA level speech aides. These aides, as required by licensure law, are registered with the Board and are allowed to perform those activities which have been approved by their supervisors. These same BA level speech aides will continue to be allowed to perform those functions which they were allowed to perform in the 1988/89 school year if they enroll in a graduate program. The rule amendment provides current BA level speech aides the opportunity to meet licensure requirements up to 1992.

2. The upgrading of standards is coming at a time when the University of Montana is discussing the possibility of totally eliminating the only training program for speech therapists that is being offered in the state of Montana.

RESPONSE: The rule amendment is not an upgrading of standards, but a clarification of what non-licensed personnel may or may not do.

3. The upgrading of standards, which we perceive will make serving handicapped children in this state even more difficult, will be happening at a time when preschool services are mandated to begin throughout the state. This will further compound the problem of our having a shortage of trained personnel available to work without handicapped children.

RESPONSE: The rule amendment is not an upgrading of standards, but a clarification of what non-licensed personnel may/may not do.

4. School personnel, on this panel, have expressed that they have had good experience using BA level speech therapists, and there is some concern that there is no need to fully restrict ourselves to the utilization of Master's level therapists. We generally perceive MA level personnel as being better trained and more qualified than BA level personnel, but this depends to some extent upon the abilities of the individual and the training that they have received. We point out that although we will generally recognize that MA level teachers are better trained and more skilled than BA level teachers, we certainly find that BA level teachers do an excellent job of working with our handicapped children. We support the encouragements for unlicensed speech therapists to secure more training and work toward licensure, but we do not support restrictions on our utilization of therapists during the time that this upgrading of training is occurring.

RESPONSE: In accordance with section 37-15-101, MCA, "... in order to safeguard the public health, safety, and welfare and to protect the public from being misled by incompetent,

unscrupulous, and unauthorized persons and to protect the public from unprofessional conduct by qualified speech pathologists and audiologists and to help assure the availability of the highest possible quality speech pathology and audiology services to the communicatively handicapped people of this state, it is necessary to provide regulatory authority over persons offering speech pathology or audiology services to the public."

5. With the upgrading in training will also go an increase in the cost for districts to employ speech therapists. It has been over 15 years since special education costs were fully funded. The more expensive any aspect of program becomes, the less effectively we are able to fully serve our handicapped children.

RESPONSE: The purpose of licensure is to protect the public. The funding of special education costs is the responsibility of the Montana Office of Public Instruction and the state legislature, not the Board.

6. We have a concern that if a master's level of training is required before a person can become approved to perform all the functions of a speech therapist, then many young people will be discouraged from pursuing speech therapy as a career option. Speech therapists are not being paid high enough salaries to cause young students to commit themselves to six years of training before they can secure employment.

RESPONSE: All speech/language pathologist and audiologist training programs in the United States recognize that the BA level degree is not adequate to train an individual to perform all the functions of a speech/language pathologist or audiologist. The American Speech-Language-Hearing Association does not recognize a person as a speech/language pathologist unless he or she has met the master's level or equivalency requirements. If a change in the training programs for speech/language pathologists is desired, it will be necessary to work with the university systems in the United States to change the pre-service training programs.

7. As with teaching, many of the highly talented women who used to secure training in speech therapy (which was a field where they could be paid at comparable level with men), now have options for careers in other fields that are more responsive to women's varied interests and can pay more competitive salaries.

RESPONSE: This comment has no relevancy to the rule amendment or consumer protection.

8. At the University of Montana the Master's program in speech therapy requires that the student spend one full year on campus. There are some BA level therapists who are

unable to make this kind of commitment to securing upgrading training.

RESPONSE: Master's programs in speech/language pathology in other states allows for students to meet licensure requirements through summer/only attendance.

4. No other comments or testimony were received.

BOARD OF SPEECH PATHOLOGISTS
AND AUDIOLOGISTS

BY: Gene W. Bukowski
GENE BUKOWSKI, CHAIRMAN

Certified to the Secretary of State, October 2, 1989.

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

In the matter of the amendment of Rules 46.10.508, 46.10.510 and 46.10.512 pertaining to eligibility requirements for the AFDC program	)))))	NOTICE OF THE AMENDMENT OF RULES 46.10.508, 46.10.510 and 46.10.512 PERTAINING TO ELIGIBILITY REQUIREMENTS FOR THE AFDC PROGRAM

TO: All Interested Persons

1. On August 17, 1989, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.10.508, 46.10.510 and 46.10.512 pertaining to eligibility requirements for the AFDC program at page 1166 of the 1989 Montana Administrative Register, issue number 15.

2. The Department has amended Rules 46.10.508, 46.10.510 and 46.10.512 as proposed.

3. No written comments or testimony were received.

Julia E. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State October 2, 1989.

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

In the matter of the repeal of ARM 46.13.405 and the amendment of ARM 46.13.204, 46.13.206, 46.13.301, 46.13.302, 46.13.303, 46.13.401 and 46.13.502 pertaining to the Low Income Energy Assistance Program (LIEAP)	)))))))	NOTICE OF THE REPEAL OF ARM 46.13.405 AND THE AMENDMENT OF ARM 46.13.204, 46.13.206, 46.13.301, 46.13.302, 46.13.303, 46.13.401 and 46.13.502 PERTAINING TO THE LOW INCOME ENERGY ASSISTANCE PROGRAM (LIEAP)

TO: All Interested Persons

1. On August 17, 1989, the Department of Social and Rehabilitation Services published notice of the proposed repeal of ARM 46.13.405 and the amendment of ARM 46.13.204, 46.13.206, 46.13.301, 46.13.302, 46.13.303, 46.13.401 and 46.13.502 pertaining to the Low Income Energy Assistance Program (LIEAP) at page 1174 of the 1989 Montana Administrative Register, issue number 15.

2. The Department has repealed Rule 46.13.405 as proposed.

3. The Department has amended Rules 46.13.204, 46.13.206, 46.13.302, 46.13.303, 46.13.401, and 46.13.502 as proposed.

4. The Department has amended the following rule as proposed with the following changes:

46.13.301 DEFINITIONS Subsections (1) through (7) remain as proposed.

(8) ~~"Disability" is as defined in 20 CFR 416.905 which is the basic definition of disability for social security law purposes. The department hereby adopts and incorporates by reference 20 CFR 416.905, as amended through October 1, 1989. Copies of 20 CFR 416.905, as amended through October 1, 1989, are available from the Department of Social and Rehabilitation Services, Economic Assistance Division, P.O. Box 4210, Helena, MT 59604-4210.~~ "HANDICAPPED HOUSEHOLD" MEANS A HOUSEHOLD IN WHICH RESIDES AT LEAST ONE PERSON WHO HAS BEEN DETERMINED DISABLED BY THE FEDERAL SOCIAL SECURITY ADMINISTRATION.

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 53-2-201 MCA

5. The department changed the proposed definition of "disability" to "handicapped household". That change is consistent with the language used in ARM 46.13.401(2).

6. No written comments or testimony were received.

7. These rules will be applied retroactively to October 1, 1989.

Julia E. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State October 2, 1989.

VOLUME NO. 43 OPINION NO. 32

ARMED FORCES - Absence due to active military duty;
CONSTITUTIONS - Eligibility of elected officers of the executive branch for compensation from other governmental agencies;
PUBLIC OFFICERS - Absence due to active military duty; eligibility of elected officers of the executive branch for compensation from other governmental agencies;
PUBLIC SERVICE COMMISSION - Absence due to active military duty; eligibility of elected officers of the executive branch for compensation from other governmental agencies;
MONTANA CODE ANNOTATED - Sections 2-15-2601, 2-16-111(1), 2-16-112, 2-16-501, 10-2-221(2), 10-2-228, 69-1-103;
MONTANA CONSTITUTION - Article VI, section 5(2);
MONTANA LAWS OF 1971 - Chapter 272.

HELD: 1. Absence from the state attributable to active military duty does not result in a vacancy within the office of public service commissioner.

2. Elected members of the Public Service Commission may not receive additional compensation for simultaneous service in the Montana Army National Guard.

September 27, 1989

John B. Driscoll
Public Service Commission
2701 Prospect Avenue
Helena MT 59620

Dear Mr. Driscoll:

You have requested my opinion concerning the following questions. (I have consolidated your second and third questions for the sake of convenience.)

1. What is the extent of the freedom of a member of the Public Service Commission to be out of state for active military duty, while continuing to hold state office?

2. Is a member of the Public Service Commission entitled to additional compensation for simultaneous service in the Montana Army National Guard?

The foregoing issues have resulted from your decision to accept an opportunity for additional training as a member of the Montana Army National Guard. During the 4 1/2-

month training period you will be on active duty at the United States Army Command and General Staff College in Fort Leavenworth, Kansas. You have indicated that it is your intention to maintain your position as a member of the Public Service Commission and to participate in its functions during your absence.

Extended absence from the state generally implicates the provisions of section 2-16-501, MCA, which provides in pertinent part:

> Vacancies created. An office becomes vacant on the happening of any one of the following events before the expiration of the term of the incumbent:
>
> ....
>
> (5) his ceasing to be a resident of the state or, if the office be local, of the district, city, county, town, or township for which he was chosen or appointed or within which the duties of his office are required to be discharged;
>
> (6) his absence from the state, without the permission of the legislature, beyond the period allowed by law;
>
> (7) his ceasing to discharge the duty of his office for the period of 3 consecutive months, except when prevented by sickness or when absent from the state by permission of the legislature[.]

I conclude that the foregoing statutory provision does not result in a vacancy within the Public Service Commission in this instance.

There is no indication that your tenure at the United States Army Command and General Staff College in Fort Leavenworth, Kansas, is anything other than temporary. Therefore, it does not appear that a change of residence is present which implicates the provisions of section 2-16-501(5), MCA.

There is no limitation upon the length of absence of a member of the Public Service Commission from the state which would serve to implicate the provisions of section 2-16-501(6), MCA. Section 2-16-112, MCA, provides:

> Absence from the state. No officer mentioned in 2-16-111(1) and no officer appointed by the governor and confirmed by the senate must

> absent himself from the state for more than 60 consecutive days unless upon business of the state or with the consent of the legislature.

Application of the 60-day limitation on absence from the state is limited to those public officers either subject to gubernatorial appointment or listed in section 2-16-111(1), MCA. Members of the Public Service Commission are elected rather than appointed, § 69-1-103, MCA, and they are not among the officers listed in section 2-16-111(1), MCA, which requires certain officers to both reside and maintain office at the seat of government. Therefore, the statutory limitation on absence from the state has no application to members of the Public Service Commission.

It is your stated intention to fulfill your obligation as a member of the Public Service Commission during your absence. There is therefore no basis to anticipate the applicability of section 2-16-501(7), MCA, which provides that the failure to discharge official duties for a period of three consecutive months renders an office vacant.

My conclusion is further buttressed by the fact that your absence is attributable to active military duty. Section 10-2-228, MCA, provides as follows:

> Absence for military service creates no vacancy in office. It is specifically provided that the provisions of 2-16-112, subsections (5), (6), and (7) of 2-16-501, and 7-4-2208, shall not be, and the same are declared not to be, applicable insofar as they relate to absence or residence of any officer of the state or political subdivision thereof caused by the military service of such officer as set forth in 10-2-221. It is specifically declared that the absence of such officer caused by such military service shall not create a vacancy in the office to which he was elected.

Section 10-2-221(2), MCA, provides that a public officer is entitled to restoration to the remainder of his elected term of office upon completion of the military service which prevented performance of official duties.

The Montana Supreme Court has given the following interpretation to the foregoing statutory provisions:

> [They make] such absence result, not in a permanent vacancy of office, but with the officer's concurrence, in something of the nature of his leave of absence, or his

> suspension or relief from duty, with a right, under certain conditions, to resume his office, thus resulting in a temporary vacancy in the office[.]

Gullickson v. Mitchell, 113 Mont. 359, 126 P.2d 1106, 1110 (1942). To the extent that section 2-16-501, MCA, would otherwise apply, its effect is ameliorated by sections 10-2-221 and 10-2-228, MCA, where absence is attributable to active military service.

I therefore conclude that absence from the state attributable to active military service does not result in a vacancy within the office of public service commissioner.

With respect to your second question, I conclude that a member of the Public Service Commission may not receive additional compensation for simultaneous service in the Montana Army National Guard.

The elected members of the Public Service Commission are subject to the provisions of Article VI, section 5(2) of the Montana Constitution, which provides as follows:

> (2) During his term, no elected officer of the executive branch may hold another public office or receive compensation for services from any other governmental agency. He may be a candidate for any public office during his term.

The inclusion of the Public Service Commission within the executive branch of government is nowhere more clearly demonstrated than by the Executive Reorganization Act of 1971. 1971 Mont. Laws, ch. 272. The foregoing legislation designated the Public Service Commission to serve as the department head of the Department of Public Service Regulation, a department of the executive branch of government. See § 2-15-2601, MCA. "No person or persons charged with the exercise of power properly belonging to one branch [of government] shall exercise any power properly belonging to either of the others[.]" Mont. Const. Art. III, § 1. Had the character of the Public Service Commission been anything other than executive, its designation as head of a department of the executive branch of government would have constituted a breach of the principle of separation of the powers of government. See, e.g., State ex rel. Judge v. Legislative Finance Committee, 168 Mont. 470, 543 P.2d 1317 (1975).

Inclusion of the Public Service Commission within the executive branch of government is consistent with its

historical character and function. It is "a department of our government created by the legislature, whose officials are elected to carry out and promote a legislative function." Cascade County Consumers Association v. Public Service Commission, 144 Mont. 169, 394 P.2d 856, 868 (1964); cert. denied, 380 U.S. 909, 85 S. Ct. 891, 13 L. Ed. 2d 796 (1965). Its function has been characterized as follows:

> The Legislature itself has the undoubted authority to regulate public utilities, and by means of a duly constituted Commission it operates through its administrative medium.

Billings Utility Co. v. Public Service Commission, 62 Mont. 21, 203 P. 366, 368 (1921). Clearly, the Legislature may "make a policy determination and delegate to an executive agency or officer the duty to later implement the legislature's policy determination." State ex rel. Judge v. Legislative Finance Committee, supra, 543 P.2d at 1321. It is "beyond dispute" that the Public Service Commission has been delegated the authority to fix rates charged by public utilities pursuant to legislated standards. State ex rel. Olson v. Public Service Commission, 131 Mont. 272, 309 P.2d 1035, 1038 (1957). The Public Service Commission is an "administrative agency [and] has only those powers specifically conferred upon it by the legislature." City of Polson v. Public Service Commission, 155 Mont. 564, 473 P.2d 508, 511 (1970). The above-cited cases support a determination that the Public Service Commission is a part of the "executive branch" as that phrase is used in Article VI, section 5(2) of the Montana Constitution.

It is equally beyond dispute that service in the Montana National Guard is within the constitutional proscription of compensation for additional governmental service by elected members of the executive branch. Simply stated, the Montana National Guard is a governmental agency as referred to in Article VI, section 5(2) of the Montana Constitution. The following discussion occurred at the constitutional convention prior to approval of that provision of the new constitution:

> DELEGATE KELLEHER: Mr. Joyce, no elected officer may receive compensation for his services from any governmental agency. I'm just concerned with National Guard Officers. For instance, my brother Pete, down the row here, is a National Guard officer. Could he be governor and still hold his commission? Or say, Auditor, or something--a governmental agency, would that be--

DELEGATE JOYCE: He could be Governor and he would then be, maybe--statutorily, he'd be the Commander of the National Guard, but he couldn't get any extra salary other than his Governor's salary for being the Commander of the National Guard.

DELEGATE KELLEHER: What if he were State Treasurer?

DELEGATE JOYCE: He couldn't either, under this section.

IV Mont. Const. Conv. 629 (1972).

For the reasons discussed above, I conclude that elected members of the Public Service Commission may not receive additional compensation for simultaneous service in the Montana Army National Guard.

THEREFORE, IT IS MY OPINION:

1. Absence from the state attributable to active military duty does not result in a vacancy within the office of public service commissioner.

2. Elected members of the Public Service Commission may not receive additional compensation for simultaneous service in the Montana Army National Guard.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 33

ADMINISTRATIVE LAW AND PROCEDURE - Authority of state licensing board to reconsider decision of predecessor;
JURISDICTION - Authority of state licensing board to reconsider decision of predecessor;
LICENSES, PROFESSIONAL AND OCCUPATIONAL - Authority of state licensing board to reconsider decision of predecessor;
STATE AGENCIES - Authority of state licensing board to reconsider decision of predecessor;
ADMINISTRATIVE RULES OF MONTANA - Sections 8.17.301, 8.17.803;
MONTANA CODE ANNOTATED - Sections 2-15-102(10), 2-15-135, 37-1-131, 37-29-201, 37-29-311;
OPINIONS OF THE ATTORNEY GENERAL - 33 Op. Att'y Gen. No. 15 (1969).

HELD: The Board of Dentistry, having succeeded to the functions of the Board of Denturitry, may not reconsider a prior decision of the Board of Denturitry to issue a denturist's license.

September 12, 1989

Robert B. Cotner, D.D.S.
President, Board of Dentistry
Department of Commerce
Division of Business Regulation
1424 Ninth Avenue
Helena MT 59620

Dear Dr. Cotner:

You have requested my opinion on the following question:

> Is a state licensing board which succeeds to the functions of a predecessor board bound by the decisions of the predecessor?

Your inquiry recites that the Board of Denturitry was created in January 1985, for the purpose of licensing denturists and supervising the profession of denturitry in Montana. In accordance with chapter 548, 1985 Mont. Laws, the Legislative Audit Committee conducted a Sunset Performance Audit of the Board of Denturitry and found that the Board had licensed fewer than 30 denturists between January 1985 and October 1986. Accordingly, the Committee introduced a bill to merge the Board of Denturitry with the Board of Dentistry. The two boards

were merged effective July 1, 1987, pursuant to chapter 524, 1985 Mont. Laws.

The legislative audit concluded that of the 18 denturists licensed by the Board of Denturitry, five did not meet all required criteria for licensure because of a failure to serve a required internship or a lack of formal training. The Board of Dentistry has been asked to investigate the qualifications of these five individuals. Your question is whether the Board has the authority to undertake such an investigation, or whether it must adhere to the decision of the Board of Denturitry to issue the licenses in the first place. I agree with the Board of Dentistry that the Board is bound by the initial licensing decisions of its predecessor, the Board of Denturitry, for the reasons stated hereafter.

Under section 2-15-135, MCA, decisions made by the Board of Denturitry prior to July 1, 1987, remain in effect following the transfer of functions, and the Board of Dentistry succeeds to all rights, duties, and functions of its predecessor. By operation of law, the Board of Dentistry possesses the same authority previously held by the Board of Denturitry. Accordingly, the Board of Dentistry has the authority to reconsider the licensure of the five individuals if, but only if, the Board of Denturitry had been so authorized. Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 217 (1929) (powers and duties of person holding office are impersonal and unaffected by change in person holding such office).

In order to answer your request, I must consider whether, as a licensing board within the Department of Commerce, the Board of Denturitry would have the power on its own motion to reconsider the issuance of a license some three to four years after it has been granted.

There are conflicting lines of authority as to the power of an administrative agency or board to reconsider its own decisions. Under federal law, and under the laws of some states, administrative agencies are cloaked with certain implied or inherent powers, including the "inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." Trujillo v. General Electric Co., 621 F.2d 1084, 1086 (10th Cir. 1980). Accord Dawson v. Merit System Prod. Bd., 712 F.2d 264, 267 (7th Cir. 1983); Trap Rock Industries, Inc. v. Sagner, 133 N.J. Super. 99, 335 A.2d 574 (1975), aff'd, 69 N.J. 599, 355 A.2d 636 (1976) (per curiam); In re Fain, 65 Cal. App. 3d 376, 135 Cal. Rptr. 543, 550

(1976). Other courts hold that an administrative agency does not have the power to reopen or reconsider its decision in the absence of statutory authority. Caldwell v. Nolan, 167 Ill. App. 3d 1057, 522 N.E.2d 175, 179 (1988); Rosenberger v. City of Casper Board of Adjustment, 765 P.2d 367, 369 (Wyo. 1988); Hupp v. Employment Sec. Comm'n, 715 P.2d 223, 225 (Wyo. 1984); Yamada v. Natural Disaster Claims Comm'n, 54 Hawaii 621, 513 P.2d 1001, reh'g denied, 55 Hawaii 126, 516 P.2d 336 (1973); Koehn v. State Board of Equalization, 166 Cal. App. 2d 109, 333 P.2d 125, 128 (1959); Suryan v. Alaska Industrial Board, 12 Alaska 571, 573 (1950).

Some jurisdictions recognize an exception or take an intermediate approach, concluding that reconsideration is appropriate to correct obvious mistakes where that can be achieved fairly and promptly, Hall v. City of Seattle, 24 Wash. App. 357, 602 P.2d 366, 369 (1979), or to correct fraud, illegality or irregularity in vital matters, Geiger v. Mississippi State Board of Cosmetology, 246 Miss. 542, 151 So. 2d 189, 191 (1963). Distinction is frequently drawn between decisions which are legislative or ministerial in nature and decisions which are judicial in nature. Siegel v. Mangan, 258 App. Div. 448, 16 N.Y.S.2d 1000, aff'd per curiam, 283 N.Y. 557, 27 N.E.2d 280 (1940). If the former, reconsideration is permissible. Id., 16 N.Y.S.2d at 1002. If the latter, reconsideration may not be had absent statutory basis therefor. Yamada, 513 P.2d at 1005. Further, authorities allowing reconsideration require that the power be exercised with reasonable diligence. Duvin v. State, Department of Treasury, 76 N.J. 203, 386 A.2d 842, 844 (1978); Hall, 602 P.2d at 369; Anchor Casualty Co. v. Bongards Cooperative Creamery Ass'n, 253 Minn. 101, 91 N.W.2d 122 (1958).

Montana adheres to the principle that "[a]dministrative agencies enjoy only those powers specifically conferred upon them by the legislature." Bick v. State, Department of Justice, 43 St. Rptr. 2331, 2332, 730 P.2d 418, 420 (1986). They possess no common law powers, and may not exceed the authority conferred on them by statute. State ex rel. Anderson v. State Board of Equalization, 133 Mont. 8, 17, 319 P.2d 221, 226-27 (1958); Bell v. Department of Licensing, 182 Mont. 21, 22-23, 594 P.2d 331, 332-33 (1979). Implied powers are limited to "those necessary for the effective exercise and discharge of the powers and duties expressly conferred." State ex rel. Dragstedt v. State Board of Education, 103 Mont. 336, 338, 62 P.2d 330, 332 (1936).

Although the Supreme Court of Montana has not decided whether an administrative agency has inherent power to

reconsider its decision to issue a license, see generally Matter of Authority to Conduct Savings and Loan Activities, 182 Mont. 361, 367, 597 P.2d 84, 88 (1979), the court's strict interpretation of agency authority (as noted in the cases cited above) is consistent with the view that agencies do not possess such inherent power. The Court's decision in Bradco Supply Co. v. Larsen, 183 Mont. 97, 598 P.2d 596 (1979), indicates that an agency may not reconsider a final decision unless it has promulgated rules providing for rehearing. Additionally, the issuance of licenses is considered a quasi-judicial function under Montana law, § 2-15-102(10), MCA, lending further support to the conclusion that the power to reconsider such issuance is not inherent. Although an earlier Opinion of the Attorney General did conclude that an administrative board could under some circumstances rescind or modify the action taken by a previous board, that opinion was issued prior to adoption of the Montana Administrative Procedure Act and did not consider Montana's narrow interpretation of agency authority. 33 Op. Att'y Gen. No. 15 at 36 (1969). Further, it recognized that resolution of the question "turns on the nature of the specific circumstances surrounding the case." Id. at 36. Accordingly, it becomes necessary to look to the applicable statutory and regulatory scheme to determine whether the power of reconsideration is expressed or necessarily implied therein.

Each board within the Department of Commerce is authorized to set and enforce standards and rules governing licensing of the members of the profession within its jurisdiction, and to sit in judgment in hearings for the suspension, revocation, or denial of a license within its jurisdiction. § 37-1-131, MCA. The specific powers and duties of the Board of Denturitry, now the Board of Dentistry, as set forth in section 37-29-201, MCA, are these:

> (1) [D]etermination of the qualifications of applicants for licensure under this chapter;
>
> (2) administration of examinations for licensure under this chapter;
>
> (3) collection of fees and charges prescribed in this chapter;
>
> (4) issuance, suspension, and revocation of licenses for the practice of denturitry under the conditions prescribed in this chapter; and

> (5) to adopt, amend, and repeal rules necessary for the implementation, continuation, and enforcement of this chapter, including but not limited to license applications, form and display of licenses, license examination format, criteria and grading of examinations, disciplinary standards for licensees, inspection of denturitry premises and facilities, and investigation of complaints.

Suspension or revocation of a denturist's license is governed by section 37-29-311, MCA, which lists specific grounds therefor, including "unprofessional conduct as defined by rule of the board." § 37-29-311(1)(f), MCA. Unprofessional conduct is defined at § 8.17.801, ARM. Additional regulations have been promulgated setting forth grounds for denial of a license. § 8.17.803, ARM.

There is no provision either in the controlling legislation or in the applicable regulations for reconsideration of the issuance of a license. Further, although failure initially to meet the minimum statutory requirements is ground for denial of a license, § 8.17.803(1), ARM, such failure is not ground for revocation of a license already issued. Certainly, if any of the five individuals at issue engaged in fraud, misrepresentation or deceit in obtaining a license, the Board would be within its authority in instigating revocation or suspension proceedings, subject to the Administrative Procedure Act and to other pertinent provisions of law. See, e.g., § 2-4-631, MCA. Absent such misrepresentation or other unprofessional conduct, however, there is no provision for sua sponte review of a licensee's qualifications.

Finally, there is the consideration of timeliness. Under the standards developed by the courts, as discussed above, the Board has not acted with reasonable diligence in pursuing any reconsideration. Without express statutory or regulatory authority, any powers of reconsideration the Board may enjoy cannot be exercised three to four years after the licenses have been issued. A contrary determination would endow the Board with unbridled power to reopen the licensing proceeding at any time and for any reason with no safeguards to protect the licensees.

THEREFORE, IT IS MY OPINION:

> The Board of Dentistry, having succeeded to the functions of the Board of Denturitry, may not

reconsider a prior decision of the Board of Denturitry to issue a denturist's license.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 34

COUNTY COMMISSIONERS - Authority to modify method for calculating deputy sheriff longevity pay through collective bargaining;
COUNTY OFFICERS AND EMPLOYEES - County commissioners' authority to modify method for calculating deputy sheriff longevity pay through collective bargaining;
EMPLOYEES, PUBLIC - County commissioners' authority to modify method for calculating deputy sheriff longevity pay through collective bargaining;
LABOR RELATIONS - County commissioners' authority to modify method for calculating deputy sheriff longevity pay through collective bargaining;
SALARIES - County commissioners' authority to modify method for calculating deputy sheriff longevity pay through collective bargaining;
SHERIFFS - County commissioners' authority to modify method for calculating deputy sheriff longevity pay through collective bargaining;
MONTANA CODE ANNOTATED (1987) - Section 7-4-2505;
MONTANA CODE ANNOTATED (1981) - Section 7-4-2510;
MONTANA CODE ANNOTATED (1978) - Sections 7-4-2507, 7-4-2510, 39-3-401 to 39-3-408, 39-31-304;
MONTANA CODES ANNOTATED, 1905 - Political Code § 4596;
MONTANA LAWS OF 1986 (June Spec. Sess.) - Chapter 12;
MONTANA LAWS OF 1981 - Chapter 603;
MONTANA LAWS OF 1971 - Chapter 417;
MONTANA LAWS OF 1923 - Chapter 82;
MONTANA LAWS OF 1919 - Chapter 222;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 76 (1988); 42 Op. Att'y Gen. No. 37 (1987); 38 Op. Att'y Gen. No. 116 (1980); 38 Op. Att'y Gen. No. 20 (1979); 37 Op. Att'y Gen. No. 113 (1978);
REVISED CODES OF MONTANA, 1947 - Section 25-604;
REVISED CODES OF MONTANA, 1937 - Section 4874;
REVISED CODES OF MONTANA, 1907 - Section 3118.

HELD: The method for calculating longevity pay increases for undersheriffs and deputy sheriffs in section 7-4-2510, MCA, is mandatory and may not be altered through collective bargaining.

September 15, 1989

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

Dear Mr. Salvagni:

You have requested my opinion concerning the following question:

> Does section 7-4-2510, MCA, preclude a board of county commissioners from complying with a collective bargaining agreement provision which authorizes longevity increases to deputy sheriffs predicated on all years of service, including any years during which a deputy sheriff's base salary was set at the same level as in the previous fiscal year, when such agreement was entered into after July 3, 1986?

Because section 7-4-2510, MCA, constitutes a mandatory condition of employment from which a board of county commissioners has no authority to deviate, I conclude that, under the facts here, the collective bargaining agreement provision is unenforceable to the extent it permits inclusion of service years for the purpose of calculating longevity pay increases expressly excluded under the statute.

Gallatin County and the Gallatin County Deputy Sheriffs' Association have entered into a series of collective bargaining agreements, the latest of which commenced on July 1, 1988. The present agreement contains the following provision:

> All sworn deputies shall be paid longevity pay which shall be added to their base wages at the rate of one percent (1%) of the minimum base annual salary for each year of service with the department and shall be calculated as of the anniversary date of hiring. This payment shall be made in equal monthly installments.

The provision was taken from 1981 Montana Laws, chapter 603, section 5 (codified at § 7-4-2510, MCA (1981)) which, prior to amendment in 1986, stated:

> Beginning on the date of his first anniversary of employment with the department and adjusted annually, a deputy sheriff or undersheriff is entitled to receive a longevity payment amounting to 1% of the minimum base annual salary for each year of service with the department. This payment shall be made in equal monthly installments.

1986 Montana Laws, chapter 12, section 6 (June Spec. Sess.) (codified at § 7-4-2510, MCA), however, added the following clause at the conclusion of the first sentence of the above: "but years of service during any year in which the salary was set at the same level as the salary of the prior fiscal year may not be included in any calculation of longevity increases." The amended provision became effective on July 3, 1986. 1986 Mont. Laws, ch. 12, § 7 (June Spec. Sess.). The issue of whether section 7-4-2510, MCA, as amended or the collective bargaining agreement provision governs has arisen because the base salaries of the county's deputy sheriffs remained unchanged during fiscal year 1987 from the previous fiscal year, and the parties disagree over the appropriate method for calculating longevity pay increases for fiscal year 1990.

Your question essentially presents the recurring issue of whether a public employer is foreclosed from entering into or giving effect to a collective bargaining agreement provision which differs from a statute dealing with the same condition or term of employment. E.g., 42 Op. Att'y Gen. No. 37 (1987); 38 Op. Att'y Gen. No. 116 at 408 (1980); 38 Op. Att'y Gen. No. 20 at 71 (1979); 37 Op. Att'y Gen. No. 113 at 486 (1978). Resolution of this issue typically requires determining whether the involved statutory provision circumscribes the public employer's discretion with respect to establishing the particular employment condition--i.e., whether the Legislature has decided to impose an employment standard which, at least among comparably situated governmental entities, is to be uniform. Attorney General Greely thus stated as the general rule "that, when a particular employment condition for public employees has been legislatively set, it may not be modified through collective bargaining without statutory authorization." 42 Op. Att'y Gen. No. 37, slip op. at 2. That rule grows out of the canon of statutory construction giving controlling significance to a specific legislative enactment where a conflict exists with a more general statutory provision or scheme. Ibid. Instantly, the specific provision is section 7-4-2510, MCA, and the general provision is section 39-31-304(2), MCA, obligating a public employer to bargain in good faith over wages, hours, fringe benefits and other conditions of employment.

The maximum salary which undersheriffs or deputy sheriffs may receive has been statutorily prescribed since shortly after statehood. Pol. Code § 4596, Mont. Codes Ann. 1905; § 3118, R.C.M. 1907; § 4874, R.C.M. 1935; § 25-604, R.C.M. 1947; see Jobb v. Meagher County, 20 Mont. 424, 426-30, 51 P. 1034, 1035-36 (1898)

(describing early history of statutory regulation of deputy sheriff compensation). These provisions, except for a period between 1919 (1919 Mont. Laws, ch. 222) and 1923 (1923 Mont. Laws, ch. 82), applied to all county deputy officers or assistants and, in relevant part, established maximum compensation levels. E.g., State ex rel. Thompson v. Gallatin County, 120 Mont. 263, 269, 184 P.2d 998, 1001 (1947); Modesitt v. Flathead County, 57 Mont. 216, 187 P. 911 (1929); Penwell v. Board of County Commissioners, 23 Mont. 351, 357-58, 59 P. 167, 169 (1899). The Montana Supreme Court accordingly held in City of Billings v. Smith, 158 Mont. 197, 490 P.2d 221 (1971), that deputy sheriffs were not entitled to overtime compensation since section 25-604, R.C.M. 1947, later codified in section 7-4-2505, MCA (1978), explicitly set permissible salary ranges for deputies which were not altered by the provisions of the Montana Minimum Overtime Wage Compensation Act, 1971 Mont. Laws, ch. 417 (codified as amended at §§ 39-3-401 to 408, MCA).

Ten years later in 1981 Montana Laws, chapter 603 (codified as amended at §§ 7-4-2507 to 2510, MCA), the Legislature responded to City of Billings by authorizing county commissioners to establish through resolution "that any undersheriff or deputy sheriff who works in excess of his regularly scheduled work period will be compensated for the hours worked in excess of the work period at a rate to be determined by [the] board of county commissioners." 1981 Mont. Laws, ch. 603, § 4 (codified at § 7-4-2509(2), MCA); see Feb. 20, 1981 Minutes of House State Administration Committee at 3; March 18, 1981 Minutes of Senate Local Government Committee at 1-2. The 1981 statute also provided yearly one percent longevity increases to the minimum base annual salaries of undersheriffs and deputy sheriffs, based upon all years of service with the particular sheriff's department. 1981 Mont. Laws, ch. 603, § 5 (codified as amended at § 7-4-2510, MCA). This provision, which was quoted earlier, was thereafter amended to its present form in 1986. The effect of the amendment is to permit county commissioners to freeze an undersheriff's or deputy sheriff's base salary at its current level and, once that discretion has been exercised, to mandate exclusion of any years when no increase in salary occurred from calculation of that service on which longevity credits are predicated. See 42 Op. Att'y Gen. No. 76 (1988).

It is clear, therefore, that compensation rates for deputy sheriffs have been statutorily controlled for almost 100 years. These statutes have been construed without exception as exclusive and mandatory. Indeed,

1981 Montana Laws, chapter 603, section 7 (codified at § 7-4-2507, MCA) expressly states that, "[i]f there is a conflict between 7-4-2508 through 7-4-2510 and any other law, 7-4-2508 through 7-4-2510 govern with respect to undersheriffs and deputy sheriffs." There can thus be no legitimate dispute that under the circumstances here the county commissioners lacked discretion to enter into a collective bargaining agreement provision that conflicted with section 7-4-2510, MCA. Consequently, to the extent the longevity pay provision nominally includes credits for all years of departmental service irrespective of whether an increase in base annual salary occurred, it misstates the law controlling the parties at the time the agreement became effective and is enforceable only insofar as capable of an application consistent with section 7-4-2510, MCA. Because that statutory provision excludes service years when no base salary increase occurred for purposes of longevity pay calculation, fiscal year 1987 may not be included in determining such increase for fiscal year 1990.

I note, finally, that no impairment of contracts issue is presented under Article I, section 10, clause 1 of the United States Constitution or Article II, section 31 of the Montana Constitution since the involved collective bargaining agreement was executed after the effective date of the 1986 amendment to section 7-4-2510, MCA. See Neel v. First Federal Savings and Loan Association, 207 Mont. 376, 388, 675 P.2d 96, 103 (1984) ("laws existing at the date a contract is executed are as much a part of the contract as if set forth therein"); Gagnon v. City of Butte, 75 Mont. 279, 289, 243 P. 1085, 1088 (1926) ("'the obligation of a contract is measured by the standard of the laws in force at the time it was entered into, and its performance is to be regulated by the terms and rules which they prescribe'").

THEREFORE, IT IS MY OPINION:

> The method for calculating longevity pay increases for undersheriffs and deputy sheriffs in section 7-4-2510, MCA, is mandatory and may not be altered through collective bargaining.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 35

PRISONERS - Effect of imprisonment on residence;
RESIDENCE - Residence of special education student with imprisoned custodial parent;
SCHOOL DISTRICTS - Responsibility for tuition for out-of-district special education student;
SCHOOL DISTRICTS - School district of residence of special education child with imprisoned custodial parent;
MONTANA CODE ANNOTATED - Sections 1-1-215, 20-7-420(1), (2);

HELD: 1. The school district of residence of a special education student whose custodial parent is imprisoned is the school district where the custodial parent resided prior to being imprisoned.

2. If a special education student is admitted to a school district that is not his district of residence, his district of residence is responsible for that student's tuition.

September 19, 1989

John W. Robinson
Ravalli County Attorney
Ravalli County Courthouse
Hamilton MT 59840

Dear Mr. Robinson:

You have requested my opinion concerning the following questions:

1. What is the school district of residence for a special education student whose custodial parent has been imprisoned?

2. If a special education student is admitted to a school district that is not his district of residence, which school district is financially responsible for the child's tuition?

Regarding your first question, I understand that the father, who was the custodial parent of a special education student, resided with the student in Lolo, Montana, which is in the Lolo School District. At the

time the father was imprisoned, the student was attending school in the Lolo School District. After the father was imprisoned, the Montana Department of Family Services was awarded temporary custody of the student by court order, although the father's parental rights were not terminated. The student was subsequently placed with a foster family residing in Florence, Montana, which is within the Florence-Carlton School District. The special education student is currently attending school in the Florence-Carlton School District.

In 1979, the Legislature passed a bill (HB 295) clarifying the rules for determining a child's school district of residence for special education purposes, and establishing responsibility for payment of tuition for a child requiring a special education program. 1979 Mont. Laws, ch. 470. Chapter 470 has been encoded at section 20-7-420, MCA, and provides in part:

> (1) In accordance with the provisions of 1-1-215, a child's district of residence for special education purposes is the residence of his parents or of his guardian unless otherwise determined by the court. This applies to a child living at home, in an institution, or under foster care. If the parent has left the state, the parent's last known district of residence is the child's district of residence.

Section 1-1-215, MCA, sets forth the rules for determining a person's residence:

> Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:
>
> (1) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose and to which he returns in seasons of repose.
>
> (2) There can only be one residence.
>
> (3) A residence cannot be lost until another is gained.
>
> (4) The residence of his parents or, if one of them is deceased or they do not share the same residence, the residence of the parent having legal custody or, if neither parent has legal custody, the residence of the parent with whom he customarily resides is the

residence of the unmarried minor child. In case of a controversy, the district court may declare which parental residence is the residence of an unmarried minor child.

(5) The residence of an unmarried minor who has a parent living cannot be changed by either his own act or that of his guardian.

(6) The residence can be changed only by the union of act and intent.

Section 20-7-420, MCA, plainly evinces a legislative intent that a child's district of residence for special education purposes shall be the residence of the custodial parent, even when a child has been placed in a foster home. In the words of Representative Marks, who sponsored HB 295, the legislation was necessary "to put responsibility for those [special education] costs back on the residence of the parent rather than the district where the child lives in a group home." Minutes, Senate Committee on Education, March 14, 1979. The Senate Minutes indicate that HB 295 was enacted because section 1-1-215, MCA, did not clearly establish residency status of special education students "who reside in an institution or foster home." Minutes, Senate Committee on Education, March 14, 1979.

Therefore, for special education purposes, a child's district of residence is the residence of the custodial parent. That determination is unaffected by the fact that the Department of Family Services has temporary custody of the child under court order while the father, whose parental rights have not been terminated, is imprisoned. However, if the department has custody after a parent's rights have been terminated, the child's residence no longer follows the parent but follows instead the physical location of the district court ordering the termination. See 43 Op. Att'y Gen. No. 36 (1989).

The issue you raise thus turns on a determination of the residency of the imprisoned father, a question which is neither addressed by section 1-1-215, MCA, nor by case law interpreting that statute. However, the majority rule has been clearly established: A person does not acquire a new residence by virtue of imprisonment, but retains the residence he had prior to incarceration. Turner v. Kelly, 411 F. Supp. 1331, 1332 (D. Kan. 1976); Polakoff v. Henderson, 370 F. Supp. 690, 693 (D. Ga. 1973); Ellingsburg v. Connett, 457 F.2d 240, 241 (5th Cir. 1972); Hillman v. Stults, 70 Cal. Rptr. 295, 309 (Cal. Ct. App. 1968); Bull v. Kistner, 135 N.W.2d 545,

548-49 (Iowa 1965); United States v. Cohen, 297 F.2d 760, 774 (9th Cir. 1962), cert. denied, 369 U.S. 865 (1962); Millet v. Pearson, 173 N.W. 411, 412 (Minn. 1919); see also Restatement (Second) of Conflict of Laws § 17, comment c (1971); 25 Am. Jur. 2d Domicil § 41 (1966). The rationale for this rule is based on the common law requirement, codified at section 1-1-215 (6), MCA, that a person may change his residence only by union of act and intent. A person compelled to serve a prison sentence under court order is removed to prison without exercising any volition, and thus cannot intend to change his residence. See Turner, 411 F. Supp. at 1332; Bowers v. Baughman, 281 N.E.2d 201, 202 (Ohio 1972); Restatement (Second) of Conflict of Laws § 17, comment c (1971); 25 Am. Jur. 2d Domicil § 41 (1966); Duryea v. Duryea, 269 P. 987, 990 (Idaho 1928); Millet, 173 N.W. at 412.

In the example you present, therefore, the district of residence of the imprisoned father, and thus the residence of the special education student, continues to be the Lolo School District.

Regarding your second question, section 20-7-420(2), MCA, provides that the "district of residence is financially responsible for tuition as established under 20-5-305 and 20-5-312 for special education students." As already noted, for special education purposes the child's district of residence is the residence of the custodial parent under section 20-7-420(1), MCA. Where statutory language is plain and unambiguous, the statute speaks for itself and there is no need to engage in further construction. Matter of Blake v. State, 44 St. Rptr. 580, 584, 735 P.2d 262, 265 (1987); Yearout v. Rainbow Painting, 43 St. Rptr. 1063, 1065, 719 P.2d 1258, 1259 (1986). I therefore conclude that the Lolo School District is financially responsible for the education of the special education student mentioned in your question.

THEREFORE, IT IS MY OPINION:

1. The school district of residence of a special education student whose custodial parent is imprisoned is the school district where the custodial parent resided prior to being imprisoned.

2. If a special education student is admitted to a school district that is not his district of residence, his district of residence is responsible for that student's tuition.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 36

CHILD CUSTODY AND SUPPORT - School district of residence for special education student in temporary or permanent custody of Department of Family Services;
COURTS, DISTRICT - School district of residence for special education student in temporary or permanent custody of Department of Family Services;
EDUCATION - School district of residence for special education student in temporary or permanent custody of Department of Family Services;
FAMILY SERVICES, DEPARTMENT OF - School district of residence for special education student in temporary or permanent custody of Department of Family Services;
RESIDENCE - School district of residence for special education student in temporary or permanent custody of Department of Family Services;
SCHOOL DISTRICTS - School district of residence for special education student in temporary or permanent custody of Department of Family Services;
MONTANA CODE ANNOTATED - Sections 1-1-215, 20-7-420;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 35 (1989), 40 Op. Att'y Gen. No. 69 (1984).

HELD: 1. The school district of residence for special education purposes of a child for whom the Department of Family Services has temporary legal custody is the district of residence of the child's parents, regardless of whether the child is placed in a foster home in a separate school district.

2. The school district of residence for special education purposes of a child for whom the Department of Family Services has legal custody following termination of parental rights and before a permanent placement is accomplished is the same as that of the physical location of the district court that ordered the termination. 40 Op. Att'y Gen. No. 69 (1984) is overruled insofar as it conflicts with the holding of this opinion.

September 19, 1989

Robert L. Mullen, Director
Department of Family Services
P.O. Box 8005
Helena MT 59604

Dear Mr. Mullen:

You have requested my opinion concerning the following questions:

For the purpose of obtaining funding for special education, how is the school district of residence determined for a child:

(1) for whom the Department of Family Services has temporary legal custody and who is placed in a foster home in one county when the child's parents reside in another county; and

(2) for whom the Department of Family Services has legal custody pending permanent placement of the child after the parent's parental rights have been terminated?

Regarding your first question, I understand that the Department of Family Services (hereinafter "the department") is often given temporary custody of a child in abused, dependent and neglected child proceedings initiated under chapter 3 of Title 41, MCA. In most cases where the department has temporary custody, the parental rights of the natural parents have not been terminated. The district of residence for special education purposes of a child for whom the department has temporary legal custody is the district of residence of the child's parents or guardian, unless otherwise determined by a district court, and that district is responsible for special education costs, as is more fully discussed in 43 Op. Att'y Gen. No. 35 (1989). See also § 20-7-420, MCA; Minutes, Senate Committee on Education, March 14, 1979.

Regarding your second question, you have indicated that in the usual case the local office of the Department of Family Services is given custody of a child whose parent's rights have been terminated under the Parent-Child Legal Relationship Termination Act of 1981, §§ 41-3-601 to 612, MCA (hereinafter "the Act"). Generally, the department's local office will retain custody until the child is permanently placed, usually by means of adoption. It is also my understanding that in the interim period between termination and permanent placement, a child in the custody of the department may undergo several temporary placements, often in several different school districts.

Although Montana statutes do not directly address the issue you raise, they do provide guidance in determining residence. The primary rules for determining a person's residence in Montana are set forth in section 1-1-215, MCA:

Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

(1) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose and to which he returns in seasons of repose.

(2) There can only be one residence.

(3) A residence cannot be lost until another is gained.

(4) The residence of his parents or, if one of them is deceased or they do not share the same residence, the residence of the parent having legal custody or, if neither parent has legal custody, the residence of the parent with whom he customarily resides is the residence of the unmarried minor child. In case of a controversy, the district court may declare which parental residence is the residence of an unmarried minor child.

(5) The residence of an unmarried minor who has a parent living cannot be changed by either his own act or that of his guardian.

(6) The residence can be changed only by the union of act and intent.

These rules have been amplified for the purpose of determining the school district of residence of special education students by section 20-7-420, MCA:

(1) In accordance with the provisions of 1-1-215, a child's district of residence for special education purposes is the residence of his parents or of his guardian unless otherwise determined by the court. This applies to a child living at home, in an institution, or under foster care. If the parent has left the state, the parent's last known district of residence is the child's district of residence.

Section 20-7-420(2), MCA, provides that the "district of residence is financially responsible for tuition ... for special education students."

The quoted statutes clearly indicate that in general a child's residence follows that of his parents. However, when parental rights have been legally terminated by court order under the Act, the parent/child relationship is extinguished, and as a matter of law the child no longer has parents. § 41-3-611, MCA. Application of section 20-7-420(1), MCA, becomes unclear in such a case, since the child has no legal parents and no

guardian has been formally appointed for the child. Determination of the child's district of residence thus requires some discussion of applicable common law rules. It should be noted parenthetically that, although the words "residence" and "domicile" are not synonymous in the common law, the word "residence" is often used instead of "domicile" in statutory law, and is used in that sense in Montana's residency statute quoted above. See State ex rel. Duckworth v. District Court, 107 Mont. 97, 101, 80 P.2d 367, 368-69 (1938); Restatement (Second) of Conflict of Laws § 11, comment k (1971); 28 C.J.S. Domicile § 2 (1941). Thus, "decisions with reference to the rules for determining domicile are clearly in point." Duckworth, 107 Mont. at 101, 80 P.2d at 369. In this opinion, the terms "domicile" and "residence" will be used interchangeably.

Two important policy considerations underlie the issue presented: the first is that a "person's domicile should usually be in the place to which he is most closely related," and the second is that a child who is a ward of the court "should not acquire a domicile in a place where that court does not wish him to." Restatement (Second) of Conflict of Laws § 22, comment h (1971).

The specific issue you raise has not been addressed by the Montana Supreme Court. However, most courts that have considered the problem have ruled that the residence of a child who has been made a ward of a court is the same as that of the court itself. In the Matter of the Appeal in Maricopa County Juvenile Action No. A-27789, 680 P.2d 143, 144 (Ariz. 1984) (en banc); In re Eleanor A., 148 Cal. Rptr. 315, 318-19 (Cal. Ct. App. 1978); Matter of Adoption of Buehl, 555 P.2d 1334, 1340-41 (Wash. 1976) (en banc); Betts v. Betts, 473 P.2d 403, 406 (Wash. Ct. App. 1970); In re Adoption of Johnson, 161 F.2d 358, 362 (Pa. 1960). A minority view holds that the residence of the ward follows that of the social service agency entrusted with the ward's custody. Matter of Cathy C., 391 N.Y.S.2d 971, 973 (N.Y. Fam. Ct. 1977).

In the case of a child whose custody has been entrusted to the department pending a permanent placement after parental rights have been terminated, I conclude that the majority view is most consistent with the provisions of the Act, Montana residency law, and the common law of domicile. It is the district court which orders the termination of parental rights (§ 41-3-609, MCA), and which is responsible for assigning custody of the child to the department. §§ 41-3-607(1), 41-3-406(3)(a), MCA;

see Matter of C.A.R., 214 Mont. 174, 182, 693 P.2d 1214, 1219 (1984). Most importantly, it is the district court that continues to monitor the efforts of the department to permanently place the child, and the district court that ultimately controls "disposition meeting the best interests of the child." § 41-3-610, MCA; see also §§ 41-3-607(1), 41-3-406(3), MCA. Thus, the district court exercises a considerable degree of control over the affected child, and maintains significant contacts with that child on a continuing basis until a permanent placement is accomplished.

If the residence of the child were to follow the location of the department, it can be argued that the result would be that all such children in the state would legally reside in the school district where the department's main office is located in Helena. Again, the majority rule seems more consistent with actual practice in Montana, since caseworkers employed by the Department work with and before local district courts in termination proceedings. If residency of the child were to follow the locus of temporary placements of the child by the department pending permanent placement, the child's district of residence would change with each temporary placement, a situation that would generate unnecessary difficulty and widespread uncertainty regarding financial responsibility for the child's education. Because it appears that temporary placements may last for only a matter of days, such a resolution also contravenes the policy that a child's domicile should be that place to which he is most closely related.

It is my opinion that the logical resolution of this issue therefore requires that, for a child whose parent's rights have been terminated and who is in the custody of the department pending permanent placement, the child's residence is the same as the physical location of the district court which ordered the termination and which maintains jurisdiction of the case until permanent disposition. In the case of a special education student, the child's school district of residence would therefore be the physical location of the district court, and the school district for that location would be financially responsible for the child's tuition under section 20-7-420(2), MCA. It must be observed that pursuant to section 20-7-420(1), MCA, the district court always has the option of making an independent determination of the child's district of residence. See also § 1-1-215(4), MCA.

Finally, I note that the following language from 40 Op. Att'y Gen. No. 69 (1984) may be construed as conflicting with my holding here:

> [A] child's residence is the residence of the natural parents in almost all cases. The only exceptions would be for a child who was married, emancipated, or subject to a final decree of adoption. [Citations omitted.] It is my opinion that legal custody in a local welfare department by either temporary or permanent order does not change the child's residence from that of his or her natural parents.

40 Op. Att'y Gen. No. 69 at 277 (1984).

It is clear that, once parental rights are terminated, a child's legal residence cannot logically follow that of his natural parents, since under the law they are no longer the child's parents.

To the extent that the quoted language conflicts with the holding of this opinion, it is overruled.

THEREFORE, IT IS MY OPINION:

1. The school district of residence for special education purposes of a child for whom the Department of Family Services has temporary legal custody is the district of residence of the child's parents, regardless of whether the child is placed in a foster home in a separate school district.

2. The school district of residence for special education purposes of a child for whom the Department of Family Services has legal custody following termination of parental rights and before a permanent placement is accomplished is the same as that of the physical location of the district court that ordered the termination. 40 Op. Att'y Gen. No. 69 (1984) is overruled insofar as it conflicts with the holding of this opinion.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 37

COUNTIES - Taxation authority under a district court order that the judicial budget be funded;
COUNTY COMMISSIONERS - Taxation authority under a district court order that the judicial budget be funded;
COURTS - Authority to compel county commissioners to fund judicial budget through tax levy;
COURTS, DISTRICT - Authority to compel county commissioners to fund judicial budget through tax levy;
JUDGMENTS - Defined;
TAXATION AND REVENUE - Authority of district courts to compel county commissioners to fund judicial budget through a special tax levy;
MONTANA CODE ANNOTATED - Sections 2-9-316, 3-1-111, 3-5-901, 7-6-2344, 7-6-2352, 7-6-2501, 7-6-2511, 7-6-2531 to 7-6-2536;
OPINIONS OF THE ATTORNEY GENERAL - 39 Op. Att'y Gen. No. 71 (1982), 39 Op. Att'y Gen. No. 25 (1981), 38 Op. Att'y Gen. No. 31 (1979).

HELD: Section 2-9-316 does not grant counties the authority to levy taxes in response to a district court order that a judicial budget or budget deficit be funded.

September 21, 1989

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

Dear Mr. Paul:

You have recently requested my opinion on the following question:

> May a board of county commissioners levy pursuant to section 2-9-316, MCA, up to 10 mills annually to pay for the deficit incurred by a judicial district during the past year?

Your question derives from the practice in recent years by several Montana counties of having the district court enter a judgment ordering the county commissioners to levy a special tax to provide for the court's past deficit or future budget. Cascade County has contemplated such a practice but questions whether it is authorized by Montana law.

The district courts of Montana may be funded through a variety of revenue sources. First and foremost the counties are empowered to levy a property tax to provide for court costs. This taxing authority is limited by statute to a maximum value for the different classes of counties. A first- or second-class county may levy a property tax not to exceed six mills of the appraised property value. § 7-6-2511, MCA. The number of mills authorized to generate revenue for the budget of the district courts has not increased since the inception of the authority over ten years ago. See 1979 Mont. Laws, ch. 692.

Counties may also apply to the Montana Department of Commerce for grants to fund the expenditures of the district courts. § 7-6-2352, MCA. These grants are distributed to the extent excess money is appropriated by the state legislature to fund those enumerated costs of criminal cases listed in section 3-5-901, MCA. The statutory language underlying the grant program has been the subject of several prior Opinions of the Attorney General. See 39 Op. Att'y Gen. No. 71 at 268 (1982), 39 Op. Att'y Gen. No. 25 at 95 (1981). The counties may also fund the district courts by appropriations from other revenue sources, such as their general fund. 38 Op. Att'y Gen. No. 31 at 107 (1979). Finally, statutory provisions exist for emergency expenditure requests and emergency levies. §§ 7-6-2344, 7-6-2531 to 2536, MCA.

You question whether a further method of revenue generation to fund district courts is available to the counties. In 1977, the Legislature enacted Senate Bill 53 (1977 Mont. Laws, ch. 360) which was codified in full as follows:

> 2-9-316. Judgments against governmental entities except state. A political subdivision of the state shall satisfy a final judgment out of funds that may be available from the following sources:
>
> (1) insurance;
>
> (2) the general fund or any other funds legally available to the governing body;
>
> (3) a property tax, otherwise properly authorized by law, collected by a special levy authorized by law, in an amount necessary to pay any unpaid portion of the judgment, except that such levy may not exceed 10 mills;

> (4) proceeds from the sale of bonds issued by a county, city, or school district for the purpose of deriving revenue for the payment of the judgment liability. The governing body of a county, city, or school district is hereby authorized to issue such bonds pursuant to procedures established by law. Property taxes may be levied to amortize such bonds, provided the levy for payment of any such bonds or judgments may not exceed, in the aggregate, 10 mills annually.

Several Montana counties of the first- or second-class have used the special tax levy authority of subsection (3) of this statute to generate revenue for their courts beyond the six mills authorized by section 7-6-2511, MCA. The district courts of these counties have executed orders directed at their respective county commissioners to impose a special tax levy pursuant to section 2-9-316(3), MCA. The order is labeled a "judgment" which suggests that the decree has sufficient formality to trigger section 2-9-316, MCA. These orders expressly note the authority established by the Montana Supreme Court that a district court may compel the payment of claims for necessary and reasonable district court expenses. See State ex rel. District Court of Eighth Judicial District v. Whitaker, 41 St. Rptr. 1104, 681 P.2d 1097 (1984).

It is beyond dispute that a district court of Montana may issue orders for "out-of-budget reasonable and necessary court expenditures." Id. at 1099. With one exception, the authority of the district courts to compel payment of expenditures has been consistently affirmed by the Montana Supreme Court. Id.; Board of Commissioners v. Eleventh Judicial District Court, 182 Mont. 463, 597 P.2d 728 (1979); State ex rel. Browman v. Wood, 168 Mont. 341, 543 P.2d 184 (1975); State ex rel. Schneider v. Cunningham, 39 Mont. 165, 101 P. 962 (1909). In State ex rel. Hillis v. Sullivan, 48 Mont. 320, 137 P. 392 (1913), the Supreme Court found that a district court had no authority to appoint and compensate an attendant whose services were not integral to its functions. However, while the district court order compelling payment in Hillis was reversed, the opinion recognized that a district court is clothed "with all the power and authority necessary to render its jurisdiction effective." Id. at 394. The language of that opinion mirrors a current code section of 19th century origin:

> 3-1-113. Means to carry jurisdiction into effect. When jurisdiction is, by the constitution or any statute, conferred on a court or judicial officer, all the means necessary for the exercise of such jurisdiction are also given. In the exercise of this jurisdiction, if the course of proceeding is not specifically pointed out by this code, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

Thus, various authority exists to support the general recognition that the district courts have the power to compel the payment of their out-of-budget reasonable and necessary expenditures.

The payment of specified judicial expenditures by a county government is distinguishable from the practice you have asked me to examine. You are concerned here with the funding of a judicial budget and retirement of its deficit through the levy of a special property tax ordered by a district court. I conclude that there is no statutory basis for this method of judicially-compelled revenue generation.

The statutory authority relied upon by certain judicial districts and counties is section 2-9-316(3), MCA. This statute by its title and plain language is intended to provide sources of payment for "judgments" against political subdivisions of the state. A "judgment" by definition is "the final determination of the rights of the parties in an action or proceeding." Rule 54(a), Mont. R. Civ. P. An instrument or order does not become a "judgment" merely by its form or its title. Instead, one must examine its content and substance. State ex rel. Meyer v. District Court of Fourth Judicial District, 102 Mont. 222, 57 P.2d 778 (1936). The orders that have been used by the counties to invoke section 2-9-316(3), MCA, generally are comprised of: (1) a recitation of the inability of the county to adequately fund the district court system; (2) the district court's authority to compel payment of necessary and reasonable expenditures; and (3) an order to fully fund the upcoming fiscal year's court budget or previous year's deficit through a special mill levy if other sources of revenue are unavailable. While the instrument is internally labeled a "judgment," the document is not so much "a determination of the rights of parties" as it is a unilateral directive from one party to another to generate revenue through a levy of taxes.

More importantly, it is a settled rule of statutory construction that tax laws are to be strictly construed against the state and in favor of the taxpayer. 3 Sutherland Statutory Construction § 66.01 (4th ed. 1986). Section 2-9-316, MCA, was enacted in 1977 following an interim study that addressed the abolition of sovereign immunity by the 1972 Montana Constitution. The statute provided specific sources from which judgments against political subdivisions of the state could be paid. Minutes, House Judiciary Committee, March 8, 1977. As such, the language and intent of the Legislature related to lawsuits filed against counties. The special tax levy provision must be narrowly construed with its original purpose in mind. I conclude that section 2-9-316, MCA, does not grant counties the authority to levy taxes in response to a court order that a judicial budget or budget deficit be funded.

My opinion should not be construed as limiting either the inherent or statutory power of the judiciary to compel payment of its reasonable and necessary expenditures. In particular, the scope of our courts' inherent power to effect their jurisdiction is not at issue. My holding is limited to the narrow question presented, that is, the proper application of the taxation authority contained within section 2-9-316, MCA.

THEREFORE, IT IS MY OPINION:

> Section 2-9-316 does not grant counties the authority to levy taxes in response to a district court order that a judicial budget or budget deficit be funded.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 38

CITIES AND TOWNS - Assignment of interest in tax sale certificate;
CITIES AND TOWNS - Purchase of tax sale certificate from county;
CITIES AND TOWNS - Responsibility for payment of special assessment after taking tax deed;
COUNTIES - Assignment of interest in tax sale certificate;
COUNTIES - Responsibility for payment of special assessment after purchasing interest in tax sale certificate;
COUNTIES - Responsibility for payment of special assessment after taking tax deed;
LIENS - Effect on special assessment lien when tax deed is issued to municipality or county;
TAXATION AND REVENUE - Effect on special assessment lien when county or municipality takes tax deed;
TAXATION AND REVENUE - Payment for special assessment lien when county or municipality purchases and assigns interest in tax sale certificate;
MONTANA CODE ANNOTATED - Sections 15-17-121(5), 15-17-214, 15-17-317, 15-17-318(1), 15-17-323(1), 15-17-324, 15-18-211, 15-18-214, 50-60-301;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 82 (1988), 41 Op. Att'y Gen. No. 77 (1986).

HELD: 1. When a county becomes a purchaser of a tax sale certificate pursuant to section 15-17-214, MCA, the county is not required to pay special assessments levied against the property after the tax sale.

2. When a county assigns its interest as purchaser of a tax sale certificate, it must collect from the assignee all delinquent taxes and assessments due on the property that is the subject of that interest, unless the assignee is a municipality. If the assignee is a municipality, the county must collect only delinquent taxes (excluding assessments) and costs.

3. If a municipality takes an assignment of interest in a tax sale certificate from a county pursuant to section 15-17-317, MCA, the municipality must reassign that interest only if a subsequent purchaser pays both the municipality's purchase price and any delinquent assessments against the property, plus interest, penalties, and costs.

4. If either a county or a municipality takes a tax deed to property pursuant to section 15-18-211, MCA, the granting of the tax deed extinguishes the lien created by any special assessment against the property which becomes payable prior to the issuance of the deed, but leaves unaffected any lien created by a special assessment which first becomes payable after issuance of the deed.

September 25, 1989

Lee R. Kerr
Treasure County Attorney
Treasure County Courthouse
Hysham MT 59038

Dear Mr. Kerr:

You have requested my opinion regarding the collection of a delinquent special assessment levied by a town against property which is also involved in tax sale proceedings in the county, due to nonpayment of property taxes. I have taken the liberty of rephrasing your questions as follows:

When a municipality levies a special assessment against property after the property has been struck off to the county following a tax sale:

1. Is the county liable for the special assessment imposed by the municipality?

2. If the county assigns its interest in the tax sale certificate as provided in section 15-17-214(3), MCA, and section 15-17-323, MCA, must it collect the special assessment from the assignee?

3. If the municipality purchases an assignment of the tax sale certificate from the county, must it collect the special assessment from subsequent assignees?

4. If either the county or the municipality were to take a tax deed to the property, would the issuance of the tax deed extinguish the special assessment?

You have explained that these questions arose after Treasure County ("the county") was deemed to be the "purchaser" under section 15-17-214, MCA, of a tax sale certificate to property located in the town of Hysham ("the municipality"). You also explained that after the county became the purchaser of the tax sale certificate, the municipality removed a dangerous building from the property and levied a special assessment against that property pursuant to the Uniform Code for the Abatement of Dangerous Buildings (1985 ed.) (hereinafter "the abatement code").

The abatement code was adopted by the municipality in accordance with section 50-60-301, MCA, and has also been adopted by the Department of Commerce pursuant to section 50-60-203, MCA. See also § 8.70.103, ARM. When a jurisdiction which has adopted the abatement code incurs expenses in demolishing a dangerous building, the governing body of that jurisdiction is entitled to assess a charge constituting a special assessment and lien upon the affected property for the costs of demolition. § 905, Uniform Code for the Abatement of Dangerous Buildings (1985 ed.). The code also provides that "[t]he amount of the assessment shall be collected at the same time and in the same manner as ordinary property taxes are collected and shall be subject to the same penalties and procedure and sale in case of delinquency as provided for ordinary property taxes. All laws applicable to the levy, collection and enforcement of property taxes shall be applicable to such assessment." § 911, Uniform Code for the Abatement of Dangerous Buildings.

It is my understanding that since the county was deemed to be the "purchaser" of the tax sale certificate, the redemption period provided for in section 15-18-111, MCA, has passed, the property tax lien has not been redeemed, and the county commissioners have not directed the treasurer to issue the county a tax deed pursuant to section 15-18-211(3), MCA.

Regarding your first question, section 15-17-214, MCA, provides that when no other purchaser comes forward to pay the delinquent taxes on property at a tax sale, the county is deemed to be the purchaser of the tax sale certificate, without payment. However, section 15-17-324, MCA, provides:

> (1) The assessment of property on which a tax sale certificate has been issued or for which the county is listed as the purchaser as provided in 15-17-214 continues in the same manner as other property is assessed.

> (2) If any assessed taxes are not paid when due, they are delinquent.

This statute clearly indicates that although a county may be considered the purchaser of a tax sale certificate without payment under section 15-17-214, MCA, the subject property continues to be assessed just as any other property would be, and if assessments are not timely paid, they become delinquent. Sections 15-17-214 and 15-17-324, MCA, must be construed together, giving effect to each if possible. Matter of W.J.H., 44 St. Rptr. 817, 821, 736 P.2d 484, 486-87 (Mont. 1987); City of Billings v. Smith, 158 Mont. 197, 212, 490 P.2d 221, 230 (1971). It would be illogical for the Legislature first to deem the county the purchaser of a tax sale certificate, without payment of delinquent taxes and assessments, when no other purchaser comes forward at a tax sale, and then to place responsibility on the county for payment of future assessments. Thus I conclude that although the special assessment at issue was correctly assessed against the property despite the fact that the county was considered the purchaser at a tax sale, the county as purchaser of the tax sale certificate is not itself required to pay the newly delinquent assessment.

In answer to your second question, if the county assigns its interest as purchaser of the tax sale certificate, it must collect from the assignee all "delinquent taxes, including penalties, interest, and costs, accruing from the date of delinquency." § 15-17-323(1), MCA.

Because the word "taxes" as used in the tax sale statutes includes all property assessments and fees related to property in addition to ad valorem property taxes (§ 15-17-121(5), MCA), the county must collect the special assessment from an assignee in accordance with section 15-17-323, MCA. The only exception would be if the county were to assign its interest to a municipality pursuant to section 15-17-317, MCA, which provides in part as follows:

> Whenever property has been struck off to the county at a tax sale under ... [15-17-214], is subject to the lien of delinquent special assessments, and has not been assigned under ... [15-17-214] or ... [15-17-323], at the request of the municipality the county treasurer shall assign all of the rights of the county acquired therein at the sale to the municipality upon payment of any delinquent taxes (excluding assessments) and costs,

> without penalty or interest. [Emphasis provided.]

According to the explicit language of section 15-17-317, MCA, such an assignment must be made to the municipality upon payment of only the delinquent taxes and costs less assessments. If the municipality takes such an assignment, the property that is the subject of the assignment "must be held in trust by the municipality for the improvement fund into which the delinquent special assessments are payable." § 15-17-317, MCA. It should be observed here that in 1987, after repealing the entire statutory scheme dealing with tax sales and tax deeds, the Legislature enacted statutes which streamlined the tax sale and tax deed process. 1987 Mont. Laws, ch. 587. Prior to 1987, a municipality taking an assignment of a tax sale certificate considered as purchased by a county at a tax sale had no option but to pay all delinquent taxes and assessments, together with all associated interest and penalties. See 42 Op. Att'y Gen. No. 82 (1988). Since 1987, however, a municipality taking such an assignment from a county is specifically excused from paying delinquent assessments by section 15-17-317, MCA (1987).

Your third question concerns whether, after taking an assignment pursuant to section 15-17-317, MCA, the municipality must collect the special assessment from subsequent assignees. Section 15-17-318(1), MCA, provides the answer:

> At any time after a parcel of land has been acquired by a municipality, as provided in 15-17-317, and has not been redeemed, the treasurer of the municipality shall assign all the rights of the municipality in the property to any person who pays:
>
> (a) the purchase price paid by the municipality;
>
> (b) the delinquent assessments;
>
> (c) interest on the purchase price and delinquent assessments at the rate of 5/6 of 1% a month; and
>
> (d) penalties and costs as provided by law. [Emphasis provided.]

Thus, after the municipality has purchased the county's interest in tax sale property pursuant to section 15-17-317, MCA, it must reassign that interest only if a

subsequent purchaser pays municipality's purchase price and the delinquent assessment, plus interest, penalties, and costs.

Regarding your fourth question, under the circumstances presented it would be possible for either the county or the municipality to take a tax deed to the property, provided no third-party purchaser comes forward in accordance with section 15-17-318(1) or 15-17-323, MCA. For example, because the redemption period has passed, and the tax lien at issue was not timely redeemed, the county commissioners could by resolution direct the county treasurer to issue the county a tax deed pursuant to section 15-18-211(3), MCA. Alternatively, the municipality could purchase an assignment from the county in accordance with section 15-17-317, MCA, and because the tax lien was not timely redeemed, the county treasurer would be required under section 15-18-211(1), MCA, to issue a tax deed to the municipality. You have asked whether, given either alternative, the lien created by the special assessment survives the issuance of a tax deed. Prior to 1987, this question was addressed by section 15-18-309, MCA (1985), which provided in relevant part as follows:

> Effect of deed. The deed issued under this or any other law of this state shall convey to the grantee the absolute title to the lands described therein as of the date of the expiration of the period for redemption, free of all encumbrances and clear of any and all claims of said defendants to said action except the lien for taxes which may have attached subsequent to the sale and the lien of any special, local improvement, irrigation, and drainage assessments levied against the property, payable after the execution of said deed[.]

The quoted statutory language was construed by the Attorney General as leaving unaffected special assessments payable after execution of the tax deed, but extinguishing those special assessments payable before the taking of the tax deed. 41 Op. Att'y Gen. No. 77 (1986) at 343-44. Although the Legislature repealed section 15-18-309 in 1987, it enacted a replacement, § 15-18-214, MCA, which provides in pertinent part:

> Effect of deed. (1) A deed issued under this chapter conveys to the grantee absolute title to the property described therein as of the date of the expiration of the redemption

> period, free and clear of all liens and encumbrances, except:
>
> (a) when the claim is payable after the execution of the deed and:
>
> (i) a property tax lien attaches subsequent to the tax sale; or
>
> (ii) a lien of any special, rural, local improvement, irrigation, or drainage assessment is levied against the property[.]

The language of the 1987 enactment is substantially similar to the language quoted above from the repealed 1985 statute. Reenactment of a statute in substantially the same terms constitutes an adoption of the practical construction placed on the previous statute by executive or administrative departments of government. State ex rel. Lewis & Clark County v. State Board of Public Welfare, 141 Mont. 209, 212, 376 P.2d 1002, 1003 (1962); 82 C.J.S. Statutes § 370(b)(2) (1953). I therefore conclude the granting of a tax deed extinguishes the lien created by a special assessment which becomes payable prior to the issuance of the deed, but leaves unaffected any lien created by a special assessment which first becomes payable after issuance of the deed. This conclusion applies regardless of whether the deed is granted to the county or the municipality. I am bolstered in this conclusion by the careful choice of words used by the Legislature in drafting the exceptions to the general rule that issuance of a tax deed grants title "free and clear of all liens and encumbrances." Section 15-18-214(1)(a)(ii), MCA, provides the pertinent exception here, and that exception is triggered only when the special assessment against the tax deed property becomes payable after the execution of the deed.

THEREFORE, IT IS MY OPINION:

1. When a county becomes a purchaser of a tax sale certificate pursuant to section 15-17-214, MCA, the county is not required to pay special assessments levied against the property after the tax sale.

2. When a county assigns its interest as purchaser of a tax sale certificate, it must collect from the assignee all delinquent taxes and assessments due on the property that is the subject of that interest, unless the assignee is a municipality. If the assignee

is a municipality, the county must collect only delinquent taxes (excluding assessments) and costs.

3. If a municipality takes an assignment of interest in a tax sale certificate from a county pursuant to section 15-17-317, MCA, the municipality must reassign that interest only if a subsequent purchaser pays both the municipality's purchase price and any delinquent assessments against the property, plus interest, penalties, and costs.

4. If either a county or a municipality takes a tax deed to property pursuant to section 15-18-211, MCA, the granting of the tax deed extinguishes the lien created by any special assessment against the property which becomes payable prior to the issuance of the deed, but leaves unaffected any lien created by a special assessment which first becomes payable after issuance of the deed.

Sincerely,

Marc Racicot

MARC RACICOT
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 June 30, 1989. This table includes those rules adopted during the period July 1, 1989 through September 30, 1989 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through June 30, 1989, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1989 Montana Administrative Register.

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