# MONTANA ADMINISTRATIVE REGISTER



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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 23

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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NOTICE SECTION

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

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| In the matter of the proposed amendment of ARM 2.21.8017 (3)(c)(i) and 2.21.8018 (9), relating to grievances | ) ) ) ) ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 2.21.8017 (3) (c) (i) AND 2.21.8018 (9) RELATING TO GRIEVANCES |

TO: All Interested Persons.

1. On December 28, 1989, at 9:00 a.m. in Room 136, Mitchell Building, Helena, Montana 59620, a public hearing will be held to consider the amendment of ARM 2.21.8017 (3)(c)(i) and 2.21.8018 (9) relating to grievances.

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

2.21.8017 GRIEVANCE PROCEDURE (1) - (3)(c) remain the same.
(i) within 20 working days of the grievant's request for final review.
(ii) - (e) remain the same.
(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

2.21.8018 HEARING (1) - (8) remain the same.
(9) The agency head shall issue the final administrative decision within 10 working days of receipt of the hearing summary.
(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

3. These rule amendments are necessary because agencies have requested clarification as to whether the "20 days" and "10 days" refer to "working" or "calendar" days. The proposed amendments will answer this question.

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

Laurie Ekanger, Administrator
State Personnel Division
Department of Administration
Room 130, Mitchell Building
Helena, Montana 59620

no later than January 5, 1990.

5. Gale Kuglin, Personnel Policy Coordinator, State Personnel Division, Department of Administration, Mitchell Building, Helena, Montana 59620, has been designated to preside over and conduct the hearing. This hearing will be held on December 28, 1989, at 9:00 a.m. in Room 136, Mitchell Building, Helena, Montana 59620.

6. The authority of the agency to make the proposed amendments is based on 2-18-102, MCA, and the proposed amendments implement 2-18-102, MCA.

Dave Ashley, Acting Director
Department of Administration

Certified to the Secretary of State November 27, 1989.

BEFORE THE PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA

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| In the matter of the amendment of 2.43.302, 2.43.404, 2.43.406, 2.43.418, 2.43.420, 2.43.423, 2.43.430, 2.43.431, 2.43.603, 2.43.605, 2.43.715, and 2.43.716; the adoption of new rules relating to purchasing service credit, post-retirement benefit adjustments, and return to covered employment after retirement; and the repeal of ARM 2.43.416, 2.43.417, 2.43.701, 2.43.702, 2.43.703, 2.43.704, 2.43.705, 2.43.706, 2.43.707, 2.43.708, 2.43.709, 2.43.710 and 2.43.712. | NOTICE OF PUBLIC HEARING ON THE AMENDMENT, ADOPTION AND REPEAL OF THE RULES RELATING TO MONTANA'S RETIREMENT SYSTEMS AND THE STATE SOCIAL SECURITY PROGRAM |

TO: All Interested Persons.

1. On December 27, 1989 at 9:00 am in the Board Meeting Room of the Public Employees Retirement Division, 1712 Ninth Avenue, Helena, Montana, a public hearing will be held to consider the amendment of ARM 2.43.302, 2.43.404, 2.43.406, 2.43.418, 2.43.420, 2.43.423, 2.43.430, 2.43.431, 2.43.603, 2.43.605, 2.43.715, and 2.43.716 pertaining to the administration of public retirement systems and the state social security program; the adoption of new rules relating to purchasing service credit and post-retirement benefit adjustments in the retirement systems; and the repeal of Rules 2.43.416, 2.43.417, 2.43.701, 2.43.702, 2.43.703, 2.43.704, 2.43.705, 2.43.706, 2.43.707, 2.43.708, 2.43.709, 2.43.710 and 2.43.712 pertaining to school district and seasonal employment service credit in the retirement systems and terminating coverage and reporting requirements for the state social security program.

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

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

(1) - (3) remain the same.

(4) "full-time employment" means any period of employment in which the member is compensated for at least ~~140~~ 160 hours during a calendar month;

(5) "full-time public service employment" means a period of at least ~~140~~ 160 hours of paid employment during a calendar month with the state of Montana, or a political subdivision thereof, which was not subject to coverage under a state-administered retirement system at the time the service was performed and is not otherwise qualifiable for service credits in a retirement system;

(6) "inactive member" means a member who has terminated covered employment and has left their contributions and interest

on deposit with the retirement system;

(6) becomes (7)

(~~7~~8) "part-time employment" means any period of employment in which the member is compensated for less than ~~140~~ 160 hours during a calendar month;

Renumber (8) through (12)

(14) "termination of employment" means cessation of all work related activities and accrual of any benefits attributable to that employment.

(15) "survivor" means the designated or statutory beneficiary of a member who dies while in membership service;

(16) "survivorship allowance" means a monthly benefit payable for life to the survivor of a member who dies while serving in covered employment; and

(~~13~~17) "vested" means the member has satisfied any statutorily-imposed requirements and has a right to retirement ~~or other enumerated membership~~ benefits after reaching minimum retirement age.

(Auth. Secs. 19-3-304, 19-5-201, 19-6-201, 19-7-201, 19-8-201, 19-9-201, and 19-13-202 MCA; IMP, Title 19, Chs. 3, 5, 6, 7, 8, 9, and 13 MCA)

2.43.404 REQUIRED EMPLOYER REPORTS (1) remains the same.

(2) All PERS and sheriffs' retirement system reporting officials must report, on a monthly basis, all retired PERS and sheriffs' retirement system members employed with their agency. This report must include the retiree's social security number, last and first name, salary and hours worked.

(3) remains the same.

(Auth. Secs. 19-3-304, 19-5-201, 19-6-201, 19-7-201, 19-8-201, 19-9-201, and 19-13-202 MCA; IMP, Secs. 19-3-307, 19-3-1106, 19-5-201, 19-6-201, 19-7-201, 19-8-201, 19-9-202 and 19-13-203 MCA)

2.43.406 BASIC UNIT OF SERVICE (1) The year is the basic unit for the awarding of service credits and service years for all retirement systems.

(2) Except as otherwise specified by rule or statute, 12 months of service credit will equal one year of service credit, regardless of the calendar period during which the service credits were earned.

(3) In the case of members with periods of both full-time and part-time covered employment with such full-time employment being used in the calculation of "final average salary," proportional service credits shall be granted in each calendar month where the fraction is the number of hours worked during a calendar month divided by ~~140~~ 160 hours. In no case may the fraction be greater than 1.

(4) If a member has only part-time covered employment, or if he has both full-time and part-time covered employment but such full-time employment is not used to calculate "final average salary," ~~a full year of~~ proportional service credits shall be granted for each year of continuous part-time employment ~~regardless of~~ based upon the months or hours worked

during ~~that~~ each part-time year and the percentage time worked during the "final average salary" computation period.

(Auth. Secs. 19-3-304, 19-5-201, 19-6-201, 19-7-201, 19-8-201, 19-9-201, and 19-13-202 MCA; IMP, Title 19; Ch. 3, part 5; Ch. 5, part 3; Ch. 6, part 3; Ch. 7, part 3; Ch. 8, part 3; Ch. 9, part 4; Ch. 13, part 4 MCA)

2.43.418 ELECTED OFFICIALS (1) and (2) remain the same. (3) An elected official whose statutory term of office ends prior to the 15th of a month may elect to terminate retirement system membership effective on the last day of the month preceding the end of his term of office.

(Auth. Secs. 19-3-304, 19-5-201 and 19-7-201 MCA; IMP, Title 19, Ch 3, part 5 and Chs. 5 and 7, part 3 MCA)

2.43.420 REQUALIFICATION OF SERVICE (1) At any time prior to retirement, ~~an active~~ member who is statutorily eligible to do so, may elect to qualify into his current retirement system all or any portion of his previously refunded credits in his current or another state retirement system.

(2) The foregoing shall not be construed to allow the transfer or purchase of credits between two retirement systems while the individual is a member of both systems, nor shall it allow the transfer or purchase of service into a system by an ~~inactive member or~~ former member of that system.

(3) In order to qualify the previously refunded service, an ~~active~~ eligible member must initiate the action through the system to which he currently contributes, identifying, in writing, the system and the period of employment which is to be requalified.

(4) through (6) remain the same.

(Auth. Secs. 19-3-304, 19-6-201, 19-7-201, 19-8-201, 19-9-201, and 19-13-202 MCA; IMP, Secs. 19-3-509, 19-3-511, 19-3-605, 19-6-305, 19-7-309, 19-8-306, 19-9-405, 19-9-603, 19-13-404 MCA)

2.43.423 QUALIFICATION OF OTHER TYPES OF SERVICE (1) When the statutes allow for military, U.S. government, full-time Montana public service employment, or other service which is not otherwise "creditable service" to be qualified into a retirement system, the ~~active~~ eligible member will be responsible for providing military records or employer certification of such service and the compensation received to the board.

(2) through (4) remain the same.

(5) The ~~active~~ eligible member must have a letter of intent on file with the board to qualify all, or a specific portion of this service, to be credited to his account. The letter of intent will state whether payment for this qualification of service will be made in a lump sum or in installment payments. Such installment payments will be subject to additional interest as determined by the board and computed over the payment period.

(Auth. Secs. 19-3-304, 19-5-201, 19-6-201, 19-7-201, 19-8-201, 19-9-201, and 19-13-202 MCA; IMP, Secs. 19-3-503, 19-3-505,

19-3-510, 19-5-304, 19-6-304, 19-6-305(2), 19-7-309(2), 19-8-304(3) and (4), 19-8-306(2), 19-8-307, 19-9-403, 19-9-405(2), 19-13-403, and 19-13-404(2) MCA)

2.43.430 ~~PREVIOUSLY REFUNDED~~ OUT-OF-STATE OR FEDERAL PUBLIC SERVICE (1) ~~For the purposes of qualifying up to 5 years of previously refunded public service into PERS, a~~ A statutorily eligible member must apply, in writing, to the retirement division, supplying the following information:

(a) remains the same.

(b) name and mailing address of his former public retirement system, approximate dates of employment, name of employing agency, approximate date of refund, and full name (if different) under which he was then employed, or

(c) certification by the member's former public employer that the member was employed with the employer prior to the employer's adoption of a public retirement system, the dates of employment, full- or part-time employment status, and weekly or monthly hours of employment (if part-time).

(2) remains the same.

(3) The actuarial cost rate will be the current ~~normal~~ total cost rate of the system ~~plus 1.5% to compensate for adverse selection,~~ plus simple interest beginning one month from the date of initial eligibility for qualifying such service or the date on which he completed six years of PERS service, whichever is later. ~~In setting the actuarial cost for a given period, the board may round down to a simple whole or half percent for purposes of ease in administering this provision.~~

(4) and (5) remain the same.

(Auth. Sec. 19-3-304 MCA; IMP 19-3-512 MCA)

2.43.431 SHERIFF'S MILITARY BUY-BACK (1) A member of the Sheriffs' Retirement System who elects to purchase military service under the provisions of Title 19, Chapter 7 will be required to contribute ~~11.1~~ 14.67% of salary as of his 16th year and as many succeeding years as are required to qualify this service.

(Auth. Sec 19-7-201 MCA; IMP 19-7-310 MCA)

2.43.603 REFUNDS (1) Remains the same.

(2) Correctly completed and submitted refund applications will be processed within three weeks after the member's final contributions are credited to his account, including termination payments of sick and annual leave.

(3) through (8) remain the same.

(Auth. Secs. 19-3-304, 19-5-201, 19-6-201, 19-7-201, 19-8-201, 19-9-201, and 19-13-202 MCA; IMP, Secs. 19-3-703, 19-5-403, 19-6-403, 19-7-304, 19-8-503, 19-9-304, 19-9-602 and 19-13-602 MCA)

2.43.605 DESIGNATION OF BENEFICIARY (1) The participant shall make the selection of beneficiary, in writing and on the form provided by the division for this purpose, dated and signed by the participant and ~~either:~~

~~(a)~~ witnessed by a disinterested third party who shall attest to the voluntary nature of the participant's action ~~(for members of the public employees', police and firefighters' unified retirement systems); or~~ .

~~(b) notarized (for members of the judges', highway patrol, sheriffs' or game wardens' retirement systems)~~.

(2) The designation of beneficiary shall be effective immediately upon receipt by the division.

(Auth. Secs. 19-3-304, 19-5-201, 19-6-201, 19-7-201, 19-8-201, 19-9-201, and 19-13-202 MCA; IMP, Secs. 19-3-1301, 19-5-602, 19-6-602, 19-7-602, 19-8-702, 19-9-912, and 19-13-903 MCA)

2.43.715 ERROR DISCOVERED BY SOCIAL SECURITY ADMINISTRATION (1) If the social security administration (SSA) discovers a reporting error for periods up to and including December 31, 1986 while ~~in the~~ processing ~~of~~ an individual's claim for benefits, a "federal determination of error in state's wage reports" will be sent to the reporting official for verification.

(2) remains the same.

(Auth. Secs. 19-1-201 MCA; IMP, Title 19, Ch. 1, parts 7 and 8 MCA)

2.43.716 LATE FILING PENALTIES (1) If the Montana social security wage and deposit report and payments for periods up to and including December 31, 1986 are not received by the state agency by the due dates, the entity will receive written notification of state and/or federal interest penalties due and payable with the next report. The penalties will have been calculated according to the guidelines defined in the "Montana social security reporting manual."

(2) and (3) remain the same.

(Auth. Sec. 19-1-201 MCA; IMP, Title 19, Ch. 1, parts 7 and 8 MCA)

3. The rules are proposed to be amended in order to respond to new legislation, sunset provisions of previous legislation, and in order to clarify provisions of certain rules.

Legislation enacted during the 1989 Legislature provided that elected officials may elect to terminate retirement system membership under certain conditions; allowed a PERS member to qualify out-of-state service which was not yet subject to a public retirement system; changed the contribution rate in the Sheriffs' Retirement System; and changed the witnessing requirements for designation of beneficiary in the judges', highway patrol, sheriffs' and game wardens' retirement systems. In addition, federal legislation has terminated the Social Security reporting and contribution requirements for the state after January 1, 1987.

During the 1987 Legislature, SB 136, required the amendment of rules to allow full salary credit for periods of temporary

service reductions due to a budget deficit. This legislation sunsetted on July 1, 1989 and the board proposes to return the full-time service hours to their pre-SB 136 levels.

Legislation enacted during the 1989 session also provided for post-retirement adjustments for members of three retirement systems. Additional definitions are proposed to be amended into the current rules in order to define inactive membership, survivor, and survivorship allowance in order to administer this statute.

Finally, the board proposes to clarify the manner in which service is credited to members with periods of both part-time and full-time employment (or periods of employment for less than 12 months per year), that vested inactive members are eligible to purchase service, and the processing time for refunds of terminated members' contributions.

4. The proposed rules provide as follows:

RULE I. PERS ADDITIONAL SERVICE (1) Subject to statutory limitations, a person who became a PERS member prior to July 1, 1989 and who has 5 or more years of membership service may purchase 1 full year of additional service credit for each 5 full years of service credited in the system.

(2) The cost of each year of additional service will be 13.4% of the compensation earned by the member during the immediately preceding 12 months of membership service.

(3) The purchase may be completed through a lump sum payment or in monthly installments, which will include interest at the rate currently set by the board. If making monthly installments, a member may purchase only 1 year; after completing payments for that year, he may purchase additional years based upon his immediately preceding 12 month compensation at that point in time.

(4) Service purchased under these provisions can not be counted toward initial retirement eligibility but will be used in calculating the amount of the retirement benefit, including any early retirement reduction.

(5) A person who was in receipt of a PERS pension on or before July 1, 1989 and who returns to active PERS membership on or after March 13, 1989 is eligible to purchase additional service after he has returned to active membership for a period of at least 12 months. The amount of additional service which may be purchased will be based on his total service credits in the system, subject to any statutory limitations in effect.

(Auth. 19-3-304, MCA; Imp. 19-3-513 and HB 235, 1989 Legislature)

RULE II. PURCHASE OF FULL-TIME SERVICE BY PART-TIME MEMBERS (1) When a member employed on a part-time basis is eligible to purchase periods of full-time service, the compensation used to calculate the cost to purchase such full-time service will be the actual part-time compensation earned.

(2) If the member later retires with a full-time FAS, the full-time service purchased under (1) will be proportionally reduced based upon the proportion of time worked when the service was purchased.

(3) A member whose service is reduced under (2) above may elect to purchase service to equal full-time by paying the difference between the cost actually paid and the cost had the member's salary been full-time, plus interest.

(Auth. 19-3-304, 19-6-201, 19-7-201, 19-8-201, 19-9-201, and 19-13-202 MCA; Imp. 19-3-503, 19-3-512, 19-3-513, 19-6-304, 19-7-310, 19-8-304, 19-9-403, and 19-13-403, MCA)

RULE III. POST RETIREMENT ADJUSTMENT (1) Post-retirement adjustments for PERS, Game Wardens and Sheriff's Retirement System retirees will be made in each year that investment earnings are available for this purpose. Adjustments made in one year will be paid to eligible retirees beginning in the succeeding January.

(2) Eligibility for each post-retirement adjustment will be determined from June 30 of the year for which adjustments are being made.

(3) If the eligible retiree or survivor has elected to receive an option 2, 3, or 4 retirement allowance, the post retirement adjustment must be adjusted using the most recent actuarial tables adopted by the Board.

(Auth. 19-3-304, 19-7-201, and 19-8-201, MCA; Imp. 19-3-1109, 19-3-1110, 19-3-1111, 19-7-708, 19-7-709, 19-7-710, 19-9-809, 19-9-810, and 19-9-811 MCA)

RULE IV. MINIMUM BENEFIT ADJUSTMENT FOR RETIREES WITH PART-PAID FIREFIGHTER SERVICE (1) If a member of the firefighters' unified retirement system has only part-paid service in that retirement system, the minimum retirement benefit payable to that retiree will be 7.5% of a newly confirmed firefighter's salary in the city from which he retires.

(Auth. 19-13-202, MCA; Imp. 19-13-104(14), 19-13-1007 and 19-13-1009, MCA)

RULE V. RETURN TO COVERED EMPLOYMENT BY RETIREE (1) For purposes of reemployment, a retiree is considered to be receiving a retirement allowance when the individual:

(a) has not worked in covered employment for 30 days or more; and

(b) has been issued a retirement check.

(Auth. Secs. 19-3-304, and 19-7-201, MCA; IMP, 19-3-403(15), 19-3-1104, 19-3-1106, and 19-7-301(2), MCA).

5. Rule I is proposed to be adopted in order to implement the provisions of HB 235 enacted by the 1989 Legislature. The rule clarifies that only full years of service may be purchased; that only 1 year at-a-time can be purchased when monthly installments are made toward purchase of additional service; and that additional service purchased may reduce an early retirement reduction. In addition, HB 235 as enacted provided for

coordination with HB 234. When the statutes were codified, the coordination instruction was not followed. Therefore, Rule I clarifies that the total cost of purchasing additional service is 13.4% of the immediately preceding 12 months compensation.

Rule II is proposed to clarify the procedure for purchasing full-time service by part-time members, providing a mechanism for adjustment of service credit should the member change to full-time service; and providing a mechanism for such members to requalify the service as full-time prior to retirement. This rule documents current board policy.

Rule III is proposed to be adopted in order to clarify the time period for which each annual post-retirement adjustment will be made and to specify how actuarial adjustments will be made to post-retirement adjustments of retirees with option 2 or 3 retirement allowances.

Rule IV is proposed to be adopted in order that part-paid firefighters be allowed to receive minimum benefit adjustments on an equitable basis along with full-paid firefighters.

Rule V is proposed in order to clarify when a person becomes reemployed after retirement for purposes of administering limited return to work provisions in the PERS and Sheriffs' Retirement System.

6. The board is proposing to repeal the following rules: 2.43.416 regarding service credits for members employed by school districts or universities and can be found on page 2-3136 of the ARM; 2.43.417 regarding seasonal employees and can be found on page 2-3136 of the ARM; 2.43.701 regarding eligibility of political subdivisions to terminate Social Security Coverage and can be found on page 2-3181 of the ARM; 2.43.702 regarding the initiation of proceedings to terminate Social Security coverage and can be found on page 2-3181 of the ARM; 2.43.703 regarding transmission of certified copy of resolution to terminate Social Security coverage and can be found on page 2-3181 of the ARM; 2.43.704 regarding authorization of referendum of termination of Social Security coverage by the governor and can be found on page 2-3181 of the ARM; 2.43.705 regarding notice of referendum for termination of Social Security coverage and can be found on page 2-3182 of the ARM; 2.43.706 regarding proof of notice of referendum for termination of Social Security coverage and can be found on page 2-3182 of the ARM; 2.43.707 regarding eligibility to vote in referendum for termination of Social Security coverage and can be found on page 2-3182 of the ARM; 2.43.708 regarding certification of results of referendum on termination of Social Security coverage and can be found on page 2-3182 of the ARM; 2.43.709 regarding notice of termination of Social Security coverage and can be found on page 2-3183 of the ARM; 2.43.710 regarding withdrawal of notice of termination of Social Security coverage and can be found on page 2-3183 of the ARM; and

2.43.712 regarding required reports to be submitted to the state by political subdivision covering their employees for Social Security purposes and can be found on page 2-3184 of the ARM.

7. The first two rules are proposed for repeal because they are redundant in light of the proposed amendment of ARM 2.43.406. The remainder of the rules are proposed for repeal in light of changes in federal statute which prohibit termination of social security coverage and which remove the social security collection and reporting responsibilities from the states.

8. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted no later than January 5, 1990 to the:

Public Employees Retirement Board
1712 Ninth Avenue,
Helena, Montana 59620

9. Paul Smietanka, legal counsel for the Department of Administration, has been designated to preside over and conduct the hearing.

10. The authority of the agency to make the proposed rules is based on sections 19-1-201, 19-3-304, 19-5-201, 19-6-201, 19-7-201, 19-8-201, 19-9-201, and 19-13-202, MCA, and the rules implement Title 19, Sections 1,3,5,6,7,8,9, and 13, MCA.

By: Mona Jamison
Mona Jamison, President
Public Employees' Retirement Board

Certified to the Secretary of State on November 27, 1989

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

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| In the matter of the adoption of rules regarding the establishment and operations of a surplus lines stamping office, imposition upon transactions of surplus lines insurance of a stamping fee, and compulsory membership in a surplus lines advisory organization | ) ) ) ) ) ) ) ) | NOTICE OF PUBLIC HEARING FOR PROPOSED ADOPTION OF RULES GOVERNING SURPLUS LINES INSURANCE TRANSACTIONS |

TO: All Interested Persons.

1. On January 4, 1990, at 9:00 a.m., a public hearing will be held in Room 270 of the Mitchell Building, 111 Sanders, Helena, Montana, to consider the adoption of rules I through IX.

2. The proposed rules do not replace or modify any section currently found in the Administrative Rules of Montana.

3. The proposed rules provide as follows:

RULE I PURPOSE AND SCOPE (1) In accordance with 33-2-301 et seq., MCA, the commissioner declares that the purpose of [these rules] is to implement Title 33, chapter 2, part 3, MCA. Rules I through IX implement 33-2-301, MCA, through 33-2-326, MCA, the surplus lines insurance law.

(2) These rules provide for the establishment of and compulsory membership in a surplus lines advisory organization, hereinafter called the association, to process surplus lines insurance transactions; collect a stamping fee; maintain records for inspection by the commissioner; compile and disseminate lists of eligible surplus lines insurers and surplus lines coverages; and encourage compliance by surplus lines insurance producers with laws and rules concerning surplus lines insurance.

AUTH: 33-1-313, 33-2-316, MCA
IMP: 33-2-301 through 33-2-326, MCA

RULE II DELEGATION OF AUTHORITY (1) Effective January 1, 1990, the association, under the general supervision of the department of insurance, state of Montana, has had delegated to it the responsibilities set forth in 33-2-321, MCA.

AUTH: 33-1-313, 33-2-316, MCA
IMP: 33-2-301 through 33-2-326, MCA

RULE III EXAMINATION OF SUBMISSIONS (1) The association

is to examine each submission from licensed Montana surplus lines producers to assure accuracy.

(2) With the exception of the annual statement required by 33-2-310, MCA, every Montana surplus lines producer shall submit to the association all information required to be filed by 33-2-301, et seq., MCA, these rules, or those sections of the operating manual compiled by the association which have been approved by the commissioner and distributed in compliance with Rule VII. Such submissions shall be made by surplus lines insurance producers in the manner prescribed by the approved sections of the operating manual.

(3) All such submissions are to be made by licensed Montana surplus lines producers to the association on forms approved by the commissioner, and shall be submitted to the association within 7 working days of receipt by the surplus lines producer of the policy or within 30 working days of the effective date of the policy, whichever comes first.

(4) Licensed Montana surplus lines producers shall submit the annual statement required by 33-2-310, MCA, and the premium tax required by 33-2-311, MCA, directly to the commissioner.

AUTH: 33-1-313, 33-2-316, MCA
IMP: 33-2-301 through 33-2-326, MCA

RULE IV COLLECTION OF STAMPING FEE (1) Pursuant to 33-2-321(5), MCA, the association shall, with the approval of the commissioner, collect a stamping fee equalling one percent of the base premium, including any monied endorsement, payable for each surplus lines insurance policy transacted by its members in the state. Such stamping fee shall be earned in full as soon as any portion of the premium payable for the underlying policy is earned. The commissioner may, by rule, reduce the percentage amount of the stamping fee whenever such reduction will not impair the association's ability to pay its expenses.

(2) Because such stamping fee does not constitute "consideration for insurance" within the meaning of 33-15-102, MCA, and thus does not constitute part of the premium for surplus lines insurance, a surplus lines insurance producer may collect such stamping fee from the insured in addition to the premium payable in consideration for the insurance contract. Nothing in this section shall operate to exclude any other assessment, membership, policy, survey, inspection, service or similar fee or charge from the definition of "premium" contained in 33-15-102, MCA.

(3) Both the base premium and the stamping fee of every policy of surplus lines insurance transacted in this state shall appear on the policy's declarations page and be clearly labelled as such. For the purposes of collecting this stamping fee only, any inspection fees or placement fees payable in consideration of the policy shall be excluded from calculations of the base premium. Designation of a base premium for purposes of calculating the stamping fee shall not operate to

exclude from the definition of "premium" contained in 33-15-102, MCA, any assessment or membership, policy, survey, inspection, service or similar fee or charge in consideration of that surplus lines insurance policy.

(4) The association must collect a penalty from any surplus lines insurance producer who does not pay the stamping fee on each transaction within 30 days after the date on which the association bills the surplus lines insurance producer for the stamping fee. Such penalty shall equal 25 percent of the amount initially overdue on each transaction plus 1.5 percent per month of the accumulated amount overdue on each transaction.

AUTH: 33-1-313, 33-2-316, MCA
IMP: 33-2-301 through 33-2-326, MCA

RULE V ORGANIZATION AND DUTIES OF SURPLUS LINES ADVISORY ORGANIZATION (1) The association, in addition to the responsibilities outlined above, shall:

(a) for the protection of all concerned have its articles, by-laws, rules and procedures submitted to and approved by the commissioner. Any changes made therein shall also be submitted to and approved by the commissioner before becoming effective. Any such submission to the commissioner under this subsection shall be deemed approved if not expressly disapproved within 60 days of the date of submission;

(b) file with the commissioner, and update annually, a list of its members;

(c) keep complete records of all submissions from its members concerning surplus lines insurance transactions; provide accurate information to its members and the commissioner so that proper tax may be collected on surplus lines policies; and forward to the commissioner such submissions from surplus lines insurance producers and such reports as she requests;

(d) make its records available at any time for examination by the commissioner;

(e) report through its manager to the commissioner any transactions which come to its attention which may not comply with 33-2-301, et seq., MCA.

AUTH: 33-1-313, 33-2-316, MCA
IMP: 33-2-301 through 33-2-326, MCA

RULE VI OPERATING EXPENSES (1) The association's expenses may include the expenses of contracting by bid for management services and may include establishing reserve operating expenses not to exceed the total operating expenses incurred in the previous year. During the first full fiscal year of its operations under these rules, the association may dedicate all stamping fees collected in excess of its actual operating expenses to establishing reserve operating expenses.

AUTH: 33-1-313, 33-2-316, MCA

IMP: 33-2-301 through 33-2-326, MCA

RULE VII MEMBERSHIP IN SURPLUS LINES ADVISORY ORGANIZATION (1) Pursuant to authority granted by 33-2-321(4), MCA, the commissioner hereby orders every licensed surplus lines insurance producer, as a condition of continued licensure, to join the association within thirty days of either the effective date of these rules, or the initial issuance of that license to the surplus lines insurance producer, whichever comes later. No licensed surplus lines insurance producer who joins the association shall be required to pay any fees other than stamping fees and any penalty due thereon, attend or participate in association events, vote in association elections, or provide any other information than that required by the association to fulfill its obligations under 33-2-301, et seq., MCA, and these rules.

(2) Upon becoming a member of the association, every surplus lines insurance producer shall receive from the association, at no cost, a surplus lines operating manual and stamp, both approved by the commissioner, and every subsequent publication which the association disseminates to its members. The association shall publish and distribute to its members all amendments to those sections of the operating manual approved by the commissioner, and no such amendment shall become effective until approved by the commissioner and distributed to the association's members.

(3) The association shall at all times maintain a current list of its members available, upon request, to the commissioner and shall publish at least annually a complete list of its members and make such list available to its members, the commissioner, and the public.

AUTH: 33-1-313, 33-2-316, MCA
IMP: 33-2-301 through 33-2-326, MCA

RULE VIII PUBLICATION AND DISTRIBUTION (1) The association shall publish and distribute to its members at least semiannually a complete current list of eligible surplus lines insurers provided by the commissioner.

(2) The association shall publish and distribute to its members at least semiannually a complete current list, provided by the commissioner pursuant to Rule IX below, of the kinds of insurance which cannot be obtained from authorized insurers.

(3) The association shall produce for each of its members, in a form approved by the commissioner, an annual report complying with the requirements of 33-2-310(2), MCA, for a surplus lines insurance producer's annual statement. The association shall mail such annual reports to its members prior to March 1 of each year, for their review and submission to the commissioner. Nothing in this section or in the annual report prepared by the association shall relieve a surplus lines insurance producer from the duties imposed by 33-2-310, MCA,

and 33-2-311, MCA.

AUTH: 33-1-313, 33-2-316, MCA
IMP: 33-2-301, 33-2-326, MCA

RULE IX LIST OF KINDS OF INSURANCE PRESUMED UNOBTAINABLE FROM AUTHORIZED INSURERS (1) The commissioner and association shall jointly appoint a five-member committee to compile a list of the kinds of insurance which cannot be obtained from authorized insurers. Such committee shall meet at least semiannually and shall consist of four licensed surplus lines insurance producers and one staff member of the department of insurance, each serving until replaced by the commissioner.

(2) The committee shall make reasonable efforts to verify that the kinds of insurance included on its list cannot be obtained from authorized insurers, and the commissioner may add or delete kinds of insurance from the list submitted by the committee for his approval.

(3) The committee shall submit a new list to the commissioner for her approval on or before December 1 and June 1 of each year, and once approved the list shall be effective for the immediately following period January 1 through June 30 or July 1 through December 31, respectively. At the commissioner's request, the committee shall submit a new list in addition to the regularly scheduled semiannual lists, and once approved such additional list shall be effective for the remainder of the period January 1 through June 30 or July 1 through December 31 within which it was approved. Unless the commissioner expressly disapproves or alters the list within 30 days after its submission, it shall be deemed approved.

(4) Once approved, the list shall constitute a conclusive presumption within the meaning of 33-2-302, MCA, that any kind of insurance appearing thereon cannot be obtained from authorized insurers and does not require a diligent search by a licensed surplus lines insurance producer.

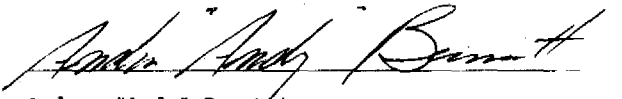
AUTH: 33-1-313, 33-2-316, MCA
IMP: 33-2-301 through 33-2-326, MCA

4. The State Auditor and Commissioner of Insurance is proposing these rules because they are necessary to establish a surplus lines advisory organization and assist surplus lines insurance producers to comply with title 33, chapter 2, part 3, MCA, the surplus lines insurance law.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to David Barnhill, Deputy Commissioner of Insurance, State Auditor's Office, Mitchell Building, P.O. Box 4009, Helena, Montana 59604-4009, no later than January 10, 1990.

6. David Barnhill, Deputy Commissioner of Insurance, has

been designated to preside over and conduct the hearing.



Andrea "Andy" Bennett
State Auditor and
Commissioner of Insurance

Certified to the Secretary of State this 27th day of November, 1989.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF SANITARIANS

| | | |
|---|---|---|
| In the matter of the proposed amendment of a rule pertaining to fees | ) ) ) | NOTICE OF PROPOSED AMENDMENT OF 8.60.413 FEE SCHEDULE |

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On January 6, 1990, the Board of Sanitarians proposes to amend the above-stated rule.

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

"8.60.413 FEE SCHEDULE (1) through (4) will remain the same.

(5) Renewal ~~$40.00~~ $35.00

(6) will remain the same."

Auth: Sec. 37-15-202, MCA; IMP, Sec. 37-15-307, 37-15-308, MCA

REASON: This amendment is being proposed to make fees commensurate with program areas costs.

3. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Board of Sanitarians, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than January 4, 1990.

4. If a person who is directly affected by the proposed amendment wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Board of Sanitarians, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than January 4, 1990.

5. If the Board receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a 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 15 based on the 154 licensees in Montana.

BOARD OF SANITARIANS
SAM KALAFAT, CHAIRMAN

BY: _____
MICHAEL L. LETSON, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 27, 1989.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE FINANCIAL DIVISION

| | | |
|---|---|---|
| In the matter of the proposed adoption of rules pertaining to the application procedure for engaging in the escrow business, change of ownership of business, and examination of business | ) ) ) ) ) ) ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF NEW RULE I APPLICATION PROCEDURE FOR AUTHORIZATION TO ENGAGE IN THE ESCROW BUSINESS, II CHANGE OF OWNERSHIP IN ESCROW BUSINESSES AND III EXAMINATION OF ESCROW BUSINESS |

TO: All Interested Persons:

1. On January 3, 1990, at 10:00, a.m., a public hearing will be held in the downstairs conference room of the Department of Commerce building, 1424 - 9th Avenue, Helena, Montana, to consider the adoption of the above-stated rules.

2. The proposed new rules will read as follows:

"I APPLICATION PROCEDURE FOR AUTHORIZATION TO ENGAGE IN THE ESCROW BUSINESS (1) Pursuant to and in compliance with Title 32, chapter 7, MCA, "The Regulation of Escrow Business Act," all existing or proposed escrow businesses, as defined by the act, shall file with the department of commerce applications for licenses to engage in the escrow business.

(2) Said applications must be in writing, verified by oath, and in the form prescribed by the director. Application forms may be obtained from the Commissioner of Financial Institutions, Department of Commerce, 1520 East Sixth Avenue, Helena, Montana 59620-0542.

(3) In addition to statutory qualifications, officers and managers of proposed escrow businesses must demonstrate through past record and present status as purveyors of escrow services, and as business persons and citizens, that they are likely to operate their proposed escrow businesses in compliance with all applicable laws of the state and local governments.

(4) The director, the commissioner of financial institutions, and examining personnel of the financial division may gather all available information relative to applications and conduct such investigations as they may determine are warranted to verify the qualifications of the applicant.

(5) An application fee of five hundred dollars ($500) shall be paid to the state of Montana at the time of application, and thereafter shall not be refundable either in whole or in part."

Auth: Sec. 32-7-108, MCA; IMP, Sec. 32-7-109, MCA

"II CHANGE OF OWNERSHIP IN ESCROW BUSINESS (1) In the event of a change of ownership of an escrow business, the buyer(s) shall file with the department of commerce, a new

application for a license. For the purpose of this rule, a change in ownership will be deemed to occur when a 25% or more partnership interest of 25% or more of the outstanding voting stock in a corporation is transferred to a new owner."

Auth: Sec. 32-7-108, MCA; IMP, Sec. 32-7-111, MCA

"III EXAMINATION OF ESCROW BUSINESS (1) Examinations of escrow businesses may be conducted by the department of commerce, financial division, when requested by the licensee or when, in the judgment of the director, they are necessary. Licensees shall be charged for examinations at a rate equal to the department's actual costs for examiner wages and travel expenses. Examination fees shall be paid to the state of Montana within 10 days of completion of the examination. Failure to pay the examination fee will result in an order from the director that licensee cease and desist from doing business as an escrow business until the examination fee is paid. If necessary, the director may apply to the district court of the first judicial district court of Lewis and Clark County to enforce compliance."

Auth: Sec. 32-7-108, MCA; IMP, Sec. 32-7-108, 32-7-122, MCA

REASON: These rules are mandated by the legislature in Chapter 651 of the Laws of 1989.

3. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Financial Division, Department of Commerce, 1520 East Sixth Avenue, Helena, Montana 59620, no later than January 4, 1990.

4. Annie M. Bartos, Helena, Montana, has been designated to preside over and conduct the hearing.

FINANCIAL DIVISION

BY: _____
MICHAEL L. LETSON, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 27, 1989.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE MONTANA LOTTERY

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|---|---|
| In the matter of the proposed amendment of rules pertaining to definitions, retailer bonding, duties, revocation or suspension of license, and prizes and the adoption of a new rule pertaining to on-line endorsement | ) NOTICE OF PROPOSED AMENDMENT OF 8.127.203 DEFINITIONS, 8.127.406 RETAILER BONDING, 8.127.408 RETAILER DUTIES, 8.127.611 REVOCATION OR SUSPENSION OF LICENSE, 8.127.1201 PRIZES AND THE ADOPTION OF NEW RULE I ON-LINE ENDORSEMENT |

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On January 6, 1990, the Montana Lottery proposes to amend and adopt the above-stated rules.

2. The proposed amendments, and the reasons for those amendments, will read as follows: (new matter underlined, deleted matter interlined)

"8.127.203 DEFINITIONS (1) through (4) will remain the same.

(5) "Endorsement" means the seal attached to the license which authorizes a retailer to sell lottery on-line tickets at a fixed place of business.

(5) through (9) will remain the same but will be renumbered (6) through (10).

(11) "On-line ticket" means a lottery ticket printed by a terminal connected by a phone line to a computer."

Auth: Sec. 23-5-1007, MCA; IMP, Sec. 23-5-1016, MCA

REASON: This amendment is being proposed to add definitions for new terms associated with the implementation and operation of an on-line lottery system.

"8.127.406 RETAILER BONDING (1) The director will not require a bond of instant ticket or on-line retailers."

Auth: Sec. 23-5-1016, MCA; IMP, Sec. 23-5-1016, MCA

REASON: The amendment is being proposed to expand the rule to cover bonding of new on-line retailers.

"8.127.408 RETAILER DUTIES (1) Each retailer shall agree to actively promote the sale of all Montana lottery ~~tickets~~ products they are authorized to sell and to maintain a retailer manual, point-of-sale materials and displays in accordance with instructions of the director."

Auth: Sec. 23-5-1007, MCA; IMP, Sec. 23-5-1007, 23-5-1016, MCA

REASON: To expand the rule to contemplate multiple lottery products.

"8.127.611 REVOCATION OR SUSPENSION OF LICENSE/ENDORSEMENT (1) After notice, in writing, and hearing before the commission, the director shall revoke the license and endorsement of any person who has:

(a) through (d) will remain the same.

(2) The director may, after a hearing before the commission, suspend or revoke a license and/or endorsement for any of the following reasons:

(a) through (4) will remain the same."

Auth: Sec. 23-5-1007, MCA; IMP, Sec. 23-5-1016, MCA

REASON: To expand the rule to provide for suspension or revocation of on-line license endorsements.

"8.127.1201 PRIZES (1) through (4) will remain the same.

(5) The lottery may deny a claim for a winning instant or on-line ticket if:

(a) through (10) will remain the same.

(11) Prizes over $100,000 ~~shall~~ may be paid in equal yearly installments without interest over a period of not more than 20 years, as determined by the director. No installment may be less than $20,000.00.

(12) will remain the same."

Auth: Sec. 23-5-1007, MCA; IMP, Sec. 23-5-1007, 23-5-1022, MCA

3. The proposed new rule will read as follows:

"I ON-LINE ENDORSEMENT (1) The director may issue an on-line endorsement to a licensed retailer taking into consideration factors including, but not limited to:

(a) history of instant ticket sales;

(b) customer count;

(c) days and hours of operation;

(d) location relative to other on-line retailers.

(2) In order to receive an on-line endorsement a licensed retailer must enter into a formal agreement with the Montana lottery outlining the conditions associated with the installation and operation of an on-line lottery terminal."

Auth: Sec. 23-5-1007; IMP, Sec. 23-5-1007, 23-5-1016, MCA

REASON: To bring the lottery's rules into conformity with the Multi-State Lottery Association rules for on-line game "Lotto*America."

4. Interested persons may submit their data, views or arguments concerning the proposed amendments and adoption in writing to the Montana Lottery, 2525 North Montana, Helena, Montana 59620, no later than January 4, 1990.

5. If a person who is directly affected by the proposed amendments and adoption 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 Montana Lottery, 2525

North Montana, Helena, Montana 59620, no later than January 4, 1990.

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

MONTANA LOTTERY
SPENCER HEGSTAD, CHAIRMAN

BY: 
MICHAEL LETSON, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 27, 1989.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the proposed amendment of Rules 11.14.314 and 11.14.316 pertaining to group day care home health care requirements | ) ) ) ) ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 11.14.314 AND 11.14.316 PERTAINING TO GROUP DAY CARE HOME HEALTH CARE REQUIREMENTS |

TO: All Interested Persons

1. On January 4, 1990, at 10:00 a.m., a public hearing will be held in the conference room of the Department of Family Services, 48 North Last Chance Gulch, Helena, Montana, to consider the proposed amendment of Rules 11.14.314 and 11.14.316 pertaining to group day care home health care requirements.

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

11.14.314 FAMILY DAY CARE HOMES, HEALTH CARE REQUIREMENTS Subsection (1) remains the same.

(2) No child shall be admitted to a family day care home except in an emergency before obtaining from the parent the "Medical Record of Children Receiving Day Care" prescribed by the department stating that he is free from communicable disease and that he has been immunized or is in the process of being immunized against diphtheria, tetanus, polio, measles, rubella, and, if under five years of age, whooping cough. Any child with a history of measles is considered immunized. These requirements ~~would~~ may be waived only in the following cases: ~~case of~~

(a) the parent provides a signed statement by a physician indicating that immunizations would be contra-indicated for health reasons;or

(b) the parent provides a signed and notarized affidavit on a form prescribed by the department of health and environmental sciences stating that immunization is contrary to the religious tenets and practices of the signer.

(3) Such medical records for each child shall be kept on file at the home.~~for each child~~

Subsections (3) through (9) are renumbered (4) through (10), but otherwise remain the same.

AUTH: 53-4-503, MCA
IMP: 53-4-504, MCA

11.14.316 GROUP DAY CARE HOMES, HEALTH CARE REQUIREMENTS Subsection (1) remains the same.

(2) No child shall be admitted to a group day care home except in an emergency before obtaining from the parent the "Medical Record of Children Receiving Day Care" prescribed by

the department stating that he is free from communicable disease and that he has been immunized against diphtheria, tetanus, polio, measles, rubella, and, if under five years of age, whooping cough. Any child with a history of measles is considered immunized. These requirements ~~would~~ may be waived only in the following cases: ~~case of~~

(a) the parent provides a signed statement by a physician indicating that immunizations would be contra-indicated for health reasons; or

(b) the parent provides a signed and notarized affidavit on a form prescribed by the department of health and environmental sciences stating that immunization is contrary to the religious tenets and practices of the signer.

(3) Such medical records for each child shall be kept on file at the home ~~for each child~~.

Subsections (3) through (16) are renumbered (4) through (17), but otherwise remain the same.

AUTH: 53-4-503, MCA
IMP: 53-4-504, MCA

3. Rationale: The Department of Family Services relies upon the expertise of the Department of Health and Environmental Sciences (DHES) to provide advice regarding rules and regulations relating to health and medical issues for facilities that the department licenses. The 1989 legislature amended section 20-5-405, MCA, which delineates the DHES' legal position regarding immunization for school children. The Department of Family Services proposes to amend it's rules regarding immunization requirements for day care facilities to be commensurate with those of DHES.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Family Services, P.O. Box 8005, Helena, Montana, 59604, no later than January 5, 1990.

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

Director, Department of
Family Services

Certified to the Secretary of State 11 27 89, 1989.

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

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|---|---|
| In the matter of the amendment of rules 16.26.102 through 16.26.105, 16.26.302, 16.26.401 and 16.26.402 | NOTICE OF PROPOSED AMENDMENT OF RULES<br><br>NO PUBLIC HEARING CONTEMPLATED<br>(Women, Infants & Children) |

To: All Interested Persons

1. On January 15, 1990, the department proposes to amend rules 16.26.102 through 16.26.105, 16.26.302, 16.26.401 and 16.26.402 which set standards for implementation of the Women, Infants and Children (WIC) Program.

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

16.26.102 INCORPORATIONS BY REFERENCE (1) - (3) Same as existing rule.

(4) All of the incorporations by reference of federal agency rules are listed below by state rule number, together with the CFR edition date. This rule supersedes any specific references to editions of the CFR contained in other rules in this chapter.

| State Rule 16.26. | Federal Rule Incorporated 7 CFR . . . | CFR Edition Date |
|---|---|---|
| 103 | Parts 15, subparts A & B; Part 246; and Part 3015 | January 1, 1988~~9~~ |
| 105 | 246.4, 246.5, 246.10, 246.14(b) & (c); and Part 3015 | January 1, 1988~~9~~ |
| 201 | 246.5(a)-(e) | January 1, 1988~~9~~ |
| 202 | 246.6 | January 1, 1988~~9~~ |
| 203 | 246.5(d)(1) and 246.18 | January 1, 1988~~9~~ |
| 301 | 246.12(e)-(o) | January 1, 1988~~9~~ |
| 302 | 246.18 | January 1, 1988~~9~~ |
| 303 | 246.12(f) | January 1, 1988~~9~~ |
| 401 | 246.9 | January 1, 1988~~9~~ |
| 402 | 246.18 | January 1, 1988~~9~~ |

(5) Same as existing rule.
AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.26.103 PROGRAM ADMINISTRATION AND GUIDANCE (1) - (2) Same as existing rule.

(a) the "1988~~8~~90 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (~~July 1987~~ October 1989 edition), which is a comprehensive summary of applicable federal regulations (all of which are elsewhere incorporated in this chapter), procedures, and forms used by the department, and which is distributed to each participating local agency and is to be followed by each local agency in administering the program; and

(b) Same as existing rule.

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

(d) the "1988~~8~~90 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (~~July 1988~~ October 1989 edition), which is a department handbook setting forth procedures, practices, and forms used for the implementation of the federal WIC program in Montana.

(e) Same as existing rule.
AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.26.104 NUTRITION SERVICES STANDARDS (1) Standardized nutritional risk assessment procedures as developed and defined in "Nutritional Problems, Codes, Criteria and References for Public Health Nutrition Services" (December 1986 edition) and "Weighing and Measuring Children: A Training Manual for Supervisory Personnel" must be used by all participating local WIC agencies, in a form and manner prescribed by the department as included in the "1988~~8~~90 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (~~July 1987~~ October 1989 edition), which is a comprehensive summary of applicable federal regulations (all of which are elsewhere incorporated in this subchapter), procedures, and forms used by the department.

(2) Local agencies shall arrange for standard nutrition education contacts between local agencies and participating clients, which include appropriate type and number of contacts for high risk and lower risk participants as described in the "1988~~8~~90 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (~~July 1987~~ October 1989 edition), and shall utilize nutrition education materials which have met the criteria in "E.M.P.O.W.E.R. -- Evaluate Materials to Promote Optimal Use of WIC Education Resources" (April 1985 edition).

(3) Policies and procedures for authorizing specific WIC foods based on cost, availability, nutritional value, and participant acceptance are set forth in the "1988~~8~~90 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (~~July 1987~~ October 1989 edition).

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

(b) the "1988~~8~~90 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)"

(~~July 1987~~ October 1989 edition);

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

AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.26.105 DEFINITIONS (1) - (47) Same as existing rule.

(48) "State plan" means the "1988~~90~~ State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (~~July 1987~~ October 1989 edition), a plan of program operation and administration that describes the manner in which the department intends to implement and operate all aspects of program administration within its jurisdiction in accordance with 7 CFR 246.4.

(49) - (52)(e) Same as existing rule.

(f) the poverty income guidelines contained in volume ~~52~~ 54 of the Federal Register, issue ~~94 (May 15, 1987)~~ 89 (May 10, 1989);

(g) Same as existing rule.

(h) the "1988~~90~~ State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (~~July 1987~~ October 1989 edition), which is a comprehensive summary of applicable federal regulations, procedures, and forms used by the department.

(i) Same as existing rule.

AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.26.302 PERIODIC REVIEW AND DISQUALIFICATION OF FOOD VENDORS (1) The department (or local agency in consultation with the department), before re-authorization, shall conduct periodic reviews of the operations of participating food vendors. In conducting such reviews, the department or local agency may utilize an "educational buy" or a "compliance buy" as described in the "1988~~90~~ State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (~~July 1987~~ October 1989 edition), and shall consider the following:

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

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

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

(a) the "1988~~90~~ State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (~~July 1987~~ October 1989 edition), a comprehensive summary of applicable federal regulations, procedures, and forms used by the department; and

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

AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.26.401 APPEALS BY PROGRAM PARTICIPANTS (1) Same as existing rule.

(2) The processing of such requests and the conduct of such hearing shall be in accordance with 7 CFR 246.9 and applicable sections of the "1988~~90~~ State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children

(WIC)" (~~July 1987~~ October 1989 edition), a comprehensive summary of applicable federal regulations, procedures, and forms used by the department.

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

(b) the fair hearing requirements of the "1988~~7~~90 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (~~July 1987~~ October 1989 edition), a comprehensive summary of applicable federal regulations, procedures, and forms used by the department.

(c) Same as existing rule.

AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

16.26.402 APPEALS BY LOCAL AGENCIES AND FOOD VENDORS

(1) Same as existing rule.

(2) The issuance of notice of adverse action, the processing of fair hearing requests, and the conduct of such hearings shall be in accordance with the provisions of 7 CFR 246.18 and applicable sections of the "1988~~7~~90 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (~~July 1987~~ October 1989 edition).

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

(b) the fair hearing requirements for local agencies and food vendors set forth in the "1988~~7~~90 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (~~July 1987~~ October 1989 edition), a comprehensive summary of applicable federal regulations, procedures, and forms used by the department.

(c) Copies of 7 CFR 246.18 and the local agency and food vendor fair hearing provisions of the "1988~~7~~90 State Plan for Montana's Special Supplemental Food Program for Women, Infants and Children (WIC)" (~~July 1987~~ October 1989 edition) may be obtained from the Family/Maternal and Child Health Services Bureau, WIC Program, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.

AUTH: 50-1-202, MCA; IMP: 50-1-202, MCA

3. The proposed amendments are necessary to update the citations to the federal WIC regulations that are incorporated by reference and to adopt the most current version of the Montana WIC State Plan, which federal law requires to be revised annually.

4. Interested persons may submit their data, views, or arguments concerning the proposed amendments, in writing, to David L. Thomas, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than January 5, 1990.

5. If a party who is directly affected by the proposed amendments wishes to express her/his data, views, and arguments orally or in writing at a public hearing, s/he must make written request for a hearing and submit this request along with any written comments s/he has to David L. Thomas, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than January

5, 1990.

6. If the department receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendments; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not fewer than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. The department has determined that the number of persons representing 10% of the class of potentially affected persons is in excess of 25, based upon the number of participants in the WIC program and individuals involved in its administration.

DONALD E. PIZZINI, Director

Certified to the Secretary of State November 27, 1989.

BEFORE THE DEPARTMENT OF HIGHWAYS
OF THE STATE OF MONTANA

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| In the matter of the adoption of a rule providing requirements for convoy moves of oversize vehicles and the amendment of rules 18.8.510B, 18.8.511A, 18.8.515 and 18.8.602 concerning flag vehicles. | ) ) ) ) ) ) ) | NOTICE OF PUBLIC HEARING FOR PROPOSED ADOPTION OF RULE I AND PROPOSED AMENDMENTS TO RULES 18.8.510B, 18.8.511A, 18.8.515, AND 18.8.602 REGARDING CONVOY MOVES OF OVERSIZE VEHICLES AND FLAG VEHICLE REQUIREMENTS |

TO: All Interested Persons:

1. On January 9, 1990 at 10 A.M. a public hearing will be held in the auditorium of the Department of Highways building at 2701 Prospect Avenue in Helena, Montana, to consider the adoption of a rule regarding convoy moves of oversize vehicles and the amendment of rules regarding flag vehicles.

2. The proposed new rule would establish requirements for moving oversize vehicles in convoy and supplement 18.8.509(8), 18.8.510A, and 18.8.511A. The proposed amendments will establish uniformity for flag vehicles and flag persons, increase safety, and reduce operator costs.

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

RULE I CONVOY MOVES OF OVERSIZE VEHICLES (1) Overdimensional and overweight vehicles which require flag escorts may be moved in a convoy under the following restrictions.

(a) Overwidth vehicles may not exceed 14 feet wide for the main body of the load, or 15 feet wide including appurtances.

(b) Convoys may not exceed 5 overdimensional or overweight vehicles.

(c) Total length of any vehicle or combination of vehicles may not exceed 120 feet.

(d) There shall be a minimum of 500 feet and a maximum of 1000 feet between all vehicles in a convoy.

(e) One properly equipped escort vehicle is required at the front and rear of the convoy. In addition to the equipment required in 18.8.510A, each escort vehicle shall be equipped with a sign stating "Oversize Load Convoy Follows - (Number of) Vehicles" or Oversize Load Convoy Ahead - (Number of) Vehicles", as applicable.

(f) Loads operating under 18.8.602 conditions will be required to have a properly equipped flag person in each escort vehicle.

AUTH: 61-10-155, MCA; IMP.: 61-10-121 and 61-10-122, MCA.

4. The proposed amendments provide as follows:

18.8.510B REGULATIONS AND EQUIPMENT FOR VEHICLES OR LOADS EXCEEDING 10 FEET WIDE (1) A sign with the words "WIDE LOAD" or similar wording shall be mounted ~~a minimum of 8 feet above the surface of the highway on the towing vehicle and a minimum of 6 feet above the surface of the highway on the back of the trailing unit or load~~ at any visible height on the front and rear of the load. Letters shall not be less than 8 inches in height. The letters shall be dark in color on a light colored background.

(2) through (4) will remain the same.

AUTH: 61-10-155, MCA; IMP.: 61-10-121 and 61-10-122, MCA.

18.8.511A WHEN FLAG VEHICLES ARE REQUIRED (1) through (5) will remain the same.

(6) A flag vehicle is required at the rear when a vehicle or load exceeds ~~110~~ 120 feet in length on the interstate highway.

AUTH: 61-10-155, MCA; IMP.: 61-10-121 and 61-10-122, MCA.

18.8.515 REGULATIONS FOR MOVEMENT OF A LONG LOAD (1) Vehicles and combinations of vehicles exceeding 95 feet to and including 120 feet, but not exceeding the statutory width, are restricted to the following:

(a) Travel during daylight hours, 7 days a week, excluding holidays and holiday weekends, on all highways except those indicated on the "red route restrictions" map.

(b) A long load with a combined length, including towing vehicle, over 100 feet requires a flag vehicle at the rear of the combination and a "long load" sign displayed at the rear of the load when travelling on a two-lane highway. The power vehicle must maintain a minimum speed of 25 m.p.h. at all times.

(c) A long load with a combined length, including towing vehicle, over ~~110~~ 120 feet requires a flag vehicle at the rear of the combination and a "long load" sign displayed at the rear of the load when travelling on an interstate highway. The power vehicle must maintain a minimum speed of 25 m.p.h. at all times.

(2) through (3) will remain the same.

AUTH: 61-10-155, MCA; IMP.: 61-10-121 and 61-10-122, MCA.

18.8.602 CONDITIONS IMPOSED FOR MAXIMUM WEIGHT

(1) When required by weight analysis, a maximum speed limit of 55 miles per hour on the interstate and 45 miles per hour on two-lane highways is imposed unless a slower speed is required.

(2) When required by weight analysis, where speed is restricted across an interstate structure, ~~there must be two rear flag vehicles. There must be a front and rear flag vehicle for an overweight permitted load where a speed restriction is imposed for travel across structures on primary and secondary highways.~~ the vehicle may remain in its traffic lane and normal traffic will be allowed to pass. Only one overweight vehicle may be allowed on the structure at a time.

(3) On primary and secondary highways, two flag vehicles or one flag vehicle and one flag person, equipped with orange vest and proper signs, are required when speed restrictions over structures are imposed.

~~(3)~~ (4) Before crossing any structure or structures, except interstate structures, the hauling unit shall come to a complete stop approximately 50 feet from the end of the structure. After flag vehicles or flag persons have stopped all traffic onto the structure, the overweight vehicle shall proceed at a speed not to exceed 5 miles per hour with the center of the unit directly over the centerline of the roadway of the structure. There shall be no alteration of the speed (changing of gears) while on the structure or approach. ~~(4)~~ Flag vehicles or flag persons shall not permit any other traffic on the structure until the overloaded vehicle is off the structure.

(5) through (6) will remain the same.

AUTH: 61-10-155, MCA; IMP.: 61-10-121 and 61-10-122, MCA.

5. The department proposes to adopt rule I because of complaints from the trucking industry that current rules are too restrictive and add unnecessary expenses to oversize moves. The department has considered their concerns and proposes the adoption of this rule to decrease the number of flag cars required, to require the flag cars it believes are necessary, and to conform its rules more closely with the requirements of neighboring states. The department is proposing the amendments to 18.8.510B, 18.8.511A, 18.8.515 and 18.8.602 to make the flag vehicle and flag person requirements uniform throughout Chapter 8 of Title 18, for safety of the travelling public, and to reduce the cost to overdimensional vehicle operators.

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

David A. Galt, Acting Administrator, G.V.W. Division, Box 4639, Helena, MT 59604, no later than January 8, 1990.

7. Kelly O'Sullivan, Assistant Attorney General, has been designated to preside over and conduct the hearing.

Larry W. Larsen, P.E.
Director of Highways

By: Larry W. Larsen

Certified to the Secretary of State November 27, 1989.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

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| IN THE MATTER OF THE REPEAL of ARM 42.18.101; 42.18.102; 42.18.103; and 42.18.104 and ADOPTION of Rules I through VIII for Property Tax - Reappraisal Plan. | ) ) ) ) ) ) ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED REPEAL of ARM 42.18.101; 42.18.102; 42.18.103 and 42.18.104 and PROPOSED ADOPTION of Rules I through VIII for Property Tax - Reappraisal Plan. |

TO: All Interested Persons:

1. On January 3, 1990, at 9:00 a.m., a public hearing will be held in Room 104 of the Employment Security Division, Department of Labor & Industry, Lockey and Roberts Streets, Helena, Montana, to consider the repeal and adoption of rules for property tax - reappraisal plan.

2. The administrative rules to be repealed are found on pages 42-1805 through 42-1809 and are as follows:

42.18.101 MONTANA APPRAISAL PLAN
(AUTH: Sec. 15-1-201 MCA; IMP, Sec. 15-7-111 MCA.)

42.18.102 RESIDENTIAL AND COMMERCIAL APPRAISAL PLAN
(AUTH: Sec. 15-1-201 MCA; IMP, Sec. 15-7-111 MCA.)

42.18.103 AGRICULTURAL AND TIMBER APPRAISAL PLAN
(AUTH: Sec. 15-1-201 MCA; IMP, Sec. 15-7-111 MCA.)

42.18.104 INDUSTRIAL APPRAISAL PLAN
(AUTH: 15-1-201 MCA; IMP, Sec. 15-7-111 MCA.)

3. The proposed new rules are as follows:

RULE I MONTANA REAPPRAISAL PLAN (1) The Montana Reappraisal Plan consists of seven parts: residential appraisal, commercial appraisal, agricultural and timber appraisal, industrial appraisal, certification and training requirements, manuals, and progress reporting. The Montana Reappraisal Plan implements the Legislature's cyclical reappraisal program and the annual sales assessment ratio adjustments set forth in 15-7-111, MCA.

(2) The Montana Reappraisal Plan provides for the valuation of residential property, commercial property, agricultural and timberland property, and industrial property. A new computer assisted mass appraisal system (CAMAS) will be implemented to assist in the valuation process. The Department will determine a new appraised value for each parcel of land, each residential improvement, each commercial improvement, each agricultural improvement, and each industrial improvement by

December 31, 1992. Existing agricultural land valuation schedules will be reviewed and updated, as provided in 15-7-201, MCA. Taxpayers will receive a notification of their new appraised value by April 30, 1993. Taxpayer review and appeal of the new values will take place during tax year 1993. The Department will enter the new appraised values on the tax rolls for tax year 1994. (AUTH: Sec. 15-1-201, MCA; IMP, Secs. 15-7-111 and 15-7-133, MCA).

RULE II RESIDENTIAL APPRAISAL PLAN (1) The reappraisal of residential property consists of limited field reviews; comprehensive field reviews; residential property data conversion and collection; the collection, verification and analysis of sales information; the data entry of land, improvements and sales information; the development and review of computer assisted land pricing (CALP) models; the development of market models/benchmarking; the generation and review of inventory contents sheet; and a final determination of values. Multiple field reviews of each property will be kept to an absolute minimum. Workplans must reflect that position.

(2) Limited field reviews were conducted from January 1, 1987 through December 31, 1989. Limited field review of residential property consists of an external observation to determine accuracy of existing information on the property record card; to observe condition; to review grade and depreciation assignment; and collect additional data required to implement CAMAS. After May 1, 1989, limited field reviews will only be undertaken when a comprehensive field review or an inventory contents sheet review is not contemplated.

(3) Comprehensive field reviews will be conducted from January 1, 1989 through June 30, 1990. Appraisal staff will identify specific areas of the county where the data is questionable. The comprehensive field review consists of an internal inspection, when possible, and external inspection of the residential property. No call-backs will be made to the property unless specifically requested by the taxpayer, the appraisal supervisor, or area manager.

(4) Residential property data conversion and collection consists of electronically moving all residential property data which currently resides on the Department of Administration mainframe computer to the Department of Revenue computer. The conversion and collection process will also include the review of edits which result from the conversion process; the addition of supplementary data to the new computer assisted appraisal system; and sketch vectoring.

(5) The collection, verification, analysis and data entry of sales information is an important component of CAMAS. Procedures for collection, verification, and validation of sales information shall be formulated by the Department of Revenue. Accuracy of sales information is critical to the development of accurate sales assessment ratio studies, annual appraisal updates; to land valuation; to benchmarking; to the development of accurate market models; to individual property final value determinations; and to the defense of final value estimates.

(6) Residential lots and tracts are valued through the use of computer assisted land pricing (CALP) models. Homogeneous areas within each county are geographically defined as a neighborhood. The CALP models are initially developed using 1987 or a more current year base land data and sales information. During subsequent years, sales information will be analyzed and an ongoing review of the CALP models will be made. The review of the CALP models will take place from January 1 through January 31 of each year. The review will determine whether each CALP model is accurate or requires adjustment.

(7) The development of market models using CAMAS is a requirement for property valuation during the reappraisal cycle. The key components that influence value and the appropriate level of influence are determined through use of multiple regression analysis. A primary market model template will be developed. Appraisal staff will develop separate market models for each neighborhood following the primary market model template.

(8) Inventory contents sheets are generated and reviewed by appraisal staff. The sheets include component information, sales information, basic ownership information, and valuation information. The review will consist of analyzing and collecting component information such as condition, desirability and utility (CDU) factors and style of improvements. The review of the improvements is limited to an exterior inspection. The review is the first opportunity for the appraiser to review and compare property information to an estimate of value. Discrepancies in data or the collection of additional information required by the review will result in the update of CAMAS data. The addition or refinement of existing data results in a more accurate valuation estimate.

(9) A final determination of values is conducted once all required field and program needs of the new computer assisted appraisal system are met. The appraised value for residential property may include indicators of value using: the cost approach and the market data approach. The appraised value supported by defensible market data, when available, serves as the value for ad valorem tax purposes. (AUTH: Sec. 15-1-201, MCA; IMP, Sec. 15-7-111, MCA).

RULE III COMMERCIAL APPRAISAL PLAN (1) The reappraisal of commercial property consists of limited field reviews; comprehensive field reviews; data conversion and collection; collection, verification and analysis of sales and income information; data entry of sales and income information; development and review of computer assisted land pricing (CALP) models; development of market and income models/benchmarking; generation and review of inventory contents sheet; and a final determination of values. Multiple field reviews will be kept to an absolute minimum. Workplans must reflect that position.

(2) Limited field reviews were conducted from January 1, 1987 through December 31, 1989. Limited field review of commercial property consists of an external observation to determine accuracy of existing information on the property

record card; to observe condition; to review depreciation assignment; and to collect additional data required to implement CAMAS. After May 1, 1989, limited field reviews will only be undertaken when a comprehensive field review or an inventory contents sheet review is not contemplated.

(3) Comprehensive field reviews will be conducted from January 1, 1989 through June 30, 1990. Appraisal staff will identify specific areas of the county where the data is questionable. The comprehensive field review consists of an internal inspection and external inspection of the commercial property. No call-backs will be made to the property unless specifically requested by the taxpayer, the appraisal supervisor, or area manager.

(4) Commercial property data conversion and collection consists of entering commercial property data to the Department of Revenue computer.

(5) The collection, verification, analysis and data entry of sales and income information is an important component of CAMAS. Procedures for collection, verification, and validation of sales and income information shall be formulated by the Department of Revenue. Accuracy of sales information and income information is critical to accurate sales assessment ratio studies for annual appraisal updates; land valuation; to benchmarking; to the development of accurate market and income models; to individual property final value determinations; and to the defense of final value estimates.

(6) Commercial lots and tracts are valued through the use of computer assisted land pricing (CALP) models. Homogeneous areas within each county are geographically defined as a neighborhood. The CALP models are initially developed using 1987 or a more current year base land data and sales information. During subsequent years, sales information will be analyzed and an ongoing review of the CALP models will be made. The review of the CALP models will take place from January 1 through January 31 of each year. The review will determine whether each CALP model is accurate or requires adjustment.

(7) The development of market and income models using CAMAS is a requirement for property valuation during the reappraisal cycle. The key components that influence value and the appropriate level of influence are determined through use of multiple regression analysis. Primary market and income model templates will be developed. Appraisal staff will develop separate market and income models for each neighborhood following the primary market and income model templates.

(8) Inventory contents sheets are generated and reviewed by appraisal staff. The inventory contents sheets includes component information, income information, sales information, basic ownership information, and valuation information. The review will consist of analyzing and collecting component information. The review of the improvements is limited to an exterior inspection. The review is the first opportunity for the appraiser to review and compare property information to an estimate of value. Discrepancies in data or the collection of additional information required by the review will result in the

update of CAMAS data. The addition or refinement of existing data results in a more accurate valuation estimate.

(9) A final determination of values is conducted once all required field and program needs of CAMAS are met. The appraisal value for commercial property may include indicators of value using: the cost approach, the market data approach, and the income approach. The appraisal value supported by the most defensible valuation information serves as the value for ad valorem tax purposes. (AUTH: Sec. 15-1-201, MCA; IMP, Sec. 15-7-111, MCA).

RULE IV AGRICULTURAL/TIMBER APPRAISAL PLAN

(1) Agricultural and timber lands are valued in accordance with administrative rules adopted by the Department of Revenue. Use changes are kept current annually on both agricultural and timber land. For agricultural land the valuation methodology and agricultural land valuation schedules are developed in accordance with 15-7-201, MCA. The methodology for valuation of timber land will not change; lumber values minus logging costs are applied to stand volume tables to value the standing timber. The land under the timber is valued according to its grazing capacity. The timber values are based on data for the period January 1, 1987 through December 31, 1991. Agricultural and timber land will be put on the tax rolls for tax year 1994.

(2) The appraisal of agricultural/timber property consists of limited field reviews; comprehensive field reviews of agricultural/timber improvements; agricultural/timber property data conversion and collection; the data entry of agricultural/timber information; the generation and review of inventory contents sheet; and a final determination of values. Multiple field reviews of each property will be kept to an absolute minimum. Workplans must reflect that position.

(3) Limited field reviews were conducted from January 1, 1987 through December 31, 1989. Limited field review consists of an external observation to determine accuracy of existing information on the property record card; to observe condition; to review grade and depreciation assignment; to review agricultural and timberland classification; and to collect additional data required to implement CAMAS. After May 1, 1989, limited field reviews will only be undertaken when a comprehensive field review or an inventory contents sheet review is not contemplated.

(4) Comprehensive field reviews will be conducted from January 1, 1989 through June 30, 1990. Appraisal staff will identify specific areas of the county where the data is questionable. The comprehensive field review consists of an internal inspection, when possible, and external inspection of the agricultural timber improvements. No call-backs will be made to the property unless specifically requested by the taxpayer, the appraisal supervisor or the area manager.

(5) Agricultural/timber property data conversion and collection consists of electronically moving all agricultural property data to the Department of Revenue computer. The conversion and collection process also consists of reviewing

edits which result from the conversion process, the manual entry of agricultural land information to the Department of Revenue computer, the addition of improvement data (outbuildings and residences) to CAMAS; and sketch vectoring.

(6) Inventory contents sheets are generated and reviewed by appraisal staff. The inventory contents sheets include component information for agricultural/timber improvements; productivity information for agricultural land; classification information for timberland; basic ownership information; and valuation information. The review consists of analyzing, collecting component information on improvements; reviewing productivity information on agricultural land; and classification criteria on timberland. The review is the first opportunity for the appraiser to review and compare property information to an estimate of value. Discrepancies in data or the collection of additional information required by the review will result in the update of data on CAMAS. The addition or refinement of existing data results in a more accurate valuation estimate.

(7) A final determination of values is conducted once all required field and program needs of CAMAS are met. The appraised value for agricultural/timber property improvements includes an estimate of value using the cost approach and, when possible, the market data approach. (AUTH: Sec. 15-1-201, MCA; IMP, Sec. 15-7-111, MCA).

RULE V INDUSTRIAL PROPERTY APPRAISAL (1) Approximately 1,500 industrial properties are appraised by industrial appraisers and the resulting appraised values are distributed to the appropriate county appraisal/assessment offices. Each industrial property will be appraised prior to December 31, 1992.

(2) Industrial property will be valued as an entity. For valuation methodology, the Department will rely upon ARM 42.22.1304 through 42.22.1310. The industrial appraisal bureau will be responsible for valuing industrial property as that concept is defined in ARM 42.22.1301, 42.22.1302, and 42.22.1303. (AUTH: Sec. 15-1-201, MCA; IMP, Sec. 15-7-111, MCA).

RULE VI CERTIFICATION AND TRAINING REQUIREMENTS (1) Residential and commercial appraisers are required to be certified in accordance with ARM 42.18.201 and ARM 42.18.202. Agricultural and timber appraisers/classifiers are required to be certified in accordance with ARM 42.18.203. Industrial appraisers are required to be certified in accordance with ARM 42.18.204.

(2) Instruction is required for employees capturing agricultural data. Instruction will be given at the county offices. Training began on January 1, 1989 and concludes on March 31, 1990.

(3) The first phase of training for CAMAS is on residential valuation and system administration. This training session prepares staff to use the computer terminals and

computerized files. This training will teach staff to create individual property files, update component listings, review 1982 base year cost values, update and delete records, and backup, store and process data on the computer file. This training began on July 10, 1989.

(4) Designated appraisal staff will attend a second phase, one week long, on residential valuation for reappraisal, use of the cost approach, system reporting features, development of market models and computer assisted land pricing (CALP) models. This will prepare the appraisal staff to use CAMAS for accomplishing reappraisal. The appraiser will learn how to develop both the cost approach and the market data approach for each property. This training began on September 11, 1989 and will continue until the designated staff is trained.

(5) The third phase is a one week session covering commercial/industrial data entry and data management, use of the commercial cost approach, review of CALP modeling and residential market valuation. This training will begin on December 4, 1989.

(6) The fourth and final phase is a one week session on commercial valuation for reappraisal and the collection, analysis and input of commercial property income/expense information. The instruction will also include an overview of prior training sessions. This training session will begin on January 2, 1990.

(7) The firm of Cole, Layer and Trumble Co. is providing training in the use of CAMAS to 25 division employees. These 25 employees will serve as trainers for the remainder of the field staff. Approximately 100 individuals will receive training at the Property Assessment Division office in Helena, Montana. Employees trained in Helena will return to their offices and provide training for the remainder of the staff. (AUTH: Sec. 15-1-201, MCA; IMP, Sec. 15-7-111, MCA).

RULE VII MANUALS (1) For residential and agricultural/timber new construction, the January 1, 1982 Montana Appraisal Manual will be used through tax year 1993. For reappraisal, the Montana Appraisal Manual developed by the firm of Cole, Layer and Trumble Co. will be used. The cost base schedules will initially reflect 1987 cost information. Those cost schedules will be reviewed and if necessary updated on an annual basis to reflect current cost conditions specific to Montana. The final review and update of that cost appraisal manual will be made effective January 1, 1992.

(2) For commercial new construction and industrial property the January 1, 1982 Marshall Valuation Service Manual will be used if the property is listed. If not, other construction cost manuals such as Boeckh or Means will be used with a publication date as close to Marshall Valuation Service as possible. For reappraisal, the Montana Appraisal Manual developed by the firm of Cole, Layer and Trumble Co. will be used if the property is listed. If not, other construction cost manuals such as Boeckh or Means will be used with a publication date as close as possible to the Montana Appraisal Manual

developed by the firm of Cole, Layer and Trumble Company. The cost base schedules will initially reflect 1987 cost information. Those cost schedules will be reviewed and if necessary updated on an annual basis to reflect current cost conditions specific to Montana. The final review and update of that cost appraisal manual will be made effective January 1, 1992. (AUTH: Sec. 15-1-201, MCA; IMP, Sec. 15-7-111, MCA).

RULE VIII PROGRESS REPORTING (1) Daily work progress reports will be completed and submitted monthly by each county appraisal office. The work progress reports will assess planned performance against actual accomplishments, and identify those factors that directly affect the appraisal performance in any given month. Movement of staff between counties or permanent reallocation of staff will be considered to ensure work is completed on schedule. The work progress reporting forms will be provided to the offices by the Department.

(2) Workplans, which identify the task assignments required to complete reappraisal, will be developed for each staff member. The workplans must identify at a minimum all task assignments identified in the Montana Reappraisal Plan.

(3) County progress report information is summarized each month and shall be available by the third week of the following month for use in making presentations before the Revenue Oversight Committee. (AUTH: Sec. 15-1-201, MCA; IMP, Sec. 15-7-111, MCA).

4. The repeal of ARM 42.18.101; 42.18.102; 42.18.103 and 42.18.104 is necessary because the current Montana appraisal plan is outdated and obsolete.

5. The new rules are proposed to implement the new appraisal plan which complies with the legislative mandate to have a current appraisal plan in place by 1993.

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

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

no later than January 5, 1990.

7. David W. Woodgerd, Chief Legal Counsel, Department of Revenue, Office of Legal Affairs, has been designated to preside over and conduct the hearing.

DENIS ADAMS, Director
Department of Revenue

Certified to Secretary of State November 27, 1989.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

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| IN THE MATTER OF THE REPEAL of ARM 42.20.401; 42.20.404; 42.20.407; 42.20.410; 42.20.413; 42.20.416; and 42.20.419 and ADOPTION of Rules I through VI for Property Tax - Sales Assessment Ratio. | NOTICE OF PUBLIC HEARING ON THE PROPOSED REPEAL of ARM 42.20.401; 42.20.404; 42.20.407; 42.20.410; 42.20.413; 42.20.416 and 42.20.419 and PROPOSED ADOPTION of Rules I through VI for Property Tax - Sales Assessment Ratio. |

TO: All Interested Persons:

1. On January 3, 1990, at 1:30 p.m., a public hearing will be held in Room 104 of the Employment Security Division, Department of Labor & Industry, Lockey and Roberts Streets, Helena, Montana, to consider the repeal and adoption of rules for property tax - sales assessment ratio.

2. The administrative rules to be repealed are found on pages 42-2075 through 42-2082 and are as follows:

42.20.401 LIMITATION ON CHANGING PROPERTY VALUE
(AUTH, Sec. 15-1-201 MCA; IMP, Secs. 15-7-111, 15-10-411 and 15-10-412 MCA.)

42.20.404 CRITERIA FOR REDUCING PROPERTY VALUE
(AUTH, Sec. 15-1-201 MCA; IMP, Secs. 15-7-111, 15-10-411 and 15-10-412 MCA.)

42.20.407 PROCEDURE FOR VALIDATING SALES INFORMATION
(AUTH, Sec. 15-1-201 MCA; IMP, Secs. 15-7-111, 15-10-411 and 15-10-412 MCA.)

42.20.410 STRATIFIED SALES ASSESSMENT RATIO STUDY
(AUTH, Sec. 15-1-201 MCA; IMP, Secs. 15-7-111, 15-10-411 and 15-10-412 MCA.)

42.20.413 DIVISION OF PROPERTY INTO STRATUM
(AUTH, Sec. 15-1-201 MCA; IMP, Secs. 15-7-111, 15-10-411 and 15-10-512 MCA.)

42.20.416 APPLICABILITY OF PROPERTY VALUE ADJUSTMENTS
(AUTH, Sec. 15-1-201 MCA; IMP, Secs. 15-7-111, 15-10-411 and 15-10-412 MCA.)

42.20.419 PERCENTAGE ADJUSTMENTS FOR THE 1988 TAX YEAR
(AUTH, Sec. 15-1-201 MCA; IMP, Secs. 15-7-111, 15-10-411 and 15-10-412 MCA,(

3. New rules as proposed by the department are as follows:

RULE I PROPERTY VALUE ADJUSTMENTS (1) The department shall increase or decrease the value of individual taxable properties as the result of the completion of the stratified sales assessment ratio study required under 15-7-111(4), MCA. AUTH, 15-1-201 MCA; IMP, 15-7-111, 15-10-411 and 15-10-412 MCA.

RULE II CRITERIA FOR REDUCING OR INCREASING PROPERTY VALUE (1) When a stratified sales assessment ratio study conducted under 15-7-111(4), MCA, establishes an assessment level of greater than 105% or less than 95% for residential property or for commercial property within a sales assessment area, the department shall independently adjust residential property values or commercial property values in those identified sales assessment areas to common value of 1 by multiplying property values by the percentage adjustment calculated in (2) of this rule.

(2) The department shall make percentage adjustments rounded to the nearest whole number to coincide with the estimated assessment level from the following table:

ASSESSMENT LEVEL (Expressed as a Decimal)

| From | To | Percentage Adjustment |
|---|---|---|
| .7491 | .7547 | 133% |
| .7548 | .7604 | 132% |
| .7605 | .7663 | 131% |
| .7664 | .7722 | 130% |
| .7723 | .7782 | 129% |
| .7783 | .7843 | 128% |
| .7844 | .7905 | 127% |
| .7906 | .7968 | 126% |
| .7969 | .8032 | 125% |
| .8033 | .8097 | 124% |
| .8098 | .8163 | 123% |
| .8164 | .8230 | 122% |
| .8231 | .8299 | 121% |
| .8300 | .8368 | 120% |
| .8369 | .8439 | 119% |
| .8440 | .8511 | 118% |
| .8512 | .8584 | 117% |
| .8585 | .8658 | 116% |
| .8659 | .8734 | 115% |
| .8735 | .8810 | 114% |
| .8811 | .8889 | 113% |
| .8890 | .8969 | 112% |
| .8970 | .9050 | 111% |
| .9051 | .9132 | 110% |
| .9133 | .9217 | 109% |
| .9218 | .9302 | 108% |
| .9303 | .9390 | 107% |
| .9391 | .9479 | 106% |
| .9480 | .9569 | 100% |
| .9570 | .9662 | 100% |

| | | |
|---|---|---|
| .9663 | .9756 | 100% |
| .9756 | .9852 | 100% |
| .9853 | .9950 | 100% |
| .9951 | 1.0050 | 100% |
| 1.0051 | 1.0152 | 100% |
| 1.0153 | 1.0256 | 100% |
| 1.0257 | 1.0362 | 100% |
| 1.0363 | 1.0471 | 100% |
| 1.0472 | 1.0582 | 100% |
| 1.0583 | 1.0695 | 94% |
| 1.0696 | 1.0811 | 93% |
| 1.0812 | 1.0929 | 92% |
| 1.0930 | 1.1050 | 91% |
| 1.1051 | 1.1173 | 90% |
| 1.1174 | 1.1300 | 89% |
| 1.1301 | 1.1429 | 88% |
| 1.1430 | 1.1561 | 87% |
| 1.1562 | 1.1696 | 86% |
| 1.1697 | 1.1835 | 85% |
| 1.1836 | 1.1976 | 84% |
| 1.1977 | 1.2121 | 83% |
| 1.2122 | 1.2270 | 82% |
| 1.2271 | 1.2423 | 81% |
| 1.2424 | 1.2579 | 80% |

(3) The department shall not adjust property values if the stratified sales assessment ratio study establishes an area sales assessment ratio between 95% and 105% of common value 1. AUTH, 15-1-201, MCA; IMP, 15-7-111, MCA.

RULE III PROCEDURE FOR VALIDATING SALES INFORMATION

(1) In conducting the stratified sales assessment ratio study, the department shall compile sales information from realty transfer certificates. Department staff who did not participate in the determination of appraised values will validate such sales information as required by 15-7-111(7), MCA. For purposes of this rule, "department staff who did not participate in the determination of appraised values" means: department staff who did not complete the appraisal of the sold property. The department shall review each sale transaction evidenced by a realty transfer certificate to determine whether a sale was a valid, arms-length transaction. For the purposes of this rule, "valid, arms-length transaction" means: a sale of real estate not affected by unreasonable or unusual personal influence or control, as defined in literature prepared by the International Association of Assessing Officers.

(2) The following sales transactions shall be excluded from the stratified sales assessment ratio study:

(a) a sale of agricultural or timber land;

(b) a sale in which the purchaser or seller is the United States of America, a state, a county, a municipality, or an instrumentality, agency, or political subdivision thereof, or a public utility;

(c) a sale that is recorded to confirm, correct, modify

or supplement a previously recorded instrument;

(d) a sale pursuant to a court decree;

(e) a sale pursuant to a merger, consolidation, or reorganization of a corporation, partnership, or other business entity;

(f) a sale between affiliated corporations or between shareholders and the corporation;

(g) a sale of a decedent's estate;

(h) a sale constituting a gift;

(i) a sale between a husband and wife or a parent and child or other family member with only nominal actual consideration;

(j) a sale transferring property to the same party or parties;

(k) a sale of delinquent taxes, sheriff's sale, bankruptcy sale, mortgage foreclosure, or premature liquidation of property;

(l) a sale made in contemplation of death;

(m) a sale of tax exempt property;

(n) a sale of multiple parcels of property; and royalty interest or an assignment of interest.

(3) The department may verify sales information by submitting to the parties participating in a sale transaction the sale verification form. Completion of the sales verification form may be accomplished during on-site discussions with the buyer or seller, or through telephone conversation or written correspondence with the buyer or seller, or their representative. Additionally, the department may secure information from the lending institution involved in the sale for purposes of verifying the terms and conditions of the sale. AUTH, 15-1-201 MCA; IMP, 15-7-111 MCA.

RULE IV DETERMINATION OF AREAS (1) Sales assessment areas shall be defined by the department of revenue in accordance with 15-7-111(6), MCA. Area designations may include geographic regions which are not contiguous. The department of revenue may analyze any of the following information in addition to other appropriate information by county and municipality to help identify and ensure the economic and demographic homogeneity of areas:

(a) Population;

(b) Employment;

(c) Income;

(d) Service availability and infrastructure;

(e) Multiple listing service designations;

(f) Zoning and planning board designations;

(g) Proximity to employment/business center; and

(h) Proximity to federal parks and reservations.

(2) The availability of statistically sufficient number of sales will be the final ingredient in determining area boundaries. AUTH, 15-1-201, MCA; IMP, 15-7-111, MCA.

RULE V DIVISION OF PROPERTY INTO STRATUM (1) For

purposes of conducting sales assessment ratio studies, the term "stratum" is defined to be:

(a) all residential land and improvements and all agricultural 1 - acre homesites and improvements within a designated area; and

(b) all commercial land and improvements within a designated area. AUTH, 15-1-201, MCA; IMP 15-7-111, MCA.

RULE VI APPLICABILITY OF PROPERTY VALUE ADJUSTMENTS

(1) The Department shall notify the counties of any change of property values required under 15-7-111, MCA, on or before the date which the department notifies the counties of the valuation of all property under the provisions of 15-8-706 and 15-10-301, MCA. AUTH, 15-1-201, MCA; IMP, 15-7-111, MCA.

4. The repeal of ARM 42.20.401; 42.20.404, 42.20.407; 42.20.410; 42.20.413; 42.20.416; and 42.20.419 is necessary because the 1989 Legislature substantially amended the sales assessment ratio study language in 15-7-111, MCA.

5. The new rules are proposed to implement the new statutory language. The proposed rules identify the general methodology the department will employ to comply with the amendments to 15-7-111, MCA.

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

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

no later than January 5, 1990.

7. David W. Woodgerd, Chief Legal Counsel, Department of Revenue, Office of Legal Affairs, has been designated to preside over and conduct the hearing.

DENIS ADAMS, Director
Department of Revenue

Certified to Secretary of State November 27, 1989.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

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|---|---|
| IN THE MATTER OF THE AMENDMENT of ARM 42.23.117 relating to a Surtax for Corporations. | NOTICE OF PROPOSED AMENDMENT of ARM 42.23.117 relating to a Surtax for Corporations. |

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On January 15, 1990, the Department of Revenue proposes to amend ARM 42.23.117 relating to a Surtax for Corporations.

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

42.23.117 SURTAX (1) All corporations filing Montana corporate license or Montana corporate income tax returns for years beginning on or after January 1, 1988 but before December 31, 1988, shall pay an additional four percent (.04) surtax. The surtax is calculated by multiplying the otherwise calculated Montana tax liability by four percent (.04) to arrive at the surtax. The surtax is in addition to the regular tax liability and also applies to the $50 minimum corporation license tax.

(2) All corporations filing Montana corporate license or Montana corporate income tax returns for years beginning on or after January 1, 1990 but before January 1, 1991, shall pay an additional five percent (.05) surtax. The surtax is calculated and applies as provided in (1). (AUTH. Sec. 15-31-501 MCA; IMP, Sec. 15-31-121 MCA.)

3. This rule needs to be amended to provide an effective date and termination date for the surtax that was approved in HB 28 during the 1989 special legislative session. In addition, clarification must be made as to whether the surtax applies to the minimum tax.

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

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

no later than January 5, 1990.

5. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Cleo Anderson at the above address no later than January 5, 1990.

6. If the agency receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the Legislature; from a governmental subdivision, or agency; or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 25.

DENIS ADAMS, Director
Department of Revenue

Certified to Secretary of State November 27, 1989.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF ATHLETICS

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|---|---|---|
| In the matter of the amendment of rules pertaining to boxing contestants, down, fouls and appeals | ) ) ) ) | NOTICE OF AMENDMENT OF 8.8. 2901, 8.8.3105, 8.8.3107, 8.8.3108 PERTAINING TO ATHLETICS |

TO: All Interested Persons:

1. On August 31, 1989, the Board of Athletics published a notice of proposed amendment of the above-stated rules at page 1254, 1989 Montana Administrative Register, issue number 16.

2. The Board has amended ARM 8.8.2901, 8.8.3107 and 8.8.3108 exactly as proposed. The Board has amended 8.8.3105 as proposed but with the following change:

"8.8.3105 DOWN (1) through (7) will remain as proposed.

(8) When a contestant is "down" his opponent shall retire to the farthest neutral corner designated by the referee and remain there until the count is completed. Should he fail to do so, the referee may cease counting until he has so retired.

(9) will remain the same."

Auth: Sec. 23-3-405, MCA; IMP, Sec. 23-3-405, MCA

3. The Board decided to leave the words "farthest neutral" corner in the rule. Subsection (9) is not being amended but was inadvertently omitted in the original notice.

4. No comments or testimony were received.

BOARD OF ATHLETICS
JOHN R. HALSETH, M.D., CHAIRMAN

BY: _____
MICHAEL L. LETSON, DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 27, 1989.

BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of proposed amendment of Rule 8.86.301 (6)(b), (g)(i)(B) and (C) as it relates to class I resale pricing formula | ) | NOTICE OF AMENDMENT OF RULE 8.86.301(6)(b,(g)(i)(B) and (C) |
| | ) | PRICING RULES |
| | ) | DOCKET #93-89 |

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

1. On June 15, 1989, the Montana board of milk control published notice of a proposed amendment of rule 8.86.301(6)(b), (g)(i)(B) and (C) relating to the class I resale pricing formula. Notice was published at page 710 of the 1989 Montana Administrative Register, issue No. 11, as MAR Notice No. 8-86-32.

2. Hearing on the proposal was held July 17, 1989, at 9:00 a.m. in the Department of Highway's auditorium in Helena, Montana. Eleven persons appeared at the hearing to offer testimony and comment on the proposed rule amendments. Eight persons spoke in favor of the proposed rule amendments. No one in opposition. Three interested persons participated.

3. After thoroughly considering all of the testimony received, the board is adopting the proposed rule amendments with the following changes. (new matter underlined, deleted matter interlined)

"8.86.301 PRICING RULES

(1) through (6)(g)(i)(A) remain the same as before proposed.

(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 per billing period.

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

(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~~ quantity will be five hundred (500) gallons per billing period.

(h) . . ."

4. This amendment is to be effective April 1, 1990.

5. The authority for the board to amend the rule is in section 81-23-302, MCA, and the rule and amendments implement section 81-23-302, MCA.

6. The principal reason for the adoption of the amendments of the rule was that there have been numerous violations of the $150.00 and the 500 gallon minimum requirements as they pertain to drop shipment and dock pricing respectively. The rule provisions in their present form were essentially unenforceable. The board felt that lowering the volume requirements would result in more compliance with the law.

7. The principal reason against the adoption of the new amendment was the additional cost of delivering the smaller volumes justifies the $150.00 and 500 gallon minimums.

8. Principal reasons for rejecting this argument were as follows:

(a) The board did not feel that the additional cost of delivery was compelling when the minimums were being systematically circumvented.

(b) The present price level with volume discounts is impossible to enforce.

(c) Lowering volume requirements would put small and independent retailers in a more competitive position with large chains.

9. The board denied the petitioners request to amend paragraph (6)(b).

(a) The reasons given for adoption were as follows:

(i) The margins between wholesale prices and jobber and retail prices need to be reinstated to enable small processors to survive in business.

(ii) Supplies of milk to rural areas will be jeopardized if small processors and jobbers are unable to remain in business.

(iii) Producers could be forced out-of-business if their processing plants go out-of business, thus jeopardizing an adequate supply of milk.

(iv) Processing and distribution costs are higher in Montana. Thus a higher price is needed.

(v) In Montana, processors are forced to bear costs that are born by consumers in other states.

(b) The reasons against granting the request were as follows:

(i) Cost evidence submitted by the bureau and Equity Supply Company was the best and most substantial evidence in the record and supported the price reduction ordered by the board in its Docket No. 89-88.

(ii) The savings resulting from a reduction in price structure for the entire distribution system for milk should be passed on to the consumer.

(iii) The law does not guarantee a livelihood to any one industry member or individual, and minimum prices set should not reflect that guarantee.

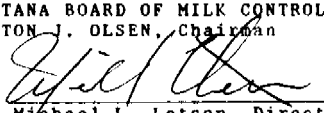
(iv) Granting of petitioners' request would not correct the marketing problems that are causing unrest in the industry.

(v) Enforcement of the December 20, 1988, order in Docket #89-88 will not affect the supply of milk to any area in Montana.

(vi) Enforcement of the December 20, 1988, order in Docket #89-88 will not necessarily increase prices to rural consumers.

(vii) The remaining reasons given were not considered substantial.

MONTANA BOARD OF MILK CONTROL
MILTON J. OLSEN, Chairman

BY: 
Michael L. Letson, Director
Department of Commerce

Certified to the Secretary of State November 27, 1989.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

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|---|---|
| In the matter of the adoption of Experience Verification and Class 3 Administrative Certificate | NOTICE OF ADOPTION OF ARM 10.57.204, EXPERIENCE VERIFICATION AND ARM 10.57.403, CLASS 3 ADMINISTRATIVE CERTIFICATE |

TO: All Interested Persons

1. On August 17, 1989, the Board of Public Education published notice of a proposed amendment of ARM 10.57.204, Experience Verification, and ARM 10.57.403, Class 3 Administrative Certificate, on page 1072 of the 1989 Montana Administrative Register, issue number 15.

2. The Board did not amend ARM 10.55.804, but amended ARM 10.57.403 as proposed and ARM 10.57.204 with the following change:

10.57.204 EXPERIENCE VERIFICATION (1) through (6) remain the same.

(7) Beginning with those certificates that expire in 1990, instructional ~~aide~~ assistant experience may be considered for renewal if the following conditions are met:

(a) The individual must hold a valid Montana teaching certificate when the experience is acquired.

(b) The experience must be within the K-12 structure.

(c) It must be verified by the appropriate administrative supervisor as an instructional experience. Instructional ~~aide~~ assistant experience is defined as experience utilizing the course of instruction prescribed by the trustees under an employment agreement of at least 100 days full-time equivalent (600 hours) in any one instructional year.

(d) and (e) remain the same as noticed.

3. At the public hearing which was held on September 14, 1989, no persons testified on the proposed amendment to the rules. The Board received no letters of comment on either rule prior to September 8, 1989, the date on which the Board closed the hearing record. The Board changed the wording in rule 10.57.204 to clearly differentiate between teaching aides and other classifications of aides.

Alan Nicholson
ALAN NICHOLSON, CHAIRPERSON
BOARD OF PUBLIC EDUCATION

BY: Claudette Morton

Certified to the Secretary of State November 14, 1989.

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

| | |
|---|---|
| In the matter of the adoption of Rules for Paddlefish Egg Donations, Marketing and Sale | NOTICE OF ADOPTION OF ARM 12.7.1001 THROUGH ARM 12.7.1006 (RULES I THROUGH VI) REGARDING PADDLEFISH EGGS |

TO: All interested persons

1. On September 28, 1989, the Department of Fish, Wildlife, and Parks published notice of proposed adoption of ARM 12.7.1001 through ARM 12.7.1006 (RULE I through RULE VI) establishing rules for paddlefish egg donations, marketing and sale at page 1383 of the 1989 Montana Administrative Register, issue number 18.

2. Oral comment was taken at the public hearing October 28, 1989 and written comments were received through October 31, 1989.

3. The Department has adopted the rules as proposed with the following changes:

12.7.1001 (RULE I) DEFINITIONS (1), (a), and (b) Remain the same.

(c) "Processing" means the washing, screening, cooling and salting ~~or~~ OF roe.

12.7.1002 (RULE II) SELECTION OF CORPORATION AND NOTICING (1) The fish and game commission will select a nonprofit corporation duly incorporated and certified under the Montana Nonprofit Corporation Act to receive paddlefish roe donations and process and market the roe as caviar. ~~A purpose of the nonprofit corporation as stated in its articles of incorporation shall be to generate funds for use by the department for benefitting the paddlefish fishery and to fund historical, cultural, recreational and fish and wildlife projects as selected by the advisory committee appointed by the commission pursuant to section 87-4-601(3)(d)(ii), MCA.~~ The selection will be made from proposals submitted by qualified organizations according to criteria set forth in this section.

(2) Remains the same.

12.7.1003 (RULE III) CRITERIA IN SELECTING NONPROFIT CORPORATION

(1) and (a) remain the same;

(b) estimated ~~resource and public~~ benefits TO THE PUBLIC AND PADDLEFISH RESOURCE;

(c) remains the same;

(i) ability to ~~maximize resource utilization without encouraging over harvest~~ MINIMIZE WASTE AND IMPACTS ON THE PADDLEFISH RESOURCE;

(ii) through (iv) remain the same;

~~(d) corporation's ideas for use of the funds generated from the sale of the paddlefish roe;~~

~~(e) impacts of the proposed operations on the resource;~~

~~(f)~~ (d) burden of the proposed operations on department administration and enforcement;

~~(g)~~ (e) benefits of the proposed operations to the local community;

~~(h)~~ (f) compliance with all local and state food processing and health laws; and

~~(i)~~ (g) feasibility of the corporation's plan for marketing and processing.

12.7.1004 (RULE IV) OPERATING PLAN (1) and (a) remain the same.

(b) precautions to be taken to avoid wasting the PADDLEFISH resource;

(c) the mechanism for securing eggs from only fresh~~ly caught~~ legally taken fish;

(d) through (g) remain the same.

12.7.1005 (RULE V) RECORDS (1) and (a) remain the same.

(b) recording tag numbers ~~and angler's names~~ from ~~legally taken~~ ALL fish;

(c) and (d) remain the same.

(e) the ~~total value~~ GROSS INCOME FROM ~~of~~ roe or caviar sold; and

(f) the ~~daily~~ WEEKLY total expenses incurred including operation costs and salaries.

12.7.1006 (RULE VI) PERMIT (1) Remains the same.

(2) The commission may revoke the permit AFTER OPPORTUNITY FOR HEARING if it determines that:

(a) remains the same.

(b) ~~corporate assets~~ PADDLEFISH ROE FUNDS are being misapplied or wasted; or

(c) that the corporation is unable to carryout ~~its~~ THE PURPOSES OF THE PADDLEFISH ROE DONATION PROGRAM.

3. The department has considered the comments received and has made changes as a result. Substantive changes are explained as follows:

**COMMENTS REGARDING ARM 12.7.1002 (RULE II)** The provision requiring the corporation to list the operation of the paddlefish roe donation program to benefit the resource and public as a purpose of the organization in its Articles of Incorporation would restrict existing nonprofit corporations from operating the program.

**RESPONSE:** The provision complained of was proposed as a check on organizations that might incorporate for the sole purpose of tapping funds that might be generated by the paddlefish roe donation program. However, the check is not necessary for existing nonprofit corporations with civic purposes

and there are sufficient checks in the remainder of the rules to insure that newly incorporated organizations do not use the program for the personal gain of the organization's officers. Therefore, the objected to provision has been deleted.

COMMENTS REGARDING ARM 12.7.1003 (RULE III): The Audubon Council applauded the Department's effort to minimize waste and protect the resource. However, Glendive area citizens complained that protecting the resource is the Department's job and not the job of the selected organization's. There was also comment that the proposed language regarding resource waste and impacts was ambiguous and duplicative. Finally, there was comment that (1)(d) was superfluous because an appointed committee will be making decisions for use of funds generated.

RESPONSE: The primary duty of the Department is to the resource and it must have the ability to consider potential waste of and impacts on the resource when it selects the organization that will operate the paddlefish roe donation program. Some proposals may be more damaging to the resource than others and the Commission should consider this factor in its decision. Changes have been made to the proposed rule in the interest of clarity. Provision (1)(d) in the proposed rule has been omitted.

COMMENTS REGARDING ARM 12.7.1005 (RULE V): The Audubon Council applauded the Department's efforts to require careful record keeping. Glendive area citizens objected strongly to the corporation keeping records of angler names.

RESPONSE: The Department agrees that recording the donating fisherman's name is not necessary for resource protection and has omitted the requirement.

COMMENTS REGARDING 12.7.1006 (RULE VI): The Commission should not be allowed to summarily revoke the permit.

RESPONSE: The procedures for permit revocation can be agreed to between the Department and selected organization and made part of the permit. However, the rule has been changed to reflect that there must be an opportunity for hearing prior to permit revocation.

K. L. Cool, Director
Montana Department of Fish,
Wildlife, and Parks

Certified to the Secretary of State November 27, 1989.

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

| | |
|---|---|
| In the matter of the adoption of an Upland Game Bird Habitat Enhancement Program | NOTICE OF ADOPTION OF ARM 12.9.701 through 12.9.706 (RULES I through VI) |

TO: All interested persons

1. On September 28, 1989 the Department of Fish, Wildlife, and Parks published notice of a proposed amendment of ARM 12.9.701 through ARM 12.9.706 (RULE I through RULE VI) at page 1386 of the 1989 Montana Administrative Register, issue number 18.

2. Oral comment was taken at the public hearings scheduled in the rulemaking notice and written comments were received through October 31, 1989.

3. The Department has adopted the rules as proposed with the following changes:

12.9.701 (RULE I) PROJECT APPLICATIONS Section (1) (a) through (j) remain the same.

12.9.702 (RULE II) PROJECT REQUIREMENTS (1) Remains the same.

(a) projects must be designed to establish or improve HABITAT COMPONENTS SUCH AS nesting cover, winter cover and feeding areas THAT ARE NOT PRESENT ON THE AREA. THE COMPONENTS DO NOT ALL NEED TO BE PRESENT UNDER THE SAME OWNERSHIP;

~~(b) projects must be designed to provide at least 10% winter cover, 10% suitable nesting cover and 25% food sources;~~

~~(c)~~(b) projects must be located within a SUITABLY SIZED AREA, NORMALLY A minimum of 100 contiguous acres. THE PROJECT AREA NEED NOT BE ALL under the ownership of the applicant ~~or the person authorizing the project. Projects within smaller parcels will be considered on a case-by-case basis and may be authorized if the acreage involved is critical habitat or if adjacent lands can be combined to increase the effective area of habitat improvements~~ IF THE NECESSARY HABITAT COMPONENTS (NESTING COVER, WINTER COVER, FEEDING AREAS) ARE PRESENT AT SUITABLE DISTANCES ON ADJACENT OWNERSHIPS;

~~(d)~~(c) all projects ON PRIVATE LAND must be implemented through lease, conservation easement or by department cost-sharing with the landowner, project sponsor, or a federal cost share program;

~~(e)~~(d) projects which require the department to purchase fee title to lands will not be considered; and

~~(f)~~(e) all projects on private lands must be open to public hunting FOR UPLAND GAME BIRDS for the duration of the project. Reasonable use limitations ON NUMBERS OF HUNTERS AND AREAS TO BE HUNTED may be allowed; however, user fees may not be changed. Projects located within a leased or commercial hunting operation will not be considered.

12.9.703 (RULE III) PROJECT REVIEW AND APPROVAL (1) Remains the same.

(2) ~~Priority~~ EMPHASIS will be given to projects on private lands; however, ~~activities~~ PROJECTS on public land will be ~~considered for~~ PURSUED WHERE OPPORTUNITIES FOR cooperative cost-share projects EXIST.

(3) Remains the same.

(4) Remains the same.

12.9.704 (RULE IV) REPORTING REQUIREMENTS (1) (a) through (2) remain the same.

12.9.705 (RULE V) PAYMENT BY DEPARTMENT (1) The department will compensate individuals or organizations by cost sharing the actual costs incurred for completed upland game bird habitat enhancement projects as set forth on a contract. The department's share, not to exceed 100%, will be negotiated on an individual project basis for cost-sharing projects. IN-KIND SERVICES SUCH AS LABOR MAY BE USED FOR THE PROGRAMS PARTICIPANTS' PORTION OF THE COST-SHARE. On cost-share projects, the department will not pay for federal costs received from such programs. The department will reimburse the landowner for up to 100% of his share ~~of the agricultural stabilization and conservation service (ASCS) cost-share programs~~ OF OTHER FEDERAL, STATE, AND/OR PRIVATE COST-SHARE PROGRAMS.

(2) The department may compensate individuals or organizations for upland game bird habitat enhancement activities accomplished through a lease, up to the fair market value of the lease. The organization or individual will be compensated only if the organization or individual holds title to OR LEASES the specified property.

(3) Remains the same.

(4) Remains the same.

12.9.706 (RULE VI) EFFECT OF RULE VIOLATIONS (1) Remains the same.

4. The department has considered the comments recieved and responds as follows:

**COMMENT ON NEW RULE II(a) (ARM 12.9.702(a)):** Must a project provide nesting cover, winter cover, and feeding areas to be valid?

**RESPONSE:** Enhancement projects should be designed to establish the habitat components that are not present in the existing landscape in reasonable proximity to each other. Many projects may be aimed at establishing only one habitat component because others are already present. The rule has been changed to clarify this.

**COMMENT ON NEW RULE II(b) (ARM 12.9.702(b)):** It is unclear to what the referenced percentages apply.

**RESPONSE:** The department agrees with this comment and has eliminated this clause in the final rules.

**COMMENT ON NEW RULE II(c) (ARM 12.9.702(c)):** The 100 acre minimum size project area is too restrictive and will eliminate many projects from areas west of the divide that typically have small farms. The minimum size should be reduced or dropped.

**RESPONSE:** The wording of this rule has been changed to reflect this concern. However, it should be noted that if habitat enhancement efforts are to be successful, they must be conducted on areas large enough to support the game bird species in question. For many species, this will be an area of 100 acres or larger in size, but not necessarily under one ownership.

**COMMENTS ON NEW RULE II(f) (ARM 12.9.702(f))**

**COMMENT:** The rule requires that all projects on private lands must be open to public hunting for the duration of the project. This requirement is not necessary and should be eliminated. It may discourage landowners from participating in the program.

**RESPONSE:** The legislation authorizing this program requires that "land in the project area remains open to public hunting in accordance with reasonable use limitations imposed by the landowner." Since this requirement is part of the law, the department has no authority to eliminate it.

**COMMENT:** Under this rule the phrase "reasonable use limitations" should be defined.

**RESPONSE:** The department thinks that it is best to leave this definition up to each individual landowner at the time. However, it is the department's interpretation that under this provision, landowners may place some restrictions on numbers of hunters, areas where hunting is allowed, and times when hunting is allowed. The rule has been changed to reflect this comment.

**COMMENT:** Does the requirement that "land in the project area remains open to public hunting" mean that the landowners must allow all kinds of hunting including big game.

**RESPONSE:** The department believes that the provision applies only to upland game bird hunting and not to other species. The department has changed the rule to reflect this comment.

**COMMENT ON NEW RULE V(2) (ARM 12.9.705(2)):** Is the title holder of the land or the lessee eligible for the compensation?

**RESPONSE:** The department does not wish to dictate nor does it probably have the right to decide to whom the compensation is paid. That should be left up to the agreement between the landowner and lessee.

**GENERAL COMMENTS**

**COMMENT:** More emphasis should be placed on habitat enhancement projects on public lands.

**RESPONSE:** The department will be looking at and initiating habitat projects on all kinds of land ownerships including department, state and federal lands.

**COMMENT:** Provisions should be made in the rules to fund predator control projects.

**RESPONSE:** The legislation authorizing this program does not allow expenditures for predator control. It is the department's position that dollars spent on habitat improvement provide a better return for each dollar spent where an objective is increasing upland game birds over a large area.

**COMMENT:** Funds from this program should be used to purchase upland game bird habitat.

**RESPONSE:** The legislation authorizing this program does not allow the purchase of land in fee title. The legislation directs the program to be implemented through "cost-sharing programs, leases and conservation easements."

**COMMENT:** There is concern that funding for this program could be "raided" for other purposes.

**RESPONSE:** The funds for this program are specifically earmarked for its implementation by the legislation authorizing the program and by legislative appropriation. However, the legislature has the authority to legislate and appropriate the funds as it wishes in future legislative sessions.

**COMMENT:** The rules are unnecessarily complicated.

**RESPONSE:** It is the department's position that the rules are the minimum necessary to implement the program as directed by the legislation. The final rules have been changed or classified where there was specific comment on individual rules.

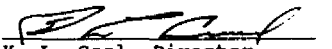
**COMMENT:** The funds could be put to better use for reintroducing birds into areas that once had them.

**RESPONSE:** The legislation and rules adopted in 1988 allow for the introduction of pen-reared pheasants by interested individuals or groups who will be reimbursed at the rate of $3 for each bird released. It is the department's position based on years of research in this state and others that it is much more cost-effective and beneficial to spend funds on habitat development than on releasing pen-reared pheasants.

**COMMENT:** The program is an excellent idea, but it is two years too late because of the Federal Conservation Reserve Program now in effect.

**RESPONSE:** The Conservation Reserve Program has given the state an excellent start on establishing nesting and to some extent winter habitat for upland game birds. The Upland Game Bird Habitat Enhancement Program will be used to create other habitat components such as feeding and wintering areas where they are lacking so it will go hand-in-hand with CRP. Also, there are a number of areas in Montana with very little land enrolled

in CRP and the department's habitat program will be very important in these areas.



K. L. Cool, Director
Montana Department of Fish,
Wildlife, and Parks

Certified to the Secretary of State November 27, 1989.

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

| | |
|---|---|
| In the matter of the proposed amendment of rules 16.8.807 and 16.8.809 concerning the monitoring and reporting of air quality data | NOTICE OF ADOPTION ON AMENDMENT OF RULES 16.8.807 AND 16.8.809 (Air Quality Monitoring) |

To: All Interested Persons

1. On August 31, 1989, at page 1259 of the Montana Administrative Register, issue number 16, the Board published notice of the proposed amendment of rule 16.8.807 and 16.8.809 which would update the rules to incorporate the most recent revision of the Montana Quality Assurance Manual, a revision which affects the air quality monitoring audit, operations, and personnel sections of the manual and focuses primarily on use of new equipment and techniques.

2. The Board of Health and Environmental Sciences adopted the rule as proposed.

3. No comments or testimony were received.

HOWARD TOOLE, Chairman
BOARD OF HEALTH AND
ENVIRONMENTAL SCIENCES

by William J. Opitz
WILLIAM J. OPITZ, Deputy Director
Department of Health and
Environmental Sciences

Certified to the Secretary of State November 27, 1989 .

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

| | |
|---|---|
| In the matter of the adoption of the Montana Pollutant Discharge Elimination System rules, repealing sections 16.20.901 through 16.20.919 and adopting new rules I through LIII -- I (16.20.920) through VII (16.20.926) and VIII (16.20.1301) through LIII (16.20.1347) | NOTICE OF ADOPTION ON THE AMENDMENT OF THE MONTANA POLLUTANT DISCHARGE ELIMINATION SYSTEM RULES - REPEALING 16.20.901 THROUGH 16.20.919 AND ADOPTING NEW RULES I THROUGH LIII (Water Quality) |

To: All Interested Persons

1. On September 28, 1989 at page 1391 of the 1989 Montana Administrative Register, issue number 18, the Board published notice of the proposed repeal of ARM 16.20.901 through 16.20.919 and the adoption of new rules to update the Montana Pollutant Discharge Elimination System rules to conform with federal law and regulations.

2. The Board of Health and Environmental Sciences repealed rules 16.20.901 through 16.20.919 and adopted rules I through LIII as proposed with the correction of a few typographical errors in cross references as shown below (new material is underlined; material to be deleted is interlined):

RULE I (16.20.920) through RULE XI (16.20.1304) Same as proposed.

RULE XII (16.20.1305) EXCLUSIONS (1) - (3) Same as proposed.

(4) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in RULE XI (16.20.1304)(3), discharges from concentrated aquatic animal production facilities as defined in RULE XI (16.20.1304)~~(7)~~(6), discharges to aquaculture projects as defined in RULE XI (16.20.1304)~~(6)~~(5), and discharges from silvicultural point sources as defined in RULE XI (16.20.1304)~~(58)~~(56).

(5) - (7) Same as proposed.

RULE XIII (16.20.1306) through RULE XVI (16.20.1309) Same as proposed.

RULE XVII (16.20.1310) APPLICATION FOR A PERMIT

(1) - (6)(f) Same as proposed.

(g) A topographic map (or other map if a topographic map is unavailable) extending one mile beyond the property boundaries of the source, depicting the facility and each of its intake and discharge structures; each of its hazardous waste

treatment, storage, or disposal facilities; each well where fluids from the facility are injected underground; and those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area (group II storm water discharges, as defined in RULE XI (16.20.1304)~~(64)~~(62), are exempt from the requirements of this subsection);

(h) Same as proposed.

(i) For Group II storm water dischargers (as defined in RULE XI (16.20.1304)~~(64)~~(62) only, a brief narrative description of:

(i) - (iii) Same as proposed.

(7)(a) - (i) Same as proposed.

(j)(i) An applicant that qualifies as a Group II storm water discharger under RULE XI (16.20.1304)~~(64)~~(62) and RULE XXI (16.20.1314) is exempt from the requirements of subsections (6)(g) and (7) of this rule, unless the department requests such information;

(ii) - (iii) Same as proposed.

(k) - (m) Same as proposed.

(8) Same as proposed.

(9) New and existing concentrated animal feeding operations (defined in RULE XI (16.20.1304)(3)) and concentrated aquatic animal production facilities (defined in RULE XI (16.20.1304)~~(7)~~(6)) shall provide the following information to the department, using the application form provided by the department:

(a) - (b) Same as proposed.

(10) - (15) Same as proposed.

RULE XVIII (16.20.1311) through RULE XXI (16.20.1314) Same as proposed.

RULE XXII (16.20.1315) SILVICULTURAL ACTIVITIES

(1) Silvicultural point sources, as defined in RULE XI (16.20.1304)~~(58)~~(56), are point sources subject to the MPDES permit program.

RULE XXIII (16.20.1316) NEW SOURCES AND NEW DISCHARGERS

(1) Except as otherwise provided in an applicable new source performance standard, a source is a new source if it meets the definition of new source in RULE XI (16.20.1304)~~(39)~~(37), and

(a) - (c) Same as proposed.

(2) A source meeting the requirements of subsections (1)(a), (b), or (c) of this rule is a new source only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger. (See RULE XI (16.20.1304)~~(38)~~(36).)

(3) Same as proposed.

(4) Construction of a new source as defined under RULE XI (16.20.1304)~~(39)~~(37) has commenced if the owner or operator has:

(a) - (b) Same as proposed.

(5) - (10) Same as proposed.

RULE XXIV (16.20.1317) through RULE XXVII (16.20.1320) Same as proposed.

RULE XXVIII (16.20.1321) CALCULATING MPDES PERMIT CONDITIONS (1) - (6) Same as proposed.

(7) Discharges which are not continuous, as defined in RULE XI (16.20.1304)~~(13)~~(12), must be particularly described and limited, considering the following factors, as appropriate:

(a) - (d) Same as proposed.

(8) - (12) Same as proposed.

RULE XXIX (16.20.1322) through RULE LIII (16.20.1347) Same as proposed.

3. No comments or testimony were received.

HOWARD TOOLE, Chairman
BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES

by _____
DONALD E. PIZZINI, Director

Certified to the Secretary of State November 27, 1989.

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

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|---|---|
| In the matter of the adoption of rules I through XV establishing pretreatment standards for discharges into publicly operated treatment works. ARM 16.20.1401 through 16.20.1416 | NOTICE OF ADOPTION OF NEW RULES I THROUGH XV RELATING TO PRETREATMENT STANDARDS FOR DISCHARGE INTO PUBLICLY OPERATED TREATMENT WORKS (Water Quality) |

To: All Interested Persons

1. On September 28, 1989, at page 1457 of the 1989 Montana Administrative Register, issue number 18, the Board published notice of the proposed adoption of new rules concerning pretreatment standards for dischargers into publicly operated treatment works.

2. The Board of Health and Environmental Sciences adopted the rule as proposed with the correction of one typographical error as shown below (new material is underlined; material to be deleted is interlined):

RULE II (16.20.1402) DEFINITIONS The definitions contained in ARM Title 16, chapter ~~10~~ 20, subchapter 13 are hereby incorporated by reference in this subchapter.

3. No comments or testimony were received.

HOWARD TOOLE, Chairman
BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES

by _____
DONALD E. PIZZINI, Director

Certified to the Secretary of State November 27, 1989 .

BEFORE THE BOARD OF CRIME CONTROL
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of ARM 23.14.401 and the adoption of ARM 23.14.423, 23.14.424 and 23.14.425 | ) | NOTICE OF AMENDMENT OF ARM 23.14.401 ADMINISTRATION OF PEACE OFFICER STANDARDS AND TRAINING, FOR ADOPTION OF 23.14.423 MINIMUM STANDARDS FOR THE EMPLOYMENT OF DETENTION OFFICERS, 23.14.424 REQUIREMENTS FOR DETENTION OFFICER CERTIFICATION, 23.14.425 REFERENCED RULES APPLY TO FULL-TIME AND PART-TIME DETENTION OFFICERS |

TO: All Interested Persons

1. On October 12, 1989, the Board of Crime Control published notice of proposed amendments to ARM 23.14.401, concerning administration of peace officer and detention office standards and training and proposed adoption of ARM 23.14.423, concerning minimum requirements for the employment of detention officers, ARM 23.14.424, concerning requirements for certification of detention officers, and ARM 23.14.425, concerning referenced rules applying to full-time and part-time detention officers, at page 1559 of the 1989 Montana Administrative Register, issue number 19.

2. The agency has amended and adopted the rules as proposed.

3. No comments or testimony were received.

Edwin L. Hall
Administrator

Certified to the Secretary of State, November 16, 1989

BEFORE THE BOARD OF CRIME CONTROL
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of ARM 23.14.404 and ARM 23.14.405 | ) ) ) ) | NOTICE OF AMENDMENT OF ARM 23.14.404 GENERAL REQUIREMENTS FOR CERTIFICATION, AND ARM 23.14.405 REQUIREMENTS FOR THE BASIC CERTIFICATE |

TO: All Interested Persons

1. On October 12, 1989, the Board of Crime Control published notice of proposed amendments to ARM 23.14.404, concerning general requirements for certification of federal law enforcement officers and ARM 23.14.405 concerning requirements for the basic certificate for federal law enforcement officers, at page 1557 of the 1989 Montana Administrative Register, issue number 19.

2. The agency has amended the rules as proposed; however, a typographical error was made in the implementing cite for ARM 23.14.404. Section 44-11-301 is listed twice and it should be 44-11-301 and 44-11-302.

3. No comments or testimony were received.

Edwin L. Hall
Administrator

Certified to the Secretary of State, November 16, 1989

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

| | | |
|---|---|---|
| In the matter of the amendment of rule pertaining to the voluntary transfer of a reserved water right | ) ) ) ) | NOTICE OF AMENDMENT OF RULE 36.16.118 |

To: All Interested Persons.

1. On October 12, 1989, the Board of Natural Resources and Conservation published notice of the proposed amendment of Rule 36.16.118 pertaining to the voluntary transfer of a reserved water right at page 1564, 1989 Montana Administrative Register, issue number 19.

2. The Board has amended Rule 36.16.118 with the following changes: (new matter underlined, deleted matter interlined)

"36.16.118 CHANGES AND TRANSFERS (1) . . .

(2) ~~Only upon the request of a reservant may a water reservation be transferred~~ A reservant may voluntarily transfer all or any portion of its reservation to a transferee ~~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) . . ."

3. The Board received one written comment on the rule amendment from the City of Billings, Montana. A board member presented one comment. The comments received and the Board's responses are as follows:

COMMENT: The proposed rule as written would allow any reservant to request a transfer of its own reservation or any other reservant's water reservation. The Board's declaratory ruling held that the Board has the authority to approve only voluntary transfers where the affected reservant requests the transfer.

RESPONSE: The reason for the amended rule is to conform the 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. The comment is in accord with the Board's declaratory ruling. The Board accepts the comment.

COMMENT: Because no person owns water it may be confusing to use the term new owner. The term transferee appropriately describes the legal relationship created by the transfer.

RESPONSE: The Board accepts the comment.

4. No other written or oral comments were received.

Board of Natural Resources
and Conservation

Certified to the Secretary of State, November 27, 1989.

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

| | | |
|---|---|---|
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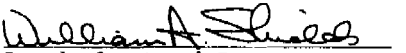
RESPONSE: The reason for the amended rule is to conform the rule to the declaratory ruling issued by the board on April 11, 1989. The declaratory ruling held, in pertinent part, that the board does not have authority to involuntarily transfer a municipal water reservation. The comment is in accord with the Board's declaratory ruling. The Board accepts the comment.

COMMENT: Because no person owns water it may be confusing to use the term new owner. The term transferee appropriately describes the legal relationship created by the transfer.

RESPONSE: The Board accepts the comment.

4. No other written or oral comments were received.



Board of Natural Resources
and Conservation

Certified to the Secretary of State, November 27, 1989.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

| | |
|---|---|
| IN THE MATTER OF THE ADOPTION of Rule I (ARM 42.27.118) Prepayment of Motor Fuel Taxes. | NOTICE OF THE ADOPTION of Rule I (ARM 42.27.118) Prepayment of Motor Fuel Taxes. |

TO: All Interested Persons:

1. On August 31, 1989, the Department of Revenue published notice of the proposed adoption of Rule I (ARM 42.27.118) relating to Prepayment of Motor Fuel Taxes at page 1264 of the 1989 Montana Administrative Register, issue no. 16.

2. COMMENTS: J. Michael Scott, of Ranch Hand, Inc., Eureka, Montana commented that in lieu of Rule I, the Department should adopt the following formula for prepayment purposes: "Multiply previous amount of motor fuel taxes paid by 1.1. or 1.2. There would be no late penalty if the difference in the actual taxes due (and taxes prepaid) would be received by the Department of Revenue within 60 days of due date."

RESPONSE: There are great differences between licensed gasoline distributors. One formula would not fit the majority of distributors. The proposed rule allows each distributor to estimate the credit balance which will reduce the possibility of a late payment penalty and interest based on the distributor's own business. The gasoline license tax provides that the late payment penalty may be waived upon a showing of "good cause" for the late payments. In ARM 42.3.101 through 42.3.112, the Department sets out what constitutes "good cause" for waiving late payment penalty. These rules provide for sufficient flexibility in waiving the late payment penalty to prevent any injustice or hardship.

3. Therefore, the Department adopts the rule as proposed in the notice of August 31, 1989.

DENIS ADAMS, Director
Department of Revenue

Certified to Secretary of State November 27, 1989.

VOLUME NO. 43 OPINION NO. 42

EDUCATION - Applicability of Montana Human Rights Act to public school districts on Indian reservations;
INDIANS - Existence of federally-protected tribal interest in school district hiring practices;
INDIANS - Validity of preferences with respect to reservation-based public school employment under Montana Human Rights Act;
LABOR RELATIONS - Existence of federally-protected tribal interest in school district hiring practices;
SCHOOL DISTRICTS - Existence of federally-protected tribal interest in school district hiring practices;
SCHOOL DISTRICTS - Validity of Indian preferences with respect to reservation-based employment under Montana Human Rights Act;
MONTANA CODE ANNOTATED - Sections 49-2-101 to 49-2-601, 49-2-303(1)(a), 49-2-403(1);
MONTANA CONSTITUTION - Article II, section 4;
UNITED STATES CODE - 20 U.S.C. §§ 236 to 240; 25 U.S.C. § 81; 25 U.S.C. § 450e(b); 25 U.S.C. § 472; 42 U.S.C. §§ 2000e to 2000e-17; 42 U.S.C. § 2000e(b); 42 U.S.C. § 2000e-2(i); 42 U.S.C. § 2000e-7; 42 U.S.C. § 2000h-4;
UNITED STATES CONSTITUTION - Article II, section 8, clause 3; Amendments V, XIV.

HELD: The Montana Human Rights Act applies to public school districts lying wholly or partially within Indian reservations on district-owned lands and prohibits the school district from granting employment preferences to Indians unless specifically required by federal statute. Indian tribes do not have a federally-protected interest in requiring that such preferences be granted their members or other Indians.

November 16, 1989

James C. Nelson
Glacier County Attorney
P.O. Box 428
Cut Bank MT 59427

Dear Mr. Nelson:

You have requested my opinion concerning the following question:

> Does the prohibition in the Montana Human Rights Act against racial discrimination apply to employment decisions by public school boards whose districts lie wholly or partially within an Indian reservation so as to render unlawful the granting of employment preferences to Indians, even when such preferences are required by tribal resolution or ordinance?

I conclude that the Montana Human Rights Act, §§ 49-2-101 to 601, MCA, does apply and prohibits the granting of reservation-based employment preferences to Indians unless specifically required by federal statute. I further conclude that, under the facts here, this Act's application does not impermissively infringe on the self-government powers of the Blackfeet Tribe.

East Glacier School District No. 51 is located entirely within the exterior boundaries of the Blackfeet Indian Reservation. The district's physical facilities are situated in the town of East Glacier on lands owned by it, and its student population for school year 1988-89 is approximately 40 pupils, divided in roughly equal parts between Indian and non-Indian children. The employment at issue occurs in the district's facilities and affects tasks such as teaching, clerical, and janitorial services. Funding for such activities is derived almost entirely from payments under the state foundation program, revenues generated from property tax levies, and federal impact aid pursuant to Public Law No. 81-874, 67 Stat. 1100 (codified as amended at 20 U.S.C. §§ 236-240). None of the positions in question is subject to a federal statute requiring employment preferences for Blackfeet tribal members or other Indians.

The Blackfeet Tribe has established by resolution a tribal employment rights office and requires "[a]ll employers operating within the exterior boundaries of the Blackfeet Reservation ... to give preference to Indians in hiring, promotion, training, [and] all other aspects of employment[.]" Blackfeet Tribal Resolution No. 126-82, para. 2 (Nov. 24, 1981). The resolution subjects noncomplying employers to a broad range of penalties, including "denial of the right to commence business on the Blackfeet Reservation, fines, suspension of the employer's operation, termination of the employer's operation, denial of the right to conduct any further business on the Blackfeet Reservation, payment of back pay or other relief to correct any harm done to

aggrieved Indians, and the summary removal of employees hired in violation of the Blackfeet Tribe's employment rights requirements." Id., para. 4. The Tribe has informed School District No. 51 that the district must honor these preference provisions and that, therefore, qualified Blackfeet tribal members or other Indians must be awarded positions within the district irrespective of the qualifications of non-Indian employees or applicants.

Your opinion request raises serious issues under both state and federal law. They involve the questions of whether the prohibition against racial discrimination in the Human Rights Act should be construed as encompassing reservation-based Indian employment preferences and, if the state act does proscribe such preferences, whether this prohibition may be given effect in light of the tribal resolution. I address these questions in order.

I.

Section 49-2-303(1)(a), MCA, of the Human Rights Act makes it unlawful for any Montana public or private employer to discriminate on the basis of race. No exemptions from this prohibition exist. The threshold issue is thus whether an exception should nevertheless be implied, as a matter of state law, for Indian employment preferences because of the unique status of tribes and their members under federal law.

In Morton v. Mancari, 417 U.S. 535 (1974), the United States Supreme Court upheld the constitutionality of section 12 of the Indian Reorganization Act, 25 U.S.C. § 472, which requires the Secretary of the Interior "to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed to the various positions maintained ... by the Indian Office, in the administration of functions or services affecting any Indian tribe" and to grant such qualified Indians "the preference to appointment to vacancies in any such positions." Mancari arose after section 12 preferences were utilized in the Albuquerque, New Mexico office of the Bureau of Indian Affairs to select Indians over non-Indians for various promotions. The non-Indians alleged that the preferences were racially-grounded and, in the absence of a compelling state interest, violated the due process clause of the Fifth Amendment. The Supreme Court, however, concluded otherwise, reasoning that the statutory preference was political, not racial, in nature:

> Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. ... The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. ... Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other governmental agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations.

Id. at 553-54 (footnote omitted). The Court then concluded by stating that, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed" and that the section 12 preference provision was "reasonable and rationally designed to further Indian self-government[.]" Id. at 554. Later decisions have relied upon the Mancari distinction between "political" and "racial" discrimination to reject due process or equal protection challenges where unique legal status or privileges accorded Indians were at stake. E.g., Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 673 n.20 (1979) (upholding validity of treaty fishing rights retained by tribal members); United States v. Antelope, 430 U.S. 641, 645-46 (1977) (rejecting Fifth Amendment challenge to 18 U.S.C. § 1153 which subjects Indians, but not non-Indians, to federal prosecution for specified major crimes); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 479-80 (1976) (rejecting claim that common-law tax immunity granted Indians constituted invidious racial discrimination against non-Indians); Fisher v. District Court, 424 U.S. 382, 390-91 (1976) (per curiam) (vesting exclusive jurisdiction in tribal court over adoption proceedings involving only tribal members residing on reservation did not impermissibly deny them access to state courts

on racial grounds); Mullenberg v. United States, 857 F.2d 770, 772 (Fed. Cir. 1988) ("the failure to extend notice requirements to nonpreference eligible excepted service employees is not racial discrimination since Indian status is political and not racial"); Duro v. Reina, 851 F.2d 1136, 1144 (9th Cir.), petition for reh. en banc denied, 860 F.2d 1463 (1988), cert. granted, 109 S. Ct. 1930 (1989) (finding no equal protection violation by virtue of tribal court criminal jurisdiction over nonmember Indians but not over non-Indians); Barona Group of Capitan Grande Band of Mission Indians v. American Management and Amusement, 840 F.2d 1394, 1406-07 (9th Cir. 1987), cert. dismissed, 109 S. Ct. 7 (1988) (upholding validity of 25 U.S.C. § 81 which requires federal approval of contracts made with Indian tribes or Indians); Alaska Chapter, Associated General Contractors v. Pierce, 694 F.2d 1162, 1166-70 (9th Cir. 1982) (upholding constitutionality of Indian preference provision in 25 U.S.C. § 450e(b)); see also Regents v. Bakke, 438 U.S. 265, 304 n.42 (1978) ("In Mancari, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior. ... We observed in that case, however, that the legal status of the BIA is sui generis").

Mancari was clearly premised on the special relationship existing between the United States and Indian tribes, and it is doubtful the decision stands for the general proposition that states may, without congressional authorization, bestow preferential employment rights on individuals because of their Indian status. See Queets Band v. Washington, 765 F.2d 1399, 1404 n.1 (9th Cir. 1985), vacated upon joint motion, 783 F.2d 154 (1986). A contrary conclusion, moreover, would raise significant concerns under the equal protection clauses of the Fourteenth Amendment and Article II, section 4 of the Montana Constitution. The United States Supreme Court thus recently stated in City of Richmond v. J. A. Croson Company, 109 S. Ct. 706, 719 (1989), that merely because "Congress may identify and redress the effects of society-wide [racial] discrimination does not mean, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate." The Court later said that, "[w]hile the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." Id. at 727. Although the analysis in City of Richmond concerning Congress' more expansive authority

to formulate "race-conscious" statutory schemes was premised on section 5 of the Fourteenth Amendment, which provides that "[t]he congress shall have power to enforce, by appropriate legislation" such amendment, the Court's reasoning appears particularly apt here since Congress, but not the states, has plenary power over Indian affairs pursuant to Article II, section 8, clause 3 of the federal constitution and a special relationship with tribes and their members. E.g., McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 n.7 (1973).

Yet, even if states do have the discretion to enact reservation-based employment preferences for Indians, Montana's Human Rights Act requires, as a general matter, even-handed treatment which neither benefits nor penalizes individuals because of their Indian status. Cf. Taylor v. Department of Fish, Wildlife & Parks, 205 Mont. 85, 666 P.2d 1228, 1232 (1983) (even express statutory exceptions in the Human Rights Act must be strictly construed). In either situation the employment practice is racially motivated and proscribed under section 49-2-303(1)(a), MCA. See Tuveson v. Florida Governor's Council on Indian Affairs, 495 So. 2d 790, 794 (Fla. Dist. Ct. App. 1986) ("[t]he [employer's] conclusion that Indian preference is legal under Federal law is irrelevant; what is legal under Federal law is not the same as what is legal under Florida law"). As a matter of state law, therefore, such preferences are prohibited at least where, as here, they are not remedial devices designed to correct prior discriminatory practices by the employer. See § 49-2-403(1), MCA (Race "may not comprise justification for discrimination unless the nature of the service requires the discrimination for the legally demonstrable purpose of correcting a previous discriminatory practice"). I express no opinion concerning whether or under what circumstances racially-conscious affirmative action plans may be utilized pursuant to Montana law.

II.

The second issue is whether, under federal law principles, application of the Human Rights Act under the circumstances here infringes impermissibly on the Blackfeet Tribe's sovereignty. Because the involved operations of the district occur on nontribal land and the Tribe seeks to regulate the conduct of a nonmember entity, I apply the analytical standards articulated in Montana v. United States, 450 U.S. 544 (1981).

Montana arose from an action filed by the United States which, in part, sought to establish that the Crow Tribe had exclusive jurisdiction to regulate reservation hunting and fishing--including such activity by nonmembers on nonmember-owned fee land. The Supreme Court held the tribe's inherent authority was "not so broad" as to support this claim, remarking that such authority had normally been limited to matters of internal concern involving tribal members and that "the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Id. at 564. Regulation of hunting and fishing by nonmembers on nontribal or nontrust land was then characterized as having "no clear relationship to tribal self-government or internal relations." Ibid. The Court did observe that tribes may retain "inherent sovereignty to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," citing as examples (1) activity by nonmembers who have entered into a consensual relationship with a tribe or its members and (2) activity by nonmembers which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566. The Court found no consensual relationship and no threat to the Crow Tribe's political or economic security with respect to nonmember hunting and fishing on nonmember lands. These basic principles were recently reaffirmed in Brensdale v. Confederated Tribes and Bands of the Yakima Nation, 109 S. Ct. 2994 (1989), although Justice White suggested in his plurality opinion, joined in by three other members of the Court, that the tribal interests protected under Montana may only be vindicated on a case-by-case basis in a civil proceeding and not through exercise of tribal regulatory jurisdiction. Id. at 3007-08.

Here there is no consensual or contractual relationship between School District No. 51 and the Blackfeet Tribe. The district is a creature of state statute and exists solely to provide education to children in accordance with Montana and federal law. Its presence on the reservation is also not contingent upon tribal approval. The question accordingly becomes whether the school district's activity has a sufficient connection to the "economic security" of the Tribe to justify the latter's enforcement of its Indian preference requirements.

That question cannot fairly be resolved without balancing the Tribe's interest as sovereign in maximizing member or other Indian employment and the

state interest in employing the most qualified persons to provide, within budgetary constraints, services essential to the educational process. Cf. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 156 (1980) ("[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the federal government, on the one hand, and those of the State, on the other"). The state interest has been deemed highly significant even with respect to employment decisions in connection with grants subject to Indian employment preferences under section 7(b) of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(b). Johnson v. Central Valley School District No. 356, 645 P.2d 1088, 1094 (Wash. 1982), cert. denied, 459 U.S. 1107 (1983) ("Here, one of the express conditions of the grant was that the school district utilize the best possible talent and resources. The purpose of the grant was to improve the learning abilities and opportunities of Indian children. Nowhere in the Act authorizing the grant did Congress express a finding that this service could best be rendered by persons of Indian heritage, irrespective of their training, experience and other capabilities").

Needless to say, full application of the Tribe's preference regulations might well result in additional employment for some members or other Indians and, by so doing, generally further tribal economic security. Such an effect on the Tribe, even if not merely marginal, can nonetheless hardly be metamorphosed into the kind of impact which Montana envisioned as rebutting the presumptive absence of a protectible tribal interest with respect to nonmember activity occurring on nonmember land. See Bresndale v. Confederated Tribes and Bands of the Yakima Indian Nation, 109 S. Ct. at 3008 (under Montana, "[t]he impact must be demonstrably serious and imperil the political integrity, economic security or the health and welfare of the tribe"). Moreover, this economic interest likely runs contrary to the Tribe's presumably equal or greater interest in all reservation children receiving the best possible education--regardless of whether that education is provided by Indians or non-Indians. Under these circumstances, I find no protected tribal interest in the school district's employment decisionmaking.

My conclusion concerning the absence of a protected tribal interest in School District No. 51's hiring practices is unaffected by the "on or near" reservation exemption in Title VII of the Equal Employment Opportunity Act, 42 U.S.C. §§ 2000e to 2000e-17.

Section 703(i) of this statute, 42 U.S.C. § 2000e-2(i), excludes from coverage under Title VII "any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation." Also excluded from the definition of "employer" under section 701(b) of the federal law, 42 U.S.C. § 2000e(b), are Indian tribes. These exemptions "reveal[] a clear congressional recognition, within the framework of Title VII, of the unique legal status of tribal and reservation-based activities" and "a clear congressional sentiment that Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed." Mancari, 417 U.S. at 548. However, the exemption in 703(i) does not affirmatively direct, as section 12 of the Indian Reorganization Act and section 7(b) of the Indian Self-Determination and Education Assistance Act do, the granting of preferences to qualified Indians either generally or, as conditioned in section 7(b), "to the greatest extent feasible" but, instead, merely renders Title VII neutral as to preferential reservation-based employment practices. See Shaw v. Delta Air Lines, 463 U.S. 85, 103 (1983) ("[q]uite simply, Title VII is neutral on the subject of all employment practices it does not prohibit"). Coupled with such neutrality is the express disclaimer in sections 708 and 1104 of the federal act of, respectively, any intent "to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under [Title VII]" or "to occupy the field in which [the federal act] operates to the exclusion of State laws on the same subject matter ... [or] invalidat[e] any provision of State law unless such provision is inconsistent with any of the purposes ... or any provision [of the federal act]." 42 U.S.C. §§ 2000e-7, 2000h-4. Sections 708 and 1104 were enacted, as their literal language indicates, to "explicitly disclaim[]" all preemptive intent except where state law purports to sanction what is prohibited under the federal act or "stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" California Federal Savings and Loan Association v. Guerra, 479 U.S. 272, 281 (1987).

It is evident from these various provisions of the Equal Employment Opportunity Act that Congress determined to leave almost entirely unfettered state authority to legislate against employment discrimination and to recognize a limited exception from federal liability for reservation-based preferential hiring of Indians. Read together or separately, though, these provisions cannot be viewed as giving either states or tribes jurisdiction over matters which they otherwise lack. See Pervel Industries v. Department of Industry, 468 F. Supp. 490, 493 (D. Conn. 1978), aff'd mem., 603 F.2d 214 (2d Cir. 1979), cert. denied, 444 U.S. 1031 (1980) ("Title VII did not create new authority for state anti-discrimination laws; it simply left them where they were before the enactment of Title VII"). The scope of such jurisdiction or, as in this matter, a tribe's protected interest must instead be determined independently by reference to other principles like those articulated in Montana.

Finally, this opinion is necessarily limited to its particular facts. I thus do not conclude that the Blackfeet Tribe, or any other tribe, may never enforce its preference requirements on reservation employers. Where, for example, a business relationship exists between an employer and the Tribe, somewhat different preemption principles will apply and application of the Human Rights Act may be foreclosed. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-45 (1980). There may also be situations in which preferences are expressly required by a federal statute such as section 7(b) of the Indian Self-Determination and Education Assistance Act. Applicability of the Human Rights Act to reservation-related activities must therefore be carefully decided on a case-by-case basis.

THEREFORE, IT IS MY OPINION:

> The Montana Human Rights Act applies to public school districts lying wholly or partially within Indian reservations on district-owned lands and prohibits the school district from granting employment preferences to Indians unless specifically required by federal statute. Indian tribes do not have a federally-protected interest in requiring that such preferences be granted their members or other Indians.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 43

ARMED FORCES - Compensation paid to state officer for military duty;
CONSTITUTIONS - Eligibility of elected officers of executive branch for compensation from other governmental agencies;
PUBLIC OFFICERS - Eligibility of elected officers of executive branch for compensation from other governmental agencies;
PUBLIC SERVICE COMMISSION - Eligibility of elected officers of executive branch for compensation from other governmental agencies;
MONTANA CODE ANNOTATED - Sections 2-15-501(1), 10-1-103, 10-1-501, 17-4-103(1);
MONTANA CONSTITUTION - Article VI, sections 4(5), 5(2);
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 32 (1989);
UNITED STATES CODE - 32 U.S.C. § 325(a), 37 U.S.C. § 204, 37 U.S.C. § 206;
UNITED STATES CONSTITUTION - Article VI.

HELD: 1. Article VI, section 5(2) of the Montana Constitution has no effect upon the salary of an elected member of the Public Service Commission but restricts his right to accept additional compensation from the state for service in the Montana Army National Guard.

2. Article VI, section 5(2) of the Montana Constitution restricts the right of an elected member of the Public Service Commission to accept additional compensation from the state for service in the Montana Army National Guard when such duty constitutes state rather than federal service.

3. To the extent applicable, as noted above, the constitutional limitation upon the right of elected officers of the executive branch to accept compensation from their elected office prohibits all compensation from the state resulting from service in the Montana Army National Guard, beginning with the first instance of dual compensation.

4. A public officer has a duty to repay unauthorized compensation and the state has a corresponding right to recover the same.

5. The state auditor has the authority to compel an elected member of the Public Service

Commission to repay unauthorized additional compensation received from the state for service in the Montana Army National Guard.

November 22, 1989

The Honorable Andrea Bennett
State Auditor of Montana
P.O. Box 4009
Helena MT 59604

Dear Ms. Bennett:

You have requested clarification of my recent opinion wherein I concluded that, as a matter of state law, an elected state officer of the executive branch, who is also a member of the Montana Army National Guard, may not receive additional compensation for simultaneous service in the Montana Army National Guard. See 43 Op. Att'y Gen. No. 32 (1989). At the outset it is important to mention that although it was beyond the scope of the prior opinion to discuss the issue of federal preemption, your request adduced additional information concerning the different sources of compensation received, thus requiring a discussion of preemption. As will be explained hereafter, the nature of service and the source of payment affect the right of a state officer to receive additional compensation. My prior opinion was directed toward the reception of additional compensation from the state for service in the Montana Army National Guard. That opinion, although correct, is subject to clarification in view of the additional information concerning federal compensation which has come to light as a consequence of your request. Your specific questions are as follows:

1. Since your previous opinion concludes in relevant part that elected members of the Public Service Commission may not receive additional compensation for simultaneous service in the Montana Army National Guard, which salary--the salary received as an elected member of the Public Service Commission or the salary received for service in the Montana Army National Guard--is prohibited?

2. If the prohibited salary in the above question is the salary received as an elected member of the Public Service Commission, can the State Auditor

unilaterally withhold payment of the salary to the elected member and revert it to the general fund? If the State Auditor cannot unilaterally withhold payment of the salary and must receive authorization, who can provide such authorization and by what procedure?

3. Does the state constitutional violation of dual compensation begin with the first payment of the double salary? If so, must the elected official return all prohibited salary he received to the fund which paid it? If the prohibited salary was paid by the State Auditor, can the state auditor compel the elected official to return all prohibited salary he received?

The answer to your first question is dictated by the plain meaning of the language used in Article VI, section 5(2) of the Montana Constitution which provides as follows:

> 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. [Emphasis added.]

The intent of the framers of a constitutional provision is controlling and "should be determined from the plain meaning of the words used." State v. Cardwell, 187 Mont. 370, 373, 609 P.2d 1230, 1232 (1980). The underlined portion of the foregoing provision clearly evinces an intention to prohibit compensation attributable to service in a governmental agency other than the position to which the officer was elected. The example employed in discussion of the foregoing provision at the constitutional convention resolves all doubt.

> 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. [Emphasis added.]

IV Mont. Const. Conv. 929 (1972). I therefore conclude that Article VI, section 5(2) of the Montana Constitution has no effect upon the salary of an elected member of the Public Service Commission but instead restricts that state officer's right to accept additional compensation from the state for military service.

In view of the foregoing discussion there is no reason to answer your second question.

Before discussing your third group of questions, it will be necessary to further clarify the effect of Article VI, section 5(2) of the Montana Constitution. As a result of the unique character of the National Guard, the foregoing constitutional provision does not operate as a complete bar to the receipt of additional federal compensation for military service.

In modern form, the organizational structure of the National Guard may be described as follows:

> The National Guard is the organized militia of the several States. [10 U.S.C. § 101(10), (12)]. The National Guard of the United States (NGUS) consists of the members of the National Guard or organized militia who are also enlisted in a reserve component of the United States Army or Air Force. [10 U.S.C. § 261.]
>
> In 1933, Congress established the National Guard of the United States as a component of the Army of the United States. Act of June 15, 1933, ch. 87, § 5, 48 Stat. 155. The National Guard of the United States consisted of the federally recognized members and units of the National Guard of the several States. Id. The 1933 Act created a dual enlistment system, id., §§ 7-11, 48 Stat. 156-57, whereby "an incoming guardsman joined both the National Guard of his home state and the National Guard of the United States, a reserve component of the U.S. Army." Johnson v. Powell, 414 F.2d 1060, 1063 (5th Cir. 1969). [Emphasis supplied.]

Perpich v. United States Department of Defense, 880 F.2d 11, 14-15 (8th Cir. 1989). See also § 10-1-103, MCA.

The National Guard is and always has been subject to both state and federal regulation as a result of its dual character.

> The Constitution as adopted represented a compromise. A standing army was authorized, but the militia was not abolished. It was to be available for federal service in three specified contingencies. It was to be organized, armed and disciplined by Congress, but, except when in federal service, was to be governed by the States. The President was to be Commander-in-Chief of the Army, and of the militia while in federal service.

Weiner, The Militia Clause of the Constitution, 54 Harv. L. Rev. 181, 184-85 (1940).

It was inevitable that the constitutional framework of dual control would provide for instances of conflicting state and federal regulation. The relevant factor in the resolution of such disputes is the determination of whether the National Guard is engaged in state or federal service at the time.

> [T]he relevant dichotomy in the constitutional language is between federal service and state service. See Article 1, sec. 8, cl. 16 ("The Congress shall have Power ... To provide ... for governing such Part of [the militia] as may be employed in the Service of the United States....").

Perpich v. United States Department of Defense, 666 F. Supp. 1319, 1324 (D. Minn. 1987). See also Dukakis v. United States Department of Defense, 686 F. Supp. 30, 36 (D. Mass. 1988); aff'd, 859 F.2d 1066 (1st Cir. 1988) (per curiam), cert. denied, ___ U.S. ___, 109 S. Ct. 1743, 104 L. Ed. 2d 181 (1989) ("Under the dual-enlistment rationale, ... the states' authority over training of the militia, reserved in the Militia Clause, does not apply to the period during which members of the militia are on active duty as part of the NGUS.")

Congress has authorized active federal service for the National Guard in a wide variety of circumstances. Perpich v. United States Department of Defense, supra, 880 F.2d at 15. See, e.g., 10 U.S.C. §§ 672, 673, 3496; 32 U.S.C. §§ 503 to 506. When called into federal

service, a member of the National Guard is relieved from duty in its state counterpart. 32 U.S.C. § 325(a). Thus the issue of whether a member of the National Guard is subject to state or federal regulation is determined by the nature of his service, which in turn must be determined on a case-by-case basis. Emsley v. Army National Guard, 722 P.2d 1299, 1301 (Wash. 1986) ("Whether the National Guard is in federal or state service at a given time is determined by the United States Constitution, the Washington Constitution, and federal laws").

Under Article VI of the federal Constitution, federal law has supremacy over state law, including the provisions of a state constitution. Both state and federal statutory law provide for compensation for service in the National Guard. E.g., § 10-1-501, MCA; 37 U.S.C. §§ 204, 206. In contrast, Article VI, section 5(2) of the Montana Constitution prohibits an elected officer of the executive branch from accepting additional compensation for service in the Montana Army National Guard. The apparent conflict is resolved by the foregoing discussion. A member of the National Guard engaged in federal service and thus compensated by the federal government is subject to the duties and may receive the benefits of federal law. When engaged in purely state-oriented service and thus compensated by the state, he is subject to state regulation. Thus, Article VI, section 5(2) of the Montana Constitution has effect only in the latter instance. Therefore, the application of the second holding in 43 Op. Att'y Gen. No. 32 (1989) is hereby clarified to the extent that it applies only to compensation received from the state.

Your third group of questions concerns the recovery of compensation prohibited by Article VI, section 5(2) of the Montana Constitution. With respect to your first issue, I conclude that the prohibition set forth in the foregoing constitutional provision is absolute. The language employed therein permits no exception. When the meaning of a constitutional provision is apparent from its plain language, no other means of interpretation may be applied. State v. Cardwell, supra, 609 P.2d at 1232. Therefore, I conclude that to the extent of its applicability, Article VI, section 5(2) of the Montana Constitution prohibits an elected member of the executive branch from accepting any compensation from the state for service in the Montana Army National Guard beginning with the first instance of the dual compensation.

Your next issue concerns the obligation of a public officer to repay and the corresponding right of the state to recover improper compensation. While this precise issue has never been addressed by the Montana Supreme Court, the universal judicial response recognizes the right of the state to recover unauthorized compensation and imposes the obligation of repayment upon the recipient thereof.

> As a general rule, any compensation paid to a public official by the governmental body not authorized by law may be recovered by the proper governmental body, although the payment was made under a mistake of law and without fraud.

67 C.J.S. Officers § 242.

The duty to repay unauthorized compensation is absolute and applies notwithstanding the absence of improper motive.

> When a public official wrongfully receives public funds, although paid to him under an honest mistake of law, he must restore such funds.

Nodaway County v. Kidder, 344 Mo. 795, 129 S.W.2d 857, 861 (1939). The obligation to repay unauthorized compensation applies notwithstanding the actual rendition of public service.

> Russo, therefore, received money [overtime compensation] which he had no legal right to receive, and even though services actually performed furnish the basis of such payments, they cannot be retained.

Russo v. Governor of the State of New Jersey, 22 N.J. 156, 123 A.2d 482 (1956). Erroneous approval or payment of unauthorized compensation does not affect the state's right of recovery thereof.

> It has long been the rule that the State may recover public funds paid public officials in good faith but under a mistake of law, such as in the present case.

Opinion of the Justices, 175 A.2d 396, 398 (N.H. 1961); accord State v. MacDougall, 139 Ga. App. 815, 229 S.E. 667 (1976); State ex rel. Wright v. Gossett, 62 Idaho 521, 113 P.2d 415 (1941); Bockrath v. Department of Health and Human Resources, 506 So. 2d 766 (La. Ct. App.

1987); State v. Adams, 107 Wash. 2d 611, 732 P.2d 149 (1987).

The state may recover unauthorized compensation through a civil action in the proper court. State ex rel. Black v. Burch, 226 Ind. 445, 81 N.E.2d 850, 851 (1948); Bockrath v. Department of Health and Human Resources, supra, 506 So. 2d at 772; State v. Adams, supra, 732 P.2d at 153-54. See also Tit. 17, ch. 4, pt. 1, MCA.

I therefore conclude that a public officer has a duty to repay unauthorized compensation and that the state has a corresponding right to recover the same. In the instant case, the unauthorized compensation would include that compensation received from the state as a member of the Montana Army National Guard.

With respect to your final issue, I conclude that the State Auditor has the authority to compel repayment of unauthorized compensation. The duties of the State Auditor are provided by law. Mont. Const. Art. VI, § 4(5). Section 17-4-103(1), MCA, provides as follows:

> (1) In his discretion it is the duty of the state auditor to examine the collection of moneys due the state and institute suits in its name for official delinquencies in relation to the assessment, collection, and payment of the revenue and against persons who by any means have become possessed of public money or property and failed to pay over or deliver the same and against debtors of the state, of which suits the courts of the county in which the seat of government may be located have jurisdiction, without regard to the residence of the defendants.

A similar provision of Arizona statutory law has been held to confer the authority to institute judicial proceedings to compel recovery of public funds upon the office of the State Auditor.

> We think the auditor, considering the manifold duties of that office, is the logical person to determine whether prosecutions to recover state money should be instituted, and to cause such action to be taken on her relation, and the legislature has evidently reached the same conclusion[.]

State ex rel. Frohmiller v. Hendrix, 59 Ariz. 184, 124 P.2d 768, 771 (1942).

The authority conferred upon the State Auditor by section 17-4-103(1), MCA, does not conflict with the duty of the Attorney General to "prosecute or defend all causes to which the state or any officer thereof in his official capacity is a party[.]" § 2-15-501(1), MCA. The latter provision does not provide a limitation upon a specific grant of authority such as that set forth in section 17-4-103(1), MCA. See Montana Power Co. v. Department of Public Service Regulation, 218 Mont. 471, 709 P.2d 955 (1985). I therefore conclude that the State Auditor has the authority to compel repayment of unauthorized compensation.

THEREFORE, IT IS MY OPINION:

1. Article VI, section 5(2) of the Montana Constitution has no effect upon the salary of an elected member of the Public Service Commission but restricts his right to accept additional compensation from the state for service in the Montana Army National Guard.

2. Article VI, section 5(2) of the Montana Constitution restricts the right of an elected member of the Public Service Commission to accept additional compensation from the state for service in the Montana Army National Guard when such duty constitutes state rather than federal service.

3. To the extent applicable, as noted above, the constitutional limitation upon the right of elected officers of the executive branch to accept compensation from their elected office prohibits all compensation from the state resulting from service in the Montana Army National Guard, beginning with the first instance of dual compensation.

4. A public officer has a duty to repay unauthorized compensation and the state has a corresponding right to recover the same.

5. The state auditor has the authority to compel an elected member of the Public Service Commission to repay unauthorized additional compensation received from the state for service in the Montana Army National Guard.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

The authority conferred upon the State Auditor by section 17-4-103(1), MCA, does not conflict with the duty of the Attorney General to "prosecute or defend all causes to which the state or any officer thereof in his official capacity is a party[.]" § 2-15-501(1), MCA. The latter provision does not provide a limitation upon a specific grant of authority such as that set forth in section 17-4-103(1), MCA. See Montana Power Co. v. Department of Public Service Regulation, 218 Mont. 471, 709 P.2d 955 (1985). I therefore conclude that the State Auditor has the authority to compel repayment of unauthorized compensation.

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3. To the extent applicable, as noted above, the constitutional limitation upon the right of elected officers of the executive branch to accept compensation from their elected office prohibits all compensation from the state resulting from service in the Montana Army National Guard, beginning with the first instance of dual compensation.

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5. The state auditor has the authority to compel an elected member of the Public Service Commission to repay unauthorized additional compensation received from the state for service in the Montana Army National Guard.

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 September 30, 1989. This table includes those rules adopted during the period October 1, 1989 through December 31, 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 September 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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