RESERVE

MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 15

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

In the matter of the proposed amendment, repeal and adoption of rules pertaining to rules of procedure, general rules, occupational licenses, general conduct of racing, medication, corrupt practices and penalties and trifecta wagering	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT, REPEAL AND ADOPTION OF RULES PERTAINING TO HORSE RACING

TO: All Interested Persons:

1. On September 13, 1990, at 1:00 p.m., at MetraPark Fairgrounds, Zonta Room, Billings, Montana, a public hearing will be held to consider the proposed amendment, repeal and adoption of rules pertaining to horse racing.

2. The board is proposing to amend ARM 8.22.304, 8.22.321, 8.22.503, 8.22.701, 8.22.711, 8.22.801, 8.22.1401, 8.22.1402, 8.22.1502, 8.22.1503 and 8.22.1803; repeal ARM 8.22.305, 8.22.306, 8.22.308, 8.22.309, 8.22.311 through 8.22.320, 8.22.322, and 8.22.323; and adopt new rules I through VI.

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

"8.22.304 INSTITUTION OF PROCEEDINGS BY NOTICE AND CONDUCT OF HEARING (1) A hearing may be instituted by notice from the board or the department in conformity with the Montana Administrative Procedure Act ~~to any person who will be affected by a proposed revocation, suspension, or refusal to issue or re-issue, a license or any other act which the law authorizes the board to do~~.

(2) Hearings will be conducted under the Montana Administrative Procedure Act.

~~(2) Contents of notice:~~

~~(a) The notice shall be in writing, signed by, or on behalf of the board and shall contain:~~

~~(b) the action proposed to be taken by the board;~~

~~(c) a concise statement of facts upon which the board action is based;~~

~~(d) provisions of law upon which the notice is based;~~

~~(e) statement that the recipient has the right to demand a hearing where such demand is provided by law or would otherwise be applicable, and, if he desires, to be represented by counsel at said hearing.~~

~~(3) An answer to the charge in the notice may be filed by notice within 15 days of service. Where no answer is filed, all allegations of the notice will be deemed denied.~~

~~(4) A notice shall be served in the same manner as is provided in Chapter 20, Sub-Chapter 3 of these rules.~~

~~(5)--Except as herein expressly provided, the rules governing the petition shall govern a proceeding instituted by notice wherever applicable.~~"

Auth: Sec. 23-4-202, MCA; IMP, Sec. 23-4-202, MCA

REASON: This amendment is needed because this language is archaic and the board now recognizes and follows the Montana Administrative Procedure Act and the Attorney General's Model Rules.

"8.22.321 BOARD CONDUCT - NATIONAL ASSOCIATION OF STATE RACING COMMISSIONERS 5 POINT DOCTRINE (1) through (3) will remain the same.

~~(4)--Thus, if any person or group disagrees with a decision of a board of stewards, it should seek review from the responsible racing board. If one still feels aggrieved, he should seek judicial review. The final decision of the courts should terminate the matter in the racing industry as it does for the rest of our society.~~

(4) ~~(5)~~ In conclusion, the ~~NASRC~~ ARCI and each of its member boards should make it crystal clear that efforts by any segment of the racing industry to foster anarchy in the sport of racing by seeking favorable action of a board through such correction as threat of strike will be deemed an act to destroy the authority vested in the respective board subject to the full penalty provided by law in each jurisdiction."

Auth: Sec. 23-4-202, MCA; IMP, Sec. 23-4-202, MCA

REASON: There no longer is a NASRC. It has been replaced by ARCI. It is necessary to amend the rule to make the correct reference.

"8.22.503 ANNUAL LICENSE FEES The following fees shall be charged annually:

(1) will remain the same.			
(a) Assistant trainer			20.00
(2) through (11)(c) will remain the same.			
(d) Totalizer ~~operator~~ Company		~~10.00~~	50.00
(e) ~~Track tote fee~~ Tote employee			10.00
(12) through (16)(i) will remain the same.			
(j) ~~Gate admission seller~~ Photo Company		~~10.00~~	50.00
(k) through (aa) will remain the same.			
(ab) Program company			50.00
(ac) Program manager			20.00
(ad) Program employee			10.00
(ae) Simulcast site or network license			125.00
(17) Not requiring licenses but requiring identification. [Wives, children over 6 years of age and under 16 years of age, duplicate (lost i.d. cards)]"		~~2.00~~	5.00

Auth: Sec. 23-4-104, 23-4-201, 37-1-134, MCA; IMP, Sec. 23-4-104, 23-4-201, 37-1-134, MCA

REASON: It is necessary to amend this rule to revise fees to reflect program area costs and to recognize new licensed occupations that have evolved in the field, especially those

developing since the advent of simulcast wagering.

"8.22.701 GENERAL PROVISIONS (1) through (11) will remain the same.

(12) In the event of the loss of a license card, the board may in its discretion issue a duplicate, the fee for which shall be ~~$2~~ $5.00 and all minor and spouses identification cards.

(13) and (14) will remain the same."

Auth: Sec. 23-4-202; IMP, Sec. 23-4-104, MCA

REASON: This amendment is necessary to make the fee commensurate with program area costs.

"8.22.711 VETERINARIANS (1) through (3) will remain the same.

~~(a) The original medication report form shall be left with the owner, trainer, or person requesting treatment of the horse. The first copy shall be filed with the state steward by 9:00 a.m. on the day following such administration, and the second copy shall be retained by the veterinarian administering the medication.~~

~~(b)~~ (a) will remain the same."

Auth: Sec. 23-4-104, 23-4-202, MCA; IMP, Sec. 23-4-104, MCA

REASON: Clarify existing rule and relieve veterinarians of record filing requirements that no longer are practiced at the track.

"8.22.801 GENERAL REQUIREMENTS (1) through (67) will remain the same.

(68) In handicap races, high weighted horses shall be preferred regardless of ownership or trainer.

(a) When horses have equal handicap weights, preference shall be determined by lots regardless of ownership or trainer."

Auth: Sec. 23-4-104, MCA; IMP, Sec. 23-4-104, MCA

REASON: To clarify the method identifying the qualifiers for handicap races.

"8.22.1401 GENERAL RULES (1) through (11) will remain the same.

~~(a) The original medication report form shall be left with the owner, trainer or other person requesting the treatment of the horse. The first copy shall be filed with the state steward by 9:00 a.m. on the day following such administration, and the second copy shall be retained by the veterinarian administering the medication.~~ (12) - (17) remain the same.

(18) Any trainer, groom, owner, veterinarian, or other person found to be responsible for administering or permitting to be administered to any horse entered to be raced, any forbidden substance as shown by the test and/or analysis of the approved chemist shall be subject to a fine, suspension or both. ~~No veterinarian shall be subject to any penalty for~~

~~administering any substance insofar as he has fully complied with ARM 8.22.1401(9), hereof, or the "medication" rule herein, and has informed the owner, trainer, or other person requesting the treatment of the name, dosage and probable effect of the medication used.~~

(19) through (23) will remain the same."

Auth: Sec. 23-4-104, 23-4-202, 37-1-131; IMP, Sec. 23-4-104, 23-4-202, MCA

REASON: This amendment is necessary to make clear that informing an owner or trainer that a forbidden substance has been administered to a race horse prior to a race does not relieve a veterinarian of accountability for violating the board's medication rules. The deletion of subsection (a) is needed to relieve veterinarians of record filing requirements that no longer are practiced at the track.

"8.22.1402 PERMISSIBLE MEDICATION (1) through (3) will remain the same.

(4) The track veterinarian shall approve phenylbutazone drug request only if, in the exercise of his or her professional judgment, a need for the use of the drug for the treatment of the particular horse's injury or disease has been satisfactorily demonstrated. In arriving at the decision, the track veterinarian may take into account, ~~or~~ and rely upon, a written professional diagnosis made by a qualified veterinarian duly licensed by the board.

(5) through (19) will remain the same.

(20) Systemic therapy consistent with accepted standards of veterinary practice is allowed up to 24 hours before race time. Systemic therapy consistent with acceptable standards of veterinary practice includes the administration of phenylbutazone given at dosage of 2 grams i.v. or the oral equivalent thereof at 24 hour intervals on a daily basis, with the final dosage given by injection or the oral equivalent thereof 24 hours prior to post time.

(21) will remain the same."

Auth: Sec. 23-4-104, 23-4-202, MCA; IMP, Sec. 23-4-104, MCA

REASON: This amendment is necessary to clarify the existing rule, with respect to what information track veterinarians may rely upon in permitting the treatment of a race horse with phenylbutazone, and with respect to the question who is authorized to give oral administrations of phenylbutazone to race horses prior to races.

"8.22.1502 DEFINITION OF CONDUCT DETRIMENTAL TO THE BEST INTERESTS OF RACING For the purpose of implementing section 23-4-202(2), MCA, as amended, and also of defining conduct which the board considers detrimental to the best interest of racing as contemplated by ARM 8.22.701(8), the board rules that the following conduct is detrimental to the best interest of racing but these rules are not intended to limit the application of the phrase or otherwise to be exclusive:

(1) through (18) will remain the same.

(19) Failing to cooperate with an investigation by the board, or by a board of stewards, by:

(a) not furnishing requested papers or documents;

(b) not furnishing a full and complete explanation of matters referred to in a complaint filed with the board;

(c) not responding to subpoenas issued by the board;

(d) willfully misrepresenting facts to a board investigator;

(e) using threats, harassment, extortion or bribery on potential witnesses to discourage them from cooperating with an investigation or from testifying."

Auth: Sec. 23-4-104, 23-4-202, 37-1-131, MCA; IMP, Sec. 23-4-202, MCA

REASON: The additional conduct standard is needed to offset increasing instances of obstructing investigations and the board's resulting inability to enforce its own rules.

"8.22.1503 ALCOHOL AND DRUG TESTING RULE (1) No licensee or employee of any entity associated with the conduct of racing while on the grounds of a licensed or franchised race track or simulcast facility shall have present within his/her system any amount of alcohol which would constitute legal impairment or intoxication.

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

(4) No licensee or employee of any entity associated with the conduct of racing while on the grounds of a licensed or franchised race track or simulcast facility shall have within his/her system any controlled substance as listed in the U.S. Code, Title 21 (food and drug laws) or any prescription legend drug unless such prescription legend drug was obtained directly or pursuant to valid prescription or order from a duly licensed physician who is acting in the course of his/her professional practice.

(5) Jockeys shall be routinely tested for drug or alcohol usage as a part of their pre-licensing medical examination. The testing procedure and safeguards set forth in this rule shall be followed by the examining physician and others involved in the testing procedure.

(a) Refusal to submit to the test, or test results reporting a presence of illegal drugs or narcotics, or the use of non-prescription drugs shall be grounds for refusal to license the applicant. Any use or possession of illegal drugs that constitutes a felony shall preclude any further consideration of the license application.

(b) Licensees found to be involved in the illegal sale, manufacture or distribution of any narcotic/drug will be subject to license disciplinary action.

(c) Licensees demonstrating addiction to any narcotic/drug will be subject to license disciplinary action.

(d) Any improper use of any narcotic/drug by a licensee after licensing will be grounds for license disciplinary action.

(6) Current licensees will be required to submit to tests for alcohol, drug or narcotic usage as outlined below:

(a) A steward may order a drug test when, after

consultation with another steward or board representative, both concur that there is documentation that a licensee:

(i) is impaired or incapable of performing his/her assigned duties; or

(ii) has reduced productivity, excessive vehicle accidents, high absenteeism, or other behavior inconsistent with previous performance.

(b) The contents of the documentation shall be made available to the licensee.

(7) Licensees may be ordered by a steward to submit to a drug test:

(a) when the allegation involves the use, possession or sale of drugs or narcotics; or

(b) when the allegation involves the actual use of force; or

(c) when there is serious on-duty injury to the licensee or another person; and

(d) If two or more representatives of the jockey's guild at any race track advise the stewards at the track that they believe a jockey, who is scheduled to ride, is under the influence of drugs and/or alcohol, the stewards or their agents have probable cause for conducting such drug and/or alcohol tests on such jockeys as they deem appropriate.

(e) After a second steward or administrator agrees to the need for the test.

(8) A steward who orders a drug test when there is a reasonable objective basis for suspecting usage shall forward a report containing the facts and circumstances directly to the board.

(9) Test results reporting a presence of illegal drugs or narcotics, or the use of prescription, or the abuse of any over-the counter drug, will be submitted as a part of a written report by the state steward.

(10)(a) The licensee designated to give a sample must be positively identified prior to any sample being obtained.

(b) The room where the sample is obtained must be private and secure, with documentation maintained that the area has been searched and free of any foreign substance. An observer of the appropriate sex shall be present for direct observation to ensure the sample is from the employee and was actually passed at the time noted on the record. Specimen collection will occur in a medical setting, and the procedures should not demean, embarrass, or cause physical discomfort to the licensee.

(c) An interview shall be conducted with the licensee prior to the test to establish use of drugs currently taken under medical supervision.

(d) Specimen samples must be sealed, labeled and checked against the identity of the licensee to ensure that the results match the testee. Samples shall be sorted in a secured and refrigerated atmosphere until tested or delivered to the testing lab representative.

(11)(a) The testing or processing phase shall consist of the following two-step procedure:

(i) initial screening step, and

(ii) confirmation step.

(b) The urine sample will first be tested using a screening procedure. A specimen testing positive will undergo an additional confirmatory test. An initial positive report should not be considered positive, rather, it should be classified as "confirmation pending".

(c) The confirmation procedure will be technologically different than the initial screening test. Notification of test results to the steward or chief of security will be held until the confirmation test results are obtained. In those cases in which the second test confirms the presence of a drug or drugs in the sample, the sample will be retained for six months to allow further testing in case of a dispute.

(d) The testing methods selected must be capable of identifying marijuana, cocaine, and every major drug that is known to be abused, including heroin, amphetamines and barbiturates. Hospital laboratory personnel utilized for testing must be certified as qualified to conduct urinalysis and blood tests.

(e) Licensees who have been subjected to drug tests and shown to be drug free, shall receive a letter stating that no illegal drugs were found. If the licensee requests, a copy of the letter will be placed in the licensee's personal file.

(12) Licensees shall not take any narcotics or dangerous substance unless prescribed by a person licensed to practice medicine. Licensees who are required to take prescription medicine shall notify their stewards, in advance, of the medication prescribed and the nature of the illness or injury. Licensees shall submit, when requested by a steward, a doctor's statement attesting to their ability or inability to competently perform their work functions while under the influence of the prescriptive drugs.

(13) Members of the board and its designated representatives shall have the authority to full and complete entry on and to any and all parts of the grounds and mutuel plants of any licensee. Licensees who have a reasonable basis to believe that another licensee is illegally using drugs or narcotics, shall report such facts and circumstances immediately to the state steward of the live race meet or the chief of security of the simulcast facility. Any licensee who refuses to take the required drug test or to follow this rule is subject to be immediately relieved from duties pending administrative review.

~~(5)~~ (14) Acting with reasonable cause, the stewards or a designated board of horse racing representative may direct any such licensee or employee to deliver a specimen of urine in the presence of the track physician or other duly licensed physician as designated by the board, or subject his/herself to the taking of a blood sample or sample of other body fluids by the track physician or other duly licensed physician as designated by the board of horse racing.

~~(6)~~ (15) In such cases the stewards or the board of horse racing representative may prohibit such licensee or employee from participating in that day's racing or simulcast activities or other racing or simulcast activities until such time as said licensee or employee evidences a negative test result.

(7) and (8) will remain the same but will be renumbered (16) and (17).

~~(9)~~ (18) All testing shall be at the expense of the board of horse racing and the racing association on a 50-50 basis.

~~(10)~~ (19) ~~For a licensee's or employee's first violation he/she~~ First time violators shall not be allowed to participate in racing until such time as ~~his/her~~ their condition has been professionally evaluated and a professional written opinion is received stating that they can function safely without risk to the public and without detriment to the best interests of racing.

(a) After such evaluation, if said licensee's or employee's condition proves non-addictive and not detrimental to the best interest of racing, said licensee or employee shall be allowed to participate in racing provided he/she can produce a negative test result and agrees to further testing at the discretion of the stewards or designated representative of the board to insure his/her continued unimpairment.

(b) After such professional evaluation, should said licensee's or employee's condition ~~prove addictive or~~ demonstrate addiction or a condition detrimental to the best interest of racing, said licensee or employee shall not be allowed to participate in racing until such time as he/she can produce a negative test result and show documented ~~proof~~ evidence that he/she has successfully completed a certified alcohol/drug rehabilitation program approved by the board of horse racing. Said licensee or employee must agree to further testing at the discretion of the stewards or designated representative of the board to insure his/her unimpairment.

(c) If this is the second offense, the jockey shall not be permitted to ride again for six (6) months, and until he/she presents the stewards with a statement that he or she has satisfied the requirements of an appropriate rehabilitation program, with a negative test result and with an agreement to further testing at the discretion of the stewards;

(d) and, if this is the third offense, such jockey's license shall be revoked.

~~(11) For a licensee's or an employee's second violation, he/she shall be suspended and allowed to enroll in a certified alcohol/drug rehabilitation program approved by the board of horse racing, to apply for reinstatement only at the discretion of the board of horse racing.~~

REASON: This amendment is needed to clarify that the rule applies to persons involve in simulcasting and to conform with changes in the racing industry nationally.

"8.22.1803 POOL CALCULATIONS (1) and (2) will remain the same.

~~(3) The following sequence based on the official order of finish shall be used to determine the combination referred to in subsection (4):~~

~~(a) first, second, and fourth~~

~~(b) first, third, and fourth~~

~~(c) second, third, and fourth~~
~~(d) first, second, and fifth~~
~~(e) first, third, and fifth~~
~~(f) first, fourth, and fifth; and~~
~~(g) sequentially thereafter.~~

~~(4) Where only two horses finish in a race on which a Trifecta feature is operated, the pool shall be calculated in the following manner:~~

~~(a) The net pool shall be divided by the value of tickets sold in the pool on horses selected to finish first and second in the exact order of the official result coupled with any other horse that started in the race.~~

~~(5) Where only one horse finishes in a race on which a Trifecta feature is operated, the pool shall be calculated in the following manner:~~

~~(a) The net pool shall be divided by the value of tickets sold in the pool selecting that horse to finish first, coupled with any two other horses started in the race.~~

~~(6) Where there is a dead heat in any position of the official result, the pay out price for the Trifecta pool shall be calculated in the following manner:~~

~~(a) the legal percentage shall be deducted from the total amount bet in the pool to determine the net pool;~~

~~(b) the total value of all bets placed on all winning combinations shall be deducted from the net pool to determine a calculating pool;~~

~~(c) the calculating pool shall be divided into as many equal portions as there are winning combinations;~~

~~(d)~~ (3) The value of tickets of each respective winning combination shall be divided into its respective portion of the calculating pool.

~~(e)~~ (a) $1.00 shall be added to the quotients obtained pursuant to ~~paragraph (d)~~ subsection (3); and

~~(f)~~ (b) each sum obtained pursuant to ~~paragraph (e)~~ subsection (a) shall be multiplied by the purchase price of each ticket.

(4) If no ticket is sold on the winning combination, the profits shall be apportioned equally among the holders of tickets selecting the first and second place runners in their exact order.

(5) If no ticket selecting the first and second runners is sold, the profit shall be apportioned equally among the holders of tickets selecting the first and third runners in their exact order.

(6) If no ticket selecting the winning combination, the first and second runner or the first and third runner is sold, the profit shall be apportioned equally among the holders of tickets selecting the second and third runners with any other runner in their exact order.

(7) If no ticket requiring distribution of the pool pursuant to this rule is sold, the profit shall be apportioned equally among the holders of tickets selecting the runner finishing first.

(8) If no ticket requiring distribution pursuant to subsections 4, 5, 6 and 7 of this section is sold, the profits shall be apportioned equally among the holders of

tickets selecting the runner finishing second.

(9) If no ticket requiring distribution of the pool pursuant to subsections 4, 5, 6, 7 and 8 of this section is sold, the profit shall be apportioned equally among the holders of tickets selecting the runner finishing third.

(10) If no ticket requiring distribution pursuant to subsection 8.22.1803(4) through (9) is sold, complete refund will be made of entire Trifecta pool on that program upon presentation and surrender of all Trifecta tickets.

(11) If a race on which there is Trifecta wagering results in a dead heat for first place, the winning combinations shall include the first two runners as finishing in either first or second and the runner finishing third.

(12) If a race on which there is Trifecta wagering results in a dead heat for second place, the winning combinations shall include the runner finishing first and the two runners finishing in a dead heat as finishing in either second or third.

(13) If a race on which there is Trifecta wagering results in a dead heat for third place, the winning combinations shall include the runner finishing first, the runner finishing second and either of the runners finishing in a dead heat for third as finishing third.

(14) In all combinations described in subsections 10, 11 and 12 of this section, the profit shall be divided in separate pools, calculated as a place pool and paid off accordingly.

(15) If a race on which there is Trifecta wagering results in a triple dead heat or double dead heat, the net pool will be divided by the number of all such win, place, and show combinations thus formed, calculated as separate pools and paid off accordingly.

(7) through (9) will remain the same but will be renumbered (16) through (18)."

Auth: Sec. 23-4-104, MCA; IMP, Sec. 23-4-104, MCA

REASON: This amendment is needed to clarify pool payout requirements.

4. ARM 8.22.305, 8.22.306, 8.22.308, 8.22.309, 8.22.311 through 8.22.320, 8.22.322 and 8.22.323 are being proposed for repeal and can be located at pages 8-616 through 8-621, Administrative Rules of Montana. The reason for the proposed repeal is that they have been superseded by the Montana Administrative Procedure Act and the Attorney General's Model Rules and those statutes and rules are now recognized as controlling and followed by the board. The existing rules on the books are archaic.

5. The proposed new rules will read as follows:

"I PROGRAM COMPANIES (1) Program companies must provide current and complete and accurate past performance lines on each horse entered in a race.

(2) Program companies must provide an accurate printed race program for each licensed race date, which must include,

but not be limited to:

(a) past performance lines;

(b) horse numbers;

(c) past position numbers and colors;

(d) identity of owners, trainer and jockeys; and

(e) any rule of racing that the board may direct.

(3) Program companies must submit proofs of programs to the applicable racing secretary and the executive secretary of the board or its representative prior to publication.

(4) All employees of program companies must be licensed as program employees before entering the grounds of a race meet.

(5) Program companies shall share their information applicable to Montana race meets and horses racing in Montana with other program companies at a reasonable cost payable to the company providing the information."

Auth: Sec. 23-4-104, MCA; IMP, Sec. 23-4-104, MCA

"II PHOTO COMPANIES (1) Photo companies must provide state of the art photo-finish and video equipment with electronic timing capability, film, tape and other supplies and operators capable of providing accurate reproductions and depictions of all races and race finishes.

(2) Film and tape of all races shall be preserved by the photo companies for a period of at least one full calendar year from the date of the race.

(3) Film and tape of controversial races, when requested by the board, shall be supplied by the photo companies at the board's expense.

(4) All offices and employees of photo companies must be licensed before entering the grounds of a race meet."

Auth: Sec. 23-4-104, MCA; IMP, Sec. 23-4-104, MCA

"III TOTE COMPANIES (1) Tote companies must provide state of the art parimutuel equipment and tote at each licensed track that they service.

(2) Tote companies correct and complete betting odds, race results and payoff prices for each race at which wagering is permitted.

(3) Tote companies must:

(a) accept all wagers as outlined in this subchapter;

(b) pay all winners according to calculated payoff procedures;

(c) account for all monies wagered and paid-out;

(d) withhold all funds set aside by statute and contracts;

(e) deliver those funds each day to the licensee to be redistributed to the proper parties;

(f) publish daily a complete summary of all wagering pools, all payoffs, breakage, overpayments and short payments.

(4) All officers and employees of tote companies must be licensed before entering grounds of a race meet."

Auth: Sec. 23-4-104, MCA; IMP, Sec. 23-4-104, MCA

"IV LEASE AGREEMENTS (1) A fee will be assessed on all leases. This fee will be set by the board and reviewed

annually.

(2) Monies generated by the lease will be used to defray worker's compensation costs.

(3) Fees shall be rated as follows:

(a) full year lease between one licensed owner and one unlicensed owner - $150.00;

(b) full year lease between two licensed owners - $0.00

(c) a lease used, to include only one race meet - $50.00."

Auth: Sec. 23-4-104, MCA; IMP, Sec. 23-4-104, MCA

REASONS: New rules I, II and III comply with the statutory requirement that all aspects of the parimutuel system be regulated. Program companies, photo companies and tote companies are significant participants in the industry at each meet and they do require regulation.

New rule IV is necessary to provide fees to be commensurate with the cost of regulation. Policing lease agreements related to race horses have imposed increasing demands on staff's time and no longer can be ignored.

6. Interested persons may submit their data, views and arguments, either orally or in writing, at the hearing. Written data, views and arguments may also be submitted to the Montana Board of Horse Racing, Metcalf Building, Room 50, 1520 East Sixth Avenue, Helena, Montana 59620, no later than September 13, 1990.

7. Robert P. Verdon, attorney, has been designated to preside over and conduct the hearing.

BOARD OF HORSE RACING
STEVE CHRISTIAN, CHAIRMAN

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, August 6, 1990.

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

In the matter of the adoption of rules I through XL, relating to the licensing of underground tank installers and inspectors and the permitting of underground tank installations and closures; and the repeal of Emergency Rules I through XVI	NOTICE OF PUBLIC HEARING FOR THE PROPOSED ADOPTION OF RULES I THROUGH XL AND THE REPEAL OF EMERGENCY RULES I THROUGH XVI

(Underground Storage Tanks)

To: All Interested Persons

1. On September 6, 1990, at 9:30 a.m., the department will hold a public hearing in the SRS Auditorium of the SRS Building, 111 Sanders, Helena, Montana, to consider the adoption of new rules relating to underground storage tanks and the repeal of emergency rules.

2. The rules proposed to be repealed are Emergency Rules I through XVI adopted by the Department of Health and Environmental Sciences on August 1, 1990 and found in MAR issue No. 15. The rules proposed to be adopted will replace the repealed rules.

3. The rules, as proposed, appear as follows:

RULE I PURPOSE (1) The purpose of Rules I to XL is to implement sections 75-11-201, MCA to 75-11-227, MCA. These rules shall be applied in conjunction with those statutes. AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE II DEFINITIONS (1) The definitions in this section and in section 75-11-203, MCA, apply to Rules I to XL unless otherwise indicated.

(2) "Day" means a calendar day.

(3)(a) "Installation" or "to install" means the placement of an underground storage tank, including excavation, tank placement, backfilling, and piping of underground portions of the underground storage tank that store or convey regulated substances. Installation also includes repair or modification of an underground storage tank through such means as tank relining or the repair or replacement of valves, fillpipes, piping, vents, or in-tank liquid-level monitoring systems.

(b) The terms do not include:

(i) the process of conducting a precision (tightness) test to establish the integrity of the underground storage tank;

(ii) the installation of a leak detection device that is external to and not attached to the underground storage tank;

or

(iii) the installation and maintenance of a cathodic protection system. (This definition is quoted from section 75-11-203(4), MCA.)

(4) "Interim installer license" means a license issued to an individual by the department under section 75-11-210, MCA, to conduct the installation, closure, or both, of underground storage tanks from April 1, 1990 through September 30, 1990.

(5) "Lining" means the addition of a plastic, fiberglass, or other shell of impervious material to the inside of an underground storage tank for the purpose of ensuring that the tank retains its liquid contents. The term includes all steps to be taken in preparation for the addition of the lining and includes relining.

(6) "Local governmental unit" means a city, town, county or fire district.

(7) "Modification" means a change in the structure or significant components of an underground storage tank, and includes lining of a tank, cutting of the steel walls of a tank and the addition of internal leak detection devices.

(8) "Repair" means a repair as defined in ARM 16.45.101A(54), and includes tank lining.

(9) "Regular installer license" means a license issued to an individual by the department under section 75-11-210, MCA, to conduct the installation, closure, or both, of underground storage tanks after September 30, 1990.

AUTH: 75-11-204, MCA; IMP: 75-11-203, 75-11-204, MCA

RULE III INSTALLER LICENSE REQUIREMENTS GENERALLY

(1) An individual is "engaged in the business of" installation or closure of underground tanks, within the meaning of section 75-11-203(5), MCA, and must therefore have a license under section 75-11-210, MCA, if he or she installs or closes in any year in exchange for something of value, one or more underground storage tanks owned or operated by another person.

(2) An installer may not install or close an underground storage tank unless the installer has a valid license issued by the department under section 75-11-210, MCA, and Rules I to XL.

(3) The requirements of Rules I to XL do not prohibit the employment of any assistants, helpers or apprentices, who have not been issued an installer's license under those rules, by an installer at any installation or closure site so long as a licensed installer is physically present at the installation or closure and personally exercises supervisory control over those unlicensed persons.

(4) Installer licenses issued under Rules I to XL are non-transferable.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE IV ELIGIBILITY FOR REGULAR INSTALLER LICENSE

(1) No person may be granted a regular installer's license by the department unless that person:

(a) is an individual at least 18 years old;
(b) submits a completed license application to the department in accordance with Rule V;
(c) pays the appropriate license and examination fees provided in Rule XI to the department;
(d) successfully completes the licensing examination required by Rule VI; and
(e) meets the requirements of Rules I to XL and section 75-11-210, MCA, for an installer's license, as determined by the department.
AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE V REGULAR INSTALLER LICENSE APPLICATION
(1) Application for a regular installer's license must be made on a form provided by the department. On the form the applicant will provide the information required by the department.
(2) The application shall be subscribed and sworn to under oath before a notary public, stating that the information provided in the application is true.
(3) The application shall be accompanied by at least three references from other persons attesting to the experience and competency of the applicant in the installation and closure of underground tanks. The references must be written on forms provided by the department, and must show that the applicant actively participated in at least three underground storage tank installations and closures, two of which must be installations. If an applicant requests to have his or her license conditioned to allow only tank lining or closures to be conducted under the license, the applicant shall so state on the application, and the references need only apply their statements toward the applicant's closure or lining work, as appropriate. References for applicants conducting only closures or lining must show that the applicant participated in a total of at least two closures, or at least two tank linings in the last five years, as applicable.
(4) Applications and attachments shall be examined by the department for conformity with this rule and applicable statutes. Applications failing to provide information required for licensure may either be returned to the applicant with a notice to the applicant of the reasons for return or may be held by the department pending receipt of the omitted information.
(5) No license shall be granted unless the department determines, on the basis of the application and attachments and the examination given under Rule VI, that the applicant possesses the competency and experience to understand and comply with the rules governing the type of tank installations or closures or both, for which the applicant intends to be licensed, and understands the techniques of those installations or closures, as will protect public health, welfare, safety and the environment.
AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE VI REGULAR INSTALLER LICENSE EXAMINATION AND RE-

EXAMINATION (1) All applicants for a regular installer's license shall successfully complete a written examination, which shall be offered a minimum of two times per year by the department at such time(s) and place(s) as the department determines. The department shall give public notice of the time and place of the examination by advertisement in the public media.

(2) An applicant who does not hold an interim or regular installer license, and an applicant who intends to apply for a regular license with a different condition than is applicable to his or her interim or regular license, must register with the department for the examination at least twenty days before an examination is scheduled, by providing a completed license application to the department and paying the license application and examination fee provided in Rule XI.

(3) An applicant who holds an interim or regular installer license and does not intend to request a change in any conditions of the interim or regular license, must register with the department for the examination at least twenty days before an examination is scheduled, by signing a letter of intent on a form provided by the department, and paying the license application and examination fee provided in Rule XI.

(4) An applicant may purchase an examination study guide from the department by paying the study guide fee provided in Rule XI. Upon payment of the study guide fee, the department shall provide the applicant with a written study guide for the examination. The study guide shall contain such material as the department determines will assist individuals in preparing for the licensing examination.

(5) The examination given by the department shall test the applicant on his or her knowledge of applicable statutes and rules governing the type of installation or closure, or both, of underground storage tanks and the disposal of tanks and tank contents, for which a license application is being made. It will also test the applicant's knowledge of current technology and industry recommended practices for the installation and closure of underground storage tanks.

(6) A score of 80% or higher on the examination constitutes a passing grade. All examinations will be graded, and the applicants notified of their examination score, within thirty days of the date of the examination. An applicant who requested on a license application that his or her license be conditioned for conducting only closures or lining need only obtain a passing grade on the sections of the examination pertinent to closures or lining, as applicable.

(7) Any applicant who fails the examination may review his or her examination results in the department office. An applicant who fails the examination may retake it at the next scheduled examination date by registering for the examination, in the same manner as for the original examination, and by paying the reexamination fee provided in Rule XI.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE VII INSTALLER LICENSE ISSUANCE, TERM, CONDITIONS (1) The department shall issue a license upon the applicant's satisfaction of Rules I through XL, as applicable, and any statutory prerequisites. The license shall set forth the name of the licensed installer, a license identification number and the dates of issuance and expiration of the license.

(2) Licenses for applicants who request that their licenses be conditioned for conducting closures or lining only, shall have the closure or lining only condition clearly designated on the license.

(3) Interim installer licenses expire September 30, 1990. Regular installer licenses expire on the anniversary of their issuance but may be renewed no more than twice by the licensee upon payment of the renewal fee provided in Rule XI, within 30 days after expiration. A license for which an annual renewal fee is not paid is void. Licenses may be revoked, suspended, modified or conditioned prior to expiration in accordance with subsection (4) and Rules XXXVI to XL.

(4) The department may, upon issuance or reissuance of a regular license, and at other times only in accordance with Rule XXXVI, add conditions to a license limiting or restricting the licensee in the time, type, or manner of work to be performed pursuant to the license if the department determines the conditions are necessary to protect the public's or licensee's health, safety, or welfare, or the environment.

(5) Installer licenses issued under this rule are nontransferable.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE VIII INSTALLER LICENSE REISSUANCE (1) A licensed installer applying for reissuance of a regular installer license at the end of a three year license period, and an installer whose license has expired for non payment of the renewal fee provided in Rule VII, are subject to the same licensing requirements, including payment of the licensing application and examination fee and satisfactory completion of the written licensing examination, as provided in Rules I through XL.

(2) A licensee must apply for reissuance within six months before the expiration of his or her current regular license.

(3) At or before the time the licensee applies for reissuance of a license, he or she must also provide evidence on forms furnished by the department, of his or her completion of at least two department approved or sponsored continuing education courses for a total of 16 hours of continuing education, within each three-year period for which the license is issued.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE IX APPROVAL OF CONTINUING EDUCATION COURSES (1) An entity offering a continuing education course intended to fulfill the requirements of Rule VIII (3), or an installer planning to take the course, must submit a description

of the course to the department for approval of the course at least 15 days before the beginning of the course.

(2) A course in continuing education submitted to the department for approval will not be approved unless the course:

(a) is relevant to the subject area of installation, management, inspection, regulation or closure of underground storage tanks, and

(b) offers instruction on current technology or methods for the subject(s) in subsection (2)(a) and that technology or those methods will satisfy department rules governing, requiring or allowing the same.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE X INSTALLER DUPLICATE LICENSES (1) The department shall issue a duplicate license to replace a lost, damaged, or destroyed license upon receipt of evidence indicating the loss, damage or destruction and upon payment of the duplicate licensing fee provided in Rule XI. The duplicate license shall be designated as a duplicate, contain the information and conditions required of the original license and is subject to the same rules and requirements as the original license.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE XI INSTALLER LICENSING FEES (1) An individual applying for an underground storage tank installer's license shall pay to the department the applicable fee(s) provided in subsection (2) of this rule. All fees are non-refundable.

(2) Applicable fees are as follows:

(a) regular license application and examination fee ..... $ 50

(b) annual license renewal fee ..... $ 25

(c) study guide for installers (not including tank lining) ..... $ 60

(d) study guide for tank liners ..... $ 40

(e) study guide for tank closers ..... $ 40

(f) reexamination fee ..... $ 35

(g) duplicate license fee ..... $ 10

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE XII LICENSED INSTALLER RECORD KEEPING (1) Within 30 days of completion of an underground storage tank installation or closure, a licensed installer shall submit to the department and to the owner or operator:

(a) one copy of the completed department inspection checklist, or one copy of the completed manufacturer's installation checklist, and

(b) one copy of the installation or closure permit signed by the installer certifying that the work was completed according to the applicable state statutes and rules and permit conditions.

(2) The owner or operator shall keep a copy of the documents required by subsection (1) at the location of the installation or closure, or at the owner or operator's place of business if that place is different from the installation or

closure location and the copies cannot safely be kept at the location of the installation or closure. The copies required by subsection (1) shall be kept as provided in this subsection for as long as the tanks are used to store a regulated substance at the storage site, or for at least three years after a closure is completed at that site.

(3) Notwithstanding the provisions of ARM 16.45.1001(5), no person shall allow a regulated substance to be deposited into an underground storage tank during the calendar year in which the tank was installed unless the department has received the checklist and signed permit and approved the same to the owner or operator.

AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE XIII PROHIBITION OF UNPROFESSIONAL INSTALLER CONDUCT

(1) Any of the following acts of an installer licensee constitute unprofessional conduct and are prohibited:

(a) False, fraudulent, or misleading advertising;

(b) Misrepresentation or fraud in any aspect of the installation, closure, modification or repair of an underground storage tank, which creates an unreasonable risk of physical harm to the installer, his or her employee(s), the public, or to the environment;

(c) Violation of any state or federal statute or administrative rule regulating the installation or closure of an underground storage tank, which violation creates an unreasonable risk of physical harm to the installer, his or her employee(s), the public, or to the environment;

(d) Failing to cooperate with the department by:

(i) not furnishing in writing to the department upon request a full and complete explanation covering the matter contained in any complaint filed with the department; or

(ii) not responding to a subpoena issued by the department, whether or not the recipient of the subpoena is the respondent named in any proceeding;

(iii) failing to submit the signed permit and the installation or closure checklist;

(e) Interfering with an investigation or disciplinary proceeding by willful misrepresentation of facts to the department or its authorized representative, or by the use of threats or harassment against any person to prevent the person from providing evidence in a disciplinary proceeding or other legal action relating to underground storage tanks;

(f) Failing to make available, upon request of a client using the licensee's services, or upon request of the client's designee, copies of documents in the possession and under the control of the licensee, when those documents have been prepared by the licensee relating to the licensee's services performed for the client;

(g) Failing to comply with an order issued by the department or with a consent order or stipulation entered into with the department;

(h) Failing to adequately supervise the licensee's employee(s) to the extent that the installer, his or her

employee(s), the public, or the environment are endangered;

(i) Aiding or abetting an unlicensed person to install or close an underground storage tank;

(j) Willfully or repeatedly violating any ordinance of a political subdivision or any state statute or rule relating to the installation or closure of an underground storage tank;

(k) Failing to display his or her license upon request of any client, prospective client or any department or local inspector;

(l) Undertaking work from which the licensee has been prohibited by the terms of a license, permit, or order issued by the department; or

(m) Offering, giving, soliciting, or receiving, directly or indirectly, any commission, gift, or other valuable consideration in order to obtain a license from the department.

AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE XIV INSTALLATION AND CLOSURE PERMIT REQUIREMENT -- APPLICATION (1) No owner or operator may install or close an underground storage tank without a permit to do so issued by the department.

(2) A completed application for a permit shall be filed by the permit applicant on a form provided by the department, except as provided in subsection (5), at least 30 days prior to the proposed date of installation or closure. The department may return to the applicant any application form that is incomplete or otherwise does not contain sufficient information for issuance of the permit. Applications that are resubmitted to the department must be resubmitted at least 30 days prior to the proposed date of installation or closure.

(3) The applicant shall provide the information required by the department.

(4) The application must be accompanied by the appropriate permit application review fee provided in Rule VI and any applicable inspection fee provided in Rule XX.

(5) The department may issue a permit for repair, modification or closure of a tank in less than 30 days after application is made if the application could not have been submitted in the time provided in subsection (2) because of unforseen and unforeseeable circumstances and if the applicant does not qualify for an emergency permit under Rule XVII.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-212, MCA

RULE XV INSPECTION IN LIEU OF LICENSED INSTALLER (1) If a local inspector licensed under Rule XXV exists within the local governmental unit where the installation or closure will occur, the owner or operator may arrange for an inspection by the local inspector, in lieu of the department. The owner or operator must state on the permit application submitted to the department that the licensed local inspector will conduct the inspection. The inspection services scheduled by the local inspector shall be arranged and the schedule may be modified in a manner similar to department inspection services

under subsection (2).

(2) An owner or operator intending to have an underground storage tank installation or closure inspected by the department in lieu of obtaining the service of a licensed installer, as provided in section 75-11-213, MCA, shall so state on the permit application submitted to the department. After a permit is approved for issuance by the department, the department shall as soon as practicable attempt to schedule an inspection for the date(s) indicated on the permit application by the owner or operator, and shall notify the owner or operator whether inspection services will be available on those date(s). If the department is unable to schedule inspection services for those date(s) the inspection date shall be rescheduled for such other date mutually agreeable by the department and the owner or operator.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-213, MCA

RULE XVI PERMIT ISSUANCE, TERMS, CONDITIONS (1) Upon receipt of a completed permit application, the appropriate permit application fee provided in Rule XIX and any applicable inspection fee required by Rule XX for the installation or closure of an underground storage tank; the department shall review the application and determine whether the proposed installation or closure meets the criteria for approval in subsection (2).

(2) A permit shall be issued by the department upon its determination that the proposed installation or closure will:

(a) satisfy the requirements of the statutes and rules of the department and the state fire marshal;

(b) satisfy the requirements of any state law or rule governing disposal of the tanks and tank contents; and

(c) will be conducted in such a place and manner as to protect the public's health, welfare and safety and the environment.

(3) A permit issued to an applicant under this rule shall state on its face:

(a) the name of the owner or operator to whom the permit is issued;

(b) the address or location of the site at which the installation or closure may be conducted;

(c) the date(s) when the installation or closure is to be conducted;

(d) whether the installation or closure will be conducted by a licensed installer, and if so the name and license number of the installer; and

(e) whether the installation or closure will be inspected by the department or a local inspector and if so the name of the inspector;

(f) any special conditions for the installation or closure as provided for in subsection (7).

(4) The permit shall include a signature line for the licensed installer, licensed local inspector or department inspector to sign, certifying that the installation or closure was conducted in accordance with applicable statutes and rules

and any conditions of the permit.

(5) The permit must be kept at the installation or closure site during all phases of the installation or closure.

(6) A permit issued by the department under this rule or under Rule XVII is issued subject to the accuracy of the information provided by the applicant in the permit application, subject to the information stated or referenced on the permit pursuant to subsection (3), subject to compliance with all applicable statutes and rules and subject to any conditions applied pursuant to this rule or Rule XVIII. If the installation or closure is not conducted in accordance with any information, condition(s), statute or rule as provided in this subsection, the permit is void and of no effect and the installation or closure is considered to be conducted without a permit, and in violation of the law.

(7) The department may also issue upon the permit, any other condition necessary to insure compliance with subsection (2). Any such conditions shall be stated or referenced upon the permit.

(8) Upon issuance of a permit, the department shall forward a copy of the permit to any local inspector conducting an inspection of the installation or closure for which the permit was issued.

(9) Permits are valid for six months from the date of issuance.

(10) Permits issued under Rules I to XL are non-transferable.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-212, MCA

RULE XVII EMERGENCY PERMIT APPLICATION AND ISSUANCE (1) In the event of an emergency requiring immediate installation or closure of an underground storage tank, the applicant shall contact the department, orally provide the information required by Rule XIV and explain the nature of the emergency and the consequences of non-issuance. An emergency permit may be issued orally by the department for a maximum of 10 days. If an emergency permit is approved, the applicant shall pay the appropriate fees as provided in Rule XIX, and submit a completed permit application form to the department within 10 days of issuance of the emergency permit.

(2) If the department determines that an emergency exists under subsections (1) and (3) and that the requirements of Rule XIV subsection (2) have been satisfied, it shall issue the permit in the manner provided by this rule and subject to any conditions imposed pursuant to Rules I to XL.

(3) For the purposes of this rule, an emergency is an imminent and substantial threat to the public health or safety or to the environment.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-212, MCA

RULE XVIII PERMIT CONDITIONING, MODIFICATION, SUSPENSION, REVOCATION (1) The department may condition, modify, suspend or revoke any permit previously issued under Rule XVI or XVII upon its determination that the permittee:

(a) failed to meet the standards for issuance of a permit under Rule XIV or XVII, as appropriate;

(b) committed fraud or deceit in applying for a permit;

(c) violated any statute or rule of the department, the United States or the state fire marshal governing the installation or closure of an underground storage tank;

(d) violated the terms of any permit or order issued by the department relating to the installation or closure of an underground storage tank;

(e) lacks the education, training or experience necessary to conduct any installation or closure for which a permit was previously issued; or that

(f) a change in the facts or circumstances of installation or closure necessitates a change in the permit; and

(g) the condition, modification, suspension or revocation is necessary to protect the installer's or the public's health, welfare or safety, or the environment.

(2) Action by the department under this rule shall be accompanied by a written statement of the reason(s) for the department action. Upon written demand of the department, the permittee shall surrender his or her permit to the department, whereupon the department shall retain a revoked permit in accordance with subsection (4), or issue a modified or conditional permit in accordance with subsection (3).

(3) Whether or not a permit is surrendered, the department may issue a conditional or modified permit and the permittee shall comply with the conditions stated or referenced on or modification(s) to the permit.

(4) Whether or not a permit is surrendered, the department may revoke a permit effective upon mailing notice to the permittee in accordance with this rule. When a permit is revoked in accordance with this rule, the owner or operator may not install or close the tank for which the permit was originally issued without again applying for and receiving a permit for that installation or closure.

AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE XIX PERMIT APPLICATION REVIEW FEES (1) Persons applying for an underground storage tank installation or closure permit or both shall pay to the department the applicable permit application review fee(s) provided in subsections (2) through (5) of this rule, and the applicable inspection fee(s) provided in Rule XX if a licensed installer is not used to conduct the installation or closure.

(2) If a permit is denied or an application is determined by the department to be incomplete, and the application is not resubmitted within 30 days of the department's determination, 50% of the permit application and review fee and 100% of any inspection fee paid by the applicant will be returned to the applicant.

(3) For the installation or closure of an underground storage tank, the permit applicant shall pay the following permit application review fees:

(a) less than 551 gallon capacity $25/tank

(b) 551 - 5,000 gallon capacity $50/tank
(c) more than 5,000 gallon capacity $100/tank
(d) piping only ..... $25/50 feet ($25-min, $100-max)
(e) modification & repairs only $25

(4) Permit application review fees for installations, closures or both, at one facility or location shall not exceed $500 per permit issued by the department.

(5) For the issuance of a duplicate of any permit, the permittee shall pay $10.

AUTH: 75-11-204; IMP: 75-11-204, MCA

RULE XX INSPECTION FEES (1) An inspection fee deposit of $120 for the use of a local inspector and $160 for the use of a department inspector shall be submitted to the department for each installation or closure not conducted by a licensed installer. The inspection fee deposit must be submitted with the permit application in accordance with Rules XIV, XVI XVII, and XIX and must be paid in the form of a check or money order made payable to the Montana Department of Health and Environmental Sciences.

(2) If a permit applicant changes the method of installation or closure from inspection to use of a licensed installer or cancels the installation or closure, the department shall refund the inspection fee deposit to the applicant, without payment of interest, upon the applicant's request if:

(a) the applicant submits a written request for a refund which is received by the department not later than two weeks after the expiration of the permit; and

(b) the applicant surrenders the unused permit to the department.

(3) Within five days after completion of the inspection, the inspector shall send to the department a report on a form provided by the department of the total time required for the inspection, including the inspector's travel time to and from the inspection site. The time shall be reported to the nearest one-half hour. Upon receipt of the report, the department shall calculate the total inspection fee due to the department based upon the following formula for closures and installation inspections:

Type of Fee	Local Inspector	Department Inspector
Minimum fee (fee deposit)	$ 120	$ 160
Per Hour fee for each hour over 4 hours	$ 30	$ 40

(4) The total inspection fee shall be calculated by multiplying the actual inspection and travel time that is greater than four hours, calculated to the nearest one-half hour, times the hourly fee provided in subsection (3). Any amount calculated greater than the deposit paid to the department shall be billed by state invoice to the permittee and shall be paid by the permittee within 30 days of receipt of the state's invoice. Notwithstanding the provisions of ARM 16.45.1001(5), no person shall allow a regulated substance to

be deposited into an underground storage tank unless the total inspection fee has been paid to the department.
AUTH: 75-11-204; IMP: 75-11-204, MCA

RULE XXI REQUIREMENTS FOR INSPECTION GENERALLY (1) An owner or operator intending to install or close an underground storage tank without the services of a licensed installer in accordance with section 75-11-213 and 75-11-217, MCA, must have the installation or closure inspected by a department inspector or a local inspector licensed by the department.
AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE XXII ELIGIBILITY FOR INSPECTOR LICENSING (1) No person may be granted an interim inspector's license unless that person:

(a) is an individual at least 18 years old;

(b) submits a completed license application to the department in accordance with Rule XXIII;

(c) pays the licensing fee provided in Rule XXVIII;

(d) is an employee or independent contractor of a local governmental unit designated for the purpose of Rules I to XL as an implementing agency in the manner provided in Rule XXX, unless otherwise approved by the department;

(e) successfully completes the licensing examination required by Rule XXIV; and

(f) the department determines that the applicant meets the requirements of this rule.

(2) Inspector licenses issued under Rules I to XL are non-transferable.
AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-217, MCA

RULE XXIII INSPECTOR LICENSE APPLICATION (1) Application for an inspector's license will be made in the same manner as set forth in Rule V for installer licenses except that Rules V(1)(c) and V(3) do not apply to applications for inspector licensure, and inspectors are subject to the examination provided in Rule XXIV.

(2) If an applicant requests to have his or her license conditioned to allow the applicant to inspect closures only, the applicant shall so state on the application form.

(3) No licensed inspector may inspect the installation or closure of any underground storage tank owned or operated by any person who has a continuous and ongoing employment relationship with that inspector, except that licensed inspectors for federal, state, and local governmental units may, upon approval by the department, inspect work conducted by an unrelated division, department or bureau within their government entity.
AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE XXIV INSPECTOR LICENSE EXAMINATION AND RE-EXAMINATION (1) All applicants for an inspector's license must successfully complete a written examination which shall be offered by the department at such time(s) and place(s) as the

department determines. The department shall give public notice of the time and place of the examination by advertisement in the public media.

(2) An applicant who does not hold an inspector license, and an applicant who intends to apply for a license with a different condition than is applicable to his or her license, must register with the department for examination at least twenty days before the examination is scheduled by submitting a completed application to the department and paying the examination fee provided in Rule XXVIII, unless exempt from the fee in accordance with Rule XXVIII(1).

(3) An applicant who holds an inspector's license and does not intend to request a change in any conditions of the interim or regular license, must register with the department for the examination at least twenty days before an examination is scheduled, by signing a letter of intent on a form provided by the department, and paying the license application and examination fee provided in Rule XXVIII, unless exempt from payment of the fee pursuant to Rule XXVIII(1).

(4) The examination given by the department shall test the applicant on his or her knowledge of applicable statutes and rules governing the installation and closure of underground storage tanks and the disposal of tanks and tank contents. It will also test the applicant's knowledge of current technology and industry recommended practices for the installation and closure of underground storage tanks, and of proper inspection techniques and documentation.

(5) A score of 80% or higher on the examination constitutes a passing grade. All examinations will be graded, and the applicants will be notified of their score on the examination, within thirty days of the date of the examination. An applicant who requests that his or her license be conditioned to allow the applicant to conduct closures only, need only obtain a passing grade on the sections of the examination pertinent to closures as determined by the department.

(6) Any applicant who fails the examination may review his or her examination results in the department offices. An applicant who fails the examination may retake it at the next scheduled examination date by registering for the examination in the same manner as for the original examination and by paying the reexamination fee provided in Rule XXVIII.

(7) An applicant may request an examination study guide from the department. Upon payment of the study guide fee, the department shall provide the applicant with the study guide. The study guide shall contain such material as the department determines will assist individuals in preparing for the licensing examination.

AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE XXV INSPECTOR LICENSE ISSUANCE, TERM, CONDITIONS

(1) The department shall issue a license upon the applicant's satisfaction of Rules XXI through XXIX, as applicable. The license shall set forth the name of the licensed inspector, a license identification number and the dates of issuance and

expiration of the license.

(2) Licenses for applicants who request that their license be conditioned for closure only, and licenses conditioned by the department as provided in subsection (4), shall have the conditions clearly designated on the license.

(3) Inspector licenses expire on the anniversary of their issuance but may be renewed no more than twice by the licensee upon payment of the renewal fee provided in Rule XXVIII, within thirty days after expiration. A license for which an annual renewal fee is not paid is void. Licenses may be revoked, suspended, modified or conditioned prior to expiration in accordance subsection (4) and Rules XXXVI through XL.

(4) The department may, upon issuance or reissuance of a license, and at other times only in accordance with Rule XXXVI, add conditions to a license limiting or restricting the licensee in the time, type, or manner of work performed pursuant to the license if the department determines the conditions necessary to protect the public's health, safety, or welfare, or the environment.

(5) Inspector licenses issued under Rules I to XL are non-transferable.

AUTH: 75-11-204, MCA; IMP: 75-11-210, MCA

RULE XXVI INSPECTOR LICENSE REISSUANCE (1) A licensed inspector applying for reissuance of a license at the end of a three year license period and an inspector whose license has expired for nonpayment of a renewal fee, must comply with the same licensing requirements, including satisfactory completion of a written examination, as provided in Rules I through XL.

(2) A licensee must apply for reissuance within six months before the expiration of his or her current regular license. The department shall provide the licensee adequate notification of the annual expiration date.

(3) At or before the time a licensee applies for reissuance of a license, he or she must also provide evidence on forms furnished by the department, of his or her completion of at least two department approved or sponsored continuing education courses, totalling at least 16 hours of continuing education, within each three-year period for which the licensee is licensed.

(4) Approval of continuing education requirements shall be conducted in the manner provided in Rule IX.

AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE XXVII INSPECTOR DUPLICATE LICENSES (1) The department shall issue a duplicate inspector's license to replace a lost, damaged, or destroyed license upon receipt of evidence indicating the loss, damage or destruction and upon payment of the duplicate licensing fee specified in Rule XXVIII. The duplicate license shall be designated as a duplicate, contain the information required in the original license and is subject to the same rules and any conditions as the original license.

AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE XXVIII INSPECTOR LICENSING FEES (1) No fee is charged by the department for the license application, examination, issuance, reissuance, or renewal of a license or duplicate license of or to an employee of the state or a local governmental unit.

(2) An individual not employed by the state or a local governmental unit applying for or issued an underground storage tank inspector's license shall pay to the department the applicable fee(s) provided in subsection (3) of this rule. All fees are non-refundable.

(3) Applicable fees are as follows:

(a)	license application and examination fee	$ 50
(b)	study guide fee	$110
(c)	reexamination fee	$ 30
(d)	duplicate license fee	$ 10
(e)	annual license renewal fee	$ 25

AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE XXIX PROHIBITION OF UNPROFESSIONAL INSPECTOR CONDUCT (1) Any of the following acts of an inspector licensee constitute unprofessional conduct and are prohibited:

(a) False, fraudulent, or misleading advertising;

(b) Misrepresentation or fraud in any aspect of the inspection of any installation, closure, modification or repair of an underground storage tank which creates an unreasonable risk of physical harm to the installer, his or her employee(s), the public, or the environment;

(c) Violation of any administrative rule regulating the inspection, installation or closure of an underground storage tank, which violation creates an unreasonable risk of physical harm to the installer, his or her employee(s), the public, or to the environment;

(d) Failing to cooperate with the department by:

(i) not furnishing in writing to the department upon request a full and complete written or oral explanation covering the matter contained in any complaint filed with the department; or

(ii) not responding to a subpoena issued by the department, whether or not the recipient of the subpoena is the respondent named in the proceeding;

(iii) failing to conduct an inspection or submit the signed permit, installation or closure checklist or other report required by the department;

(e) Interfering with an investigation or disciplinary proceeding by willful misrepresentation of facts to the department or its authorized representative, or by the use of threats or harassment against any person to prevent the person from providing evidence in a disciplinary proceeding or other legal action relating to the inspection of underground storage tanks;

(f) Failing to make available, upon request of a person using the licensee's services, or the person's designee, copies of any inspection report, when the report has been prepared by the licensee and relates to the inspector's services performed for the person;

(g) Failing to comply with an order issued by the department or with a consent order or stipulation entered into with the department;

(h) Failing to adequately inspect an installation or closure to the extent that the installer, his or her employee(s), the public or the environment are endangered;

(i) Aiding or abetting an unlicensed person to install, close, modify or repair an underground storage tank.

(j) Willfully or repeatedly violating any ordinance of a political subdivision or state statute or rule relating to the installation, closure or inspection of an underground storage tank;

(k) Failing to display his or her license upon request of an owner, operator, department representative or installer at an installation or closure site;

(l) Undertaking work from which the licensee has been prohibited by the terms of a license or order issued by the department;

(m) Offering, giving, soliciting, or receiving, directly or indirectly, any commission, gift, or other valuable consideration in order to obtain a license from the department; or

(n) Inspection of tanks owned or operated by an employee's employer. Inspectors who work for federal, state, or local governments are exempt from this subsection for the purposes of tanks owned by those governments, in accordance with Rule XXIII(3).

AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE XXX DESIGNATION OF IMPLEMENTING AGENCIES (1) A local governmental unit employing or contracting with a licensed inspector may apply for and receive designation as an implementing agency for the purposes of Rules I to XL in the manner provided in ARM 16.45.1003.

(2) Upon designation, an implementing agency may apply for and receive up to 80 percent of the permit application review and inspection fees collected, in accordance with Rule XXXII.

(3) Upon designation, an implementing agency may administer and enforce those rules and statutes which it is authorized or required by rule, statute or its letter of designation to administer or enforce, in the same manner in which the department is authorized to enforce those statutes or rules and may apply to the department in the manner authorized by ARM 16.45.1004 for reimbursement for any such services.

(4) Designation shall be made, amended and revoked in the manner provided in ARM 16.45.1003 to 16.45.1005.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-213, MCA

RULE XXXI METHOD OF INSTALLATION AND CLOSURE INSPECTION--REPORTS (1) Each local inspector licensed by the department to conduct inspections of installations or closures or both of underground storage tanks, shall conduct both those inspections for which application is made by the owner or operator or other

person pursuant to Rule XV and such other short notice or compliance inspections as requested by the department. Each inspection by any inspector licensed under Rules I to XL shall be conducted in the manner required by applicable statutes and rules and any conditions contained in the inspector's license and in any letter of designation. At the conclusion of each stage of an inspection, the inspector shall complete a written check list prescribed by the department indicating that the applicable stage of the inspection has been conducted.

(2) If during an inspection, the inspector discovers or is provided with information indicating a violation of any state statute(s) or rule(s) or permit term or condition governing the installation or closure of the tank, the inspector shall direct that the installation or closure be, and it shall be, stopped and the inspector shall conduct as thorough and complete an inspection of the indicated violation as time and circumstances permit. The inspector shall direct compliance with, and the owner, operator, installer, permittee or other person shall comply with, all state statutes and rules and all permit terms or conditions regulating the installation or closure of the underground storage tank.

(3) Immediately upon completion of an inspection of an installation or closure conducted by a licensed installer, the inspector must sign the permit certifying that the work the inspector witnessed was completed according to the requirements of state statutes and rules and any requirements of the permit, if the work was so completed.

(4) Immediately upon completion of an inspection of an installation or closure not conducted by a licensed installer, the inspector must sign the permit certifying that the work was completed according to the requirements of state statutes and rules and any requirements of the permit, if the work was so completed.

(5) Upon completion of an inspection of an installation or closure not conducted by a licensed installer, the inspector shall submit a copy of the signed permit and the inspection checklist to the department within 10 days after completing the inspection.

(6) Upon completion of an inspection of an installation or closure not conducted by a licensed installer, the inspector shall give a copy of the signed permit and checklist to the owner or operator of the tank installation or closure that was inspected.

(7) The owner or operator shall keep a copy of the permit and checklist signed by the inspector at the place where the inspected installation or closure is located or at the owner or operator's place of business if that place is different from the installation or closure location and copies cannot safely be kept at the location of the installation or closure. The copy of the permit and checklist shall be kept as provided in this subsection for as long as the tanks are used to store a regulated substance in the same location at which the inspection took place, or for at least three years after a closure is completed at that site.

(8) Upon request of the department, an inspector shall provide to the department any records, notes or other documents in the inspector's possession relating to an inspection.
AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE XXXII INSPECTION REIMBURSEMENT (1) In accordance with section 75-11-213, MCA, within 30 days of receipt of a statement for services from a designated implementing agency, the department shall reimburse the agency 80% of the permit application review fee and 80% of any inspection fee submitted for the inspection of an installation or closure conducted by that inspector. Inspections eligible for reimbursement under this rule are those scheduled in accordance with Rule XV and those short notice or compliance inspections conducted by a designated local inspector upon request of the department.

(2) The statement for services and claims by an implementing agency shall be prepared and submitted to the department in accordance with ARM 16.45.1004.

(3) Claims for reimbursement not in accordance with this rule shall be and are denied. Claims shall be paid only within the limitations of departmental budgets and legislative appropriations.
AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-213, MCA

RULE XXXIII NOTICE OF VIOLATION -- WRITTEN ORDER TO TAKE CORRECTIVE ACTION (1) If an owner, operator, permittee, installer or other person refuses to comply with a direction given by a licensed inspector pursuant to Rule XXXI to comply with state statutes or rules or any permit condition, the inspector may complete a written notice of violation and serve it on the person by personal delivery by the inspector. The notice may include any of those matters specified in section 75-11-218, MCA. The notice shall be signed and dated by the inspector. Any order requiring corrective action or requiring information to be provided contained in the notice shall be addressed to the person committing the violation, or to the supervisor or employer determined by the inspector to be responsible for the violation or the person committing the violation, and shall contain:

(a) a short description of the violation;

(b) a citation to the rule, statute or permit condition violated;

(c) a plain statement of the act necessary for compliance;

(d) the time within which compliance is required;

(e) a plain statement of the effect of the order and the rights of the person to whom the order is addressed, including the right of a hearing before the board.

(2) The person to whom the order is addressed shall comply therewith unless a hearing is requested in accordance with section 75-11-218, MCA.
AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-218, MCA

RULE XXXIV THIRD PARTY COMPLAINTS -- INVESTIGATIONS

(1) Whenever any person, not an employee of the department, complains to the department concerning any act by a licensed installer or inspector, the department shall, within 30 days of the receipt of the complaint, send the complainant a complaint affidavit form. The form must be completed to set forth:

(a) the name and address of the licensee about whom complaint is made;

(b) the nature of the complaint, giving the date(s) of the act complained of and any statute or rule alleged to have been violated;

(c) the name and address of the complainant.

(2) All complaint affidavit forms completed under subsection (1) and filed with the department must be sworn to before a notary public by the complainant. A complaint affidavit form submitted to the department failing to give required information or not otherwise completed in accordance with this rule will not be accepted for filing by the department and no investigative or enforcement action will be taken thereon by the department.

(3) If the complaint affidavit form required by subsections (1) and (2) is not completed and returned to the department within 90 days of its submission to the complainant, the department shall dismiss any complaint then pending and any correspondence alleging the acts complained of shall be removed from department files. Receipt of the completed affidavit will be acknowledged by the department.

(4) Upon receipt of the completed complaint affidavit, the department will investigate the facts alleged to determine whether a violation of statues or rules has occurred.

(5) All investigation reports, documents concerning the complaint, and other items of evidence received by the department will be retained by the department in accordance with law. Unless confidentiality is waived in writing by the licensee who is the subject of the investigation, all information received and evidence compiled by the department is confidential unless provided otherwise by law.

(6) Actions alleged in a complaint affidavit may, if appropriate, as determined by the department, be resolved informally by correspondence, telephone communication, or otherwise between the department, the complainant, and the licensee, without the filing of an administrative or judicial complaint by the department.

(7) The department may, in its discretion, take no action on any complaint affidavit which it determines to be frivolous, vexatious, or without factual or legal basis. If no action is to be taken, the complainant shall be informed in writing by the department.

(8) If at any time the department determines that a violation of statute or rules or both has occurred, it may institute appropriate administrative or judicial action against the licensee.

AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE XXXV DISCIPLINARY AND OTHER LICENSING ACTION GENERALLY (1) The department may condition, modify, suspend, revoke or refuse to renew any license, previously issued under Rules I to XL, under this rule upon its finding that there is substantial evidence that the licensee has committed any of the following acts:

(a) failed to meet the standards for issuance of an original license, as provided in section 75-11-210, MCA, and Rules I to XL;

(b) committed fraud or deceit in applying for a license or permit;

(c) violated any statutes or rule of the department, the United States, or the state fire marshal governing the installation, closure or inspection of an underground storage tank;

(d) violated any statute or rule of the department governing the licensing of underground tank installers or inspectors including any of the rules of professional conduct provided in Rules XIII or XXIX; or

(e) violated the terms of any license, permit, order or stipulation issued or agreed to by the department relating to the installation, closure or inspection of an underground storage tank or installer's or inspector's license.

(2) The department may also condition or modify any license, previously granted under Rules I to XL, under this rule upon its finding that there is substantial evidence that:

(a) the licensee lacks the education, training or experience necessary to conduct any installation or closure for which a license was previously issued; and

(b) that the condition or modification is necessary to protect the health, welfare or safety of the licensee, the licensee's employee(s) or the public, or necessary to protect the environment.

(3) In determining whether to condition, modify, suspend, revoke or refuse to renew a license under this rule, the department shall consider:

(a) the type and seriousness of any violation, including the degree of culpability of the licensee;

(b) the degree of injury to health, welfare, or safety of the licensee, the licensee's employee(s), the public, or to the environment; and

(c) any past or pending disciplinary actions against the licensee.

(4) The department shall condition, modify, suspend, revoke or refuse to renew any license under this rule in the manner provided by this rule and Rules XXXVI to XL.

(5) An order issued by the department under this rule shall be sent to the licensee and shall be accompanied by a written statement of the reasons for and term(s) and condition(s) of the department action and a written statement of the rights of the licensee, including the right of appeal to the board under Rule XL.

(6) Action taken by the department under this rule is effective pending appeal to the board.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-211, MCA

RULE XXXVI CONDITIONING OF LICENSE (1) Upon making the finding required by Rule XXXV, the department may condition a previously issued license.

(2) Upon demand of the department in writing, a licensee shall surrender his or her license to the department, whereupon the department shall issue a new license with the conditions imposed by the department stated or referenced on the license. Whether or not a license is surrendered, the department may issue a conditional license in accordance with Rule XXXV and this rule and the licensee shall comply with the conditions stated or referenced thereon. The department shall inform the licensee in writing of the reasons for and term(s) and the condition(s).

(3) The department may add, as a condition of any license, any term, requirement or condition, not prohibited by law which, in the judgment of the department will protect the health of the licensee, the licensee's employee(s), the public safety or welfare, or protect the environment.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-211, MCA

RULE XXXVII MODIFICATION OF LICENSE (1) Upon making the finding required by Rule XXXV, the department may modify the terms or conditions of any previously issued license.

(2) Upon demand of the department in writing, a licensee shall surrender his or her license to the department, whereupon the department shall issue a new license with any modification imposed by the department. Whether or not a license is surrendered, the department may issue a modified license in accordance with Rule XXXV and this rule and the licensee shall comply with the terms of the modified license. The department shall inform the licensee in writing of the reasons for and term(s) and the modification(s).

AUTH: 75-11-204, MCA; IMP: 75-11-211, MCA

RULE XXXVIII SUSPENSION OF LICENSE (1) Upon making the finding required by Rule XXXV, the department may suspend any previously issued license.

(2) Upon suspending a license, the department shall inform the licensee in writing of the reason for and term(s) of the suspension. The department shall demand and upon demand the licensee shall surrender his or her license to the department. Whether or not a license is surrendered, the suspension is effective, upon notice to the licensee, for the term determined by the department.

(3) A licensee shall not practice or undertake the acts for which he or she was licensed during the term of the license suspension. The department may determine to issue a modified or conditional license, during the term of the suspension, upon consideration of the factors provided in and in accordance with Rule XXXV.

(4) Upon expiration of the term of suspension the department shall return the license to the licensee and inform him or her in writing of the reinstatement of the license. The

reinstated license may contain such conditions stated or referenced on the license or modifications, as the department may impose in accordance with Rules XXXVI and XXXVII.
AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-211, MCA

RULE XXXIX LICENSE REVOCATION (1) Upon making the finding required by Rule XXXV, the department may revoke a previously issued license.

(2) Upon revoking a license, the department shall inform the licensee in writing of the reason(s) for and fact of the revocation. The department shall demand and upon demand the licensee shall surrender his or her license to the department. Whether or not a license is surrendered, the revocation is effective upon notice to the licensee in accordance with this subsection.

(3) A person whose license has been revoked shall not practice or undertake the acts for which he or she was licensed without again applying for and being licensed by the department in the manner of an original license.

(4) A person whose license has been revoked may not reapply for a license for any term in which application is prohibited by the department and for which the person is informed in writing.
AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-211, MCA

RULE XL REQUEST FOR HEARING (1) A licensee or former licensee who desires a hearing before the board on any disciplinary action taken by the department pursuant to Rules XXXV to XL, shall request in writing a hearing before the board.

(2) Requests for a hearing shall be postmarked to the department no later than 30 days after mailing of the notice required by Rule XXXV(5). Requests for a hearing shall contain a statement of any facts disputed by the licensee or former licensee.

(3) The department shall return to the licensee or former licensee any request for hearing which does not comply with this rule.

(4) The department shall forward to the board for its determination any request for hearing which complies with this rule.
AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-211, MCA

4. The proposed rules and the repeal of Emergency Rules I through XVI are effective October 1, 1990.

5. These rules are proposed because leaking underground storage tanks have been identified as a significant source of underground soil and water contamination and as a potential hazard for fires and explosion. Government and industry studies show that a major cause of leaking underground storage tanks is the improper installation or closure of tanks and piping. Proper installation or closure requires specialized knowledge, training and experience. To protect the health and safety of Montana citizens and the quality of state waters and other natural resources from leaking underground storage tanks,

the Montana Legislature passed HB 552 (75-11-201 to 75-11-227 MCA). Effective April 1, 1990, this law requires licensure of underground storage tank installers upon their demonstration of competence, training and experience with installations and closures. It also authorizes the Department of Health and Environmental Sciences to adopt rules governing the licensing of underground storage tank installation and closure inspectors and the use of those inspectors. These statutes also require a permit for the installation or closure of an underground storage tank, a procedure that will help the department track tank installations and closures, and ensure that proper methods are followed. The proposed rules implement these statutes.

6. Interested persons may submit their data, views, or arguments concerning the proposed rule, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Frank Gessaman, Solid and Hazardous Waste Bureau, Department of Health, 836 Front Street, Helena, Montana 59620, no later than September 13, 1990.

7. James Scheier, at the above address, has been designated to preside over and conduct the hearing.

/s/ William J. Opitz
DONALD E. PIZZINI, Director

Certified to the Secretary of State August 6, 1990.

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

In the matter of the amendment of ARM 16.44.202, 16.44.303, 16.44.304(2)(d), 16.44.408, 16.44.605, 16.44.607, & 16.44.610 regarding mining waste exclusion and related amendments	))))))	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES (Solid & Hazardous Waste)

To: All Interested Persons

1. On September 12, 1990, at 9:00 a.m., the department will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the following sections of the Administrative Rules of Montana: 16.44.202, which defines terms used in chapter 44, Hazardous Waste Management; 16.44.303, which defines hazardous waste; 16.44.304(2)(d), which excludes certain mining wastes from the state's hazardous waste management regulations; 16.44.408, which prescribes how hazardous waste manifests are to be used; 16.44.605, which establishes the requirements for temporary permits for treatment, storage or disposal facilities; 16.44.607, which relates to the scope of a temporary permit; and 16.44.610, which relates to revision of a temporary permit.

2. The proposed amendments would make the Montana regulations correspond to the federal regulations which have recently been revised.

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

16.44.202 DEFINITIONS In this chapter, the following terms shall have the meanings or interpretations shown below:

(1)-(16) Remain the same.

(17)(a) "Designated facility" means a hazardous waste treatment, storage, or disposal facility which has received an EPA permit or interim status, a permit from the department pursuant to subchapters 1 or 6 of this chapter, a permit from another state authorized by EPA or that is regulated under ARM 16.44.306(3)(b) or subpart F of 40 CFR Part 266, and that has been designated on the manifest by the generator as required by ARM 16.44.405. If a waste is destined to a facility in an authorized state which has not yet obtained authorization to regulate that particular waste as hazardous, then the designated facility must be a facility allowed by the receiving state to accept such waste.

(b) Remains the same.

(18)-(108) Remain the same.

AUTH: 75-10-405, MCA

IMP: 75-10-405, 75-10-406, MCA

16.44.303 DEFINITION OF HAZARDOUS WASTE (1) A waste, as defined in ARM 16.44.302, is a hazardous waste if:

(a) Remains the same.

(b) it meets any of the following criteria:

(i) ~~[~~It exhibits any of the characteristics of hazardous waste identified in ARM 16.44.320 through 16.44.324~~]~~ , except that any mixture of a waste from the extraction, beneficiation, and processing of ores and minerals excluded under ARM 16.44.304(2)(d) and any other waste exhibiting a characteristic of hazardous waste identified in ARM 16.44.320 through 16.44.324 is hazardous only if it exhibits a characteristic that would not have been exhibited by the excluded waste alone if such mixture had not occurred or if it continues to exhibit any of the hazardous characteristics exhibited by the non-excluded wastes prior to mixture. Further, for the purposes of applying the extraction procedure toxicity characteristics to such mixtures, the mixture is also a hazardous waste if it exceeds the maximum concentration for any contaminant listed in table I of ARM 16.44.324 that would not have been exceeded by the excluded waste alone if the mixture had not occurred or if it continues to exceed the maximum concentration for any contaminant exceeded by the nonexempt waste prior to mixture.

(ii) ~~[~~It is listed in ARM 16.44.330 through 16.44.333~~]~~.

(iii) ~~[~~It is a mixture of any waste and a hazardous waste identified in ARM 16.44.330 through 16.44.333 solely because it exhibits one or more of the characteristics of hazardous waste identified in ARM 16.44.320 through 16.44.324, unless the resultant mixture no longer exhibits any characteristic of hazardous waste identified in ARM 16.44.320 through 16.44.324~~]~~ or unless the waste is excluded from regulation under ARM 16.44.304(2)(d) and the resultant mixture no longer exhibits any characteristic of hazardous waste identified in ARM 16.44.320 through 16.44.324 for which the hazardous waste identified in ARM 16.44.330 through 16.44.333 was listed.

(iv) Remains the same.

(2)-(4) Remain the same.

AUTH: 75-10-404, 75-10-405, MCA
IMP: 75-10-403, 75-10-405, MCA

16.44.304 EXCLUSIONS (1) Remains the same.

(2) The following are not subject to regulation under this chapter but may be subject to regulation under the provisions of ARM Title 16, chapter 14:

(a)-(c) Remain the same.

(d) waste from the extraction, beneficiation, and processing of ores and minerals (including coal), including phosphate rock and overburden from the mining of uranium ore~~]~~. For purposes of this exclusion, beneficiation of ores and minerals is restricted to the following activities: crushing; grinding; washing; dissolution; crystallization; filtration; sorting; sizing; drying; sintering; pelletizing; briquetting; calcining to remove water and/or carbon dioxide; roasting, autoclaving,

and/or chlorination in preparation for leaching (except where the roasting (and/or autoclaving and/or chlorination)/leaching sequence produces a final or intermediate product that does not undergo further beneficiation or processing); gravity concentration; magnetic separation; electrostatic separation; flotation; ion exchange; solvent extraction; electrowinning; precipitation; amalgamation; and heap, dump, vat, tank, and *in situ* leaching. For the purposes of this exclusion, waste from the processing of ores and minerals will include only the following wastes, until the department further modifies this rule in light of studies, determinations and reports to be completed by EPA:

(i) slag from primary copper processing;

(ii) slag from primary lead processing;

(iii) red and brown muds from bauxite refining;

(iv) phosphogypsum from phosphoric acid production;

(v) slag from elemental phosphorous production;

(vi) gasifier ash from coal gasification;

(vii) process wastewater from coal gasification;

(viii) calcium sulfate wastewater treatment plant sludge from primary copper processing;

(ix) slag tailings from primary copper processing;

(x) fluorogypsum from hydrofluoric acid production;

(xi) process wastewater from hydrofluoric acid production;

(xii) air pollution control dust/sludge from iron blast furnaces;

(xiii) iron blast furnace slag;

(xiv) treated residue from roasting/leaching of chrome ore;

(xv) process wastewater from primary magnesium processing by the anhydrous process;

(xvi) process wastewater from phosphoric acid production;

(xvii) basic oxygen furnace and open hearth furnace air pollution control dust/sludge from carbon steel production;

(xviii) basic oxygen furnace and open hearth furnace slag from carbon steel production;

(xix) chloride process waste solids from titanium tetrachloride production;

(xx) slag from primary zinc processing.

(e)-(g) Remain the same.

(3)-(5) Remain the same.

AUTH: 75-10-404, 75-10-405, MCA
IMP: 75-10-403, 75-10-405, MCA

16.44.408 USE OF MANIFEST (1)-(4) Remain the same.

(5) For shipments of hazardous waste to a designated facility in an authorized state which has not yet obtained authorization to regulate that particular waste as hazardous, the generator must assure that the designated facility agrees to sign and return the manifest to the generator, and that any out-of-state transporter signs and forwards the manifest to the designated facility.

AUTH: 75-10-404, 75-10-405(5) and (7), MCA
IMP: 75-10-405(5) and (7), MCA

16.44.605 TEMPORARY PERMITS (INTERIM STATUS) (1) A person who owns or operates an existing facility which treats, stores or disposes of a hazardous waste shall be ~~permitted temporarily~~ deemed to have a temporary permit (interim status) for the treatment, storage, or disposal of that waste if:

~~(1)~~(a) he files completed form 8700-12 with the department or has filed this form with EPA by November 19, 1980; and

~~(2)~~(b) he submits all the information required by ARM 16.44.119 to the department or has submitted such information to EPA by November 19, 1980.

(2) A person who owns or operates a hazardous waste management facility which is in existence on the effective date of statutory or regulatory amendments under RCRA that render the facility subject to the requirement to have a permit shall be deemed to have a temporary permit (interim status) if:

(a) he files completed form 8700-12 with the department prior to 30 days after the effective date of the ARM rule change first subjecting the facility to permitting requirements under this chapter; and

(b) he submits all the information required by ARM 16.44.119 to the department prior to 30 days after the effective date of the ARM rule change first subjecting the facility to permitting requirements under this chapter.

(3) The department may by publication in the Montana Administrative Register extend the date by which owners and operators of specified classes of hazardous waste management facilities must submit the information required by ARM 16.44.119 if it determines that there are valid reasons for the extension.

(4) The department may by compliance order issued under the Act extend the date by which the owner and operator of a hazardous waste management facility must submit the information required by ARM 16.44.119.

~~(3)~~(5) Form 8700-12 and forms for submitting the information required in sections ~~(2)~~(1)(b) and (2)(b) of this rule may be obtained from the department.

AUTH: 75-10-404, 75-10-405(4), MCA
IMP: 75-10-405(4), 75-10-406, MCA

16.44.607 TEMPORARY PERMIT (INTERIM STATUS) -- TERMS Except as provided for in ARM 16.44.610, a facility permitted under ARM 16.44.605 may not:

(1) treat, store, or dispose of a hazardous waste not specified in the information submitted pursuant to ARM 16.44.605~~(2)~~;

(2) employ processes not specified in the information submitted pursuant to ARM 16.44.605~~(2)~~; or

(3) exceed the design capacities specified in the information submitted pursuant to ARM 16.44.~~602(2)~~605.

AUTH: 75-10-405, 75-10-405(2), (3) and (4), MCA
IMP: 75-10-405 (2), (3) and (4), 75-10-406, MCA

16.44.610 CHANGES DURING TEMPORARY PERMITTING (INTERIM STATUS) (1) A new hazardous waste not previously identified in the information required by ARM 16.44.605~~(2)~~ may be treated, stored, or disposed of at a permitted existing facility if the owner or operator submits to the department a revision of the information required by ARM 16.44.605~~(2)~~ on the new waste prior to treatment, storage or disposal of the new waste.

(2) Increases in the design capacity of processes used at a permitted existing facility may be made if the owner or operator submits to the department a revision of the information required by ARM 16.44.605~~(2)~~ with a written justification explaining the need for the capacity increase and the department approves the capacity increase because of a lack of available treatment, storage or disposal capacity at other hazardous waste management facilities.

(3) Changes in the processes for the treatment, storage or disposal of hazardous waste may be made at a permitted existing facility or additional processes may be added if the owner or operator submits a revision of the information required by ARM 16.44.605~~(2)~~ prior to such change with a written justification explaining the need for the change and the department approves the change because:

(a)-(b) Remain the same.

(4) Changes in the ownership or operational control of a permitted existing facility may be made if the new owner or operator submits a revision of the information required by ARM 16.44.605~~(2)~~ no later than 90 days prior to the scheduled change.

When a transfer of ownership or operational control of a facility occurs, the transferring owner or operator shall comply with the requirements of subchapter 8 of this chapter until the new owner or operator has demonstrated to the department that it is complying with that subchapter. The new owner or operator shall demonstrate compliance with subchapter 8 financial requirements within six months of the date of the change in the ownership or operational control of the facility. All other duties imposed by ARM 16.44.609 are transferred effective immediately upon the date of the change of the ownership or operational control of the facility. Upon demonstration to the department by the new owner or operator of compliance with subchapter 8 the department shall notify the transferring owner or operator in writing that it no longer needs to comply with ARM 16.44.609 as of the date of demonstration.

(5) Remains the same.

AUTH: 75-10-405, MCA
IMP: 75-10-405, 75-10-406, MCA

4. The state of Montana is authorized under the federal Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 - 6992, to administer and enforce the RCRA hazardous waste program in Montana. The United States Environmental Protection Agency has recently revised the federal regulations regarding

the mining waste exclusion (see 54 Fed. Reg. 36592 and 55 Fed. Reg. 2322). These proposed amendments of the Administrative Rules of Montana are intended to make the Montana regulations correspond to the federal regulations on mining wastes so that these types of wastes are treated in the same manner without regard to whether the RCRA program is administered by state or federal authorities. Certain of the changes are designed to address the impacts resulting from narrowing of the mining waste exclusion. The federal regulations on the mining waste exclusion are regularly revised to reflect the latest scientific data and changes resulting from the completion of various studies on the hazards posed by various wastes.

5. Interested persons may submit their data, views, or arguments concerning the proposed amendment, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Roger C. Thorvilson, Waste Management Section, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than September 13, 1990.

6. Thomas Ellerhoff, at the above address, has been designated to preside over and conduct the hearing.

/s/ William Spitz
DONALD E. PIZZINI, Director

Certified to the Secretary of State August 6, 1990.

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

In the matter of proposed amendments of ARM 36.12.1010, ARM 36.12.1011, ARM 36.12.1013 and the repeal of ARM 36.12.1012 pertaining to definitions, grant creek and rock creek basin closures	))))))	NOTICE OF PROPOSED AMENDMENTS OF RULES 36.12.1010 DEFINITIONS, 36.12.1011 GRANT CREEK BASIN CLOSURE, 36.12.1013 ROCK CREEK BASIN CLOSURE AND REPEAL OF RULE 36.12.1012, DEFINITIONS

NO PUBLIC HEARING CONTEMPLATED

TO: ALL INTERESTED PERSONS

1. On September 15, 1990 the Dept. of Natural Resources proposes to amend Rule 36.12.1010 Definitions, Rule 36.12.1011 Grant Creek Basin Closure, Rule 36.12.1013 Rock Creek Basin Closure, and repeal Rule 36.12.1012 Definitions.

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

36.12.1010 DEFINITIONS For the purposes of these rules, the following definitions shall apply:

(1) . . .

~~(4) "Grant Creek Basin" means the Grant Creek drainage area, a tributary of the Clark Fork River, located in hydrologic basin 76M in Missoula County, Montana. The Grant Creek Basin designated as the closure area is all that drainage and head waters originating in the Rattlesnake Mountains of Township 15 North, Range 19 West, MPM, flowing southwesterly through Township 14 North, Range 19 West, MPM and into the main valley of the Clark Fork River in Township 13 North, Ranges 19 and 20 West, MPM. The entire Grant Creek drainage, from its headwaters to its confluence with the Clark Fork River, including Grant Creek, East Fork of Grant Creek, and all unnamed tributaries is contained in the closure area, as outlined on Exhibit "A" (a copy of which is available for review from the department).~~

~~(5)~~ (4) . . . (all following subsections renumbered)

AUTH: 85-2-112, 319 IMP: 85-2-319

36.12.1011 GRANT CREEK BASIN CLOSURE (1) Grant Creek Basin means the Grant Creek drainage area, a tributary of the Clark Fork River, located in hydrologic basin 76M in Missoula County, Montana. The Grant Creek Basin designated as the closure area is all that drainage and head waters originating in the Rattlesnake Mountains of Township 15 North, Range 19 West, MPM, flowing southwesterly through Township 14 North, Range 19 West, MPM and into the main valley of the Clark Fork River in Township 13 North, Ranges 19 and 20 West, MPM. The entire Grant Creek drainage, from its headwaters to its confluence with the Clark Fork River, including Grant Creek, East Fork of Grant Creek, and all unnamed tributaries is contained in the closure area, as outlined on Exhibit "A" (a

copy of which is available for review from the department).

~~(1)~~ (2) . . . (all following subsections renumbered)

AUTH: 85-2-112, 319 IMP: 85-2-319

36.12.1013 ROCK CREEK BASIN CLOSURE (1) Rock Creek Basin means the Rock Creek drainage area located in hydrologic Basin 43D, a tributary of the Clarks Fork of the Yellowstone River in Carbon County, Montana. The entire Rock Creek drainage, from its headwaters to its confluence with the Clarks Fork of the Yellowstone, including Red Lodge Creek, Spring Creek, Dry Creek, Willow Creek, Clear Creek, West Fork of Rock Creek, and all unnamed tributaries is contained in the closure area, as outlined on Exhibit "A" (a copy of which is available for review from the department).

~~(1)~~ (2) . . . (all following subsections renumbered)

AUTH: 85-2-112, 319 IMP: 85-2-319

3. 36.12.1012 is proposed to be repealed and can be found on page 36-264.91 of the ARM. AUTH: 85-2-112, 319 IMP: 85-2-319

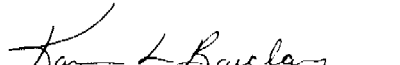
4. The department is proposing to amend rule 36.12.1010, rule 36.12.1011, rule 36.12.1013 and to repeal rule 36.12.1012 to eliminate duplication of definitions in this sub-chapter.

5. Interested persons may present their data, views, or arguments concerning the proposed adoption of amendments and repeal in writing to Teresa McLaughlin, Administrative Officer, Water Rights Bureau, 1520 E. 6th Ave., Helena, Montana 59620-2301, no later than September 14, 1990.

6. If a person who is directly affected by the proposed amendments and repeal wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Teresa McLaughlin, Administrative Officer at the above listed address, no later than September 14, 1990.

7. If the agency receives requests for a public hearing on the proposed amendments and repeal from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendments; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register.

DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION



KAREN L. BARCLAY, DIRECTOR

Certified to the Secretary of State, August 6, 1990

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

In the matter of the adoption of Rules I, II, III and IV pertaining to rural health clinics	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF RULES I, II, III AND IV PERTAINING TO RURAL HEALTH CLINICS

TO: All Interested Persons

1. On September 7, 1990, at 1:00 p.m. a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed adoption of Rules I, II, III and IV pertaining to rural health clinics.

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

[RULE I] RURAL HEALTH CLINICS, DEFINITIONS (1) "Rural health clinic (RHC)" means a clinic located in a rural area designated as a shortage area by the United States department of health and human services, which is not a rehabilitation agency or a facility primarily for the care and treatment of mental diseases.

(2) "Provider clinic" means an integral and subordinate part of a hospital, skilled nursing facility, or home health agency that is participating in medicare and is licensed, governed, and supervised with other departments of the facility.

(3) "Independent clinic" means a clinic other than a provider clinic.

(4) "Visit" means a face to face encounter between a clinic patient and any health professional whose services are reimbursed under the state plan. Encounters with more than one health professional, and multiple encounters with the same health professional, on the same day and at a single location constitute a single visit, except when the patient, subsequent to the first encounter, suffers illness or injury requiring additional diagnosis or treatment.

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

[RULE II] RURAL HEALTH CLINIC, SERVICES (1) A rural health clinic must be primarily engaged in providing outpatient services. RHC services include:

(a) diagnostic and therapeutic services and supplies that are commonly furnished in a physician's office or at the entry point into the health care delivery system. These include medical history, physical examination, assessment of

health status, and treatment for a variety of medical conditions;

(b) basic laboratory services essential to the immediate diagnosis and treatment of the patient; and

(c) medical emergency procedures as a first response to common life-threatening injuries and acute illness.

(2) Dental services are not reimbursable as a rural health clinic service.

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

[RULE III] RURAL HEALTH CLINICS, REQUIREMENTS

(1) These requirements are in addition to those contained in ARM 46.12.301 through 46.12.309.

(2) The clinic must meet the conditions of certification in accordance with 42 CFR, part 491. A clinic certified under medicare will be deemed to meet the standards for certification under medicaid. The department hereby adopts and incorporates by reference 42 CFR, part 491 (1989 edition).

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

[RULE IV] RURAL HEALTH CLINICS, REIMBURSEMENT

(1) A RHC is reimbursed as either a provider or independent clinic. Reimbursement for rural health clinic services compensable under Montana medicaid shall be as follows:

(a) Provider clinics will be reimbursed for reasonable costs of providing rural health and other ambulatory services on the basis of the cost reimbursement principles as provided in 42 CFR, part 405, subpart D. The department hereby adopts and incorporates by reference 42 CFR, part 405, subpart D (1989 edition).

(b) Independent clinics will be reimbursed under the all inclusive rate system at a reasonable cost per visit under 42 CFR 405.2426. The department hereby adopts and incorporates by reference 42 CFR 405.2426 (1989 edition).

(i) Payment under the all inclusive rate system is limited by 42 USC 13951(f). The department hereby adopts and incorporates by reference 42 USC 13951(f) (effective June 1990).

(ii) The payment limit for services provided on or after October 1, 1989 through March 31, 1990 is $47.38 per visit; on or after April 1, 1990 the payment limit is $49.37 per visit.

(2) Payment made to a RHC during a reporting period will be subject to reconciliation as provided in 42 CFR 405.2427 through 405.2429 to assure that those payments do not exceed or fall short of the allowable costs attributable to covered services. The reporting period will be the provider's fiscal

year. The department hereby adopts and incorporates by reference 42 CFR 405.2427 through 405.2429 (1989 edition).

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

3. Rural health clinics have been a mandatory covered service since 1977, however, until recently no providers existed in Montana. There is now one facility in operation and additional facilities are anticipated, therefore, there is a need for implementing retroactive rules governing the rural health care clinic operations. Effective date for coverage of this service will be retroactive to October 1, 1989.

4. Interested parties may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, no later than September 14, 1990.

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

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

Director, Social and Rehabilitation Services

Certified to the Secretary of State July 26, 1990.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

In the matter of the amendment of the emergency authorization of employment and the test for certification	))))	NOTICE OF AMENDMENT OF ARM 10.57.107, EMERGENCY AUTHORIZATION OF EMPLOYMENT and ARM 10.57.211, TEST FOR CERTIFICATION

TO: All Interested Persons

1. On May 17, 1990, the Board of Public Education published notice of a proposed amendment of ARM 10.57.107, EMERGENCY AUTHORIZATION OF EMPLOYMENT and ARM 10.57.211, TEST FOR CERTIFICATION, at page 875 of the Montana Administrative Register, Issue Number 9.

2. The Board amended the rules as proposed.

3. The public hearing was held on June 8, 1990 on ARM 10.57.107, EMERGENCY AUTHORIZATION OF EMPLOYMENT and ARM 10.57.211, TEST FOR CERTIFICATION.

(a) 10.57.107, EMERGENCY AUTHORIZATION OF EMPLOYMENT. There were six letters of testimony received. Four were proponents for the amendment, one opposed the amendment and one was from the Montana Committee for American Indian Higher Education and just presented questions to the Board regarding the proposed amendment. Three people testified at the hearing. Two of those were proponents. One was an opponent and objected to the need for such a rule when there was a sufficient supply of teachers in the state. The Board decided that there was distress in some districts and the rule change was needed.

(b) 10.57.211, TEST FOR CERTIFICATION. There were nine letters of testimony received. Six were proponents for the amendment, one was neutral, one was from the Montana Committee for American Indian Higher Education and presented questions to the Board regarding the proposed amendment and one was from the Office of Public Instruction to clarify a misunderstanding of one of the persons who testified. Four people testified at the hearing. Three of those were proponents and one was neutral.

Bill Thomas
BILL THOMAS, CHAIRMAN
BOARD OF PUBLIC EDUCATION

BY: Wayne D. Buchanan

Certified to the Secretary of State August 6, 1990

BEFORE THE MONTANA FISH AND GAME COMMISSION

In the matter of the amendment of ARM 12.6.904 Use Restrictions at Montana Power Company Dams (Hebgen Dam)	NOTICE OF AMENDMENT OF ARM 12.6.904

TO: All Interested Persons:

1. On May 17, 1990, the Montana Fish and Game Commission published notice of proposed amendment of Rule 12.6.904 concerning use restrictions at Montana Power Company dams. The notice was published at page 878 of the 1990 Montana Administrative Register, issue number 9.

2. A public hearing was held on June 19, 1990 in West Yellowstone, Montana.

3. A report summarizing the public comment was prepared and submitted to the Commission and the Department.

4. The Department recommended to the Commission that the proposed amendment be adopted.

5. After considering the public comment and the Department's recommendation the rule has been amended as proposed.

6. Comment: The only comments received supported the proposed amendment concerning the use restriction at Hebgen Dam. No negative comments were received.

K.L. Cool, Secretary
Montana Fish and Game
Commission

Certified to the Secretary of State August 6, 1990.

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

In the matter of the adoption of rules I through XVI, relating to the licensing of underground tank installers and the permitting of underground tank installations and closures	NOTICE OF EMERGENCY ADOPTION OF RULES I THROUGH XVI (Underground Storage Tanks)

To: All Interested Persons

1. Leaking underground storage tanks have been identified as a significant source of underground contamination and as a potential hazard for fires and explosion. Government and industry studies show that a major cause of leaking underground storage tanks is improper installation or closure. Proper installation or closure requires specialized knowledge, training and experience.

To protect the health of Montana citizens and the quality of state waters and other natural resources from leaking underground storage tanks, the Montana Legislature passed HB 552 (75-11-201 to 75-11-227 MCA). Effective April 1, 1990, this statute requires licensure of tank installers upon their demonstration of competence, training and experience with installations and closures. It also requires permits for the installation or closure of underground storage tanks, a procedure that will help the department track tank installations and closures, and ensure that proper methods are followed. Final rules could not be ready for adoption by the April 1 date so the Department therefore adopted emergency rules in MAR Issue No. 7, at p. 731, which expire on August 1, 1990. Because the Department's permanent rules cannot be adopted prior to the expiration of the 120 day period provided in Section 2-4-303, MCA for emergency rules on August 1, 1990, it is essential that the emergency rules providing procedures for installer licensure and permit issuance be readopted. Failing to readopt the emergency rules could result in numerous improper underground storage tank installations or closures. The consequences of these improper installations or closures in the form of groundwater contamination, or fire hazards will be an imminent peril to the public health, safety and welfare of Montana citizens. Readoption of rules by emergency procedure is necessary to have rules effective by August 1, 1990. The Department is therefore readopting the emergency rules first adopted in MAR Issue No. 7, at page 731, with some modifications to address both interim and regular installer licenses and inspector licenses.

2. The department adopts the emergency rules effective August 1, 1990. A standard rulemaking procedure with a full public hearing will be undertaken prior to the expiration of these emergency rules to have the permanent rules in place by October 1, 1990.

3. The text of the proposed rules is as follows:

RULE I PURPOSE, APPLICABILITY, DEFINITIONS (1) The purpose of Rules I through XVI is to implement sections 75-11-201 to 75-11-227, MCA.

(2) Rules I through XVI shall be applied in conjunction with the statutes.

(3) (a) "Installation" or "to install" means the placement of an underground storage tank, including excavation, tank placement, backfilling, and piping of underground portions of the underground storage tank that store or convey regulated substances. Installation also includes repair or modification of an underground storage tank through such means as tank relining or the repair or replacement of valves, fillpipes, piping, vents, or in-tank liquid-level monitoring systems.

(b) The terms do not include:

(i) the process of conducting a precision (tightness) test to establish the integrity of the underground storage tank;

(ii) the installation of a leak detection device that is external to and not attached to the underground storage tank; or

(iii) the installation and maintenance of a cathodic protection system.

(4) "Interim installer license" means a license issued to an individual by the department under section 75-11-210, MCA, to conduct the installation, closure, or both, of underground storage tanks from April 1, 1990 through September 30, 1990.

(5) "Lining" means the addition of a plastic, fiberglass or other shell of impervious material to the inside of an underground storage tank for the purpose of ensuring that the tank retains its liquid contents. The term includes all steps to be taken in preparation for the addition of the lining and includes relining.

(6) "Local governmental unit" means a city, town, county or fire district.

(7) "Modification" means a change in the structure or significant components of an underground storage tank, and includes lining of a tank, cutting of the steel walls of a tank and the addition of internal leak detection devices.

(8) "Repair" means a repair as defined in ARM 16.45.101A(54), and includes tank lining.

(9) "Regular installer license" means a license issued to an individual by the department under section 75-11-210, MCA, to conduct the installation, closure, or both, of underground storage tanks after September 30, 1990, for a three year period. AUTH: 75-11-203, MCA; IMP: 75-11-204, 75-11-209, 75-11-210, MCA

RULE II INSTALLER LICENSE REQUIREMENTS GENERALLY (1) An individual is "engaged in the business of" installation or closure of underground tanks, within the meaning of section 75-11-203(5), MCA, and must therefore have a license under section 75-11-210, MCA, if he or she installs or closes in any year

in exchange for something of value, one or more underground storage tanks owned or operated by another person.

(2) An installer may not install or close an underground storage tank unless the installer has a valid license issued by the department under section 75-11-210, MCA, and Rules I to XV.

(3) The requirements of Rules I to XV do not prohibit the employment of any assistants, helpers or apprentices, who have not been issued an installer's license under those rules, by an installer at any installation or closure site so long as a licensed installer is physically present at the installation or closure and personally exercises supervisory control over those unlicensed persons.

(4) Installer licenses issued under Rules I to XV are nontransferable.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE III ELIGIBILITY FOR INSTALLER LICENSE (1) No person may be granted an interim installer's license by the department unless that person:

(a) is an individual at least 18 years old;

(b) submits a completed license application to the department in accordance with Rule IV;

(c) pays the interim license fee provided in Rule VII to the department;

(d) meets the requirements of Rules I to XVI and section 75-11-210, MCA, for an interim installer's license as determined by the department.

(2) No person may be granted a regular installer's license by the department unless that person meets the requirements of subsection (1) and successfully completes the licensing examination required by Rule V.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE IV INSTALLER LICENSE APPLICATION (1) Application for an interim or regular installer's license must be made on a form provided by the department. On the form the applicant will provide the information required by the department.

(2) The application shall be subscribed and sworn to under oath before a notary public, stating that the information provided in the application is true.

(3) The application shall be accompanied by at least three references from other persons attesting to the experience and competency of the applicant in the installation and closure of underground tanks. The references must be written on forms provided by the department, and must show that the applicant actively participated in at least three underground storage tank installations and closures, two of which must be installations. If an applicant requests to have his or her license conditioned to allow only tank lining or closures to be conducted under the license, the applicant shall so state on the application, and the references need only apply their statements toward the applicant's lining or closure work, as appropriate. References for

applicants conducting only closures or lining must show that the applicant participated in a total of at least two closures, or at least two tank linings in the last five years, as appropriate.

(4) Applications and attachments shall be examined by the department for conformity with this rule and applicable statutes. Applications failing to provide information required for licensure may either be returned to the applicant with a notice to the applicant of the reasons for return or may be held by the department pending receipt of the omitted information.

(5) No license shall be granted unless the department determines, on the basis of the application and attachments, and the examination given under Rule V for regular licenses, that the applicant possesses the competency and experience to understand and comply with the rules governing the type of tank installation or closure or both, for which the applicant intends to be licensed, and understands the techniques of installation or closure, as will protect public health, welfare, safety and the environment.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE V REGULAR INSTALLER LICENSE EXAMINATION AND RE-EXAMINATION (1) All applicants for a regular installer's license shall successfully complete a written examination, which shall be offered a minimum of two times per year by the department at such time(s) and place(s) as the department determines. The department shall give public notice of the time and place of the examination by advertisement in the public media.

(2) An applicant who does not hold an interim or regular installer license, and an applicant who intends to apply for a regular license with a different condition then is applicable to his or her regular license, must register with the department for the examination at least ten days before an examination is scheduled, by providing a completed license application to the department and paying the license application and examination fee provided in Rule VII.

(3) An applicant who holds an interim or regular installer license and does not intend to request a change in any conditions of the interim or regular license, must register with the department for the examination at least ten days before an examination is scheduled, by signing a letter of intent on a form provided by the department, and paying the license application and examination fee provided in Rule VII.

(4) An applicant may purchase an examination study guide from the department by paying the fee established in Rule VII. Upon payment of the study guide fee, the department shall provide the applicant with a written study guide for the examination. The study guide shall contain such material as the department determines will assist individuals in preparing for the licensing examination.

(5) The examination given by the department shall test the applicant on his or her knowledge of applicable statutes and rules governing the type of installation or closure or both, of

underground storage tanks and the disposal of tanks and tank contents for which a license application is being made. It will also test the applicant's knowledge of current technology and industry recommended practices for the installation and closure of underground storage tanks.

(6) A score of 80% or higher on the examination constitutes a passing grade. All examinations will be graded, and the applicants notified of their examination score, within thirty days of the date of the examination. An applicant who requested on a license application that his or her license be conditioned for conducting only closures or lining, need only obtain a passing grade on the sections of the examination pertinent to closures or lining, as applicable.

(7) Any applicant who fails the examination may review his or her examination results in the department office. An applicant who fails the examination may retake it at the next scheduled examination date by registering for the examination, in the same manner as for the original examination, and by paying a reexamination fee provided in Rule VII.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE VI INSTALLER LICENSE ISSUANCE, TERM, CONDITIONS

(1) The department shall issue a license upon the applicant's satisfaction of Rules I through XVI, as applicable, and any statutory prerequisites. The license shall set forth the name of the licensed installer, a license identification number and the dates of issuance and expiration of the license.

(2) Licenses for applicants who request that their licenses be conditioned for conducting closures or lining only, as provided in subsection (4), shall have the closure or lining only condition clearly designated on the license.

(3) Interim installer licenses expire September 30, 1990. Regular installer licenses expire on the anniversary of their issuance but may be renewed no more than twice by the licensee, upon payment of the renewal fee provided in Rule VII, within 30 days after expiration. A license for which an annual renewal fee is not paid is void. Licenses may be revoked, suspended, modified or conditioned prior to expiration in accordance with subsection (4).

(4) The department may, upon issuance of an interim license or upon issuance or reissuance of a regular license, and at any other time only upon notice and hearing, add conditions to a license limiting or restricting the licensee in the time, type, or manner of work to be performed pursuant to the license if the department determines the conditions are necessary to protect the public's or licensee's health, safety, or welfare, or the environment. Licenses may be revoked or suspended by the department, only upon notice and hearing, for the violation of any statute, rule or license condition.

(5) Installer licenses issued under this rule are nontransferable.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE VII INSTALLER LICENSING FEES (1) An individual applying for an underground storage tank installer's license shall pay to the department the applicable fee(s) provided in subsection (2) of this rule. All fees are non-refundable.

(2) Applicable fees are as follows:

(a) interim license fee ..... $ 25

(b) regular license application and examination fee ..... $ 50

(c) study guide for installers (not including tank lining) ..... $ 60

(d) study guide for tank closers ..... $ 40

(e) study guide for tank liners ..... $ 40

(f) reexamination fee ..... $ 35

(g) duplicate license fee ..... $ 10

(h) license renewal fee ..... $ 25

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-210, MCA

RULE VIII LICENSED INSTALLER RECORD KEEPING (1) Within 30 days of completion of an underground storage tank installation or closure, a licensed installer shall submit to the department:

(a) one copy of the completed manufacturer's installation checklist, or one copy of the completed department inspection checklist, and

(b) one copy of the installation permit signed by the installer certifying that the work was completed according to the applicable state statutes and rules and permit conditions.

(2) Within the same time, the licensed installer shall also give the owner or operator of the tank copies of the completed checklist and signed permit. The owner or operator shall keep a copy of the documents required by subsection (1) at the location of the installation or closure, for as long as the tanks are used to store a regulated substance in the location at which the inspection took place.

AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE IX INSTALLATION AND CLOSURE PERMIT REQUIREMENT -- APPLICATION (1) No owner or operator may install or close an underground storage tank without a permit to do so issued by the department.

(2) A completed application for a permit shall be filed by the permit applicant on a form provided by the department at least 30 days prior to the proposed date of installation or closure. The department may return to the applicant any application form that is incomplete or otherwise does not contain sufficient information for issuance of the permit. Resubmitted applications shall also be submitted to the department at least 30 days prior to the proposed date of installation or closure.

(3) The applicant shall provide the information required by the department.

(4) The department may issue a permit for repair, modification or closure of a tank in less than 30 days after application

is made if the application could not have been submitted in the time provided in subsection (1) because of unforseen and unforeseeable circumstances and if the applicant does not qualify for an emergency permit under Rule XI.

(5) Permits issued under this rule and Rule VIII are non-transferable.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-209, 75-11-212, MCA

RULE X PERMIT ISSUANCE, TERMS, CONDITIONS (1) Upon receipt of a completed permit application, the department shall review the application and determine whether the proposed installation or closure meets the criteria for approval in subsection (2).

(2) A permit shall be issued by the department upon its determination that:

(a) any tank to be installed or closed complies with the rules of the department and the state fire marshal;

(b) the installation or closure will be conducted by a licensed installer unless exempted by section 75-11-217, MCA, or the installation or closure will be inspected by the department or a designated local inspector;

(c) the installation or closure will comply with:

(i) the rules of the department;

(ii) the rules of the state fire marshal;

(iii) any manufacturer's instructions;

(iv) the requirements of any local unit of government which are no less stringent than the requirements of subsection (2)(a) to (2)(c)(iii); and

(v) any state or local requirements for disposal of the tank and tank contents.

(d) the installation or closure will be conducted in such a place and manner as to protect the installer's and the public's health, welfare and safety and the environment.

(3) If the department determines that an emergency exists under Rule IX(4) and that the requirements of subsection (2) have been satisfied, it shall issue the permit in the manner provided by Rule IX(4) and subject to any conditions imposed pursuant to this rule.

(4) A permit issued to an applicant under this rule shall state on its face the address or location of the site at which the installation or closure may be conducted, the date(s) when the installation or closure is to be conducted, whether the installation or closure will be conducted by a licensed installer, and if so the name and license number of the installer. The permit shall include a signature line for the licensed installer to sign, certifying that the installation or closure was conducted in accordance with applicable statutes and rules and any conditions of the permit. The permit must be kept at the installation or closure site during all phases of the installation or closure.

(5) Each permit issued by the department is subject to the condition that the permittee comply with all statutes, all rules

of the department, rules of the state fire marshal, all permit conditions, and any applicable requirements of a local governmental unit which are no less stringent than the requirements of subsection (2)(a) to (2)(c)(iii), and the permittee shall comply therewith.

(6) A permit issued by the department under this rule is issued subject to the accuracy of the information provided by the permit applicant in the permit application, subject to the information stated or referenced on the face of the permit pursuant to subsection (3), subject to compliance with all applicable statutes and rules, and subject to any conditions applied by the department. If the installation or closure is not conducted in accordance with the information, condition, statute or rule as provided in this subsection, the permit is void and of no effect and the installation or closure is considered to be conducted without a permit, and in violation of the law.

(7) The department may also issue the permit upon any other condition necessary to insure compliance with subsection (2). Any such conditions shall be stated or referenced upon the face of the permit.

(8) Permits are valid for six months from the date of issuance, or for the time period specified on the permit.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-212, MCA

RULE XI EMERGENCY PERMIT APPLICATION AND ISSUANCE

(1) In the event of an emergency requiring immediate installation or closure of an underground storage tank, the applicant shall contact the department, orally provide the information required by Rule IX and the permit application and explain the nature of the emergency and the consequences of non-issuance. An emergency permit may be issued orally by the department for a maximum of 10 days. If an emergency permit is approved, the applicant shall submit a completed permit application form to the department within 10 days of issuance of the emergency permit.

(2) If the department determines that an emergency exists under subsections (1) and (3) and that the requirements of Rule IX(2) have otherwise been satisfied, it shall issue the permit in the manner provided by this rule and subject to any conditions imposed pursuant to Rules I to XVI.

(3) For the purposes of this rule, an emergency is an imminent and substantial threat to the public health or safety or to the environment.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-212, MCA

RULE XII ELIGIBILITY FOR INSPECTOR LICENSING (1) No person may be granted an inspector's license unless that person:

(a) is an individual at least 18 years old;

(b) submits a completed license application to the department in accordance with Rule XIII;

(c) pays the licensing fee provided in Rule XVI;

(d) is an employee or independent contractor of a local

governmental unit designated as an implementing agency for the purposes of these rules in the manner provided in ARM 16.45.1003;

(e) meets the requirements of subsection (1) and successfully completes the licensing examination required by Rule XIII; and

(f) the department determines that the applicant meets the requirements of this rule.

(2) Inspector licenses issued under Rules I to XVI are nontransferable.

AUTH: 75-11-204, MCA; IMP: 75-11-204, 75-11-217, MCA

RULE XIII INSPECTOR LICENSE APPLICATION (1) Application for an inspector's license will be made in the same manner as set forth in Rule IV for installer licenses except that Rule IV(3) does not apply to applications for inspector licensure, and inspectors are subject to the examination provided in Rule XIV.

(2) If an applicant requests to have his or her license conditioned to allow the applicant to inspect closures only, the applicant shall so state on the application form.

(3) No licensed inspector may inspect the installation or closure of any underground storage tank belonging to any person who has a continuous and ongoing employment relationship with that inspector, except that licensed inspectors for federal, state, and local governmental units may, upon approval by the department, inspect work conducted by an unrelated division, department or bureau within their government entity.

AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE XIV INSPECTOR LICENSE EXAMINATION AND RE-EXAMINATION (1) All applicants for an inspector's license must successfully complete a written examination which shall be offered by the department at such time(s) and place(s) as the department determines. The department shall give public notice of the time and place of the examination by advertisement in the public media.

(2) An applicant who does not hold an inspector license, and an applicant who intends to apply for a license with a different condition then is applicable to his or her license, must register with the department for examination at least ten days before the examination is scheduled, by submitting a completed application to the department and paying the examination fee provided in Rule XVI(2), unless exempt from the fee in accordance with Rule XVI(1).

(3) An applicant who holds an inspector's license and does not intend to request a change in any conditions of the interim or regular license, must register with the department for the examination at least ten days before an examination is scheduled, by signing a letter of intent on a form provided by the department, and paying the license application and examination fee provided in Rule XVI(2), unless exempt from payment of the fee pursuant to Rule XVI(1).

(4) The examination given by the department shall test the

applicant on his or her knowledge of applicable statutes and rules governing the installation and closure of underground storage tanks and the disposal of tanks and tank contents. It will also test the applicant's knowledge of current technology and industry recommended practices for the installation and closure of underground storage tanks, and of proper inspection techniques and documentation.

(5) A score of 80% or higher on the examination constitutes a passing grade. All examinations will be graded, and the applicants will be notified of their score on the examination, within twenty days of the date of the examination. An applicant who requests that his or her license be conditioned to allow the applicant to conduct closures only, need only obtain a passing grade on the sections of the examination pertinent to closures as determined by the department.

(6) Any applicant who fails the examination may review his or her examination results in the department offices. An applicant who fails the examination may retake it at the next scheduled examination date by registering for the examination in the same manner as for the original examination and by paying the reexamination fee provided in Rule XVI.

(7) An applicant may request an examination study guide from the department. Upon payment of the study guide fee, the department shall provide the applicant with a written examination study guide. The study guide shall contain such material as the department determines will assist individuals in preparing for the licensing examination.

AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

RULE XV INSPECTOR LICENSE ISSUANCE, TERM, CONDITIONS

(1) The department shall issue a license upon the applicant's satisfaction of Rules XII through XIV, as applicable. The license shall set forth the name of the licensed inspector, a license identification number and the dates of issuance and expiration of the license.

(2) Licenses for applicants who request that their license be conditioned for closure only, and licenses conditioned by the department as provided in subsection (4), shall have the conditions clearly designated on the license.

(3) Inspector licenses expire on the anniversary of their issuance but may be renewed no more than twice by the licensee, upon payment of the renewal fee provided in Rule XVI within 30 days after expiration. A license for which an annual renewal fee is not paid is void. Licenses may be revoked, suspended, modified or conditioned prior to expiration in accordance with subsection (4).

(4) The department may, upon issuance or reissuance of a license, and at any other time only upon notice and hearing, add conditions to a license limiting or restricting the licensee in the time, type, or manner of work performed pursuant to the license if the department determines the conditions necessary to protect the public's or licensee's health, safety, or welfare,

or the environment. Licenses may be revoked or suspended by the department only upon notice and hearing, for the violation of any statute, rule or license condition.

(5) Inspector licenses issued under Rules I to XVI are non-transferable.

AUTH: 75-11-204, MCA; IMP: 75-11-210, MCA

RULE XVI INSPECTOR LICENSING FEES (1) No fee is charged by the department for the license application, examination, issuance, reissuance, or renewal of a license or duplicate license of or to an employee or contractor of the state or a local governmental unit.

(2) An individual not employed by the state or a local governmental unit applying for or issued an underground storage tank inspector's license shall pay to the department the applicable fee(s) provided in subsection (3) of this rule. All fees are non-refundable.

(3) Applicable fees are as follows:

(a)	license application and examination fee	$ 50
(b)	study guide fee	$110
(c)	reexamination fee	$ 30
(d)	duplicate license fee	$ 10
(e)	annual license renewal fee	$ 25

AUTH: 75-11-204, MCA; IMP: 75-11-204, MCA

4. The rationale for the emergency rules is set forth in the statement of emergency in paragraph 1.

DONALD E. PIZZINI, Director

Certified to the Secretary of State August 1, 1990 .

BEFORE THE DEPARTMENT OF INSTITUTIONS
OF THE STATE OF MONTANA

In the matter of the amendment of Rule 20.7.1101 which sets forth conditions on probation or parole.	NOTICE OF AMENDMENT OF RULE 20.7.1101, Conditions on Probation or Parole

TO: All Interested Persons

1. On April 12, 1990, the Department of Institutions published a Notice of a Proposed Amendment of Rule 20.7.1101 on pages 695 thru 697, 1990 Montana Administrative Register, Issue number 7.

2. The Department of Institutions amended the rule exactly as proposed.

3. No comments or testimony were received.

CURT CHISHOLM, Director
Department of Institutions

Certified to the Secretary of State August 6th, 1990.

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of rules 24.9.225, Procedure on Finding of Lack of Reasonable Cause, 24.9.262A, Issuance of Right to Sue Letter When Requested by a Party, and 24.9.264, Effect of Issuance of Right to Sue Letter	)))))))	NOTICE OF THE AMENDMENT OF RULES 24.9.225, PROCEDURE ON FINDING OF LACK OF REASONABLE CAUSE, 24.9.262A, ISSUANCE OF RIGHT TO SUE LETTER WHEN REQUESTED BY A PARTY, AND 24.9.264, EFFECT OF ISSUANCE OF RIGHT TO SUE LETTER

TO: All Interested Persons

1. On June 14, 1990, at page 1065 of the 1990 Montana Administrative Register, Issue No. 11, the Human Rights Commission published notice of proposed amendments to Rules 24.9.225, 24.9.262A and 24.9.264, ARM. Rule 24.9.225 relates to the procedures to be followed by the commission staff and the parties in a case when the commission staff's investigation of the case concludes that there is a lack of reasonable cause to believe unlawful discrimination occurred. Rule 24.9.262A relates to the procedures to be followed by the commission staff and the parties in a case when a party requests that the commission staff administrator issue a right to sue letter allowing the charging party to file the complaint in district court. Rule 24.9.264 relates to the effect of issuance of a right to sue letter and the procedures to be followed by the parties in a case and the commission when a party objects to issuance of a right to sue letter.

2. The authority of the commission to make these amendments is based upon Section 49-2-204 and 49-3-106, MCA.

3. The rules as amended implement Sections 49-2-504, 49-2-505, 49-2-509, 49-3-307, 49-3-308 and 49-3-312, MCA.

4. The commission did not receive any public comments concerning the proposed amendments.

5. The commission has adopted the rules listed above as proposed with the following changes:

24.9.225 PROCEDURE ON FINDING OF LACK OF REASONABLE CAUSE As proposed.

24.9.262A ISSUANCE OF RIGHT TO SUE LETTER WHEN REQUESTED BY A PARTY (1) and (2) As proposed.

(3) A party who requests issuance of a right to sue letter and is dissatisfied with a decision of the administrator ~~to~~ refuse~~s~~ing to issue a right to sue letter may seek commission review of the decision by filing a written objection~~s~~ within 14 days after the decision is served. ~~The date of service is the date the administrator's decision is mailed.~~ Briefs are not required. A party who files such an objection and wishes to file

a supporting brief must file and serve the brief within five days of filing the objection. Any opposing party who wishes to file an answer brief must file and serve the brief within ten days of service of the initial brief. A ~~The~~ party making an ~~the~~ objection who wishes to file a reply brief must file and serve the brief within ten days of service of an answer brief. If a ~~the~~ party filing objection does not file a supporting brief, any opposing party may request permission from the commission to file a brief in opposition to the objection. The objections will be considered at the next commission meeting after conclusion of the briefing schedule. Consideration of the objections will be based upon the written record unless oral argument is requested and authorized by the commission. Service by mail is complete upon mailing.

(4) and (5) As proposed.

24.9.264 EFFECT OF ISSUANCE OF RIGHT TO SUE LETTER

(1) As proposed.

(2) A party who is dissatisfied with a decision to issue a right to sue letter may seek commission review of the decision by filing a written objections within 14 days after the decision is served. ~~The date of service is the date the decision is mailed.~~ Briefs are not required. A party who files such an objection and wishes to file a supporting brief must file and serve the brief within five days of filing the objection. Any opposing party who wishes to file an answer brief must file and serve the brief within ten days of service of the initial brief. A ~~The~~ party making ~~the~~ an objection who wishes to file a reply brief must file and serve the brief within ten days of service of an answer brief. If a ~~the~~ party filing an objection does not file a supporting brief, any opposing party may request permission from the commission to file a brief in opposition to the objection. The objections will be considered at the next commission meeting after conclusion of the briefing schedule. Consideration of the objections will be based upon the written record unless oral argument is requested and authorized by the commission. Service by mail is complete upon mailing.

(3) - (6) As proposed.

6. The commission added subsection (7) to ARM 24.9.225 to make it clear that parties filing objections to the administrator's decision to dismiss a case and issue a right to sue letter upon a lack of reasonable cause finding must follow the procedures specified in ARM 24.9.264. The commission amended ARM 24.9.262A by adding timelines for filing briefs in support of or in opposition to an objection to the administrator's refusal to issue a right to sue letter requested by a party. The commission amended ARM 24.9.264 by adding timelines for filing briefs in support of or in opposition to an objection to the administrator's decision to issue a right to sue letter.

MONTANA HUMAN RIGHTS COMMISSION
JOHN B. KUHR, CHAIR

By: _____
ANNE L. MacINTYRE
ADMINISTRATOR
HUMAN RIGHTS COMMISSION STAFF

Certified to the Secretary of State August 6, 1990.

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

In the matter of the adoption of a new rule regarding travel expense reimbursement	NOTICE OF ADOPTION OF RULE I - 24.29.1409 TRAVEL EXPENSE REIMBURSEMENT

TO: All Interested Persons

1. On April 26, 1990, The Department of Labor and Industry published Notice of Public Hearing on the Proposed Adoption of a New Rule Regarding Travel Expense Reimbursement at page 816 of the 1990 Montana Administrative Register, issue number 8.

2. The Department has adopted the rule with the following changes:

RULE I (24.29.1409) TRAVEL EXPENSE REIMBURSEMENT

~~(1) The insurer shall reimburse the injured worker for reasonable travel expenses incurred for treatment of an injury according to the requirements of this rule. Travel is reimbursable only when the medical services obtained are payable by the insurer.~~

(1)~~(2)~~ Reimbursement for travel expenses shall be determined as follows:

(a) Personal automobile and private airplane mileage expenses shall be reimbursed at the current rates specified for state employees. Prior authorization from the insurer is required for the use of a private airplane. Total reimbursable automobile miles shall be determined according to the most direct highway route between the injured worker's residence and the provider. When the travel coincides in whole or in part with the injured worker's regular travel to or from his employment, the coincident mileage may be subtracted from the reimbursable mileage. For each calendar month, the first fifty (50) miles of automobile mileage is not reimbursable. ~~For purposes of travel reimbursement, automobile mileage shall be calculated using the towns listed as the post office addresses of the injured worker, the provider, and the employer.~~

(b) Expenses for eligible meals shall be reimbursed at the meal rates established for state employees. ~~A meal is eligible for reimbursement only when the one-way mileage as determined in subsection (2)(a) is greater than 15 miles, and when the travel time falls within the time ranges established for meal reimbursement for state employees.~~

(c) Actual out-of-pocket receipted lodging expenses incurred by injured workers shall be reimbursed up to the maximum amounts established for state employees. Lodging in those areas specifically designated as high cost cities shall be reimbursed at actual cost. Any claim for receipted or high cost lodging reimbursement must be accompanied by an original receipt from a licensed lodging facility. If the injured worker stays in a non-receiptable facility, or fails to obtain

a receipt, the reimbursement is the amount set for state employees for non-receipted lodging.

(d) Miscellaneous transportation expenses, such as taxi fares or parking fees, are reimbursable and must be supported by paid receipts.

(2) ~~(3)~~ (a) Preauthorized expenses incurred for direct commercial transportation by air or ground, including rental vehicles, shall be reimbursed when no other less costly form of travel is available to the injured worker, or when less costly forms of travel are not suitable to the injured worker's medical condition.

(b) If an injured worker chooses to use commercial transportation when a less costly form of travel suitable to his medical condition is available, reimbursement shall be made according to the rates associated with the least costly form of travel.

(3) ~~(4)~~ Claims for reimbursement of travel expenses must be submitted within 90 days of the date the expenses are incurred, on a form furnished by the insurer.

(4) ~~(5)~~ The department shall make available to interested parties the specific information referenced in this rule concerning rates for transportation, meals, and lodging; meal time ranges; and designations of high cost cities. The department shall inform interested parties in a timely manner of all applicable updates to this information.

AUTH: Section 39-71-203 MCA IMP: Section 39-71-704 MCA

3. The following are the reasons for and against adoption and reasons for the overruling of considerations urged against adoption of the rule:

REASONS FOR ADOPTION

1. Implementation of Statute. As required by section 39-71-704(1)(c), MCA the rule defines how reimbursement shall be determined for personal automobile and private airplane mileage, meals, lodging, commercial transportation, and miscellaneous transportation expenses. The rule also gives requirements for submission of claims and for dissemination of rate information. Specific guidelines in these areas were needed for the practical application to injured workers of the rates established for state employees.

2. Definition of Mileage. Restrictions on private airplane use and on automobile route selection are included to give further definition to the application of mileage rates.

3. Exception of First Fifty (50) Miles. Comments received at the informal meeting, prior to the hearing notice, and following the public hearing strongly supported a "deductible" monthly mileage amount.

4. Exception of Coincident Mileage. Comments received at the informal meeting were strongly in support of excepting from

reimbursement the mileage that the claimant would have travelled whether he or she had visited a medical provider or not.

5. Requirement for Lodging Receipts. Receipt requirements stated in the rule are identical to those given in the Administrative Rules of Montana for lodging reimbursement for state employees. This language was necessary as different rates exist for receipted and non-receipted lodging.

6. Requirement for Miscellaneous Transportation Receipts. Comments received at the informal meeting favored requiring receipts for all miscellaneous expenses, even for small amounts.

7. Restriction on Commercial Travel. Comments received prior to notice of the public hearing favored preauthorization for commercial transportation. Specific conditions--relating to cost of alternatives and medical condition of the claimant--for authorization of commercial travel were included in the rule to provide further definition of eligibility.

8. Claim Submission Requirement. Comments received at the informal meeting strongly favored a time limit on submission of travel claims.

9. Rate Information Dissemination. A requirement for the Department to make rate information available to interested parties is included to aid in quick and accurate application of the rule.

CONSIDERATIONS AGAINST ADOPTION

[From comments received at various stages of the rulemaking process]

1. Conditions for meal reimbursement are not strict enough. An overnight stay, or a minimum of, say, six hours in travel status, should be required for meal reimbursement.

   Overruled: Further restrictions would conflict with the statutory requirement for adherence to state rates.

2. Lodging should be reimbursable only when preauthorized.

   Overruled: The language of the statute does not require preauthorization for lodging expenses; such a requirement would be more restrictive than necessary.

3. Non-receipted lodging should not be reimbursable.

   Overruled: Rates for non-receipted lodging are included in the state employee travel rates; therefore, according to the statute, they are applicable to injured workers.

4. The time for submitting travel claims is too long.

Overruled: The 90 day period given in the rule is reasonable and is one of the two times suggested by insurers at the informal meeting. A claimant unfamiliar with the workers' compensation system may need this amount of time to contact the agencies and the insurer involved; obtain the necessary form(s) from the insurer; and obtain and assemble the various receipts.

5. Use of an insurer's travel claim form should not be required.

Overruled: Most insurers giving comments on the rule favored the requirement.

Mario A. Micone, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State: August 6, 1990

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
BEFORE THE BOARD OF WATER WELL CONTRACTORS

In the matter of the adoption of ARM 36.21.413A concerning required training.	)))	NOTICE OF ADOPTION OF 36.21.413A REQUIRED TRAINING

TO: ALL INTERESTED PERSONS:

1. On May 17, 1990, the Board of Water Well Contractors published a notice of public hearing on the proposed adoption of required training, ARM 36.21.413A at page 896, 1990 Montana Administrative Register, Issue number 9.

2. On June 15, 1990, the public hearing was held in the Glacier Room of the Department of Natural Resources and Conservation, 1520 East Sixth Avenue, Helena, Montana. Fred Robinson, Attorney for the Board presided over and conducted the hearing. Present were Board members Wesley Lindsay, Dan Fraser, Robert Bergantino, William Osborne, and Ron Guse; Diana Cutler, Program Specialist for the Board; Patty Greene, Recording Secretary. In addition to staff and Board members, there were 10 individuals in attendance.

No one speaking opposed the rule adoption, but several comments were made. In addition, several letters were received. The following summarizes the public comments and the Board's responses.

COMMENT: The notice stated the Montana Water Well Drillers Association had requested the mandatory training requirement. Attending members from the Association's Board of Directors said that while the Association Board supported required training, the idea was not proposed by the Association.

RESPONSE: The Board of Water Well Contractors agreed that required training was proposed by the Board in response to a suggestion by the legislature.

COMMENT: A question was raised as to whether additional hours would be added at a future date.

RESPONSE: Hours could not be added without notice of proposed rule change and opportunity for comment from those people directly affected.

COMMENT: One of the manufacturing and supplies representative questioned whether time spent in the exhibit hall at the Montana Water Well Drillers Convention would be counted towards the required training.

RESPONSE: As long as the time was verified and attended in conjunction with the other educational sessions at the convention, it could be considered.

COMMENT: There was discussion on possible methods of obtaining the training.

RESPONSE: The DNRC field office could provide some local training, attendance at pump schools, etc, could also be

accepted. Accepted courses will be listed in the board newsletter Well Developments each time it is published.

COMMENT: Two letters in opposition to required training were received. They expressed concern about time, travel, and cost to obtain the required training.

RESPONSE: The Board believes that 4 hours a year is minimal to keep updated on changes in the industry. With the nine DNRC Field Offices available to present training, no one will need to travel a great distance. With pump and mud schools as acceptable training, all licensees could obtain 4 hours of training with little expense or time lost.

3. The rule is adopted as proposed.

BOARD OF WATER WELL CONTRACTORS
WESLEY LINDSAY, CHAIRMAN

BY: Karen Barclay
KAREN BARCLAY, DIRECTOR
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

Certified to the Secretary of State, August 6, 1990.

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

In the matter of the amendment of Rule 46.10.403 pertaining to AFDC standards of assistance	))))	NOTICE OF THE AMENDMENT OF RULE 46.10.403 PERTAINING TO AFDC STANDARDS OF ASSISTANCE

TO: All Interested Persons

1. On June 28, 1990, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.10.403 pertaining to AFDC standards of assistance at page 1245 of the 1990 Montana Administrative Register, issue number 12.

2. The Department has amended Rule 46.10.403 as proposed.

3. No written comments or testimony were received.

4. This rule will be applied retroactively to July 1, 1990 to comply with a state legislative mandate. Due to staff shortages, the department was unable to propose this rule in time for a prospective July 1, 1990 applicability date.

Director, Social and Rehabilitation Services

Certified to the Secretary of State July 26, 1990.

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

In the matter of the adoption of Rules I through XXIV, the amendment of Rules 46.10.701, 46.10.702, 46.10.704, 46.10.705, 46.10.707, 46.10.708 and 46.10.710, and the repeal of rules 46.10.308, 46.10.309, 46.10.310, 46.10.311, 46.10.312, 46.10.313, 46.10.601 through 46.10.608 and 46.10.713 pertaining to the Montana JOBS program	)	NOTICE OF THE ADOPTION OF RULES I THROUGH XXIV, THE AMENDMENT OF RULES 46.10.701, 46.10.702, 46.10.704, 46.10.705, 46.10.707, 46.10.708, AND 46.10.710, AND THE REPEAL OF RULES 46.10.308, 46.10.309, 46.10.310, 46.10.311, 46.10.312, 46.10.313, 46.10.601 THROUGH 46.10.608 AND 46.10.713 PERTAINING TO THE MONTANA JOBS PROGRAM

TO: All Interested Persons

1. On June 14, 1990, the Department of Social and Rehabilitation Services published notice of the proposed adoption of Rules I through XXIV, the amendment of Rules 46.10.701, 46.10.702, 46.10.704, 46.10.705, 46.10.707, 46.10.708 and 46.10.710, and the repeal of rules 46.10.308, 46.10.309, 46.10.310, 46.10.311, 46.10.312, 46.10.313, 46.10.601 through 46.10.608 and 46.10.713 pertaining to the Montana JOBS program at page 1122 of the 1990 Montana Administrative Register, issue number 11.

2 The Department has repealed Rules 46.10.308, 46.10.309, 46.10.310, 46.10.311, 46.10.312, 46.10.313, 46.10.601 through 46.10.608 and 46.10.713 as proposed.

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

46.10.701 AFDC WORK SUPPLEMENTATION PROGRAM, GENERAL
Subsection (1) remains as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, 53-4-211, ~~and~~ 53-4-215, 53-4-703, 53-4-705 AND 53-4-720 MCA

46.10.702 AFDC WORK SUPPLEMENTATION PROGRAM, DEFINITIONS
Subsections (1) through (20) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, 53-4-211, ~~and~~ 53-4-215, 53-4-703, 53-4-705 AND 53-4-720 MCA

46.10.704 AFDC WORK SUPPLEMENTATION PROGRAM, PARTICIPANT ELIGIBILITY Subsections (1) through (2) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, 53-4-211, ~~and~~ 53-4-215, 53-4-703, 53-4-706, 53-4-707, 53-4-708, 53-4-715, 53-4-717 AND 53-4-720 MCA

46.10.705 AFDC WORK SUPPLEMENTATION PROGRAM, ~~APPLICATION AND~~ PLACEMENT AND EMPLOYER REQUIREMENTS Subsections (1) through (6) remain as proposed

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, 53-4-211, ~~and~~ 53-4-215, 53-4-703, 53-4-706, 53-4-707, 53-4-708, 53-4-715 AND 53-4-720 MCA

46.10.707 AFDC WORK SUPPLEMENTATION PROGRAM, TERMINATION AND REASSIGNMENT Subsections (1) through (2)(b) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, 53-4-211, ~~and~~ 53-4-215, 53-4-703, 53-4-706, 53-4-707, 53-4-715 AND 53-4-720 MCA

46.10.708 AFDC WORK SUPPLEMENTATION PROGRAM, AFDC ELIGIBILITY; RESIDUAL GRANT Subsections (1) through (4) remain as proposed.

AUTH: Sec. 53-4-212 , 53-4-719 MCA
IMP: Sec. 53-2-201, 53-4-211, and 53-4-215, 53-4-241, 53-4-703 AND 53-4-720 MCA

46.10.710 AFDC WORK SUPPLEMENTATION PROGRAM, MEDICAL ASSISTANCE AND CHILD CARE BENEFITS Subsections (1) through (3)(c) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 and 53-6-113 MCA
IMP: Sec. 53-2-201, 53-4-211, ~~and~~ 53-4-215, 53-4-703, 53-4-716, 53-4-720 AND 53-6-131 MCA

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

[RULE I] 46.10.801 PURPOSE Subsection (1) remains as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105,~~

~~53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-701, 53-4-703 AND 53-4-705 MCA

[RULE II] 46.10.803 DEFINITIONS Subsections (1) and (2) remain as proposed.

(3) "Caretaker ~~parent~~ RELATIVE" means ~~the natural or adoptive parent in an assistance unit who functions as a provider of maintenance, physical care and guidance for the children~~ A PERSON WHO MEETS THE DEFINITION OF SPECIFIED RELATIVE AS DEFINED IN ARM 46.12.302.

Subsections (4) through (14) remain as proposed.

(15) "Good cause" means CIRCUMSTANCES BEYOND THE INDIVIDUAL'S CONTROL OR an acceptable reason as determined by the department excusing participant's failure to comply with a program requirement applicable to the participant.

Subsections (16) through (35) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-702 THROUGH 53-4-718 MCA

[RULE III] 46.10.805 ELIGIBILITY Subsections (1) through (9) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-706, 53-4-707, 53-4-708, 53-4-715, 53-4-717 AND 53-4-720 MCA

[RULE IV] 46.10.807 SERVICES Subsections (1) through (1)(j) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-705, 53-4-715 AND 53-4-720 MCA

[RULE V] 46.10.809 PARTICIPATION REQUIREMENTS FOR EDUCATIONAL ACTIVITIES Subsections (1) through (3)(d) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-705, 53-4-708, 53-4-715 AND 53-4-720 MCA

[RULE VI] 46.10.811 PARTICIPATION REQUIREMENTS FOR UNEMPLOYED PARENTS Subsections (1) through (1)(b) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-706, 53-4-707 AND 53-4-720 MCA

[RULE VII] 46.10.813 REQUIREMENTS FOR SATISFACTORY PROGRESS IN EDUCATIONAL AND WORK AND TRAINING ACTIVITIES Subsections (1) through (2)(b) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-705, 53-4-708, 53-4-715 AND 53-4-720 MCA

[RULE VIII] 46.10.815 JOB SEARCH Subsections (1) through (3) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-706, 53-4-715 AND 53-4-720 MCA

[RULE IX] 46.10.817 ON-THE-JOB TRAINING (OJT) Subsections (1) through (5)(a) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-705, 53-4-715 AND 53-4-720 MCA

[RULE X] 46.10.819 TRAINING SERVICES --POST SECONDARY Subsections (1) through (3) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-705, 53-4-708, 53-4-715 AND 53-4-720 MCA

[RULE XI] 46.10.821 COMMUNITY WORK EXPERIENCE PROGRAM (CWEP) Subsections (1) through (9) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-705, 53-4-715 AND 53-4-720 MCA

[RULE XII] 46.10.823 SELF-INITIATED SERVICES Subsections (1) through (3) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-705, 53-4-708 AND 53-4-720 MCA

[RULE XIII] 46.10.825 SUPPORTIVE SERVICES AVAILABILITY Subsections (1) through (1)(a)(i)(A) remain as proposed.

(B) liability insurance for necessary private transport AS A ONE TIME WORK-RELATED EXPENSE not to exceed ~~a total of~~ $110.00 during the twelve (12) months following enrollment in the program and any twelve months of any successive twelve month enrollment period in the program; and

(C) auto repairs for necessary private transport AS A ONE TIME WORK-RELATED EXPENSE not to exceed ~~a total of~~ $500.00 during the twelve (12) months following enrollment in the program and any twelve months of any successive twelve month enrollment period in the program.

(b) tools for specific job or training needs ~~have been established~~ AS A ONE TIME WORK-RELATED EXPENSE not to exceed ~~a total cost of~~ $300.00 during the twelve (12) months following enrollment in the program and any twelve months of any successive twelve month enrollment period in the program;

Subsections (1)(c) and (1)(d) remain as proposed.

(e) medical services including physical, prescription eyeglasses, drugs, immediate dental care can be provided if not available through medicaid or another source AS A ONE TIME WORK-RELATED EXPENSE not to exceed ~~a total cost of~~ $150.00 during the twelve (12) months following enrollment in the program and any twelve months of any successive twelve month enrollment period in the program;

Subsection (1)(f) remains as proposed.

(g) other items necessary to search for employment AS A ONE TIME WORK-RELATED EXPENSE PER MONTH not to exceed ~~a total cost of~~ $25.00 per month; and

Subsections (1)(h) through (1)(h)(ii) remain as proposed.

(iii) A ONE TIME WORK-RELATED EXPENSE not to exceed ~~a total cost of~~ $300 during the twelve (12) months following enrollment in the program and any twelve months of any successive twelve month enrollment period in the program.

Subsections (2) through (7) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-715, 53-4-716 AND 53-4-720 MCA

[RULE XIV] 46.10.827 AVAILABILITY OF SERVICES AFTER LOSS OF AFDC ELIGIBILITY Subsection (1) remains as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-716 AND 53-4-720 MCA

[RULE XV] 46.10.829 LEAD AGENCY Subsections (1) through (4)(b) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-715, 53-4-718 AND 53-4-720 MCA

[RULE XVI] 46.10.831 RESPONSIBILITIES OF LEAD AGENCY Subsections (1) through (5) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-715, 53-4-718 AND 53-4-720 MCA

[RULE XVII] 46.10.833 PARTICIPANTS EMPLOYABILITY PLAN AND JOBS CONTRACT Subsections (1) through (2)(e) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-715 AND 53-4-720 MCA

[RULE XVIII] 46.10.835 CASE MANAGEMENT Subsections (1) through (3) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-715 AND 53-4-720 MCA

[RULE XIX] 46.10.837 GOOD CAUSE (1) A participant ~~has~~ MAY HAVE good cause for failure to participate in the program. ~~due~~ GOOD CAUSE INCLUDES BUT IS NOT LIMITED to any of the following circumstances:

Subsections (1)(a) through (1)(d) remain as proposed.

(i) death of a family member; ~~or~~

(ii) severe weather conditions, if others in a similar situation have the same difficulty.; OR

(iii) NECESSARY CHILD CARE IS UNAVAILABLE.

(2) A participant has good cause for failure to accept employment under the auspices of the program due but not limited to any of the following circumstances:

Subsections (2)(a) through (2)(c)(ii)(E) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-706, 53-4-707, 53-4-717 AND 53-4-720 MCA

[RULE XX] 46.10.839 SANCTIONS (1) An AFDC recipient who is required to participate in the JOBS program ~~and who participates as required~~ and who without good cause refuses or fails to participate in the program or refuses or fails to accept or maintain employment will lose, as provided for in (2), their portion of the AFDC household grant. The sanctions will be imposed for failure to participate in ~~all~~ ANY aspects of the program including orientation, assessment, employability, development planning, case management and participation in assigned components.

Subsections (2) remains as proposed.

(3) A person who begins to participate again in the program must participate for two weeks after the date of beginning participation before benefits may be received. AFTER SUCCESSFUL COMPLETION OF THE TWO WEEKS, SANCTIONS ARE TO CEASE AS OF THE DATE OF AGREED PARTICIPATION.

Subsection (4)(a) remains as proposed.

(4)(b) the second parent in an unemployed household IF THAT PARENT IS NOT PARTICIPATING. THE SECOND PARENT MUST BE GIVEN THE OPTION TO PARTICIPATE OR DECLARE THE INTENT TO PARTICIPATE IF SLOTS ARE UNAVAILABLE.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-706, 53-4-707 AND 53-4-717 MCA

[RULE XXI] 46.10.841 CONCILIATION (1) When there is a dispute between the JOBS provider and a participant regarding a required JOBS activity, conciliation must be provided to resolve the dispute. A MATTER MAY NOT BE REFERRED BY A PROVIDER TO THE DEPARTMENT FOR CONSIDERATION AND PURSUIT OF A SANCTION UNLESS THAT MATTER CANNOT BE RESOLVED THROUGH CONCILIATION.

Subsections (2) through (5) remain as proposed.

(6) THE PERSON MAY BRING AN ATTORNEY OR NON-ATTORNEY REPRESENTATIVE TO THE CONCILIATION.

Subsection (6) is renumbered as subsection (7).

(8) ~~(7)~~ If it becomes apparent TO THE PROVIDER that the dispute cannot be resolved through conciliation, the process may be terminated earlier, upon written notification, either by the participant or the provider.

Subsections (8) through (11) remain as proposed, but are renumbered (9) through (12).

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703 AND 53-4-720 MCA

[RULE XXII] 46.10.843 FAIR HEARING PROCEDURE Subsections (1) and (2) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, 53-2-606, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703 AND 53-4-720 MCA

[RULE XXIII] 46.10.845 EVALUATIONS-PERFORMANCE STANDARDS Subsections (1) through (5)(c) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-718 AND 53-4-720 MCA

[RULE XXIV] 46.10.847 AFDC WORK SUPPLEMENTATION PROGRAM; CONDUCT OF PROGRAM Subsections (1) through (6) remain as proposed.

AUTH: Sec. 53-4-212, 53-4-719 MCA
IMP: Sec. 53-2-201, ~~53-5-211~~ 53-4-211, 53-4-215, ~~53-2-1101, 53-2-1102, 53-2-1103, 53-2-1104, 53-2-1105, 53-2-1106, 53-2-1107, 53-2-1108, 53-2-1109, and 53-2-1110~~ 53-4-703, 53-4-705 AND 53-4-720 MCA

5. These rules implement the JOBS program for recipients of Aid to Families with Dependent Children. The JOBS program is a federally mandated program authorized by the Family Assistance Act of 1988 (Public Law 100-458, codified at 42 USC 681 et seq.). The Montana Legislature has provided the Department of Social and Rehabilitation Services at 53-4-701 et seq MCA with authority for the establishment of a JOBS program in Montana.

The JOBS program provides various educational, training, work activities and support components that offer participants skills, knowledge, experience and certain types of assistance that will increase their employment opportunities and therefore help them in becoming economically self-sufficient. The program reforms the system of welfare assistance by fostering welfare recipients' desires to be self-sufficient and by providing incentives that ease their transition from welfare assistance.

The program is to be implemented incrementally by counties as resources and funding allow. The service model for the program relies upon local planning and provision of services. Local JOBS plans are designed to offer the necessary components of the programs and to meet program requirements.

The rules specify the requirements of eligibility and participation, the contents and objectives of the services, the standards that govern the availability of the services, the structures, process and standards for the delivery of services, the administrative processes accord participants for resolution of disputes. The rules are necessary to the implementation and functioning of the program, providing concise and detailed governance in accord with the particular federal authority and the policy decisions of the State of Montana.

The rules are being adopted retroactive to July 1, 1990. This retroactive adoption is necessary to provide governing authority concurrent with the first stage of implementation of the program on July 1, 1990 in certain counties of the state. The rules could not be adopted at an effective date prior to the program's July 1, 1990 implementation date due to the difficulties encountered in developing the rules among which were delays in implementation of the federal rules, problems in interpreting the federal rules and other written materials, the need to hire staff for the program, the need to involve the public in the development of the program concepts for Montana, and the need

for extensive legal review and assistance that was limited in its availability.

6. The Department has thoroughly considered all commentary received:

COMMENT: The resolution rate proposed in the administrative rules is too high. Many recipients are not ready for employment. The burden of program evaluation tied to the resolution rate forces operators to urge participants to accept low paying jobs. This perpetuates the welfare cycle. The federal regulations do not require placement rates. Each community should be allowed flexibility to design their own standards. Not enough emphasis is given to further education as an effective measure for developing long term employment opportunities for recipients.

RESPONSE: The department carefully considered the performance standards in Rule 46.10.825, Evaluations and Performance Standards. 53-4-718, MCA requires that employment and training plans contain performance standards to measure the effectiveness of the program. Allowing local flexibility in determining performance standards is not workable.

The Montana JOBS program creates a balance between education and employment. The department is committed to assisting AFDC recipients who lack a high school education or equivalency the opportunity to obtain one. The Montana JOBS program is taking an employment directed approach. Those individuals who are job ready must seek employment. Post secondary education is an available option if appropriate for an individual through case management referral and supervision or self initiated training.

Participants attending one or more educational activities will be subtracted during the period of participation from the enrollment count before determining the resolution rate. The resolution rate will be based on the remainder of participants with the assumption that this group will be more "job ready" than the total enrolled population. Post secondary education is not considered an educational activity but can be offered as self initiated training or through case management referral and supervision. Individuals in post secondary education are not subtracted from the enrollment count.

COMMENT: Self employment should be included as a resolution.

RESPONSE: The department concurs. Any employment including self employment which meets the performance standard in Rule 46.10.485 are considered a position resolution.

COMMENT: Allow the lead agency to work with applicants as well as recipients.

RESPONSE: Limited funding and some unanswered policy issues do not allow the Montana JOBS program to serve AFDC applicants at this time.

COMMENT: Is child care available for orientation and assessment?

RESPONSE: Child care will be provided for orientation and assessment.

COMMENT: Good cause for failure to participate should include the unavailability of child care.

RESPONSE: The department concurs and has made the appropriate changes to Rule 46.10.837.

COMMENT: Good cause for failure to accept employment should include the language "but not limited to" which would address all possible circumstances.

RESPONSE: The department concurs. Rule 46.10.837 subsection (2) has been changed to allow for other factors.

COMMENT: Removing the second parent's needs from the grant should the enrolled parent fail to participate should not occur, unless the second parent is allowed the option to participate or declare an intent to participate if slots are unavailable.

RESPONSE: The department concurs. The administrative rule has been changed to allow the second parent the opportunity to participate or declare intent to participate if slots are unavailable. If the second parent fails to meet this requirement, their needs will also be removed from the grant.

COMMENT: Work Supplemental Program wages should be excluded on the prospective income test. Also, transitional child care and transitional Medicaid should start at the end of the work supplementation agreement.
RESPONSE: The Family Support Administration has denied Montana's request to continue the policy of excluding WSP wages on the prospective income test. Participants with gross wages projected to exceed the Gross Monthly Income or Net Monthly Income standards are not eligible for a residual grant (grant amount will be considered to be zero) but are eligible for continued participation as WSP.

As long as the individual remains on WSP, they are considered a JOBS participant and child care will be reimbursed at 100% of

approved child care rates rather than at the sliding scale transitional rate. However, the transitional child care "clock" continues to run. The 12 month period of potential eligibility for transitional child care benefits begins its count when the AFDC grant becomes zero. The transitional Medicaid potential eligibility begins when WSP ends, not when the grant is reduced to zero. These policies are a result of federal mandates.

The department will continue to encourage the Family Support Administration to make WSP more attractive option for participants and potential employers.

COMMENT: If participation in the community work experience program is voluntary, must workers' compensation be paid?

RESPONSE: Workers' compensation must be paid for all JOBS participants enrolled in the community work experience program (CWEP). A representative from the state fund will contact all JOBS contractors providing CWEP to discuss rates and payment procedures.

COMMENT: The cost of providing workers' compensation will have an adverse impact on the community work experience programs. An economic impact statement should be done.

RESPONSE: A state fund representative will contact each contractor regarding premiums and payment procedures.

COMMENT: Contractors should be allowed to pay only reasonable costs of transportation.

RESPONSE: The Montana JOBS Plan sets maximum limits for supportive services. Local task forces are allowed to set local limits through the county planning process as long as these limits do not exceed those set forth in the State Plan.

COMMENT: The "good cause" definition should be expanded to add "circumstances beyond the individual's control".

RESPONSE: The department concurs. The definition will reflect this change.

COMMENT: The "incapacity" definition should be clarified.

RESPONSE: The department is patterning the incapacity definition after that in ARM 46.10.303 pertaining to "Aid to Families with Dependent Children".

COMMENT: First priority should be given to those who want to volunteer.

RESPONSE: Operators are allowed flexibility in deciding which AFDC recipients to enroll in the JOBS Program.

COMMENT: Training should be acceptable if it provides skills, either directly or indirectly, for jobs that will lead to self sufficiency and that are available in the local area or areas within Montana the participant is willing to move to. Post-secondary education should be allowed even for liberal arts studies.

RESPONSE: The Montana JOBS program creates a balance between educational activities, employment, and post secondary education activities that will lead to employment in Montana.

COMMENT: Rule 46.10.819 provides that full supportive services will be provided to those individuals participating in post secondary education. Rule 46.10.823 limits supportive services to those individuals in self-initiated training to child care. The department should provide the maximum possible support to individuals in self-initiated activities.

RESPONSE: Due to limited funding, the department is restricting individuals participating in self-initiated activities to child care assistance.

COMMENT: Post-secondary education is not considered in the resolution rate. At a minimum, post-secondary education should be tracked separately, as in other educational activities.

RESPONSE: The department is collecting data on post-secondary education as a component of JOBS.

COMMENT: Rule 46.10.839, Sanctions, should specify that the agency must reasonably believe the individual knew the actions were contrary to JOBS requirements before sanctions may be imposed. Sanctions should not be imposed for technical or unintentional failure, or where the claimant was simply unaware of requirements.

RESPONSE: The department concurs. The sanction procedure will be initiated as a last resort. When there is a dispute between the JOBS provider and a participant regarding a required JOBS activity, conciliation must be provided to resolve the dispute. During the conciliation, the participant's rights and responsibilities will be clearly explained including the consequences of continued failure to participate. The conciliation process must be fair and impartial. Only after the conciliation period has terminated or the dispute remains unresolved, may the provider recommend that a sanction be imposed.

COMMENT: The sanction rule in providing for a two week renewed participation option does not make it clear that the sanction ends upon return of the person to the program.

RESPONSE: The department concurs. The Administrative Rules have been changed to incorporate these changes.

COMMENT: An express statement of purpose is appropriate to distinguish conciliation from the more adversarial fair hearing process. Attempted conciliation should be stated to be a mandatory precondition to referral for sanctions.

RESPONSE: The department concurs. The Administrative Rules have been changed to incorporate these changes.

COMMENT: The proposed rule elects a thirty day conciliation period, and requires that the proceedings be recorded in the case record. The Federal Registers responses to comments suggests, but does not require a thirty day period. The Montana rule would mandate referral for sanctions if a dispute remains unresolved for thirty days, even if the imposition of sanctions may be inappropriate.

RESPONSE: The department feels that thirty days is a fair and adequate amount of time for effective conciliation.

COMMENT: The rule requires the conciliation process be "fair and impartial," but gives no guidance as to how that peaceable condition will be realized. The individual should be informed of the right to bring an attorney or non-attorney representative to the conciliation.

RESPONSE: The department concurs. Rule 46.10.841 has been changed to incorporate these changes.

COMMENT: Rule 46.10.845, Evaluations-Performance Standards, fails to mention provision of health care among the factors to be monitored under subsection (2).

RESPONSE: The department will collect data on health care coverage provided to JOBS participants placed into employment.

COMMENT: Including termination from AFDC "for any reason" risks overstating success rates, due to normal caseload turnover. Presumably, because remaining household members would continue to receive AFDC, sanctioned JOBS participants would not be counted as "resolutions." Given experience in other training programs, it would still be worthwhile to clarify that sanctions do not constitute resolutions.

RESPONSE: Evaluation shall consist of an expected resolution rate for service providers of fifty-six percent (56%) of the number of people served during the year and seventy-five percent (75%) of the resolution must be as a result of employment.

A resolution consists of:

1) employment of at least 20 hours per week that is expected to last 30 days or more;
2) termination from AFDC for any reason; or
3) reassessment and redetermination of exempt status for a participant (individuals must have participated in an approved component for 30 days or more).

COMMENT: Reconsider the requirement that prohibits work, supplementation placement in established unfilled vacancies.

RESPONSE: The Preamble of the Family Support Act referenced at Section 250.62 discusses this required provision. Since this provision is a federal mandate, the department cannot reconsider this requirement.

COMMENTS: The Administrative Code Committee pointed out that first notice did not cite the correct authorizing and implementing authorities.

RESPONSE: The department concurs and has made the appropriate corrections.

COMMENTS: The Administrative Code Committee noted that Rule 46.10.839(1) should state that sanctions will be imposed for failure to participate in "any aspect" instead of "all aspects" of the program.

RESPONSE: The department concurs and has made the appropriate changes.

COMMENT: The Administrative Code Committee noted in Rule 46.10.841 that it was unclear to whom it must become apparent that when a dispute cannot be resolved through conciliation, the process may be terminated.

RESPONSE: The department concurs and has added "to the provider" to Rule 46.10.841.

7. These rules will be applied retroactively to July 1, 1990.

Julia E. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State August 2, 1990.

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

In the matter of the amendment of Rule 46.12.303 pertaining to medicaid billing, reimbursement, claims processing and payment	)))))	NOTICE OF THE AMENDMENT OF RULE 46.12.303 PERTAINING TO MEDICAID BILLING, REIMBURSEMENT, CLAIMS PROCESSING AND PAYMENT

TO: All Interested Persons

1. On May 17, 1990, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.303 pertaining to medicaid billing, reimbursement, claims processing and payment at page 901 of the 1990 Montana Administrative Register, issue number 9.

2. The Department has amended Rule 46.12.303 as proposed.

3. The Department has thoroughly considered all commentary received:

COMMENT: Will there be a window for "old claims?"

RESPONSE: The department's 180 day rule (i.e. the old rule) will apply to those claim submissions with a date of service or date of eligibility determination prior to July 1, 1990. However, a provider must submit a clean claim no later than June 30, 1991 for claims with dates of service or eligibility determinations prior to July 1, 1990.

Claims submitted for payment with a date of service or eligibility determination after July 1, 1990 will be subject to the 12 month timely filing limit implemented July 1, 1990.

COMMENT: If a provider submits a claim to Medicaid, and does not receive a request for additional information, or a claim denial seeking additional information, can the provider assume the claim was a "clean claim?"

RESPONSE: No. A provider may assume that a clean claim has been submitted only when it has received a statement of remittance (SOR) from Consultec, the department's fiscal agent, indicating that the claim has been approved for payment. An SOR is usually sent to the provider within 14 to 30 days after submission of a claim. If a provider has not received an SOR or a returned claim (for lack of required information or documentation) within 45 days of submission, the provider

should contact Consultec. A provider may need to inquire sooner if the 12-month deadline is approaching.

COMMENT: Whose responsibility is it to be sure that a claim that was sent was not lost in the mail or lost after it was received by Consultec?

RESPONSE: As noted in the previous response, it is the provider's responsibility to contact Consultec if nothing has been received regarding the claim within about 45 days, or sooner if the deadline is approaching. A claim is not considered submitted if lost in the mail. To be considered submitted there must be a date stamped received by either the fiscal agent or the department. It is important that, for their own protection, providers submit claims carefully and early, so that errors will be minimized and providers will have sufficient time to correct claims or resubmit lost claims within the 12-month deadline.

COMMENT: What happens when claims are held pending information or determinations from entities other than the provider?

RESPONSE: It is the responsibility of the provider to obtain and submit within the 12-month deadline all information and documentation necessary for payment of the claim, including any information or documentation from entities other than the provider. Again, it is important that providers submit claims early, so that any missing information or documents can be obtained and submitted within the 12-month deadline. In the case of claims held for determination of medical necessity or for utilization review, failure to obtain an SOR indicating approval within 12 months will not preclude payment, so long as the provider has submitted a clean claim within the 12-month deadline.

4. The amendment will be applied retroactive to July 1, 1990.

Julia S. Hilleman
Director, Social and Rehabilitation Services

Certified to the Secretary of State July 23, 1990.

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

In the matter of the amendment of Rule 46.12.505 pertaining to diagnosis related groups (DRGs)	)))))	NOTICE OF THE AMENDMENT OF RULE 46.12.505 PERTAINING TO DIAGNOSIS RELATED GROUPS (DRGS)

TO: All Interested Persons

1. On May 17, 1990, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.505 pertaining to diagnosis related groups (DRGs) at page 904 of the 1990 Montana Administrative Register, issue number 9.

2. The Department has amended Rule 46.12.505 as proposed.

3. No written comments or testimony were received.

4. This rule will be applied retroactively to July 1, 1990 because the 1989 Appropriation Act allocated increases to hospitals which were to be effective July 1, 1990. Due to staff shortages the rulemaking process was not started in time for a prospective effective date.

Julia E. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State August 2, 1990.

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

In the matter of the amendment of Rules 46.12.590, 46.12.591, 46.12.592 and 46.12.599 pertaining to inpatient psychiatric services	)))))	NOTICE OF THE AMENDMENT OF RULES 46.12.590, 46.12.591, 46.12.592 AND 46.12.599 PERTAINING TO INPATIENT PSYCHIATRIC SERVICES

TO: All Interested Persons

1. On June 14, 1990, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.590, 46.12.591, 46.12.592 and 46.12.599 pertaining to inpatient psychiatric services at page 1117 of the 1990 Montana Administrative Register, issue number 11.

2. The Department has amended Rules 46.12.592 and 46.12.599 as proposed.

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

46.12.590 INPATIENT PSYCHIATRIC SERVICES, PURPOSE AND DEFINITIONS Subsections (1) through (2)(j) remain as proposed.

(k) "~~Acute psychiatric~~ HOSPITAL inpatient PSYCHIATRIC care" means hospital based active PSYCHIATRIC treatment provided under the direction of a physician ~~for a psychiatric episode which has a relatively sudden onset and a short severe course~~. The INDIVIDUAL'S psychiatric CONDITION ~~episode~~ must be of such a nature as to pose a significant ~~and immediate~~ danger to self, others, or the public safety, or one which has resulted in marked psychosocial dysfunction or grave ~~mental~~ disability of the INDIVIDUAL ~~patient~~. The therapeutic intervention OR EVALUATION must be ~~aggressive and~~ designed to achieve the patient's discharge from inpatient HOSPITAL status ~~or~~ to a less restrictive environment at the earliest possible time.

(l) "Residential psychiatric care" means ~~comprehensive,~~ active psychiatric treatment PROVIDED IN A RESIDENTIAL TREATMENT FACILITY, ~~under the supervision of a physician in a facility designed and organized to provide twenty-four hour residential care. Recipients must have been diagnosed or evaluated as being~~ TO psychiatrically impaired INDIVIDUALS WITH PERSISTENT PATTERNS OF ~~and have~~ emotional, psychological or behavioral dysfunction OF SUCH SEVERITY AS TO REQUIRE TWENTY-FOUR HOUR SUPERVISED CARE TO ADEQUATELY TREAT OR REMEDIATE THEIR CONDITION. ~~The therapeutic intervention must be aggressive~~ RESIDENTIAL PSYCHIATRIC CARE MUST BE INDIVIDUALIZED, and designed to achieve the patient's discharge ~~from~~

~~inpatient status or~~ to a less restrictive LEVELS OF CARE ~~environment~~ at the earliest possible time.

Subsection (2)(m) remains as proposed.

(n) "Residential treatment facility" means a facility, LOCATED IN MONTANA OR ANOTHER STATE, of not less than 30 beds that is accredited by the Joint Commission on Accreditation of Health Care Organizations (JCAHO), and is operated by a non-profit corporation or association for the primary purpose of providing active treatment services for mental illness in a non-hospital based residential setting to persons under 21 years of age.

~~(o) "Active treatment" means implementation of a professionally developed and supervised individual plan of care that is:~~ PAYMENT FOR INPATIENT PSYCHIATRIC SERVICES PROVIDED OUTSIDE THE STATE OF MONTANA IS SUBJECT TO THE REQUIREMENTS OF ARM 46.12.502(3).

~~(i) developed and implemented no later than 14 days after admission;~~

~~(ii) designed to achieve the recipient's discharge from inpatient status at the earliest possible time; and~~

~~(iii) meets the requirements of 42 CFR 441.155.~~

Subsections (2)(p) through (4)(c) remain as proposed.

(5) The provider must notify the department's designated review organization within three working days of an emergency admission so that a certification can be completed within 14 days of admission. If the provider fails to timely notify the review organizations, the department shall deny reimbursement for the period from admission TO and the actual date of notification.

Subsection (6) remains as proposed.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101 and 53-6-139 MCA

46.12.591 INPATIENT PSYCHIATRIC SERVICES, PARTICIPATION REQUIREMENTS Subsections (1) through (1)(f) remain as proposed.

(g) for hospital providers.

(i) comply with~~:~~ ~~(i) Title~~ 42 CFR sections 482.1 through 482.62 and meet the requirements of section 1861(f) of the Social Security Act~~; or~~, which are federal regulations and statutes setting forth requirements for psychiatric hospitals. The department hereby adopts and incorporates by reference the above-cited regulations and statutes. Copies of these regulations and statutes may be obtained from the Department of Social and Rehabilitation Services, P.O. Box 4210, 111 Sanders, Helena, MT 59604-4210~~.~~; OR

(~~ii~~hii) be accredited by the ~~j~~Joint c~~C~~ommission on a~~A~~ccreditation of ~~hospitals~~ Health Care Organizations (JCAHO).

Original subsection (1)(g)(ii)(A) remains as proposed.

~~(hi) for hospital providers, participate in medicare or reimburse the department an amount adequate to cover the increased administrative and audit functions normally~~

~~performed by the medicare intermediary. These funds shall be deposited with the state either upon entering a provider agreement or at the beginning of the applicable state fiscal year, whichever is earlier. The amount of funds per facility shall not be less than twenty five thousand dollars ($25,000) per state fiscal year;~~

Original subsections (1)(i) and (1)(j) remain as proposed but are recategorized as subsections (1)(h) and (1)(i).

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101 and 53-6-139 MCA

4. The Department has thoroughly considered all commentary received:

COMMENT: The proposed definition of hospital inpatient psychiatric care appears to be designed to reduce the Medicaid reimbursable lengths of stay in psychiatric hospitals to that of general hospital acute care psychiatric units. The proposed definition appears to allow crisis intervention or crisis stabilization, but will not allow for proper implementation and completion of a treatment program for a patient's psychiatric condition.

RESPONSE: The final definition of hospital inpatient psychiatric care is the result of a consensus reached by the providers and the Department on June 26, 1990. Inpatient psychiatric hospitals may provide crisis intervention or crisis stabilization, but they may also provide services longer than a general acute care hospital, depending upon the individual's medical need and certification of need for services.

COMMENT: The requirement contained in the last sentence of the hospital inpatient psychiatric care definition, "The therapeutic intervention or evaluation must be designed to achieve the patient's discharge from inpatient hospital status to a less restrictive environment at the earliest possible time", is either inconsistent with or redundant to the definition of active treatment contained in proposed ARM 46.12.590 (2)(o) and 42 CFR 441.154, and is therefore unnecessary.

RESPONSE: Inclusion of this sentence in the hospital inpatient psychiatric care definition, and similar language in the residential psychiatric care definition, underscores the importance of and the emphasis on "active treatment" as outlined in 42 CFR 441.154. The Department does not consider it redundant or unnecessary. The definition of "active treatment" in proposed ARM 46.12.590 (2)(o), which restated the federal regulation, has been deleted.

COMMENT: The last sentence of the hospital inpatient psychiatric care definition ignores the provision in 42 CFR 441.152 which requires that ambulatory care resources available in the

community do not meet the treatment needs of the recipient. That sentence will eliminate Medicaid reimbursement for services provided to otherwise eligible Medicaid recipients in a Rivendell facility even if there are no less restrictive services available to which the recipient can be discharged.

RESPONSE: If the recipient's psychiatric condition does not meet the medical necessity criteria for inpatient hospital psychiatric care, Medicaid cannot reimburse for the recipient's continued stay in the facility, even though active treatment continues. The Department has always considered those days "Administratively Necessary Days" (AND's) which are not a benefit of the Medicaid program. Active treatment focuses on the recipient's psychiatric condition and preparing the recipient for discharge, not upon the actual availability of a discharge placement.

COMMENT: The provision contained in the last sentence of the hospital inpatient psychiatric definition has the potential of cutting off Medicaid reimbursement prior to completion of an individual plan of care for the patient which is required in 42 CFR 441.155.

RESPONSE: Active treatment requires an individual plan of care which is "designed to achieve the recipient's discharge from inpatient status at the earliest possible time". The individual plan of care corresponds to the recipient's psychiatric condition, not to a program designed length of stay, such as 90 days.

COMMENT: Concern was expressed that inclusion of definitions was an attempt to include utilization review (UR) initiatives that should be proposed in a separate rule proceeding and which goes beyond what is required under House Bill 304 for implementation of Medicaid reimbursement of services provided in residential treatment facilities.

RESPONSE: With the inclusion of residential treatment services in the current rule, it is within the Department's legal authority and responsibility to define the services being reimbursed. The definitions provide a specific description for all providers, referring agencies/individuals and recipients, of the services that Medicaid will reimburse so that appropriate referrals and placements can be made.

COMMENT: The definitions of "hospital psychiatric inpatient care" and "residential psychiatric care" should conform to the definitions set forth in the Department's letter of June 28, 1990.

RESPONSE: The correct definition of "hospital psychiatric inpatient care" and "residential psychiatric care" that appeared in the July 29, 1990 letter appear in the final rule.

These definitions were revised through discussions between provider and agency representatives. Any discrepancies in the revised version distributed at the rule hearing were the result of typographical errors.

COMMENT: Where did the language come from and whose idea was it to include "located in Montana or another state" in the definition of a residential treatment facility?

RESPONSE: The Department has included this language to clarify that both in-state and out-of-state facilities seeking reimbursement under the Montana Medicaid program must meet the definition of a residential treatment facility specified in HB 304. This issue had been discussed at meetings between provider and Department representatives. HB 304 authorizes Medicaid payment only for services provided in residential treatment facilities as defined by the legislature.

COMMENT: At the present time, are there children in out-of-state residential treatment programs having less than thirty beds and will they be moved? Are there some out-of-state facilities that are JCAHO accredited or are there some that use the HCFA accreditation option?

RESPONSE: Of the out-of-state residential treatment facilities currently utilized by Department of Family Services (DFS), only three are JCAHO accredited. Further review on July 17, 1990 reveals that none of these facilities will meet the definition of a residential treatment facility set forth in HB 304. Nonetheless, HB 304 authorizes Medicaid to pay only for medically necessary services in residential treatment facilities as defined by HB 304.

COMMENT: HB 304 was intended to establish a 2-year pilot project for Medicaid reimbursement of inpatient psychiatric services in a residential treatment facility. At this time, it will be impossible to establish that pilot project and provide any meaningful statistical information to the upcoming legislative session.

RESPONSE: Delays arose due to the Department's efforts to obtain a federal waiver to limit the program to children in DFS custody as required by HB 304. The Department is implementing a law passed by the Legislature. The study of residential treatment services required by the Legislature will reflect the short duration of the program and the restrictions required by HB 304.

COMMENT: Because of the denial of the waiver, it appears that the anticipated cost of HB 304 will be much greater than expected. This factor alone is sufficient cause for legislative reconsideration of this matter.

RESPONSE: The Legislature was aware that without a waiver restricting residential treatment placements to Department of Family Services (DFS) children, the anticipated cost of HB 304 would be greater than expected. However, the Legislature did not preclude implementation of HB 304 if the waiver could not be obtained. The Department is proceeding forward with implementation because we feel residential treatment services are an essential component in the development of the continuum of services for emotionally disturbed children.

COMMENT: HB 304 contains discriminatory and unlawful restrictions concerning potential providers or residential treatment services. It is no secret that the law was drafted with the intent to exclude Shodair and other providers of psychiatric services to children. At this time, the only provider in the state who can qualify under HB 304 is the Yellowstone Treatment Center (YTC). If implemented, HB 304 would in effect provide an unlawful special franchise to YTC to provide this service. If the Department goes forward with the enactment of these regulations, Shodair will have no choice but to challenge the discriminatory restrictions of HB 304 by court action.

RESPONSE: The present implementation of Medicaid coverage for residential treatment facility services is a pilot project. It is a temporary measure designed to gain information and experience regarding coverage of this service to assist the Legislature in deciding whether to adopt Medicaid coverage of the service. It is within the authority of the Legislature to create a short term pilot project which restricts participation of prospective providers. This project ends on July 1, 1991 and requires the 1991 Legislature to take further action to continue the coverage, and to again address the participation and certification of need requirements.

COMMENT: The ";or" in subsection (g) of Rule 46.12.591 should not be deleted, in order to insure that psychiatric hospitals can be accredited under either HCFA or JCAHO. At the hearing it was stated that the deletion of the "; or" was inadvertent, and that there was no intent to change the rule in this regard.

RESPONSE: There is no intent to eliminate the choice of inpatient hospital providers concerning accreditation. The language of proposed ARM 46.12.591(1)(g) has been revised to allow accreditation by HCFA or JCAHO.

COMMENT: The Department appears to be changing the scope of the Medicaid benefits provided by inpatient psychiatric hospitals. The Department has not adequately assessed the impact of the proposed rule changes on the state budget, DFS, the provider community and the recipient's access to services.

SRS should not reduce the scope of Medicaid until alternative settings can be developed.

RESPONSE: Other than adding coverage of residential services, the Department does not intend through this rule to change the scope of the inpatient psychiatric services program. Services provided in an inpatient hospital or residential treatment facility will be reimbursed if the recipient's psychiatric condition meets the certification of need and medical necessity criteria required under federal law, and is being served in an appropriate setting. Since a new provider setting is being added, it is necessary for the Department to define what services will be reimbursed in those settings. Further, it is necessary to adjust the rules to emphasize the federal requirements applicable to Medicaid reimbursement.

The Department's assessment of the impact of this program was based upon the limited information available at the time of the rule filing. As additional information is made available through the Department's UR contractor and other state agencies regarding appropriate lengths of stay, the number of children needing inpatient hospital or residential treatment services, the number of children who can be served in alternative settings and what those settings are, etc., the impact data will be changed or modified to reflect the additional information. This information will be shared with providers, agencies, the Governor and the Legislature on a timely and ongoing basis.

COMMENT: ARM 46.12.591(1)(i) should be deleted from the rule. There is no justification for requiring hospitals to participate in medicare or pay a $25,000 amount to the Department.

RESPONSE: The Department agrees and has eliminated this requirement.

COMMENT: While the Montana Hospital Association (MHA) supports the language defining hospital care developed through consensus of Department and provider staff, MHA opposes the adoption of this language to support denials of services rendered by hospitals. SRS will increase the amount of uncompensated care provided by hospitals.

RESPONSE: Admission to and continued stay in a hospital facility is based upon medical necessity and certification of need for the level of service in a hospital setting. The definition clarifies the difference between hospital and residential care, and is not intended to redefine the length of stay reimbursable by Medicaid. Medicaid has not paid for medically unnecessary care or care provided in an inappropriate setting in the past. This will not change with the clarification in definitions.

COMMENT: Concern was expressed that although there will always be some need for inpatient hospital care for children and adolescents, there are other priorities that should be considered: 1) finding alternatives to hospitalization, such as day treatment centers, residential treatment centers, aftercare services, and family based, community based programs; 2) it is essential to cut lengths of stay, i.e., the individual should be stabilized and gotten out as soon as possible to an alternative setting; and 3) the need to convince providers that alternative care to hospitalization is better over the long run for the child and his family.

RESPONSE: The Department agrees that there will always be some need for hospital care and that the Department, DFS, and Department of Institutions should continue to review and build a continuum of care for children and adolescents. This rule amendment is a step in that direction.

COMMENT: How did the Department arrive at the $7 million cost estimate for the residential portion of the program?

RESPONSE: The $7 million cost estimate was based upon assumptions which have now changed. The revised cost estimate is $4,864,711 in FY91 and $6,303,792 each year for FY92 and FY93. Coverage of residential treatment facility services will result in payment for 27,028 in-state and 3,600 out-of-state residential bed days in FY91 and 30,094 in-state and 9,490 out-of-state residential bed days in FY92 and FY93. The projected cost of this service is $4,864,711 (5,688 bed days x $157/day and 24,940 bed days x $159.25/days) for FY91 and $6,303,792 (39,584 bed days x $159.25/day) in FY92 and FY93, exclusive of inflationary increases.

COMMENT: The studies required under HB 304 are very important to allow planning for development of a continuum of services for children, to estimate the need for residential treatment facility beds and to estimate the funding that realistically will be required to meet those needs. The Mental Health Association of Montana urges maximum coordination and sharing of data among the involved agencies (SRS, Department of Health, and DFS, at least) in preparing their required reports for the Legislature.

RESPONSE: The Department intends to cooperate fully with the other involved agencies in sharing data and planning for the continuum of services and related funding issues.

COMMENT: Paragraph 3 of the proposal notice states that the amendments to ARM 46.12.590 and 46.12.591 will be applied retroactively to July 19, 1990. There is no reason given for the retroactive provision.

RESPONSE: The Department prepared the proposed rule in time to be filed with a prospective July 1, 1990 effective date. However, numerous issues were raised by provider groups, other state agencies and other interested parties regarding the scope and effect of the rule. The Department held a series of meetings with interested parties to reach a consensus regarding rule language and to discuss various issues prior to implementation. The Department had previously made a commitment to Yellowstone Treatment Center (YTC) that coverage would be implemented July 1, 1990 and YTC has been operating on that assumption. It is necessary to apply the rule retroactive to July 1, 1990 so that the Department can honor its commitment to begin coverage July 1, 1990. This retroactive date benefits Medicaid recipients and YTC, the parties primarily affected by the rule.

5. These rules will be applied retroactively to July 1, 1990.

Director, Social and Rehabilitation Services

Certified to the Secretary of State July 26, 1990.

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

In the matter of the amendment of Rules 46.12.1201, 46.12.1202, 46.12.1203, 46.12.1204 and 46.12.1205 pertaining to the payment rate for skilled nursing and intermediate care services	))))))	NOTICE OF THE AMENDMENT OF RULES 46.12.1201, 46.12.1202, 46.12.1203, 46.12.1204 AND 46.12.1205 PERTAINING TO THE PAYMENT RATE FOR SKILLED NURSING AND INTERMEDIATE CARE SERVICES

TO: All Interested Persons

1. On June 14, 1990, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.12.1201, 46.12.1202, 46.12.1203, 46.12.1204 and 46.12.1205 pertaining to the payment rate for skilled nursing and intermediate care services at page 1107 Administrative Register, issue number 11.

2. The Department has amended Rules 46.12.1201 and 46.12.1204 as proposed.

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

46.12.1202 PURPOSE AND DEFINITIONS Subsections (1) through (2) remain as proposed.

(a) "Nursing facility services" means ~~skilled~~ nursing facility services provided PRIOR TO OCTOBER 1, 1990 in accordance with 42 CFR 405 Subpart K OR ~~and, effective August 1, 1989 October 1, 1990, 42 CFR 483, intermediate care facility services provided in accordance with~~ 42 CFR 442 Subpart F, and effective ~~August 1, 1989~~ October 1, 1990, 42 CFR 483, and intermediate care facility services for the mentally retarded provided in accordance with 42 CFR 483. The department hereby adopts and incorporates herein by reference 42 CFR 405 Subpart K, 42 CFR 442 Subparts F and G, and 42 CFR 483, which define the participation requirements for providers, copies of which may be obtained through the Department of Social and Rehabilitation Services, P. O. Box 4210, 111 Sanders, Helena, Montana 59604-4210. The term "nursing facility services" includes the term "long term care facility services". Nursing facility services include, but are not limited to, a medically necessary room, dietary services including dietary supplements used for tube feeding or oral feeding such as high nitrogen diet, nursing services, minor medical and surgical supplies, and the use of equipment and facilities. The services and examples of services listed in this subsection are included in the rate determined by the department under ARM 46.12.1201 and ARM

46.12.1204 and no additional reimbursement is provided for such services. Examples of nursing facility services are:

Subsections (2)(a)(i) through (2)(ac) remain as proposed.

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

46.12.1203 PARTICIPATION REQUIREMENTS Subsections (1) through (1)(g) remain the same.

(h) comply with the rules regarding screening for ~~skilled~~ nursing FACILITY SERVICES ~~and intermediate care facilities~~ set forth at ARM 46.12.1301 through 1310;

Subsection (i) remains as proposed.

AUTH: 53-6-113 MCA
IMP: 53-6-101 MCA

46.12.1205 PAYMENT PROCEDURES (1) The department pays providers amounts determined under these rules on a monthly basis upon receipt of an appropriate billing which represents the number of patient days of nursing facility services provided to authorized medicaid recipients times the payment rate minus the amount each medicaid recipient pays toward the cost of care. Authorized medicaid recipients are those residents who have been determined eligible for medicaid and have been authorized for ~~either skilled or intermediate~~ nursing FACILITY services as a result of the screening process described in ARM 46.12.1301, et seq.

Subsection (1)(a) through (8) remain as proposed.

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

4. The Department has thoroughly considered all commentary received:

COMMENT: Commentors expressed concern that the State of Montana used an inflator of only 3% to increase reimbursement rates over the past year, which the commentors feel substantially fails to keep pace with inflation in the nursing home industry in Montana. Commentors recommend that the state "rebase" the Medicaid rates by setting rates based upon the latest available, actual allowable costs rather than costs from 1980 indexed forward to the present level. The department should not change any of the variables used in reimbursement, such as the patient assessment system, unless rebasing is done. If rebasing is not possible, the department should replace the 3% inflator with an index that more accurately reflects inflationary trends expected within the industry during the next year.

RESPONSE: The Department has undertaken a study to analyze the current reimbursement system and to advise the department on the feasibility of rebasing to more current verified cost data. Based upon the results of this study and the cost data developed, the department will propose rebasing under an appropriate methodology and will propose a budget modification for required funding to implement rebasing for the 1992-93 biennium. One area that will be addressed by the reimbursement study is various methods of determining costs and measuring inflation. The study will include review and development of cost data relating to staffing costs and patient acuity, and will include consideration of alternative methods for distributing reimbursement funds. Provider concerns will be considered as part of the evaluation of the reimbursement study and no major changes to the current reimbursement system will be made until the study results are evaluated.

COMMENT: A number of comments inquired regarding the base period costs used to set reimbursement rates:

Has the department determined the actual costs experienced by facilities caring for Medicaid patients for fiscal years 1987, 1988 and 1989?

Has the department determined that the rates contained in this proposal will pay the actual costs being experienced by nursing facilities?

How many providers are expected to receive all of their allowable costs associated with caring for Medicaid patients under this proposal?

What has the department done to determine whether 1980 costs indexed forward in fact reflect current costs experienced by facilities?

RESPONSE: The department has contracted with a national consulting firm to study the current system of reimbursement. The preliminary study results are currently being evaluated by the department. The final study report will address the indexed base period costs as well as rebasing costs to more current levels. Since a prospective payment system is designed to reimburse the costs that must be incurred by economically and efficiently operated providers, it is expected that not all actual costs will be reimbursed. The department anticipates that answers to many of these questions will be provided by the study and that the study will provide a basis for appropriate revision and funding of the reimbursement system for the next biennium.

COMMENT: The department should adopt a rule which allows providers a reasonable opportunity for profit, while limiting the amount of loss a provider could incur. Such a provision could be implemented by requiring a provider to submit the necessary financial information to allow the department to determine a rate adjustment during this state fiscal year.

RESPONSE: The reimbursement study will include analysis of alternative methods of distributing reimbursement funds, including appropriate limits on Medicaid "profits" and losses. Any such proposal must consider the degree to which efficient and profitable providers should subsidize providers with high costs and which may be inefficient. Such proposal would also require definition of what constitutes a reasonable opportunity for profit. The department has considered this comment but will not implement major changes to the system until the reimbursement study has been fully analyzed.

COMMENT: The department should consider modifying the current wage index in favor of a provider specific index. This was proposed last year but rejected because it caused large payment fluctuations in reimbursement rate computations. A provider specific index should be implemented which indexes wages which fall outside of an acceptable range. The department should consider combining wage areas with only one or two facilities with larger areas. It is more equitable to combine a higher number of facilities together in a "geographic wage area" to measure wage adjustments.

RESPONSE: The suggested change would defeat the purpose of having a geographic area wage index, which is to identify areas in the state with higher or lower wages than other areas of the state and to provide more or less reimbursement based on a geographical areas wages compared to the state as a whole. A facility specific index would not provide a valid indication of the cost of hiring staff in area's of the state. It would show only that some providers are paying higher wages, not necessarily because that area is a high wage area or because staff is difficult to recruit in the area. The system would still require some comparison of the provider's wage levels to the market wage in the geographic area to determine whether the costs are reasonable.

The suggested change to the wage index could significantly increase or decrease individual facility rates. The department is not prepared to impose such impacts without considering the broader issues related to the wage factor. The results of the reimbursement study will be evaluated prior to making such major changes in the methodology of fund distribution. It appears that the present geographic wage factor system has minimal impact upon individual rates. Upon comple-

tion of the study, the department will consider changing or eliminating the wage factor.

COMMENT: The department should move Wheatland County Nursing Home from location 39 to location 23 for computation of the geographic area adjustment.

RESPONSE: The department has been informed by Wheatland Nursing Home that they feel they are grouped in the wrong geographic area. The department has reviewed the available information and documentation regarding the groupings that were used to create the geographic areas. Wheatland Nursing Home has been included consistently in location 39 since the March 1983 geographic wage survey. No one has inquired about this grouping until fiscal year 1990. The department will evaluate the appeal made by Wheatland Nursing Home and will consider its arguments that it should be grouped in a different geographic wage area for wage factor purposes.

COMMENT: The department should adopt a rule allowing negotiated rates for heavy care patients. It is clear that the state's interest in gaining access to nursing facilities is served by arranging special rates for atypical cases. It is also clear that the per diem system does not reflect the increased cost of caring for heavy care patients.

RESPONSE: For many heavy care residents, facilities are receiving considerably more than the per diem rate. For example, the residents are receiving durable medical equipment services such as equipment rental, physical therapy, and ancillary items such as oxygen, catheters, ostomy supplies, enteral/parenteral feeding solutions, and any extraordinary routine supplies. All of these items are reimbursed in addition to the basic per diem rate. The department is unaware of what additional costs for these residents' care would not be covered by Medicaid. Also, if these residents with high care needs are included on the patient assessment abstracting system, they are impacting the patient assessment score for the facility, and the facility is receiving higher reimbursement for all Medicaid residents.

Heavy care residents may be denied access to nursing facilities because of reasons other than the payment facilities will receive for the cost of caring for these residents. Specifically, access results from the shortage of staff in the particular area to provide for these residents' specific needs or the lack of specific specialized services that are required for these residents. The needs of many of these residents can be met in the community. For example, ventilator dependent patients can receive services at home or in the community.

The department proposed an amendment to its fiscal year 1990 rule to address payment services provided to heavy care residents. This proposal was removed due to objections received from the nursing facility industry. The department, through analysis of the reimbursement study, will review and consider alternative approaches to reimbursing for heavy care patients.

COMMENT: The department should clarify whether or not during the Medicare co-insurance period ancillary items can be billed to Medicaid if Medicaid is paying for the co-insurance day.

RESPONSE: For days one through twenty, Medicare payment should be made for any dually-eligible resident. Medicare payment is an all-inclusive rate and no other charges can be billed to Medicare or Medicaid during this period. For days twenty-one through one hundred, the facility may bill Medicaid for the Medicaid payment rate less any patient contribution for the cost of care. The Medicaid payment rate is the lower of the co-insurance rate or the facility's per diem rate. Ancillary items, as provided in the rule, may also be billed to Medicaid during this period. The difference in the co-insurance rate and the Medicaid per diem rate which is not reimbursed by the Medicaid payment rate plus ancillaries billed is considered to be Medicare bad debt.

COMMENT: The Department should reconsider the mathematics of the formula as applied to multiplying the difference between the facility patient assessment score and the statewide average patient assessment score by the nursing care hourly wage. Even when it is recognized that labor costs are going up (for rate purposes, the nursing care hourly wage is increasing from $6.81 in FY 90 to $7.36 in FY 91) the way the patient assessment difference is multiplied by the nursing care wage results in less reimbursement to providers even if there is no change in the patient assessment score relative to the statewide average. This was not what was intended by the system and it contradicts the rule intent.

RESPONSE: The formula for computing the patient assessment addition or deduction from the per diem operating rate does compare the facility specific patient assessment score (PAS) to the statewide average and then multiplies the difference by the nursing care hourly wage component. If a facility's patient assessment score and the statewide average remain the same, and the nursing care hourly wage increases, the facility's rate would decrease or increase depending upon whether the facility PAS was above or below the statewide average. This is because the patient assessment factor is designed to adjust the distribution of a fixed amount of funds between various facilities, rather than to adjust a particular facility's rate in relation to a fixed rate amount. This is

consistent with the intent of the rule, which is to increase reimbursement for facilities with higher acuity residents and decrease reimbursement for facilities with lower acuity patients.

COMMENT: A number of comments inquired regarding the basis for the proposed fiscal year 1991 rate:

Did the department take into account the inflationary trends or any inflation index projected for nursing facilities for the period July 1, 1990 through June 30, 1991, when it established a 3% inflation factor?

Did the department consider the inflationary trends experiences by nursing facilities during fiscal years 1988, 1989, and 1990 in developing this rule and determining whether it can expect to meet facilities' cost of providing care?

What did the department determine inflation has been for FY 1988, 1989 and 1990?

On what basis did the department determine that inflation will be 3% during FY91?

RESPONSE: The department has applied the 3% inflation factor, as set by the legislature, to fiscal year 1990 aggregate nursing facility rates to determine fiscal year 1991 aggregate reimbursement. The department will evaluate the nursing facility reimbursement study, which will consider various methods of determining costs and measuring inflation for rebasing of costs in fiscal year 1992 and later inflation indexing. The study will include an analysis of inflationary trends in Montana and will evaluate the strengths and weaknesses of specific indices which could be used to inflate rates forward.

COMMENT: The department should add language requiring the department to provide the nurse aide training cost reporting forms no later than the last day of the quarterly reporting period, together with a notice to providers that funds may be withheld temporarily for failure to complete the form within 30 days and may be withheld permanently if costs are not adequately documented.

RESPONSE: In order to make providers aware of the penalties associated with late or inaccurate reporting, the department will provide notice on the reporting form of the penalties that can be imposed if the form is late or inaccurate. The department will provide the form no later than the last day of the quarterly reporting period. However, no additional language will be added to the rule.

COMMENT: A number of comments were received regarding the property rate computation:

What is the basis for the $8.64 maximum reimbursement rate for a newly constructed facility?

What studies has the department done to determine that the $8.64 compensates a newly constructed facility for its reasonable costs?

What are the per diem costs for the most recently constructed facilities in Montana?

RESPONSE: The new construction limit of $8.64 is derived by indexing forward the base period new construction rate of $7.60 to the current level of $8.64 for fiscal year 1991.

The most recently constructed facilities are Parkview of Billings and Riverside of Missoula. Fiscal year 1989 per diem reported property costs have been computed by dividing the property costs reported on Worksheet B, Part II of the cost report by total days reported on form MA14, yielding a per diem reported property cost for each facility as follows. The reported information has not been desk reviewed or audited. Based upon this calculation, the reported property costs are $11.48 for Parkview and $22.95 for Riverside. The department has contracted with a national firm to perform a nursing facility reimbursement study to address some of these concerns regarding property reimbursement rates and to determine if these new construction costs are economic and efficient.

COMMENT: The department should amend the rules to delete the references to intermediate care facility services which appear in ARM 46.12.1202(2)(a), 46.12.1203(1)(h), and 46.12.1205(1). The new federal statute provides for only one level of nursing facility care and one type of facility.

RESPONSE: The department has amended the cited sections as suggested.

COMMENT: The proposal notice states that the amendments will be applied retroactive to July 1, 1990. There is no reason given for the retroactive effective date. The reason should be stated in the notice.

RESPONSE: The amendments are necessary to (1) implement a rate increase granted by the legislature effective July 1, 1990 and to update various components of the rate formula for purposes of implementing this rate increase; (2) to incorporate mandatory federal statutory and regulatory changes

effective on or before July 1, 1990; (3) to establish a new base year for ICF/MR rate purposes to allow federal financial participation in costs necessarily incurred to provide ICF/MR services; and (4) to allow the department to meet federal law which requires that rates be adjusted to take into account increases in the federal minimum wage effective July 1, 1990. The amendments benefit the parties affected by the rule and must be effective July 1, 1990 to meet state and federal requirements. The proposal notice was delayed by the need for clarification of the federal policy to be implemented in the rule.

Director, Social and Rehabilitation Services

Certified to the Secretary of State August 2, 1990.

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

In the matter of the adoption of Rules 46.12.1501, 46.12.1503 and 46.12.1505 pertaining to freestanding dialysis clinics	)))))	NOTICE OF THE ADOPTION OF RULES 46.12.1501, 46.12.1503 AND 46.12.1505 PERTAINING TO FREESTANDING DIALYSIS CLINICS

TO: All Interested Persons

1. On June 14, 1990, the Department of Social and Rehabilitation Services published notice of the proposed adoption of Rules 46.12.1501, 46.12.1503 and 46.12.1505 pertaining to freestanding dialysis clinics at page 1086 of the 1990 Montana Administrative Register, issue number 11.

2. The Department has adopted [RULE I] 46.12.1501, FREESTANDING DIALYSIS CLINICS FOR END STAGE RENAL DISEASE, DEFINITIONS; [RULE II] 46.12.1503, FREESTANDING DIALYSIS CLINICS FOR END STAGE RENAL DISEASE, REQUIREMENTS; [RULE III] FREESTANDING DIALYSIS CLINICS FOR END STAGE RENAL DISEASE, REIMBURSEMENT as proposed.

3. No written comments or testimony were received.

4. These rules will be applied retroactively to October 1, 1989. This rule affects only one medical provider in the state of Montana. It was not until the later part of 1989 that data was compiled and analyzed to demonstrate that the implementation of this program could amount to a potential cost savings to the state as well as a benefit to the provider and Medicaid recipients. Following this analysis, approval from the federal government was requested prior to the implementation of the rulemaking process. Thus, the benefits in making the program and these rules retroactive to October 1, 1989 (i.e. the earliest date approved by the federal government) clearly outweighed a prospective rule implementation date.

Julia E. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State August 2, 1990.

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

In the matter of the amendment of Rule 46.12.2003 pertaining to reimbursement for physicians services	))))	NOTICE OF THE AMENDMENT OF RULE 46.12.2003 PERTAINING TO REIMBURSEMENT FOR PHYSICIANS SERVICES

TO: All Interested Persons

1. On June 28, 1990, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.2003 pertaining to reimbursement for physicians services at page 1243 of the 1990 Montana Administrative Register, issue number 12.

2. The Department has amended Rule 46.12.2003 as proposed.

3. No written comments or testimony were received.

4. This rule will be applied retroactively to July 1, 1990, in order to implement the fee increase granted by the 1989 Legislature effective July 1, 1990. The rule was filed late because it was overlooked.

Director, Social and Rehabilitation Services

Certified to the Secretary of State July 26, 1990.

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

In the matter of the amendment of Rule 46.12.3206 and the repeal of Rule 46.12.305 pertaining to third party attorney fees and assignment of benefits	)))))	NOTICE OF THE AMENDMENT OF RULE 46.12.3206 AND THE REPEAL OF RULE 46.12.305 PERTAINING TO THIRD PARTY ATTORNEY FEES AND ASSIGNMENT OF BENEFITS

TO: All Interested Persons

1. On June 14, 1990 the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.3206 and the repeal of Rule 46.12.305 pertaining to third party attorney fees and assignment of benefits at page 1088 of the 1990 Montana Administrative Register, issue number 11.

2. The Department has amended Rule 46.12.3206 as proposed.

3. The Department has repealed Rule 46.12.305 as proposed.

4. No written comments or testimony were received.

Julia E. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State August 2, 1990.

VOLUME NO. 43 OPINION NO. 65

ADMINISTRATIVE LAW AND PROCEDURE - Authority of Department of Health to delegate enforcement of underground storage tank leak prevention program to local governments;
HAZARDOUS WASTE - Authority of Department of Health to delegate enforcement of underground storage tank leak prevention program to local governments;
HEALTH AND ENVIRONMENTAL SCIENCES, DEPARTMENT OF - Authority to delegate enforcement of underground storage tank leak prevention program to local governments;
LOCAL GOVERNMENT - Authority of Department of Health to delegate enforcement of underground storage tank leak prevention program to local governments;
STATE AGENCIES - Authority of Department of Health to delegate enforcement of underground storage tank leak prevention program to local governments;
MONTANA CODE ANNOTATED - Sections 75-10-401 to 75-10-451;
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 75 (1980); UNITED STATES CODE - 42 U.S.C. §§ 6901-6987.

HELD: 1. In light of the nonrestrictive language in section 75-10-405(2)(c)(vi), MCA, allowing the department to delegate to local agents the implementation of the underground storage tank program, the department may delegate to properly designated local agents enforcement of the statutes and rules governing the program.

2. The department's designated local agents may, on behalf of the department, use any of the enforcement methods available to the department.

3. The letters of designation issued by the department delegating authority to local agents are an appropriate method for delegation as long as the letters clearly define the rights, duties, and responsibilities of the department and local agents.

July 23, 1990

Donald E. Pizzini, Director
Department of Health and
Environmental Sciences
Cogswell Building
Helena MT 59620

Dear Mr. Pizzini:

You have requested an opinion on the following questions:

1. May the Department of Health and Environmental Sciences delegate to local government units the enforcement of the underground storage tank statutes and rules?

2. May the local government units use any of the enforcement methods available to the department, as indicated in ARM 16.45.1003?

3. Is there any particular form the delegation must take?

In 1989, the Montana Legislature amended the Montana Hazardous Waste Act (now Montana Hazardous Waste and Underground Storage Tank Act), sections 75-10-401 to 451, MCA, to include provisions addressing the problems of leakage of hazardous substances and petroleum products from underground storage tanks. Senate Bill 321, 51st Leg. Sess., 1989 Mont. Laws, ch. 384. The Legislature recognized that petroleum products and hazardous substances stored in underground tanks are a separate category of substances regulated under the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §§ 6901-6987), as amended. § 75-10-402(3), MCA.

Prior to 1989, the Department of Health and Environmental Sciences (department) had been vested with the authority to adopt, administer, and enforce the hazardous waste program pursuant to the Resource Conservation and Recovery Act. § 75-10-402(1), MCA. In 1989, the department was further authorized to establish, administer, and enforce the underground storage tank leak prevention program. § 75-10-402(3), MCA. The department may use the authority provided in sections 75-10-413 to 417, MCA, and other appropriate authority provided by law to remedy violations of underground storage tank requirements. Id.

In order to implement the new undergound storage tank program, the Legislature authorized the department to adopt rules for the prevention and correction of leakage from underground storage tanks. § 75-10-405(2)(c), MCA. Under section 75-10-405(2)(c)(vi), MCA, these rules expressly included

> delegation of authority and funds to local agents for inspections and implementation. The delegation of authority to local agents must complement and may not duplicate existing authority for implementation of rules adopted by the state fire marshal that relate to underground storage tanks.

While the statutes are unclear as to who is meant by "local agents," the department rules indicate that the department intends to designate local government units as "implementing agencies" for the underground storage tank program. § 16.45.1003, ARM. Upon approving the application of a local government unit as an "implementing agency," the department will issue a "letter of designation" authorizing the local government unit to act as the implementing agency and setting forth any conditions or limitations determined necessary by the department. § 16.45.1003(6), ARM.

Once a local government unit is designated as an implementing agency, the implementing agency shall,

at the request of the department and at other times as necessary, conduct on behalf of the department inspections of the installation, maintenance, operation and closure of underground storage tanks to determine compliance with ARM Title 16, chapter 45, applicable industry standards, and limitations or conditions contained in the department's letter of designation, and may enforce any rule in ARM Title 16, chapter 45 as it is authorized or required by any such rule to administer, in the same manner as the department.

§ 16.45.1004(1), ARM.

Your first question concerns whether the department can delegate not only inspection duties, but also enforcement of the underground tank statutes and rules. Enforcement of the department rules is provided for in sections 75-10-413 (administrative enforcement through notice of violation and opportunity of administrative hearing), 75-10-414 (instituting injunctions to enjoin a violation of the rules), 75-10-416 (cleanup orders), 75-10-417 (instituting court action to impose civil penalties), and 75-10-418, MCA (imposing criminal penalties). These sections were not amended by the Legislature to provide expressly for enforcement by local agents. You indicate, however, that any administrative or judicial actions under these enforcement provisions would be brought by a local attorney acting as an agent for the department and that the enforcement action would still be captioned "Department of Health and Environmental Sciences v. [Respondent/Defendant]."

Section 75-10-405(2)(c)(vi), MCA, allows the department to adopt rules for the "prevention and correction of leakage from underground storage tanks ... including delegation of authority and funds to local agents for inspections and implementation." Administrative agencies enjoy only those powers specifically conferred upon them by the Legislature. State ex rel. Anderson v. State Board of Equalization, 133 Mont. 8, 319 P.2d 221 (1957); State ex rel. STAB v. Montana Board of Personnel Appeals, 181 Mont. 366, 593 P.2d 747 (1979); Bell v. Department of Licensing, 182 Mont. 21, 22, 594 P.2d 331 (1979); Bick v. State Department of Justice, 224 Mont. 455, 730 P.2d 418, 420 (1986).

While section 75-10-405(2)(c)(vi), MCA, clearly authorizes the department to delegate inspection duties, the section also uses the term "implementation" in describing the extent of the authority that may be delegated to a local agent. The specific question here is whether the Legislature intended by use of the term "implementation" to allow the department to delegate enforcement of the underground storage tank program. By definition the verb "to implement" means "carry out, accomplish; to give practical effect to and ensure of actual fulfillment by concrete measures." Webster's Ninth New Collegiate Dictionary 604 (1988). If the local agents may "implement" the underground storage tank program, by definition, the local agents should be able to carry out and accomplish the purposes of the program.

Presumably, enforcement must be included in the authority to carry out the program.

Legislative history of the underground storage tank program supports this conclusion. The legislative history of Senate Bill 321, 51st Leg. Sess., 1989 Montana Legislature, does not indicate that the terms "inspection and implementation" were intended as restrictive terms. The statement of intent for the bill provided:

> It is the intent of the legislature that the department be able to delegate authority and funds to local agents for inspections and for other duties related to the underground storage tank program.

The statement of intent contained no restrictions upon the authority to be exercised at the local level, but expressly allowed delegation of "other duties related to the underground storage tank program."

Committee testimony indicated that there are about 18,000 underground tanks that are registered in Montana and perhaps as many as 12,000 that are not registered. Of these 30,000 tanks there were estimates that 3,000 to 10,000 tanks were leaking. Minutes, Senate Committee on Natural Resources, February 8, 1989, at 2; Minutes, House Committee on Natural Resources, March 8, 1989, at 16. In response to a question from Senator Severson on how the proposed underground storage tank program would be enforced, Larry Mitchell from the department stated:

> The department will rely heavily on local fire and health authorities and building inspectors for enforcement and inspection. Local fire and health authorities will check to ensure that a tank inspection was done in the scheduled year, and to ensure that protection systems are installed and that the owner is keeping records on the test results.

Minutes, Senate Committee on Natural Resources, February 8, 1989, at 6.

One of the purposes of Senate Bill 321 was to impose tank fees that would in turn fund the underground storage tank program. As indicated in the fiscal note accompanying the bill, the department intended to fill only four full-time positions. According to the fiscal note, the "[s]tate program staff [are] to operate where local jurisdictions are unable or unwilling to participate." The legislative history therefore indicates that the department and the Legislature intended that the new program would in great part be implemented at the local level. There is no indication that such implementation did not include enforcement of violations as well as inspections. In fact, the legislative history places no restrictions on the delegation authority of the department, indicating that the department may delegate as much authority as it deems necessary for the proper implementation of the underground storage tank program. The

department could therefore delegate to local agents the entire scope of enforcement authority vested in the department.

As a general rule, expressed in the maxim "delegatus non potest delegare," delegated power may not be delegated, absent express legislative authority. 2 Am. Jur. 2d Administrative Law § 222 at 52 (1962). An administrative agency may not alienate or surrender its powers or duties or delegate authority which under the law may be exercised only by it. 73 C.J.S. Public Administrative Law and Procedure § 56 at 513 (1983). Kerr-McGee Nuclear Corp. v. New Mexico Environmental Imp. Board, 97 N.M. 88, 637 P.2d 38 (1981); Anderson v. Grand River Dam Authority, 446 P.2d 814 (Okla. 1968); Bunger v. Iowa High School Assoc., 197 N.W.2d 555 (Iowa 1972).

In the past, subdelegation within a particular agency was even restricted. For example, in Cudahy Packing Co. v. Holland, 315 U.S. 357, 62 S. Ct. 654 (1942), the Supreme Court held that the Wage-Hour Administrator could not delegate to a regional director the power to sign and issue subpoenas. A few years later, however, the Supreme Court retreated from this strict restriction on subdelegation authority and acknowledged that the existence of rulemaking authority may itself be an adequate source of authority to delegate a particular function, "unless by express provision of the Act or by implication it has been withheld." Fleming v. Mohawk Wrecking and Lumber Co., 331 U.S. 111 (1947). If there is no statute specifically limiting subdelegation authority, federal courts uniformly have allowed subdelegation of duties within an agency or to subordinates based on general delegation authority. United States v. Cuomo, 525 F.2d 1285, 1287-88 (5th Cir. 1976); In re Persico, 522 F.2d 41 (2d Cir. 1975); United States v. Wrigley, 520 F.2d 362 (8th Cir.), cert. denied, 423 U.S. 987 (1975); United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), cert. denied, 430 U.S. 983 (1977). As stated in Hall v. Marshall, 476 F. Supp. 262, 272, aff'd, 622 F.2d 78 (3d Cir. 1980): "While the legality of a subdelegation of an agency's power is primarily a function of legislative intent, the omission of any specific grant of power to delegate should not be construed as a denial of that power. [Citations omitted.]"

The Montana Supreme Court similarly has held that an agency director may delegate his final decisionmaking authority to a subordinate even without express or specific legislation authorizing such delegation. In Hoven, Vervick and Amrine v. Montana Commissioner of Labor and Industry, 46 St. Rptr. 1024, 774 P.2d 995 (1989), the Court relied upon section 2-15-112(2)(b), MCA, which expressly allows the head of a department to delegate "any of the functions vested in the department head to subordinate employees."

Given this current approach in allowing delegation based on broad general authority and given the legislative history of Senate Bill 321, the term "implementation" as used in section 75-10-405 (2)(c)(vi), MCA, must be construed in its broadest sense. As such, the answer to your first two questions is that the department can lawfully delegate enforcement authority and

that local governments may, on behalf of the department, use any of the enforcement methods available to the department provided they are properly designated agents of the department.

Your third question asks what form the delegation must take. The restriction on delegation still exists when there is a concern that one individual subject to the political process should be held publicly responsible for agency action. Should abuses occur in the administrative process, responsibility should be traceable to one identifiable person. United States v. Turner, 528 F.2d 143, 151 (1975) (construing United States v. Giordano, 416 U.S. 505 (1974) and the federal restrictions on delegation of authority by the Attorney General under the federal statutes governing electronic surveillance.)

Here, the lines of authority should be clearly drawn through the letters of designation that the department issues to the local government units. The subdelegation should not involve a "surrender" or "abdication" of authority. In State ex rel. Browning v. Brandjord, 106 Mont. 395, 81 P.2d 677, 682 (1938), the court recognized that a state agency may not merely pass funds through the agency without entering into a contract with the entity receiving the funds.

The department rules indicate that the department will maintain some oversight of the implementing agencies. The department will have a list of all persons directly involved in implementing the program. § 16.45.1002(2), ARM. The department may set forth any "conditions or limitations determined necessary by the department" in the letters of designation. § 16.45.1003(6), ARM. Under section 16.45.1004, ARM, the implementing agency must report to the department quarterly describing all inspections and enforcement activity undertaken in the preceding calendar quarter. If the department determines that the implementing agency is not conducting inspections or enforcements in accordance with department rules, the department may revoke the letter of designation. § 16.45.1005, ARM.

While accountability provisions could be negotiated by contract through interlocal agreements, interlocal agreements need not be the exclusive method of delegation, especially in light of express legislative authorization through the rulemaking process. See 38 Op. Att'y Gen. No. 75 (1980). The proposed letters of designation are an appropriate method for delegation of department authority as long as the letters clearly delineate the rights, duties, and responsibilities of the department and the local governments.

THEREFORE, IT IS MY OPINION:

1. In light of the nonrestrictive language in section 75-10-405(2)(c)(vi), MCA, allowing the department to delegate to local agents the implementation of the underground storage tank program, the department may delegate to properly designated local agents enforcement of the statutes and rules governing the program.

2. The department's designated local agents may, on behalf of the department, use any of the enforcement methods available to the department.

3. The letters of designation issued by the department delegating authority to local agents are an appropriate method for delegation as long as the letters clearly define the rights, duties, and responsibilities of the department and local agents.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 66

EDUCATION - Calculation of average number belonging;
PUBLIC FUNDS - Calculation of average number belonging;
PUBLIC INSTRUCTION, SUPERINTENDENT OF - Calculation of average number belonging;
SCHOOL DISTRICTS - Calculation of average number belonging;
MONTANA CODE ANNOTATED - Section 20-9-311(3).

HELD: School districts must, for purposes of calculating ANB, aggregate the numbers of full-time pupils in all schools in the district, except when a school of the district is located more than three miles beyond the incorporated limits of a city or town or when a school of the district is located more than three miles from another school of the district.

July 18, 1990

Robert L. Deschamps III
Missoula County Attorney
Missoula County Courthouse
Missoula MT 59802

Dear Mr. Deschamps:

You have requested my opinion on a question regarding section 20-9-311(3), MCA, and the calculation of "average number belonging" (ANB).

Your question is phrased as follows:

> For purposes of calculating "average number belonging" (ANB) under section 20-9-311(3), MCA, may a school district count students separately in separate schools if the schools are three or more miles from incorporated limits of a city or town, or must the schools also be three or more miles from another school in the district?

The relevant portion of section 20-9-311, MCA, was enacted by the Montana Legislature in 1987 as HB 340. That section provides, in pertinent part:

> (3) The average number belonging of the regularly enrolled, full-time pupils for the public schools of a district must be based on the aggregate of all the regularly enrolled, full-time pupils attending the schools of the district, except that when:
>
> (a) a school of the district is located more than 3 miles beyond the incorporated limits of a city or town

> or from another school of the district, all of the regularly enrolled, full-time pupils of the school must be calculated individually for ANB purposes[.] [Emphasis added.]

Your question arises because it has been suggested that the legislative intent of the statute compels the conclusion that the word "or" be read as "and."

The Montana Supreme Court has repeatedly stated the standard and method by which legislative intent is to be established.

> The intention of the legislature must first be determined from the plain meaning of the words used, and if interpretation of the statute can be so determined, the courts may not go further and apply any other means of interpretation. [Citations omitted.]

Dunphy v. Anaconda Company, 151 Mont. 76, 80, 438 P.2d 660, 662 (1968). The Montana Supreme Court has consistently followed the teaching of Dunphy holding that the intention of the Legislature is to be ascertained from the plain meaning of the words used in the statute, and if the intent can be determined from the plain meaning of the statutory words, other means of interpretation may not be used. The role of the court, and one that this office must also follow when called upon to review statutes and their construction, is to "declare what in terms or in substance is contained in the statute and not to insert what has been omitted." Dunphy, 151 Mont. at 80, 438 P.2d at 662. See State v. Thompson, 46 St. Rptr. 1065, 1070, ___ P.2d ___ (1990), in which the Montana Supreme Court noted: "[T]he business of courts, however, is to interpret statutes, not to rewrite them, nor to insert words not put there by the legislature." It is presumed that the Legislature understood ordinary and elementary rules of construction of the English language when it enacted a law. State v. Miller, 231 Mont. 497, 517, 757 P.2d 1275, 1287 (1988).

In the case of section 20-9-311(3)(a), MCA, the words of the Legislature are clear. School districts may count students by separate school for ANB purposes if the school buildings are (1) more than three miles beyond the incorporated limits of a city or town, or (2) three miles from another school in the district. § 20-9-311(3)(c), MCA.

As noted above, when the language of a statute is as clear as this statute's, it would be inappropriate for a court to look at means of interpreting the statute other than the plain words. However, even if it were appropriate to refer to the legislative history, it does not support a different reading from that compelled by the statute's plain meaning. During hearings on the legislation, Gene Donaldson, sponsor of the bill, testified that

> [i]t dealt with the method of determining average number belonging within the schools. Currently, the law allows that each school district is computed separately unless they are within an incorporated city. He said he has found current situations where there is one school across the street from another school and they were receiving their ANB individually. He said the bill would direct schools to compute their ANB on a total unless they are three miles or further apart.

House Education Committee, February 6, 1987. This legislative history does not indicate that both prongs of section 20-9-311(3)(a), MCA, must be met before a school district can calculate ANB individually. Therefore, even if the statute were unclear or ambiguous, the legislative history does not indicate that school districts must satisfy both prongs of the statute in their calculation of ANB.

THEREFORE, IT IS MY OPINION:

> School districts must, for purposes of calculating ANB, aggregate the numbers of full-time pupils in all schools in the district, except when a school of the district is located more than three miles beyond the incorporated limits of a city or town or when a school of the district is located more than three miles from another school of the district.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 67

LICENSES, PROFESSIONAL AND OCCUPATIONAL - Public contractors;
SCHOOL BOARDS - Requirement for public contractor's license when awarding bids;
SCHOOL DISTRICTS - Requirement for public contractor's license when awarding bids;
ADMINISTRATIVE RULES OF MONTANA - Section 8.115.301;
MONTANA CODE ANNOTATED - Title 37, chapter 71; sections 2-4-102(11), 20-9-204, 37-71-101(3), 37-71-203.

HELD: Title 37, chapter 71, MCA, which requires a person performing public construction work to have a public contractor's license, applies to persons or firms who contract to sell and install carpeting on school district property where the value of the contract exceeds $5,000.

July 30, 1990

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

Dear Mr. Nelson:

You have requested my opinion on the following question:

> Is Title 37, chapter 71, MCA, which requires a person performing public construction work to have a public contractor's license, applicable to persons or firms who contract to install wall-to-wall carpeting on school district property where the contract price exceeds $5,000?

You have informed me that School District No. 15 recently awarded a bid in excess of $5,000 for the purchase and installation of new carpeting in eight classrooms of a district elementary school. The unsuccessful bidder holds a public contractor's license issued pursuant to Title 37, chapter 71, MCA, and challenged the award on the basis that the successful bidder did not have a public contractor's license. The Montana Department of Commerce construes the applicable law as requiring the bidders to be licensed.

Section 37-71-203, MCA, requires that all bids and proposals for the construction of any public contract project subject to the provisions of Title 37, chapter 71, MCA, contain a statement that the bidder has a public contractor's license. A "public contractor" within the meaning of that chapter includes any person who submits a proposal or enters into a contract to perform public construction work with a public board or agency

authorized to award contracts for any public work when the contract price exceeds $5,000. § 37-71-101(3), MCA. A school board is a public board authorized to enter such contracts on behalf of the school district. § 20-9-204, MCA. Thus, if the sale and installation of carpeting in the elementary school is "public construction work," the bidder is statutorily required to hold a public contractor's license.

Case law from the other states generally excludes installation of carpeting from the definition of construction. See Marston's, Inc. v. Roman Catholic Church of Phoenix, 644 P.2d 244 (Ariz. 1982); Raby v. Westphall Homes, Inc., 414 P.2d 227 (N.M. 1966); Finley-Gordon Carpet Co. v. Bay Shore Homes, Inc., 247 Cal. App. 2d 131, 55 Cal. Rptr. 378 (1966). However, those cases construe narrower, more conventional definitions of "construction." In Marston's, Inc., 644 P.2d 244, the question hinged upon whether or not the product became a permanent part of the structure. In Raby, 414 P.2d 227, and Finley-Gordon, 55 Cal. Rptr. 378, no contractor's license was required to install carpet under statutes excluding anyone who merely furnished materials or supplies without fabricating them into the structure. In contrast, the definition of "public construction work" set forth in section 8.115.301, ARM, a rule promulgated by the Montana Department of Commerce, is very broad. The rule states:

> (1) A "public contractor" is anyone who submits a proposal to or enters into a contract with a governmental agency or department for the construction or reconstruction of any public work, the cost of such construction or reconstruction being greater than $5,000. The term "public contractor" includes subcontractors.
>
> (2) For the purpose of determining the type of work which requires a public contractors [sic] license, the words "public construction work", as referred to in 37-71-101 (3), MCA, are broadly construed to include any work requiring the installation, addition, placement, replacement, or removal of any equipment, parts, structures, or materials of any kind whatever. This rule applies to all contracts exceeding $5,000 whether or not such contracts require performance of service, maintenance, repair, or any other type of work in addition to or as part of the work as above construed. [Emphasis added.]

§ 8.115.301, ARM. A properly adopted rule implementing a statute has the force of law. § 2-4-102(11), MCA. Assuming the validity of the above-cited rule, "public construction work" includes the installation or replacement of materials of any kind. I therefore conclude that under Montana statutes and rules the sale and installation of carpeting for a cost exceeding $5,000 is public construction work and the bidder is required to have a public contractor's license.

THEREFORE, IT IS MY OPINION:

Title 37, chapter 71, MCA, which requires a person performing public construction work to have a public contractor's license, applies to persons or firms who contract to sell and install carpeting on school district property where the value of the contract exceeds $5,000.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 68

COUNTIES - Whether a refuse disposal district is a "political subdivision";
COUNTY GOVERNMENT - Whether a refuse disposal district is a "political subdivision";
INVESTMENTS, BOARD OF - Whether a refuse disposal district is a "political subdivision";
LOCAL GOVERNMENT - Whether a refuse disposal district is a "political subdivision";
SOLID WASTE - Whether a refuse disposal district is a "political subdivision";
MONTANA CODE ANNOTATED - Sections 7-12-1131, 7-12-2123, 7-13-202, 7-13-204 to 7-13-210, 7-13-213, 7-13-215, 7-13-231, 7-13-232 to 7-13-234, 7-13-2218, 7-13-2221, 7-14-219, 7-33-2105, 7-34-2122, 15-1-101(2), 17-5-1601 to 17-5-1651, 17-5-1604(3), 75-10-101 to 75-10-125, 75-10-103, 75-10-112, 76-15-403, 85-7-1902;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 56 (1990), 42 Op. Att'y Gen. No. 80 (1988), 38 Op. Att'y Gen. No. 87 (1980), 37 Op. Att'y Gen. No. 22 (1977), 35 Op. Att'y Gen. No. 71 (1974).

HELD: A refuse disposal district is not a "political subdivision" as that term is used in section 17-5-1604(3), MCA.

July 31, 1990

David M. Lewis, Executive Director
Board of Investments
Department of Commerce
Capitol Station
Helena MT 59620

Dear Mr. Lewis:

You have requested my opinion on the following question:

> Is a refuse disposal district a "political subdivision" as that term is used in section 17-5-1604(3), MCA?

Your question involves interpretation of the Municipal Finance Consolidation Act (MFCA), §§ 17-5-1601 to 1651, MCA. One of the policies underlying the MFCA is to

> foster and promote, by all reasonable means, the provision of efficient capital markets and facilities for borrowing money by counties, cities, towns, school districts, special taxing districts, and other public bodies to pay for capital improvements and other needs as otherwise authorized by law[.]

§ 17-5-1602(1)(a), MCA. The MFCA is also designed to give local government units the ability to borrow money at lower interest rates. § 17-5-1602(1)(b), MCA. The Board of Investments (Board) tries to accomplish these goals by pooling debt instruments from local government units and by providing additional security for the payment of the instruments. § 17-5-1602(2)(b), MCA.

Section 17-5-1604(3), MCA, defines local government unit for purposes of the MFCA:

> "Local government unit" means any municipal corporation or political subdivision of the state, including without limitation any city, town, county, school district, or other special taxing district.

Your question is whether a refuse disposal district is a "political subdivision" as that term is used in this section.

A refuse disposal district is an area with definite boundaries established for the purpose of collecting and disposing of all refuse in the district. § 7-13-202(5), MCA. A refuse disposal district is created by resolution of the county commissioners after notice and opportunity for hearing on protest. §§ 7-13-204 to 210, MCA. Once a district is created, the commissioners appoint a board of directors. § 7-13-213, MCA. Section 7-13-215, MCA, describes the powers and duties of the board of the refuse disposal district and provides in pertinent part:

> The board of a refuse disposal district established and organized under this part has the following powers and duties, with the approval of the county commissioners of the counties involved:
>
> ....
>
> (8) to borrow from any loaning agency funds available for assistance in planning or financing a refuse disposal district and repay these with the money received from the fees levied under this part.

The refuse board may also establish a service fee, with the approval of the county commissioners, provided a public hearing is held if a written protest has been made. § 7-13-231, MCA. An increase in fees may not be approved and implemented without notice and opportunity for hearing. Id. The amount of the fee is based upon a family residential unit with fees for commercial and business accounts based on a comparison with the family unit as to the volume and type of waste produced. § 7-13-232, MCA. The amount of the fee is placed on tax notices and collected with the property tax. Failure to pay the fee results in a lien upon the property. § 7-13-233, MCA. Only the county commissioners may issue warrants upon claims approved by the refuse board. § 7-13-234, MCA.

Initially, it must be noted that a refuse district may not be considered a "special taxing district" as that term is used in section 17-5-1604(3), MCA. As generally defined, the term "taxing unit" is

> deemed to include a county, city, incorporated town, township, school district ... or any person, persons, or organized body authorized by law to establish tax levies for the purpose of raising public revenue.

§ 15-1-101(2), MCA. In 42 Op. Att'y Gen. No. 80 (1988), a rural fire district operated by the county was not considered a "taxing unit." That opinion stated:

> Where the county commissioners and not the fire district itself establish the tax levy for the district, the definition of "taxing unit" does not encompass the fire district. A "taxing unit" entails an entity that establishes its own tax levy. In this situation, the board of county commissioners and not the fire district has this role. Thus, a fire district operated by the county and not by a board of trustees is not a "taxing unit." A rural fire district operated by a board of trustees, however, is a "taxing unit" within the meaning of section 15-10-412, MCA.

42 Op. Att'y Gen. No. 80 at 315. This reasoning is equally applicable to a refuse district. A refuse district, as discussed above, has no independent governing body. The district must have the approval of the board of county commissioners before establishing a service fee. § 7-13-231, MCA. Regardless of whether or not the assessment may be considered a "tax," a refuse district would not fall within the meaning of a "special taxing district" as used in section 17-5-1604, MCA.

In order to determine whether a refuse district is a political subdivision under section 17-5-1604(3), MCA, an analysis of the nature and duties of a refuse district is necessary. In 43 Op. Att'y Gen. No. 56 (1990), slip opinion at 5 and 6, I recently acknowledged that while a rural fire district is not a "local government unit" per se, it may be considered a "political subdivision" of the county and therefore eligible to participate in the Interlocal Cooperation Act. Id. at 6. See also 38 Op. Att'y Gen. No. 87 at 302 (1980); 35 Op. Att'y Gen. No. 71 at 173, 174 (1974). I concluded that a rural fire district was a "political subdivision" because it was a "public agency" as that term is used in the Interlocal Cooperation Act. I looked to the following criteria:

> Fire district trustees govern and manage the affairs of the fire district; have the authority to provide firefighting apparatus, equipment, housing, and

> facilities for the protection of the district; appoint and form fire companies; and prepare annual budgets.

43 Op. Att'y Gen. No. 56, slip op. at 6. Based on this delegation of powers to the board of trustees of the fire district, I concluded that rural fire districts are "political subdivisions" within the meaning of the Interlocal Cooperation Act. Id.

By contrast, refuse disposal districts have no delegation of authority similar to that described in 43 Op. Att'y Gen. No. 56. Section 7-13-215, MCA, expressly provides in pertinent part:

> The board of the refuse disposal district ... has the following powers and duties, with the approval of the county commissioners of the counties involved .... [Emphasis added.]

In Ryan v. Board of County Commissioners, 190 Mont. 273, 620 P.2d 1203, 1207-08 (1980), the Court stated this language means that, "[t]he County Commissioners have been given supervisory authority over its Refuse Board." The Court in Ryan relied upon reasoning in McCarten v. Sanderson, 111 Mont. 407, 109 P.2d 1108 (1941), which described the type of discretion that comes with use of the word "approval":

> "Approval" implies knowledge and the exercise of discretion after knowledge [citation omitted], the exercise of judgment [citation omitted], the act of passing judgment, the use of discretion, and the determination as a deduction therefrom [citation omitted], unless limited by the context of the statute.

111 Mont. at 415, 109 P.2d at 1112. Applying this definition, the approval authority vested in the county commissioners, in effect, signifies the authority to supervise the refuse board.

In 37 Op. Att'y Gen. No. 22 at 97 (1977), rural improvement districts were determined to be "local governmental units" because such districts may include more than one county and have governing boards separate and distinct from the boards of county commissioners. 37 Op. Att'y Gen. No. 22 at 96. Refuse disposal districts are dissimilar from rural improvement districts in that they do not have an independent governing body. The board of a refuse disposal district may not take any significant action without first obtaining the approval of the county commissioners of the counties involved in the district. § 7-13-215, MCA. See also §§ 7-13-231 (commissioner approval before raising fees), and 7-13-234, MCA (only the county commissioners may authorize drawing warrants from the refuse district's special fund). Compare §§ 7-12-2123 (rural improvement districts), 85-7-1902 (irrigation districts), 7-13-2218 and 7-13-2221 (water and sewer districts), 76-15-403 (conservation districts), 7-12-1131 (business improvement districts), 7-14-219 (urban transportation

districts), 7-34-2122 (hospital districts), and 7-33-2105, MCA (rural fire districts). While this list is not intended to be exhaustive of all of the statutes that delegate authority to independent governing boards, a comparison of them is helpful in distinguishing those governing boards which do not need prior approval of the county commissioners before exercising their powers and duties from refuse boards which do require such prior approval. Because the refuse board is not a separate and independent body and has not been delegated supervisory authority over the refuse disposal district, I conclude that a refuse disposal district cannot be considered a "political subdivision" as that term is used in section 17-5-1604(3), MCA.

I am aware that a refuse disposal district is expressly defined as a "local government" in section 75-10-103, MCA, for purposes of sections 75-10-101 to 125, MCA. I am also aware of the broad powers and duties given such "local governments" under section 75-10-112, MCA. Nevertheless, the powers and duties of a refuse disposal board are specifically defined and limited by section 7-13-215, MCA, not by section 75-10-112, MCA. Section 7-13-215, MCA, addresses only refuse boards while section 75-10-112, MCA, includes refuse boards and other entities. Special statutes normally prevail over general. § 1-2-102, MCA. Dolan v. School District No. 10, 195 Mont. 340, 346, 636 P.2d 825, 828 (1981).

THEREFORE, IT IS MY OPINION:

A refuse disposal district is not a "political subdivision" as that term is used in section 17-5-1604(3), MCA.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 69

COUNTIES - Fees for county superintendent of schools in addition to salary;
COUNTY OFFICERS AND EMPLOYEES - Fees for county superintendent of schools in addition to salary;
PUBLIC OFFICERS - Fees for county superintendent of schools in addition to salary;
SALARIES - Fees for county superintendent of schools in addition to salary;
MONTANA CODE ANNOTATED - Sections 20-3-201(2), (3), 20-3-212;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 33 (1985), 41 Op. Att'y Gen. No. 12 (1985), 39 Op. Att'y Gen. No. 7 (1981), 37 Op. Att'y Gen. No. 63 (1977), 37 Op. Att'y Gen. No. 13 (1977), 36 Op. Att'y Gen. No. 110 (1976), 36 Op. Att'y Gen. No. 63 (1976), 35 Op. Att'y Gen. No. 32 (1973), 35 Op. Att'y Gen. No. 31 (1973), 34 Op. Att'y Gen. No. 15 (1971).

HELD: A qualified county superintendent of schools entering into a contractual agreement pursuant to section 20-3-201(3), MCA, to provide services in a county lacking a qualified county superintendent of schools is entitled to additional compensation for services rendered.

July 31, 1990

Arnie A. Hove
McCone County Attorney
P.O. Box 184
Circle MT 59215

Dear Mr. Hove:

You have requested my opinion on the following question:

> Does section 20-3-201(3), section 20-3-212, MCA, or any other section prohibit a qualified county superintendent of schools from receiving a fee for services provided pursuant to a contract authorized under section 20-3-201(3), MCA?

You have indicated that the offices of county superintendent of schools and county treasurer have been consolidated in McCone County. The holder of the consolidated office lacks the statutory qualifications associated with the office of county superintendent and is therefore unable to conduct hearings involving contested school matters. You further indicate that your county has difficulty locating a qualified county superintendent willing to enter into a contract to conduct such hearings due to the unsettled question of whether such officer is entitled to receive a fee for services rendered.

The context in which your question arose is quite clear. Prior to 1979, the consolidation of the office of county superintendent with any other county office "carr[ied] with it the minimum qualification for each office as prescribed by statute." Thus, "[a]n individual must meet the minimum qualification for each office to be eligible for the consolidated county office." 35 Op. Att'y Gen. No. 31 at 72 (1973). The minimum qualifications required for the office of county superintendent are set forth in section 20-3-201(2), MCA, which provides as follows:

> (2) Any person shall be qualified to assume the office of county superintendent who:
>
> (a) is a qualified elector;
>
> (b) holds a valid teacher certificate issued by the superintendent of public instruction; and
>
> (c) has not less than 3 years of successful teaching experience.

In 1979, legislation was enacted removing the mandatory qualifications set forth in section 20-3-201(2), MCA, when the office of county superintendent was consolidated with another county office. 1979 Mont. Laws. ch. 355. Following further amendment in 1985, section 20-3-201, MCA, currently provides in pertinent part as follows:

> (3) When the office of county superintendent of schools is consolidated with another county office within the county, the officeholder shall have the qualifications of subsection (2) or he shall, with the approval of the governing body, contract for the services of another county superintendent, with approval of the governing body of that county, to perform the duties required of a county superintendent in 20-3-207 and 20-3-210. The officeholder may contract for the services of another county superintendent to perform other duties required by law of a county superintendent. The superintendent of public instruction shall prescribe a contract form to be used.

The legislative history of the 1985 amendment indicates that the Legislature failed to resolve the issue of whether a qualified county superintendent is entitled to additional compensation pursuant to a contract to perform the functions of a county superintendent in another county. See Minutes of the House Education and Cultural Resources Committee hearing on Senate Bill 168, held March 18, 1985, at 4.

The appropriate analysis for the resolution of your question is provided in a prior Attorney General's Opinion:

> The Montana Supreme Court addressed itself to a similar situation in Anderson v. Hinman, 138 Mont. 397, 357 P.2d 895 (1960), a case concerning increased responsibilities for the clerk of the supreme court. The Montana Supreme Court, in that decision, allowed additional compensation to the clerk for services rendered which were not provided by law. The court said, at page 412:
>
> "The Clerk of the Supreme Court is paid a salary under Section 25-501, R.C.M. 1947, which is to compensate him 'for all services required of him or which may hereafter devolve upon him by law.' (section 25-501.1). This does not preclude him from receiving compensation for services he may provide which are not required by law. The general rule of law is stated in [67 C.J.S. Officers § 227, at 727-28]:
>
> "'... an officer is not obliged, because his office is salaried, to perform all manner of public service without additional compensation, and for services performed by request, not part of the duties of his office, and which could have been as appropriately performed by any other person, he may recover a proper remuneration.'" [Emphasis theirs.]

34 Op. Att'y Gen. No. 15 at 132, 133-34 (1971).

The foregoing is merely an outgrowth of the familiar principle that public officers may not receive additional compensation for discharging the duties associated with their office beyond that provided by their regular salary. Thus, because in each instance the act in question constituted a duty associated with the office, it has been held that: a clerk and recorder is not entitled to additional compensation for serving as election administrator, 41 Op. Att'y Gen. No. 33 at 124 (1985); 39 Op. Att'y Gen. No. 7 at 27 (1981); a court reporter is not entitled to additional compensation when court is held in another judicial district, 41 Op. Att'y Gen. No. 12 at 42 (1985); a county attorney is not entitled to additional compensation for prosecuting the appeal of a decision of the county tax appeal board, 37 Op. Att'y Gen. No. 63 at 256 (1977).

The converse is equally true. Unless specifically prohibited by law, a public officer is entitled to additional compensation for the rendition of services beyond those required by the duties associated with his office. Thus, because in each instance the service in question was beyond the scope of the duties associated with the office, it has been held that: a deputy sheriff is entitled to additional compensation for operating the county ambulance, 37 Op. Att'y Gen. No. 13 at 51

(1977); a court reporter is entitled to additional compensation for recording grand jury proceedings, 36 Op. Att'y Gen. No. 110 at 564 (1976); a deputy clerk and recorder is entitled to additional compensation for serving as registrar, 36 Op. Att'y Gen. No. 63 at 438 (1976); the director of the Montana Water Resources Board is entitled to additional compensation for performing additional duties not required by law, 34 Op. Att'y Gen. No. 15 at 132 (1971).

However, a public officer may not accept additional compensation when specifically prohibited by law. Thus, it has been held that district judges may not accept additional compensation for services beyond the scope of judicial duties in view of the specific prohibition set forth in Article VII, section 9 of the Montana Constitution, 35 Op. Att'y Gen. No. 32 at 72 (1973).

The resolution of your question therefore depends upon whether the statutory duties of a qualified county superintendent include performing the functions thereof in another county which lacks a qualified county superintendent and whether additional compensation therefor is prohibited by law.

The duties of a county superintendent are specified in Title 20, chapter 3, part 2, MCA. The statutory provisions therein do not require a qualified county superintendent to act as such in any county other than the county in which he or she holds office. Therefore, a qualified county superintendent entering into a contractual agreement pursuant to section 20-3-201(3), MCA, to provide services in a county lacking a qualified county superintendent is entitled to additional compensation.

You have asked whether section 20-3-212, MCA, prohibits additional compensation where contracts pursuant to section 20-3-212, MCA, are involved. Section 20-3-212, MCA, provides as follows:

> 20-3-212. **The county superintendent to appoint another county superintendent.** (1) When a county superintendent is disqualified pursuant to 20-3-211, that county superintendent must appoint another county superintendent to hear and decide the matter of controversy arising pursuant to 20-3-210.
>
> (2) The county in which the controversy was initiated shall reimburse the county served by the county superintendent appointed pursuant to subsection (1) for actual costs of travel, room, and board as a result of the appointment. Such county superintendent is entitled to expenses as provided in 20-3-203(1). [Emphasis added.]

The application of section 20-3-212, MCA, is limited by its terms to instances where an otherwise qualified county superintendent is disqualified pursuant to section 20-3-211,

MCA, from hearing or deciding contested matters. The latter statutory provision has application where an otherwise qualified county superintendent is a party or is related to a party, has personal interest or bias in the result, or the contested matter involves a handicapped child. Thus, section 20-3-212, MCA, has no application to contracts under section 20-3-201(3), MCA.

THEREFORE, IT IS MY OPINION:

> A qualified county superintendent of schools entering into a contractual agreement pursuant to section 20-3-201(3), MCA, to provide services in a county lacking a qualified county superintendent of schools is entitled to additional compensation for services rendered.

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, amendment or repeal of existing rules filed with the Secretary of State, except rules proposed by the Department of Revenue. Proposals of the Department of Revenue are reviewed by the Revenue Oversight Committee.

The Administrative Code 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 lists MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through June 30, 1990. This table includes those rules adopted during the period July 1, 1990 through September 30, 1990 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through June 30, 1990, 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 1990 Montana Administrative Register.

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