# MONTANA ADMINISTRATIVE REGISTER



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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO.

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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NOTICE SECTION

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of ARM 2.21.1812 relating to exempt compensatory time | ) ) ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 2.21.1812, RELATING TO EXEMPT COMPENSATORY TIME |

TO: All Interested Persons.

1. On December 20, 1990, at 9:00 a.m. in Room 136, Mitchell Building, Helena, Montana 59620, a public hearing will be held on the amendment of ARM 2.21.1812 relating to exempt compensatory time.

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

2.21.1812 EXEMPT EMPLOYEES AND EXEMPT COMPENSATORY TIME

(1) An exempt employee ~~shall~~ must obtain approval from ~~the appropriate authority,~~ his or her supervisor, in advance whenever possible, to work hours which may result in the accrual of exempt compensatory time.

(2) The ~~appropriate authority decides~~ employee's supervisor determines whether ~~extra~~ hours worked by an exempt employee which exceed 40 in a workweek ~~should~~ will be ~~credited~~ accrued as exempt compensatory time under these rules. The supervisor may approve or deny the accrual of exempt compensatory time either before or after the hours are worked.

(3) ~~An agency~~ The employee's supervisor may, at any time, prohibit the accumulation of exempt compensatory time until an employee's balance is reduced below 120 hours or below a lower maximum balance established by the agency.

~~(3)~~(4) ~~An agency shall~~ The employee's supervisor decides whether hours in excess of 40 in a workweek which an exempt employee spends traveling or attending conferences, lectures, meetings, education, or training should be credited as exempt compensatory time under these rules.

~~(4) Accrued exempt compensatory time may be taken off by the employee at a mutually agreeable later date during the employee's regular working hours, if the use of the compensatory time does not unduly disrupt the operations of the agency. Where the interest of the state requires the employee's attendance, the state's interest overrides the employee's interest to take exempt compensatory time off. An agency may require an exempt employee to take accrued exempt compensatory time off during any workweek.~~

~~(5) An agency may, at any time, prohibit the accumulation of exempt compensatory time until the employee's balance is reduced below 120 hours or below a lower maximum established by the agency.~~

~~(6)~~ (5) A maximum of 120 hours of exempt compensatory time may be carried over from one calendar year to the next. A determination of excess exempt compensatory time will be made as of the end of the first pay period which extends into the next calendar year. The employee must take off all excess compensatory time during the first 90 days of the next calendar year or forfeit

the excess hours, except ~~as provided~~ when the department head extends the forfeiture deadline provided in paragraph (6) or grants an exception provided in paragraph (7).

(6) When the first 90 days of the calendar year are a peak work period for the agency, the department head or a designee may extend the number of days the employee has to use excess compensatory time prior to forfeiture. The length of this extension is up to the discretion of the department head or designee, but may not exceed an 180 additional days.

(7) Until October 1, 1991, ~~an agency~~ a department head may approve an exception to the forfeiture requirement provided in paragraph (5) of this rule. 1991 is the last year department heads may make exceptions to the forfeiture requirement. The authority in paragraph (6) to make extensions to the forfeiture deadline will not be affected. Such an exception may be approved to deal with special and unique circumstances which represent periodic or temporary situations that can not be adequately addressed by other management actions. When an exception to the forfeiture requirement is approved in advance by the ~~agency~~ department head or designee, the employee shall not forfeit excess exempt compensatory time hours during the ~~next~~ calendar year. ~~At the end of that year, a new determination of excess exempt compensatory time hours shall be made.~~

(8) An agency may adjust the schedule of an exempt employee within a workweek to avoid the accrual of compensatory time. An agency may require an exempt employee to take accrued exempt compensatory time off during any workweek.

~~(8)~~ (9) Exempt compensatory time may be transferred with the employee to another agency, provided the new agency agrees. An agency is not obligated to accept any exempt compensatory time when an employee transfers from another agency. The agency, at its discretion, may agree to accept some or all accrued exempt compensatory time, up to a maximum of 120 hours.

~~(9)~~ (10) There shall be no lump sum cash compensation for accrued exempt compensatory time upon transfer or at the date of termination.

~~(10)~~ (11) Agencies are under no obligation to extend an employee's termination date to allow an exempt employee to take off accrued exempt compensatory time upon termination.

~~(11)~~ (12) ~~An agency~~ department head may approve the use of exempt compensatory time to extend an employee's termination date up to a maximum of 120 hours. Such extension may be approved when the ~~agency~~ department head determines that:

(a) compensatory time was accrued upon management's request in order to complete projects or meet objectives, or

(b) the employee has been denied reasonable opportunity to take off accrued exempt compensatory time.

~~(12)~~ (13) This rule does not authorize an extension of termination date for officers or employees exempted or personal staff listed in 2-18-103 or 2-18-104 MCA.

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

3. Exempt compensatory time is an administratively created benefit for employees who are exempt from the overtime provisions of the Fair Labor Standards Act of 1938, as amended. Unlike the overtime statute, ARM 2.21.1802 provides that, "Exempt compensatory time is not intended to provide any compensation in addition to the salaries established in statute. Rather, it is a means of providing greater flexibility in scheduling time for exempt, salaried employees." The proposed amendments are reasonably necessary to reenforce the purpose and objectives of exempt compensatory time for those approving and those accruing this benefit. Managers need latitude in the approval of time worked to ensure the hours have been for the benefit of the agency. The exempt compensatory time policy has always been interpreted to provide that latitude. The proposed amendments will implement this interpretation in rule, giving management explicit discretion to approve or deny the accrual of compensatory time. The amendments also allow management to exercise flexibility in scheduling the work and time off of exempt employees who would otherwise accrue or who already have accrued compensatory time.

Accrual and carry over of large balances of exempt compensatory time from year to year has surfaced as a problem. Currently, an employee may pyramid the accrual of exempt compensatory time by obtaining exceptions to the forfeit requirements of this rule. The proposed amendment would remove the discretion to make exceptions after October 1, 1991. This provides an interim period in which managers and employees may develop plans to reduce balances. The amendment also would allow agency directors to extend the forfeit deadline. Providing this discretion recognizes that it may not be possible for an employee to use excess compensatory time hours in the first 90 days of a year because management requires his presence at work, for example, during a legislative session.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendments to: Laurie Ekanger, Administrator, State Personnel Division, Department of Administration, Room 130, Mitchell Building, Helena, Montana 59620, no later than December 31, 1990.

5. James A. Edgcomb, Personnel Policy Coordinator, Department of Administration, Mitchell Building, Helena, Montana 59620, has been designated to preside over and conduct the hearing.

6. The authority of the agency to amend this rule is based on 2-18-102, MCA, and the proposed amendment implements 2-18-102, MCA.

Dave Ashley, Acting Director
Department of Administration

Certified to the Secretary of State November 19, 1990.

BEFORE THE DEPARTMENT OF AGRICULTURE
STATE OF MONTANA

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| In the matter of the amendment of Rule 4.12.1229 fees established for service samples | ) ) ) | NOTICE OF PROPOSED AMENDMENT OF RULE 4.12.1229 PERTAINING TO FEES ESTABLISHED FOR SERVICE SAMPLES. NO PUBLIC HEARING CONTEMPLATED |

TO: All Interested Persons.

1. On December 29, 1990, the Department of Agriculture proposes to amend rule 4.12.1229 which increases the sex ratio and percent emergence lab fee.

2. The rule as proposed to be amended provides as follows:
(New matter underlined, deleted matter interlined)

4.12.1229 FEES ESTABLISHED FOR SERVICE SAMPLES (1) Laboratory analysis -- $30.00 per sample which includes pathogens, parasites, and larvae count/lb. In addition to the $30.00 laboratory analysis, each sample may be tested for sex ratio and percent emergence for an additional fee of ~~$10.00~~ $20.00.

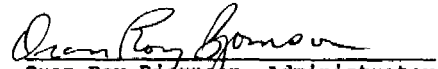
3. The rule is proposed to be amended to cover increased lab analysis expenses.

4. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to Department of Agriculture, Ag/Livestock Building, Capitol Station, Helena, MT 59620 postmarked no later than December 27, 1990.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, must make written request for a hearing and submit this request along with any written comments he has to the Department of Agriculture, Ag/Livestock Building, Capitol Station, Helena, MT 59620 postmarked no later than December 27, 1990.

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

7. The authority of the department and board to make the proposed amendment is based on Section 80-6-1103, MCA and the rule implements the same section.



Oran Roy Bjornson, Administrator
Plant Industry Division
Department of Agriculture

Certified to the Secretary of State on November 19, 1990.

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

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| In the matter of the proposed adoption of rules pertaining to pricing of noncompetitive or volatile lines | ) ) ) ) | NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION |

TO: All Interested Persons.

1. On December 19, 1990, at 9:00 a.m., a public hearing will be held in Room 260 of the Mitchell Building, 111 Sanders, Helena, Montana, to consider the proposed adoption of rules pertaining to pricing of noncompetitive or volatile lines.

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

3. The proposed rules provide as follows:

RULE I PURPOSE AND SCOPE (1) The purpose of these rules is to set forth procedures for the evaluation of various lines of insurance to determine whether they are noncompetitive or volatile pursuant to Title 33-16-231, et seq., MCA.

(2) These rules apply to all lines of insurance described in 33-16-103, MCA, which the commissioner of insurance has cause to believe are, or which have been designated as, noncompetitive or volatile. Specific rules applying to an individual line of insurance designated as noncompetitive or volatile, including but not limited to reasonable development factors and trend adjustments, may be enacted as necessary.

AUTH: 33-1-313, 33-16-234, MCA IMP: 33-16-231 through 33-16-236, MCA

RULE II DEFINITIONS (1) For the purposes of these rules, the terms "volatile" and "noncompetitive" shall have the meanings provided under 33-16-233, MCA.

(2) "Cause to believe" means a reasonable suspicion that:

(a) In the case of a noncompetitive line, a reasonable degree of competition does not exist and only a small number of insurers are willing to transact the line in Montana, based on:

(i) The monitoring of consumer complaints regarding nonavailability of coverage; or

(ii) The withdrawal of insurers from the Montana insurance market.

(b) In the case of a volatile line, the line has a low volume of claims in Montana, as evidenced by:

(i) The monitoring of consumer complaints regarding premium increases;

(ii) The monitoring of the variability in rates among insurers, as evidenced by their rate filings; or

(iii) The magnitudes of rate increases of insurers generally, as evidenced by their rate filings.

(3) "Commissioner" means the commissioner of insurance.

(4) "Line of insurance" or "line" means:

(a) That which is designated in the insurer's annual statement for statutory reporting purposes;

(b) A specific type of policy or insurance contract; or

(c) That which is necessary for the proper implementation of 33-16-231, et seq., MCA.

AUTH: 33-1-313, 33-16-234, MCA IMP: 33-16-231 through 33-16-236, MCA

RULE III EVALUATION OF A LINE - NONCOMPETITIVE (1) In determining whether a reasonable degree of competition exists for a specific line of insurance, the commissioner shall consider relevant factors of workable competition pertaining to the insurance market structure, market performance, and market conduct, and the practical opportunities available to consumers in the market to obtain pricing and other consumer information and to compare and obtain insurance from competing insurers. Such factors may include, but are not limited to, the following:

(a) The size and number of insurers actually engaged in the market.

(b) The profitability for insurers generally in the market segment and whether that profitability is unreasonably high.

(c) The price variance on premiums offered in the market.

(d) The availability of consumer information concerning the product and sales outlets or other sales mechanisms.

(e) The efforts of insurers to provide consumer information.

(f) Consumer complaints regarding the market generally.

(2) In evaluating a line of insurance which the commissioner has cause to believe is noncompetitive, he shall conduct a survey of each insurer authorized to transact that line of insurance in Montana to determine:

(a) Under what circumstances the insurer would be willing to transact that line of insurance;

(b) Whether those circumstances exist in the Montana insurance market;

(c) If not, in what respect and to what magnitude the current market in Montana for that line of insurance is deficient or unsatisfactory; and

(d) What changes in the Montana insurance market would be necessary to make the insurer a viable competitor for that line of insurance.

(3) The commissioner shall make every effort to encourage a healthy, competitive market for that line of business. To the extent possible, the circumstances necessary to promote a healthy, competitive market, as indicated in part by the insurer's survey responses in subsection (2) above, shall be created or allowed, prior to declaring the line of business to be noncompetitive.

(4) The commissioner shall declare the line of business to be noncompetitive when efforts to create a competitive market for that line of business have failed or when, in the discretionary opinion of the commissioner, a monopolistic or oligopolistic environment exists or is inevitable for that line of insurance in Montana.

(5) A line of insurance shall not be considered noncompetitive solely on the basis that there are fewer insurers willing to transact that line of insurance than another line of insurance which has already been designated noncompetitive.

AUTH: 33-1-313, 33-16-234, MCA IMP: 33-16-231 through 33-16-236, MCA

RULE IV EVALUATION OF A LINE - VOLATILE: (1) In evaluating a line of insurance which the commissioner has cause to believe is volatile, he shall require that each insurer who has issued policies for that line of insurance submit information on each Montana claim incurred or reported to the insurer in the past five years. Such information shall include the insurer's estimate of the incurred cost of the claim as of each calendar year end, since the date the claim was reported to the insurer. Such information shall be submitted on forms specified by the commissioner.

(2) The commissioner shall evaluate the insurer's submissions to determine whether Montana claim statistics are sufficiently stable for ratemaking purposes. In making such determination, classical credibility procedures shall be applied, to establish a full credibility number of claims, such that there would be a 90% probability that next year's total claim costs will be within 10% of the expected amount.

(3) The commissioner shall declare the line of insurance to be volatile if the average number of claims incurred does not equal or exceed the full credibility number of claims determined in subsection (2) above.

(4) A line of insurance shall not be considered volatile solely on the basis that there are fewer claims for that line of insurance than for another line of insurance which has already been designated as volatile.

AUTH: 33-1-313, 33-16-234, MCA IMP: 33-16-231 through 33-16-236, MCA

RULE V DATA REPORTING REQUIREMENTS: (1) If a line of insurance is designated to be noncompetitive or volatile:

(a) The commissioner shall require each insurer authorized to write that line of insurance in Montana to submit on an annual basis its loss, expense, premium and exposure statistics for that line of insurance for each of the past five years, on forms specified by the commissioner and applicable to that line of insurance. Such submission shall provide the required information separately for each state in which the insurer has issued policies for that line of insurance in the past five years.

(b) In lieu of submission by the insurer, such submission may be made on behalf of the insurer by any rating organization of which the insurer has been a member of for at least the past five years.

(2) The commissioner shall, upon receipt of the information required to be submitted pursuant to subsection (1) above, evaluate the submissions in light of the standards set

forth in 33-16-234(3), MCA, and identify the states whose experience are necessary and appropriate for use as a complementary data base in establishing Montana rates, and shall identify those states whose experience is clearly inappropriate for such use. Use by an insurer of experience from states identified by the commissioner as inappropriate for use in establishing rates in Montana shall constitute grounds for rejection of the insurer's filing.

(3) The commissioner shall adopt trend factors in the form of annual rates of change in claim severity and claim frequency for that line of insurance. Use by an insurer of an annual rate of change different than the adopted rate for that line of insurance may be deemed inappropriate, in the absence of credible insurer data to the contrary.

AUTH: 33-1-313, 33-16-234, MCA IMP: 33-16-231 through 33-16-236, MCA

RULE VI FILING REQUIREMENTS (1) Upon designating a line of insurance as noncompetitive or volatile, the commissioner may withdraw approval of an insurer's previously approved rates for that line of insurance pursuant to 33-16-205, MCA, and require that the insurer file the rates it intends to use along with statistical support sufficient to substantiate the filing.

(2) The commissioner shall review all subsequently received filings for the designated line of insurance to ensure that:

(a) Appropriate ratemaking techniques have been applied;

(b) An appropriate complementary data base has been used to supplement the insurer's Montana experience;

(c) Appropriate trend adjustments have been used;

(d) Reasonable loss development factors, based on an appropriate data base, have been used;

(e) A reasonable expense load has been incorporated in the proposed rates, and

(f) Resultant proposed rates are reasonable for the insurance to be provided.

(3) If an insurer's filing of rates for a designated line of insurance fails to meet the requirements of subsection (2) in any respect, the commissioner shall notify the insurer of the deficiencies, and allow the insurer a reasonable time in which to correct them.

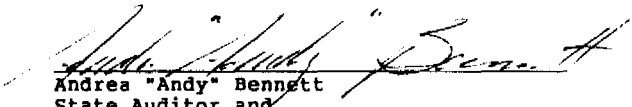
AUTH: 33-1-313, 33-16-234, MCA IMP: 33-16-231 through 33-16-236, MCA

4. The rules are necessary to establish a mechanism for the implementation of the Ratemaking Act, 33-16-231, et seq., MCA. These rules are intended to apply to any line of insurance which may be designated as noncompetitive or volatile, and are intended to be supplemented to implement the Ratemaking Act, 33-16-231, et seq., MCA, for a given line of insurance.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written testimony may be submitted to David Barnhill, State Auditor's

Office, P.O. Box 4009, Helena, MT 59604-4009, no later than December 27, 1990.

6. David Barnhill has been designated to preside over and conduct the hearing.



Andrea "Andy" Bennett
State Auditor and
Commissioner of Insurance

Certified to the Secretary of State this 19th day of November, 1990.

BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA

| | | |
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| In the matter of amendment of Rule 8.86.505 as it relates to quota plans | ) | NOTICE OF PROPOSED AMENDMENT OF RULE 8.86.505-QUOTA RULES |
| | ) | NO PUBLIC HEARING CONTEMPLATED |
| | ) | DOCKET #3-90 |

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

1. On Monday, January 7, 1991, the Board of Milk Control proposes to amend ARM 8.86.505(1)(b). The amendment is proposed on the board's own motion based on a request from Country Classic Dairies Inc.

2. The rule as proposed to be amended would read as follows: (Full text of the rule is located at pages 8-2558 through 8-2560, Administrative Rules of Montana.)(new matter underlined, deleted matter interlined)

"8.86.505 READJUSTMENT AND MISCELLANEOUS QUOTA RULES

(1)-(iv) remains the same.

(b) No quota will be readjusted before January ~~1990~~ 1992. ~~Provided-that-pool-plants-have-sufficient-milk-during September,-October,-November-and-December-of-1989-and-1990,-no quota-will-be-readjusted-before-January-1991.~~

(c)-(14) remains the same."

3. The purpose of the amendment to 8.86.505(1)(b) is to permit producers an additional period of time to adjust their production to their quotas without having to forego any additional economic hardship to comply with the quota provisions.

4. Interested persons may submit their data, views or arguments concerning the proposed amendment in writing to the Milk Control Bureau, 1520 East Sixth Avenue - Room 50, Helena, Montana, 59620-0512, no later than December 31, 1990.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit along with any written comments he has to the above address no later than December 31, 1990.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10 percent (10%) or

twenty five (25), whichever is less, of the persons who are directly affected by the proposed amendment; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent (10%) of those persons directly affected has been determined to be 22 persons based on an estimated 225 resident and not-resident producers and distributors.

7. The authority for the Board to take the action and adopt rules as proposed is in section 81-23-302, MCA. Such rules if adopted in the form as proposed or in a modified form, will implement section 81-23-302, MCA.

MONTANA BOARD OF MILK CONTROL
MILTON J. OLSEN, Chairman

BY: _____
Andy J. Poole, Deputy Director
Department of Commerce

Certified to the Secretary of State November 19, 1990.

BEFORE THE FIRE MARSHAL BUREAU
OF THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

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| In the matter of the adoption and amendment of Rules of the fire marshal bureau, describing enforcement of the rules, incorporating by reference the 1988 Uniform Fire Code, a Montana supplement to the Code, and other provisions generally dealing with fire safety. | NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT OF RULES PERTAINING TO FIRE SAFETY. |

TO: All Interested Persons.

1. On December 20, 1990, at 9:00 a.m. a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, at 111 Sanders, Helena, Montana, to consider the adoption of rules I through XVI, the amendment of ARM 23.7.121, 23.7.122, 23.7.124, 23.7.125, 23.7.131, 23.7.133, and 23.7.134, the amendment and transfer of ARM 23.2.111, 23.7.101, and the repeal of ARM 23.2.131 and 23.7.111.

2. The fire marshal proposes to adopt the following rules:

RULE I ENFORCEMENT OF FIRE MARSHAL BUREAU RULES (1) The fire marshal bureau shall administer and enforce in every area of the state of Montana all the provisions of the Fire Codes of Montana and rules adopted pursuant thereto. The chief fire official of each municipality or organized fire district or, if no such authority exists, the sheriff, shall assist the bureau as directed, and shall enforce the provisions of the Fire Codes of Montana under the direction of the fire marshal or his agent.

(2) Each local authority responsible for fire prevention inspection shall maintain reports of any violations occurring within its jurisdiction under the Fire Codes of Montana or rules adopted pursuant thereto, and shall file an activity summary with the fire marshal bureau on a quarterly basis or as otherwise directed by the fire marshal. The activity summary shall contain a summary of the reports of violations maintained in accordance with this section.

(3) Each official responsible for investigating fires shall file with the fire marshal a fire incident report on each and every fire occurring within the official's jurisdiction. Forms may be obtained from the state fire marshal, and reports shall contain the following information: FDID (fire department identification) number; incident number; exposure number (if any); date; alarm time; arrival time; time in service; situation found; action taken; mutual aid; fixed property use; ignition factor; location (including complete address); census tract (if applicable); occupant name, telephone, and room or apartment (if

applicable); owner name, address and telephone; method of alarm; district (if applicable); shift during which the fire response occurred; number of alarms; fire personnel; engines; aerial apparatus and other vehicles responding; incident related injuries and fatalities; type of complex (if applicable); mobile property type; area of fire origin; equipment involved in ignition (if any); form of heat of ignition; material and form of material ignited; method of extinguishment; estimated dollar loss; number of stories; construction type; extent of damage; detector and sprinkler performance; type and form of material generating most smoke; avenue of smoke travel; mobile property information (if applicable); officer in charge at incident; member making report; and any other information pertinent to the specific fire.

AUTH: 50-3-102(2) MCA.
IMP: 50-3-102, 50-61-102, 50-63-203(1) MCA.

RULE II NOTICE OF VIOLATION (1) Upon determination by the fire marshal or his agent that any person or entity is in violation of any provision of the Fire Codes of Montana or any rule adopted pursuant thereto, the bureau shall serve upon the person or a designated representative of the entity a notice of violation, as provided in Uniform Fire Code sections 2.204 and 2.205, setting forth in what respect a violation has been committed. The notice also shall contain the following language:

> If necessary to safeguard life and property under rules promulgated by the State Fire Marshal, legal action may be initiated to enjoin the use of all or a portion of a building or to restrain a specific activity until there is compliance with the rules. Violation of the rules of the Fire Marshal Bureau is a misdemeanor.

(2) Any person or entity served with notice of violation shall notify the fire marshal bureau in writing within 10 days of the action taken or proposed to correct the violation, unless a shorter or longer time is permitted by the state fire marshal. The fire marshal or his agent shall, within 20 days of receipt of such notice, review the proposal or inspect the condition or premises to determine whether the violation has been or will be corrected and shall promptly notify the violator of his findings.

(3) Any notice issued pursuant to this rule shall be complied with in accordance with Uniform Fire Code Article 3.

(4) EXCEPTION: This rule does not apply where the state fire marshal proceeds under section 50-61-115, MCA, or under Title 50, Chapter 62, MCA.

AUTH: 50-3-102(2) MCA. IMP: 50-3-103, 50-3-102(4) MCA.

RULE III INTERPRETATION (1) Interpretations of the Uniform Fire Code and other rules adopted by the fire marshal bureau shall be made by the state fire marshal.

(2) If a determination or interpretation under any rule adopted by the fire marshal bureau is made by a local fire official or agency, any person aggrieved by the determination may, within 20 days of receipt of the decision or interpretation, submit to the fire marshal a written appeal, which shall include arguments and any appropriate materials in support of his or her position. The fire marshal shall review the submission and issue a final determination within 30 days of receipt. The fire marshal may revoke, modify or affirm the interpretation of the local official or agency and shall state the reasons for his decision.

(3) EXCEPTION: This rule does not apply to appeals presented pursuant to section 50-62-110, MCA.

AUTH: 50-3-102 MCA. IMP: 50-3-102, 50-61-102 MCA.

RULE IV ADOPTION OF UNIFORM FIRE CODE AND DEFINITIONS

(1) The fire marshal bureau hereby adopts and incorporates by reference the Uniform Fire Code, International Conference of Building Officials, 1988 edition, together with appendices, the 1989 supplement, and the 1988 edition of the UFC Standards, subject to the modifications appearing in the pamphlet entitled, "Montana Supplement to Uniform Fire Code." Copies of the Uniform Fire Code and related materials may be obtained from the International Conference of Building Officials, 5360 South Workman Mill Road, Whittier, California 90601, or from the Building Codes Bureau of the State of Montana Department of Commerce, 1218 East Sixth Avenue, Helena, Montana 59620. Copies of the Montana Supplement to the Uniform Fire Code must be obtained from the State Fire Marshal Bureau, Department of Justice, 303 North Roberts, Helena, Montana 59620. Information is available upon request from the fire marshal bureau.

(2) As used in these rules, all definitions contained within the Uniform Fire Code apply with the following exceptions and additions:

(a) Apprentice is a person in a training position, for a period of no more than 12 months, for the installation or service of fire protection equipment.

(b) Building Code means the latest edition of the Uniform Building Code adopted by the department of commerce. Whenever a provision of the Building Code is incorporated within the Uniform Fire Code by reference, such provision is hereby adopted for application to all buildings within the jurisdiction of the state fire marshal, unless the fire marshal determines otherwise in accordance with UFC Section 2.301.

(c) Building official refers to the administrator of the building codes division of the department of commerce or, when made applicable by statute or rule, the building official of the local jurisdiction.

(d) Chief, fire chief, fire marshal, and fire prevention engineer all are treated as referring to the state fire marshal or, when made applicable by statute or rule or the context thereof, to the chief official of the appropriate local fire protection agency. Where made applicable by statute or rule, and

where no local fire department or fire district exists, these terms shall refer to the sheriff.

(e) City is treated as referring to the state of Montana or, when made applicable by statute or rule or the context thereof, to the appropriate local jurisdiction.

(f) "District", as used in section 50-61-114, means a rural fire district established under Title 7, chapter 33, part 21, MCA.

(g) Fire department and bureau of fire prevention are treated as referring to the fire marshal bureau of the department of justice or, when made applicable by statute or rule or the context thereof, to the appropriate local jurisdiction.

(h) Fire protection equipment means any listed and/or labeled fire alarm system, automatic fire alarm system, automatic fire-extinguishing system or portable fire extinguisher.

(i) Installation and service, when applicable to fire protection equipment, means such installation and servicing as required by the Uniform Fire Code and by nationally recognized standards referenced in the Uniform Fire Code. Required service for fire protection equipment is to be based on the purchase date.

(j) Mechanical Code means the latest edition of the Uniform Mechanical Code adopted by the department of commerce. Whenever a provision of the Mechanical Code is incorporated within the Uniform Fire Code by reference, such provision is hereby adopted for application to all buildings within the jurisdiction of the state fire marshal, unless the fire marshal determines otherwise in accordance with UFC Section 2.301.

(k) Ordinance means state law, city or county ordinance, or rule adopted by the fire marshal bureau.

(l) "Other fire apparatus," as that term is used in section 50-61-115, MCA, means automatic fire-extinguishing systems, sprinkler systems, building separation, hood systems, fire doors, restaurant hoods and duct ventilation systems, chimney spark arresters, standpipes, or other such devices as are required by these rules or by statute and the function of which is to prevent, extinguish, detect, warn of or prevent the spread of fire.

(m) Portable fire extinguisher means a hand-portable or wheeled container filled with any approved fire extinguishing agent that can be used to extinguish small fires.

(n) Registrant means a person certified by the state fire marshal who performs the installation or service of fire protection equipment.

(o) Single family private house means a single dwelling unit owned or being purchased by the resident or residents, and no part of which is rented to another.

(p) Uniform Fire Code means the latest edition of the Uniform Fire Code adopted by the state fire marshal, together with the Montana Supplement to the Uniform Fire Code.

(3) The fire marshal bureau does not adopt Articles 4 and 78 of the Uniform Fire Code, and does not adopt the following appendices: II-C (Marinas), II-D (Rifle Ranges).

(4) If there is any conflict between the Uniform Fire Code and the Montana Code Annotated, the provisions of the Montana Code Annotated control.

(5) This rule establishes a minimum fire protection code to be used in conjunction with the Uniform Building Code, ARM 8.70.101, et seq. Nothing in this rule prohibits any local government unit from adopting additional provisions of the Uniform Fire Code for application in the local jurisdiction to the extent authorized by law, including permit regulations in accordance with local ordinance. Provisions amended or not adopted by the bureau for application within the state may be appropriate for local adoption. See, e.g., UFC §§ 10.207, 10.301(c), 10.304, 80.301(y), 80.402(c)6, App. VI-C.

AUTH: 50-3-102(2), 50-61-102 MCA.
IMP: 50-3-102, 50-61-102 MCA.

RULE V RETAIL FIREWORKS SALE (1) Anyone engaged in the retail sale of permissible fireworks, as defined in section 50-37-105, MCA, must obtain any permit required by the applicable local jurisdiction.

(2) No person under the age of eighteen shall be employed to sell or offer for sale permissible fireworks or be allowed to accompany an employee for the purpose of selling or offering for sale permissible fireworks.

(3) No fireworks may be discharged within 100 feet of a fireworks retail sales location.

(4) At any place where permissible fireworks are sold or displayed, a sign reading "NO SMOKING" must be posted in letters at least four inches in height and 1/2 inch in stroke where customers are most likely to read it.

(5) Retail sale of fireworks shall be conducted from stands separated from gas stations, inhabited buildings, public ways, property lines, other fireworks stands, and hospitals or churches by the following distances:

| Area of Stand (in sq. ft.) | Other Fireworks Stands | Inhabited Buildings | Public Ways | Property Lines | Flammable Liquid Tanks/Dispenser | Hospital or Church |
|---|---|---|---|---|---|---|
| 300 or less | 60 | 60 | 30 | 30 | 1500 | 300 |
| 301 to 600 | 95 | 95 | 60 | 60 | 1500 | 300 |
| 601 to 900 | 130 | 130 | 90 | 90 | 1500 | 300 |
| Over 900 | Prohibited | | | | | |

(6) Parking of vehicles used to transport Class A or B explosives or flammable and combustible liquids is prohibited within 1500 feet of a retail fireworks stand.

(7) Stands over 30 feet in length shall be equipped inside with at least two pressurized water extinguishers with a minimum rating of 2A or two garden hoses. Stands 30 feet or less in length shall be provided with at least one such extinguisher or hose.

(8) Any stand constructed to admit members of the public inside shall have a minimum of two unobstructed exits remotely located from each other.

(9) All vegetation within a 50-foot radius of each exterior wall of a retail fireworks stand shall be cut to a maximum of two inches in height. The area within this radius shall be raked clean of any dead vegetation. Any trees within the radius shall be trimmed of dead branches and may be subject to removal if determined by the chief to pose a fire hazard.

(10) Electrical wiring shall be installed in accordance with the most recent version of the National Electrical Code adopted by the building codes bureau of the department of commerce.

(11) Open flame devices of any kind are prohibited in retail fireworks stands.

(12) Retail sale of fireworks from occupancies other than those authorized by this rule is prohibited.

(13) All retail fireworks stands shall be subject to inspection by the chief in accordance with section 2.201 of the Uniform Fire Code. Violations shall be handled in accordance with [Rule II]. If immediate action is necessary to safeguard life and property, the chief may issue an order to remedy in accordance with section 50-62-108, MCA, and, if there is no compliance within 24 hours after service of the order, may take any action authorized by section 50-62-109, MCA.

AUTH: 50-3-102(3) MCA. IMP: 50-3-102(3) MCA.

RULE VI FIREWORKS REPACKAGING, STORAGE AND SHIPPING (1) All buildings where fireworks are stored, opened for repacking, repackaged or prepared for shipping shall conform to the provisions of NFPA pamphlet 1124 (1988 ed.) in addition to any other requirements of the Building Code or other applicable law.

(2) All buildings in which fireworks are opened for repacking, repackaged, or prepared for shipping are considered to be process buildings as defined by NFPA pamphlet 1124 (1988 ed.).

(3) Any conflict between NFPA pamphlet 1124 and the Building Code shall be resolved by application of the highest standard of safety.

AUTH: 50-3-102(3) MCA. IMP: 50-3-102(3) MCA.

RULE VII OUTDOOR DISPLAY OF FIREWORKS (1) NFPA pamphlet 1123 (1990 ed.) is adopted as the standard for conducting supervised public displays of fireworks.

(2) The local jurisdiction shall be consulted for any permit requirements and on all other occasions where NFPA pamphlet 1123 refers to the "authority having jurisdiction."

AUTH: 50-3-102(3), 50-37-107 MCA.
IMP: 50-3-102(3), 50-37-107 MCA.

RULE VIII APPOINTMENT OF SPECIAL DEPUTY STATE FIRE MARSHALS (1) The state fire marshal may appoint special deputy state fire marshals throughout the state in accordance with this section.

(2) A special deputy state fire marshal may be appointed to conduct inspections and investigations when the services are deemed necessary by the state fire marshal.

(3) Qualifications for persons appointed special deputy state fire marshal are:

(a) Any person appointed special deputy state fire marshal, except for a qualified inspector employed by another state agency, must have a degree in fire protection engineering or related field from a recognized institution of higher education or 2 years' experience in fire protection, and must complete a training course administered or approved by the fire marshal bureau.

(b) An employee of another agency of the state of Montana may be appointed special deputy state fire marshal for the purpose of conducting inspections or investigations authorized by the state fire marshal if such employee is qualified by the employing agency as an inspector or investigator and is approved to conduct inspections or investigations by the state fire marshal.

(4) A special deputy state fire marshal may perform any duty with which the fire marshal is charged by state law or rule, subject to the direction of the state fire marshal.

AUTH: 50-3-106 MCA. IMP: 50-3-106 MCA.

RULE IX FIRE ESCAPES FOR PUBLIC BUILDINGS (1) All buildings described in section 50-61-103, MCA, of two or more stories in height, except private residences, shall be equipped with adequate fire escapes in accordance with this rule.

(2) Appendix I-A of the Uniform Fire Code is adopted for application to all existing buildings subject to this rule other than high-rise buildings, and subsection 2 thereof shall govern the provision of exits and fire escapes in all such buildings. Appendix I-B of the Uniform Fire Code is adopted for application to all existing high-rise buildings subject to this rule. Appendix I-C of the Uniform Fire Code shall govern stairway identification.

(3) Provision of fire escape exits in new buildings shall be in accordance with the Building Code.

AUTH: 50-61-105 MCA. IMP: 50-61-105 MCA.

RULE X HOUSING OF PHYSICALLY HANDICAPPED (1) Any building defined as a residential occupancy by section 50-61-103(6), MCA, or as an institutional occupancy by section 50-61-103(5), MCA, shall not house any physically handicapped person in a unit or room where escape is not feasible if elevators are disabled.

(2) The state fire marshal may, during the course of an inspection, make inquiry and determine whether adequate fire

escape provisions have been made for any handicapped residents. If a violation occurs, the fire marshal may issue a notice and proceed in accordance with sections 50-61-115 to 118, MCA.

AUTH: 50-3-102 MCA.
IMP: 50-61-102, 50-61-114 MCA.

RULE XI SMOKE DETECTORS IN RENTAL UNITS (1) In accordance with the Residential Landlord and Tenant Act of 1977, an approved smoke detector shall be installed by the landlord in each dwelling unit rented to another person.

(2) An approved smoke detector is a device that is capable of detecting visible or invisible particles of combustion, that emits an alarm signal, and that bears a label or other identification issued by an approved testing agency having a service for inspection of materials and workmanship at the factory during fabrication and assembly.

(3) Appendix I-A(6) of the Uniform Fire Code shall govern the installation of smoke detectors in all dwelling units subject to this rule.

AUTH: 70-24-303(1)(g) MCA. IMP: 70-24-303(1)(g) MCA.

RULE XII CERTIFICATE OF APPROVAL FOR DAY CARE CENTERS

(1) Any applicant for a license from the department of family services to operate a day care center for 13 or more children under Title 52, chapter 2, MCA, must obtain a certificate of approval from the state fire marshal in accordance with this rule.

(2) To obtain a certificate of approval, the applicant shall submit a written application to the state fire marshal setting forth the following information:

(a) Name and address of applicant and location of proposed day care center; and

(b) Number of children for which proposed day care center will provide care.

(3) Upon receipt of an application for certificate of approval, the fire marshal or his representative shall conduct an inspection of the proposed day care center, and shall promptly thereafter issue his findings, indicating whether or not fire safety rules have been met. In addition to compliance with the Uniform Fire Code, all day care centers shall comply with the following requirements:

(a) Day care centers shall keep children on the first story of the facility at all times, except for basements that have required exits at grade level.

(i) EXCEPTION: In buildings equipped with an automatic sprinkler system throughout, rooms used for day care purposes may be located in a basement or second story, provided there are at least two exits directly to the exterior for the exclusive use of such occupants.

(b) Day care centers shall front directly on or have access to a public street not less than twenty feet wide.

(c) Day care centers shall comply with the occupant load of 35 square feet per child as established under Table 33-A of the Building Code.

(d) Day care center basements over 1500 square feet, whether used for day care purposes or not, shall contain a sprinkler system.

(e) Day care centers shall have a minimum of two exits directly to the exterior, one of which may pass through an intervening room, provided that the intervening room may not be capable of being locked.

(f) Heating shall be by a central heating plant, enclosed in a separate room or cubicle constructed in accordance with the Uniform Building Code to provide one hour fire protection.

(i) EXCEPTION 1: A single, fixed space heater (wood, coal or fuel oil) may be used in one-story dwellings, provided it is properly installed and surrounded by a suitable barrier to prevent contact by children and is so located as to not obstruct egress.

(ii) EXCEPTION 2: Basement heating plants need not be enclosed, if the area is not used for day care purposes, if the basement is separated from the remainder of the dwelling by a twenty-minute fire rated door at the top of the stair, and if a smoke detector is properly located at the top of the stairwell.

(g) Portable electric or unvented fuel-fired heating devices are prohibited. All radiators shall be provided with protective metal enclosures.

(h) No extension cords shall be used in lieu of permanent wiring. All appliance and lamp cords shall be suitably protected to prevent pulling or chewing by children.

(i) All unused electrical receptacles shall be properly capped.

(j) Every closet door latch shall be fixed so that the door is capable of being opened by a child inside the closet.

(k) Every bathroom door lock shall be installed to permit the locked door to be opened from the outside.

(l) No Class I flammable or Class II combustible liquids shall be kept in the building and all other flammable, combustible or poisonous materials must be kept in locked cabinets or rooms. Cabinets shall comply with UFC Sec. 79.201(g).

(m) Windows having a minimum of 5.7 square feet of clear, unobstructed opening shall be readily accessible for rescue or ventilation. Windows shall be capable of being opened from the inside without the use of tools or special knowledge. Clear opening shall not be less than 20 inches in width or 24 inches in height. The bottom of the window shall not be more than 44 inches from the floor.

(n) Every day care center shall provide operational smoke detectors in the following locations, which shall be tested at least every thirty days and a log of such tests maintained on the premises:

(i) in every sleeping room,

(ii) in every class or play room,

(iii) in every corridor that separates a living and sleeping area,

(iv) at the top of basement stairwells, and

(v) at any other location deemed necessary by the chief.

(o) Portable fire extinguishers shall be installed and maintained in accordance with UFC Standard 10-1 or NFPA 10.

(p) A telephone shall be provided for emergency notification. Emergency phone numbers shall be posted in close proximity to the telephone.

(q) House numbers, no less than 6 inches in height shall be placed in such a position as to be plainly visible and legible from the street or road fronting the property. Numbers shall contrast with their background.

(r) All required exits serving an occupant load of 50 or more shall swing in the direction of the exit travel.

(s) All required exits serving an occupant load of 50 or more shall not be provided with a lock or latch unless it is panic hardware.

(t) All required exits serving an occupant load of 50 or more shall be provided with illuminated exit signs.

(u) All required exits serving an occupant load of 100 or more shall have corridors or paths to the exits illuminated with emergency lighting units and approved by the chief.

(v) Day care centers with an occupant load of 50 or more shall be provided with a manual and an automatic fire alarm system.

(w) Janitor closets and heating plant rooms shall be provided with one-hour fire resistive construction. Heating plant rooms shall draw combustion air and ventilation from the outside.

(x) Space under stairwells shall not be used for storage of any kind.

(y) Interior finish:

(i) of enclosed vertical exit ways and corridors, flame spread rating shall be less than 25 (Class I);

(ii) of other exit ways, flame spread rating shall be less than 75 (Class II);

(iii) of rooms/other ares, flame spread rating shall be less than 200 (Class III).

(z) Installation of a complete automatic sprinkler system, throughout the premises, will be accepted as satisfying the requirements for one-hour construction and flame spread requirements of interior finishes.

(4) If the proposed day care center is in compliance with these rules, the fire marshal shall issue a certificate of approval. If the center is not in compliance, the fire marshal shall issue a notice of corrective action needed to bring the center into compliance. Additional inspections may be conducted as needed until compliance is achieved.

(5) For the purposes of this rule, the definitions contained in section 52-2-703, MCA, are applicable.

(6) Inspection of any day care facility shall be done upon receipt of a request from the department of family services or as a part of an inspection performed by a fire department under

other provisions of state law. Findings of any inspection conducted at the request of the department of family services shall be reported to that department.

AUTH: 52-2-734 MCA. IMP: 52-2-734, 52-2-733(5) MCA.

RULE XIII CERTIFICATE OF APPROVAL FOR COMMUNITY HOMES (1) This rule shall govern certification for fire and life safety of all community homes for the developmentally disabled, in accordance with section 53-20-307, MCA, and of all community homes for persons with severe disabilities, in accordance with section 53-19-204, MCA.

(2) All community homes must be certified annually for fire and life safety by the state fire marshal.

(3) Applicants for certification shall submit to the state fire marshal in writing the following information:

(a) Name and address of applicant and location of proposed community home; and

(b) Number of residents for which proposed community home will provide care.

(4) Upon receipt of an application for certificate of approval, the fire marshal or his representative shall conduct an inspection of the proposed community home, and shall promptly thereafter issue his findings, indicating whether or not fire safety rules have been met.

(5) For purpose of determining compliance with fire safety rules, all community homes shall comply with Uniform Fire Code and with all other rules promulgated by the fire marshal bureau.

(6) If the proposed community home is in compliance with these rules, the fire marshal shall issue a certificate of approval. If the home is not in compliance, the fire marshal shall issue a notice of corrective action needed to bring the home into compliance. Additional inspections may be conducted as needed until compliance is achieved.

(7) The state fire marshal shall notify the department of social and rehabilitation services and the department of family services when a community home has been certified.

AUTH: 53-20-307, 53-19-204 MCA.
IMP: 50-20-307, 53-19-204 MCA.

RULE XIV THREAT OF EXPLOSIVES IN STATE BUILDINGS (1) In any building housing state offices, each department director or official in charge shall assign one individual for each building housing members of the department, whose responsibilities shall be to develop and train evacuation and search units and to practice proper procedures involving a threat of explosive materials in the assigned building or building area. The designated individual shall have authority to make necessary decisions, including authority to order and direct any evacuation, search, building closure, re-entry and other emergency procedures during a threat of explosive materials in the building to which the person is assigned.

(2) In the event a building houses more than one state agency, each agency shall designate a responsible individual. Where the threatened explosive device is located in a particular agency's area of the building, that agency's designated individual shall be primarily responsible for evacuation and search efforts, including final decisions regarding action to be taken.

(3) The fire marshal bureau adopts and incorporates by reference the state fire marshal publication entitled "Rules and Procedures concerning responsibilities to be followed where there is a threat of explosive material in a building housing state offices." Copies of the publication may be obtained from the State Fire Marshal Bureau, Department of Justice, 303 North Roberts, Helena, Montana, 59620.

AUTH: 50-3-102(1)(j) MCA. IMP: 50-3-102(1)(j) MCA.

RULE XV RENEWAL OF PERMIT, LICENSE, OR CERTIFICATE

(1) Each person or firm who receives a permit, license or certificate of registration from the state fire marshal in accordance with these rules must submit an application for renewal every two years.

(2) The application for renewal shall contain the following information:

(a) applicant's name and address;

(b) business address;

(c) business name used;

(d) type of work to be performed, or products to be sold;

(e) whether the applicant is employed by a fire protection agency of the state or of any local government unit;

(f) Whether the applicant is a member of the personnel of a non-profit fire department and, if so, for what purpose the certificate, license or permit is being obtained.

(g) Whether any of the above information has changed since the date of first issuance of the license, permit, or certificate, or since the date of last renewal;

(h) Whether the applicant has been continuously engaged in installation, sale, or service of fire protection equipment since the date of first issuance of the license, permit, or certificate, or since the date of last renewal.

(3) Upon receipt of the application, the state fire marshal shall grant a renewal of the permit, license or certificate if it appears that the applicant meets all of the requirements under ARM 23.7.121, has committed no act which would constitute ground for suspension or revocation under ARM 23.7.122, and remains properly equipped and staffed to provide the services intended to be performed. The fire marshal may require retesting if the applicant fails to meet any of the requirements of this section or if the applicant has not, for a period of two years, engaged in the business for which the original permit, license or certificate was issued.

(4) Each application for renewal shall be accompanied by a fee of $5.

AUTH: 50-3-102(2) MCA. IMP: 50-39-101 through 105 MCA.

RULE XVI CONFLICT OF INTEREST PROHIBITED (1) It is a conflict of interest for any person who holds a permit, license, or certificate of registration under this part to be employed by a state or local government fire protection agency, if the permit or license holder engages, for his or her private business purposes, in the sale, service or installation of any fire protection equipment within the jurisdiction in which the person is so employed unless the employee conducts no inspections pursuant to section 50-61-114, MCA.

(2) It is ground for revocation of a permit, license or certificate of registration for a fire protection employee identified in subsection (1) to sell, service or install fire protection equipment within his or her jurisdiction of employment.

(3) EXCEPTION: If, at the time of application or renewal, the applicant submits certification from the employing agency that he will not conduct building inspections in the course of his employment, the applicant may be permitted to engage in the sale, service, or installation of fire protection equipment.

AUTH: 50-3-102(2), 50-3-103 MCA.
IMP: 50-39-101 through 105 MCA.

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

23.7.121 APPLICATION FOR PERMIT, LICENSE, OR CERTIFICATE (1) through (2)(d) remain the same.

(e) Whether the applicant is employed by a fire protection agency of the state or of any local government unit;

(f) Whether the applicant is a member of the personnel of a non-profit fire department and, if so, for what purpose the certificate, license or permit is being obtained; and

(2)(e) remains the same but is renumbered to (2)(g).

AUTH: 50-3-102(2), 50-3-103 MCA.
IMP: 50-39-101 through 105 MCA.

23.7.122 SUSPENSION OR REVOCATION OF PERMIT, LICENSE OR CERTIFICATE (1) through (5) remain the same.

(6) ~~A licensed firm who has an employee that while employed by the firm,~~ Employed an individual who, while employed by the holder of the license, permit, or certificate, installs or services fire protection equipment improperly or who installs or services fire protection equipment without the required certificate of registration;

(7) ~~Violated any provisions of this chapter.~~ Violated any of the conditions, qualifications, or limitations set forth in the permit, license, or certificate, or allowed the permit, license, or certificate to be used by anyone other than the person or firm to whom the same was issued.

(8) Violated any provisions of this chapter.

AUTH: 50-3-102(2), 50-3-103 MCA.
IMP: 50-39-101 through 105 MCA.

23.7.124 DENIAL OF A CERTIFICATE, PERMIT OR LICENSE (1) The state fire marshal may deny a permit, license, or certificate to an applicant if the granting of one would adversely affect public safety or welfare~~.~~, or if the applicant fails to satisfy the applicable requirements of section 50-39-102, MCA, or these rules.

AUTH: 50-3-102(2), 50-3-103 MCA.
IMP: 50-39-101 through 105 MCA.

23.7.125 INVESTIGATION OF IMPROPER INSTALLATION OR SERVICE (1) Upon the request of a local authority or other person, the state fire marshal ~~shall~~ may conduct an inspection of the installation or service of fire protection equipment;

(2) remains the same.

AUTH: 50-3-102(2), 50-3-103 MCA.
IMP: 50-39-101 through 105 MCA.

23.7.131 WHO MUST OBTAIN A CERTIFICATE OF REGISTRATION (1) through (2)(a) remain the same.

(b) An apprentice, ~~must perform~~ so long as he or she performs the installation or service of fire protection equipment under the immediate personal supervision of a qualified registrant.

(c) and (d) remain the same.

AUTH: 50-3-102(2), 50-3-103 MCA.
IMP: 50-39-101 through 105 MCA.

23.7.133 EXAMINATION FOR CERTIFICATE (1) remains the same.

(2) The written examination may include information from the latest edition of the Fire Protection Handbook, the latest editions of the Uniform Fire Code Standard No. 10.1, and the National Fire Protection Association (NFPA) Pamphlets Number 10, 13, 13A, 13D, 13R, 72A, 72B, 72C, 72D, 72E, and 74.

(3) and (4) remain the same.

(5) A passing grade for the written examination is a score of 70 or better. An applicant who fails may reapply after 30 days to take another examination. The examination may be taken no more than three times during a one-year period.

AUTH: 50-3-102(2), 50-3-103 MCA.
IMP: 50-39-101 through 105 MCA.

23.7.134 ENDORSEMENT OF QUALIFICATIONS (1) through (2)(c)(i) remain the same.

(ii) automatic fire extinguishing systems;

(iii) fire alarms; ~~or~~

(iv) automatic fire alarm systems~~.~~; or

(v) other fixed fire protection systems.

AUTH: 50-3-102 MCA. IMP: 50-3-102 MCA.

4. The following rules are proposed to be amended as follows and will be transferred to new rule numbers if amended:

23.2.111 RULES RELATING TO THE BUILDING CODE (1) A notice of adoption or amendment by the state fire marshal of a rule relating to building and equipment standards covered by the state or a municipal building code must be signed by the ~~head of the~~ director of the ~~Department of Administration~~ department of commerce. ~~Those~~ Such rules "are effective upon approval of the department of ~~administration~~ commerce and filing with the secretary of state." Section 50-3-103(2) MCA.

AUTH: 2-4-201(1) MCA. IMP: 50-3-103(2) MCA

23.7.101 ~~ENFORCEMENT OF FIRE MARSHAL BUREAU RULES~~ HOLDER NOT ENTITLED TO RIGHT OF ENTRY ~~(1) The fire marshal bureau shall enforce this chapter in every area of Montana. The chief fire official or the appropriate local fire authority having jurisdiction in each area shall assist the bureau. Where no such local fire authority exits, the sheriff shall assist. The local authorities shall notify the fire marshal bureau of any violations.~~

(1) ~~(2)~~ A permit, license, or certificate does not authorize any person to enter any property or building or to enforce this chapter.

AUTH: 50-3-102(2) MCA. IMP: 50-3-102 MCA.

5. The rules proposed to be repealed are as follows: ARM 23.2.131; 23.7.101; and 23.7.111. These rules may be found on pages 23-33 and 23-361 of the Administrative Rules of Montana.

6. The adoption of these rules is necessary to implement the 1988 edition of the Uniform Fire Code. The Uniform Fire Code has been adopted by the State Fire Marshal since 1978, generally with very few revisions. In an effort to tailor the Code to the needs of Montana and to the requirements of Montana law, the Fire Marshal Bureau is adopting a Montana Supplement to the Uniform Fire Code, for application in Montana whenever the rules of the fire marshal apply. In addition, the Fire Marshal Bureau has undertaken a comprehensive review of its existing rules, together with statutory requirements, and is proposing to adopt rules which will carry into effect the fire prevention laws of this state and will better serve the function of the State Fire Marshal to safeguard life and property from the hazards of fire.

7. Interested persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Ray E. Blehm, Jr., State Fire Marshal, Room 371, Scott Hart Building, 303 North Roberts, Helena, Montana, no later than December 28, 1990.

8. Elizabeth L. Griffing, Office of the Attorney General, 215 N. Sanders, Helena, Montana 59634 has been designated to preside over and conduct the hearing.

By: Ray E. Blehm, Jr.
Ray E. Blehm, Jr.
State Fire Marshal

Certified to the Secretary of State Nov 19, 1990.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

| | |
|---|---|
| In the matter of the amendment of Rules 23.16.1201 and 1202, changing the name of the Department's authority reference. | NOTICE OF PROPOSED AMENDMENT OF RULES 23.16.1201 and 23.16.1202 REGARDING POKER AND OTHER CARD GAMES. |

NO PUBLIC HEARING
CONTEMPLATED

TO: All Interested Persons.

1. On January 2, 1991, the Department of Justice proposes to amend rules 23.16.1201(2) and 23.16.1202(1)(a) to change the name of the Department's authority reference for poker.

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

23.16.1201 DEFINITIONS As used throughout this subchapter, the following definitions apply: (1) remains the same.

(2) "Authority reference" means the Montana Official Poker Rulebook, ~~copyright 1988, Las Vegas Hilton, except for section B, F, and H~~ and Scarne's Encyclopedia of Card Games, copyright 1983, by John Scarne, pages 18 through 276. These books will be used by the department as the authority on how to play authorized card games. The sections of the books cited as authority will not apply where there is a conflict with state law or department rule. (3) through (20) remain the same.

AUTH: SEC. 23-5-115, MCA; IMP: SEC. 23-5-311, MCA.

23.16.1202 TYPES OF CARD GAMES AUTHORIZED (1) The following card games are authorized by law and must be played only in the manner set out for that game in the applicable authority reference:

(a) the poker games of Texas Hold'em, Draw Poker, Omaha, Seven Card Stud, and their variations as well as general poker rules and practices, according to the Montana Official Poker Rulebook, ~~copyright 1988, Las Vegas Hilton, except for sections B, F, and H~~; and (1)(b) through (7) remain the same.

AUTH: Sec. 23-5-115, MCA; IMP: Sec. 23-5-311, MCA.

3. These changes are necessary because the Department has printed a poker rulebook under its own name, which reproduces the applicable sections of the Las Vegas Hilton Official Poker Rulebook without changes to the text. In addition, the Montana Official Poker Rulebook includes excerpts from state law and Department rules, recommended dealer procedures, and a description of approved variations of poker.

4. Interested parties may submit their data, views or arguments concerning the proposed amendments in writing to Lois Menzies, 2687 Airport Road, Helena, MT 59620-1424, no later than December 30, 1990.

5. If a person who is directly affected by the proposed amendment wishes to submit his data, views or arguments orally or in writing at a public hearing, he must make written request

for a hearing and submit this request, along with any written comments, to Lois Menzies, 2687 Airport Road, Helena, MT 59620-1424, no later than December 30, 1990.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 60 persons based on the 602 licensed card dealers in Montana.

By: Judy Browning
for MARC RACICOT
Attorney General

Certified to the Secretary of State:

BEFORE THE BOARD OF LAND COMMISSIONERS
AND THE DEPARTMENT OF STATE LANDS
OF THE STATE OF MONTANA

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| In the Matter of the Adoption of Rules I through X regarding bonding small miner placer and dredge operations and permit requirements for small miner cyanide ore processing operations. | NOTICE OF PUBLIC HEARING ON SMALL MINER PLACER AND DREDGE AND CYANIDE RULES |

TO: All Interested Persons

1. On December 19, 1990, at 7:00 p.m., a public hearing will be held at the Scott Hart Auditorium, Scott Hart Building, 303 North Roberts, Helena, Montana, to consider adoption of Rules I through X pertaining to bonding of small miner placer and dredge operations and permit requirements for small miner cyanide ore processing operations.

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

3. The proposed new rules provide as follows:

RULE I DEFINITIONS As used in Rules II through X, unless the context indicates otherwise, the following definitions apply:

(1) "Commence reclamation within 6 months" means to commence reclamation within 6 months or the first seasonal opportunity after mining is not resumed after a seasonal closure;

(2) "Pay gravel" means gravels containing sufficient mineralization to be economic;

(3) "Plant" means a support facility, including a wash or processing plant, for a placer or dredge operation;

(4) "Sedimentation" means the movement of soils or other fine surface materials from their site of origin as a result of water erosion. This term usually refers to movement and settling of sediments into streams. AUTH: Sec. 82-4-321, MCA; IMP: Sec. 82-4-305, 82-4-335, MCA.

RULE II SMES PLACER AND DREDGE BONDING

(1) (a) A small miner who operates a placer or dredge mine shall post a $5,000 bond unless the department approves a lower amount based on the criteria below or unless it is documented that adequate bond is posted with another government agency.

(b) Bond must be filed in the form of a surety, payable to the state of Montana or to the state and the appropriate federal agency, a cash deposit, an assignment of certificate of deposit, letter of credit, or other surety acceptable to the department.

(c) The bond must be accompanied by an appropriate map showing the location of the mine, anticipated disturbances, and perennial streams which would be affected.

(2) The department shall reduce the required bonding amount if the small miner submits an operating plan documenting that the cost of reclamation to the department would be less than $5,000. The information needed to make such a determination includes the following:

(a) a description of the proposed mining operation and foreseeable expansion;

(b) a description of mine support facilities;

(c) the type of equipment and capacity of the plant;

(d) an estimate of pit and pond sizes and volumes of all soil, overburden and placer gravel stockpiles;

(e) description of mining sequence and maximum acreage to be disturbed and unreclaimed at any one time at the mine being bonded;

(f) a description of any water diversions required by the operation;

(g) a topographic map locating mine pit, ponds, diversions, roads, process area, and stream drainages. This map should include a reference to existing locatable monuments or landmarks on the ground, be 1 inch to 100 feet and be based on fixed reference points so that all mapped information is interchangeable;

(h) the depth of soil, overburden and pay zones to be excavated;

(i) the average and maximum rate of pay gravel removal;

(j) the length and width of roads and average size of the plant area;

(k) any proposal to use suitable settling pond sediments as soil amendment if limited soil is available;

(l) a proposed permanent seed mixture and rate of application (lbs/ac);

(m) characterization of stream channel and riparian conditions for locations where disturbance is proposed;

(n) identification of the construction method and materials to be used to reestablish functioning streams where stream channels have been disturbed;

(o) an erosion control plan; and

(p) status of 310 permit compliance, pursuant to 75-7-101, MCA, et seq., and status of Montana pollution discharge elimination permit compliance pursuant to 75-5-401, MCA, et seq. AUTH: Sec. 82-4-321, MCA; IMP: Sec. 82-4-305(1), MCA.

RULE III (INTERPRETIVE RULE) OPERATIONAL REQUIREMENTS

(1) In order for SMES placer and dredge operators to meet the requirements of 82-4-305 (1), MCA, which requires that the small miner agree in writing not to pollute or contaminate any stream, the department recommends the following best management practices as minimally necessary to assure that operations do not result in water quality violations:

(a) Mining equipment should not be operated in a live stream or diversion, or in any manner to cause bank caving or erosion of the bank of any live stream or diversion.

(b) The amount of make-up water should be limited to only the amount required to operate the wash plant.

(c) Adequate berms should be placed around diversion ditches and live streams to prevent water quality degradation and erosion of disturbed areas as a result of runoff from a 10-year, 24-hour precipitation event.

(d) During operations, stream banks, ditches, and diversions should be lined, riprapped, or otherwise stabilized to prevent excess erosion.

(e) Roads should:

(i) be constructed to provide controlled drainage, include culverts, waterbars, and slash filters necessary to facilitate drainage and minimize erosion and be constructed to reduce concentrated flows;

(ii) be located on well-drained soils and located back from stream bottoms in order to provide a buffer zone for preventing road sediments from washing into stream channels;

(iii) be located outside slide-prone areas characterized by seeps, steep slopes, highly weathered bedrock, clay beds, concave slopes, hummocky topography, and rock layers that dip parallel to the slope;

(iv) be constructed to stabilize sloped exposed surfaces by seeding, compacting, riprapping, benching, mulching or other suitable means prior to fall or spring runoff;

(v) not be left in a pioneer condition over a winter season; and

(vi) be used only minimally during wet periods and spring breakup when damage to the roads, which would result in increased sedimentation, is likely to occur.

(f) Cut-and-fill slopes should be constructed at a stable angle and stabilized by seeding, mulching, benching or other suitable means during the same season as construction.

(g) Clearing, grubbing or logging debris should not be placed in streams or used for diversions or cause water quality degradation.

(h) Diversions and impoundments should be sized to pass the 10-year, 24-hour precipitation event. Diversions should be constructed with drop structures or energy dissipators whenever necessary to prevent erosion. Diversion ditch berms should be sloped to account for site-specific conditions, including soils, climate, height of structure and existing natural slopes, and should be revegetated, riprapped, or otherwise stabilized to minimize stream sedimentation.

(i) Before winter shutdown, a small miner should take the following precautions:

(i) Diversions should be sized to pass spring runoff (minimum 10-year, 24-hour event) or streams should be returned to original channels.

(ii) Ponds should have adequate freeboard to prevent overtopping during spring runoff from direct precipitation and overland flow. Whenever ponds are located within a flood plain and diversions are not sized to pass the 10-year, 24-hour precipitation event, ponds should be filled and reclaimed prior to onset of winter.

(iii) Soil, overburden, and tailings stockpiles should not be placed near streams, or if so placed, should be bermed at the toe to prevent erosion of sediments into streams.

(iv) Fuel storage tanks should be drained before winter shut down.

(2) A placer or dredge operator who proposes a "project", as that term is defined in 75-7-103, MCA, on a perennial stream, must comply with the requirements of the Natural Streambed and Land Preservation Act, as amended, by obtaining a permit required by the appropriate Conservation District.

(3) In order for a SMES placer or dredge operator to meet the reclamation requirements for bond release, the following reclamation planning guidelines should be followed:

(a) A reclamation plan, or appropriate waiver, for all roads is necessary.

(b) The post-mine land use should be identified and a reclamation timetable should be established.

(c) Soil should be salvaged from all areas to be disturbed and should be stockpiled for use in reclamation.

(d) Site disturbances should be recontoured to a minimum of 3:1 slopes or flatter by backfilling excavated material, unless otherwise approved by the department as achieving comparable stability and utility in the postmining landscape.

(e) Soil should be redistributed over all areas disturbed by mining.

(f) The site should be seeded with perennial non-weedy species.

(g) Stream channels should be reconstructed, using coarse tails as necessary to dissipate energy. Riprap, temporary synthetic erosion control, or biodegradable revegetation fabrics in combination with permanent vegetation should be used to stabilize streambanks, as necessary. Streams should be reconstructed with grades, pools, and meanders comparable to pre-mine drainage. AUTH: Sec. 82-4-321, MCA; IMP: Sec. 82-4-305(1), (3), (4) and (5), MCA.

RULE IV COMPARABLE UTILITY AND STABILITY OF RECLAIMED AREAS - STANDARDS FOR BOND RELEASE

(1) In order for the department to release bond, the area must be reclaimed to a post-mining land form and land use that are at least comparable to that of adjacent areas.

(2) Bond may not be released unless the following reclamation standards for placer and dredging operations are achieved:

(a) Pits must be backfilled with overburden and washed gravels unless otherwise approved by the department as part of an alternate postmining land use that provides comparable stability and utility.

(b) Excess overburden must also have been appropriately placed and graded.

(c) Soils and soil substitutes must have been respread and graded on the backfilled, regraded overburden surface.

(d) Slopes must have been reduced to a 3:1 grade or flatter, unless otherwise approved by the department as achieving comparable utility and stability in the post-mining landscape.

(e) Disturbed areas must have been revegetated with appropriate perennial non-weedy species similar to that of adjacent areas.

(f) Roads must have been reclaimed to approximate original contour consistent with the postmining land form and land use in compliance with section (1) above unless otherwise approved by the department and concurred with by the landowner.

(g) Stream disturbances must be reclaimed to their approximate premining condition so that comparable beneficial uses, such as fisheries, are restored and comparable flow capacity.

(h) Noxious weeds must have been controlled, consistent with county weed board requirements.

(3) Additional standards may be imposed by the department for site-specific situations when such conditions are necessary to assure that reclamation provides for comparable utility and stability as that of adjacent areas, to insure public safety, and to prevent the pollution of air or water or the degradation of adjacent lands (see 82-4-336(7), MCA). AUTH: Sec. 82-4-321, MCA; IMP: Sec. 82-4-305(3), (4) and (5), MCA.

RULE V SMES BOND FORFEITURE AND SMES REVOCATION

(1) If a small miner who conducts a placer or dredge operation fails to commence reclamation within 6 months after cessation of mining or within an extended period allowed by the department for good cause shown pursuant to (4), or fails to diligently complete reclamation, the department shall notify the small miner by certified mail at his last reported address that bond will be forfeited and the department will reclaim the site unless the small miner commences reclamation within 30 days and diligently completes reclamation.

(2) The department shall revoke the small miner exclusion statement for any small miner whose bond is forfeited.

(3) Cessation of mining is considered to have occurred:

(a) whenever a small miner notifies the department of intent to cease operations, or

(b) whenever a site has been inactive through one operating season and the operator has failed to seek an extension for good cause shown.

(4) The department may grant an extension only when a site is temporarily stabilized in a manner which assures stability through spring runoff, when impact to the environment will be minimized, and when public safety is ensured.

(5) Diligent completion of reclamation will be considered to have occurred whenever:

(a) a site has been graded and seeded in compliance with the requirements of Rule IV during the first planting season, after cessation of activity; and

(b) reclamation standards are achieved within 2 years of completion of reclamation.

(6) An extension of time to reclaim must be renewed annually.

(7) A forfeited bond must be used as follows:

(a) Whenever reclamation can be achieved using the amount of the forfeited bond, excess funds must be returned to the small miner.

(b) Whenever the department documents in a written finding that reclamation cannot be achieved using the amount of the forfeited bond, funds may be deposited in the hard rock mining account established by 82-4-311, MCA, and reclamation must be conducted as priorities and additional funding allow. Forfeited funds deposited in the account may not be used for reclamation of other sites.

(c) Whenever reclamation costs exceed the bonded amount, the department may issue a notice to the placer or dredge operator that the excess costs are due and payable within 30 days, pursuant to 82-4-305(6), MCA. The department may bill the operator only for the cost of activities that are reasonably necessary to return the site to comparable stability and utility and to prevent pollution of state waters as defined in Title 75, Chapter 5, MCA. AUTH: Sec. 82-4-321, MCA; IMP: Sec. 82-4-305(4), (5) and (6), MCA.

RULE VI SMES CYANIDE APPLICATIONS

(1) A small miner proposing to operate cyanide-processing facilities and a mine under a small miner exemption must continue to meet the criteria for a small miner exemption under 82-4-305, MCA, for the operation. The total acreage committed to processing and mining must remain within the acreage limitations contained in 82-4-303, MCA.

(2) A small miner must obtain an operating permit for cyanide-processing facilities and must meet requirements for these facilities imposed by statute and rule unless the facility is grandfathered pursuant to section 4 of Chapter 347, Laws of 1989.

(3) To expedite permitting of cyanide facilities, the department shall make available to a small miner who has submitted or may submit an application for a permit to operate a cyanide ore processing facility appropriate department staff to determine how baseline, operating and reclamation plan requirements may be met in view of conditions and characteristics of the site at which the cyanide ore processing facility is proposed. The department shall process cyanide ore processing permit applications as expeditiously as possible consistent with statutory deadlines for other permit applications and the department's obligations under the Montana Environmental Policy Act.

(4) An application for a small miner cyanide ore processing operating permit must contain baseline information meeting the requirements of Rule VII, an operating plan meeting the requirements of Rule VIII, and a reclamation plan meeting the requirements of Rule IX. AUTH: Sec. 82-4-321, MCA; IMP: Sec. 82-4-305(7), 82-4-335(2), MCA.

RULE VII SMES CYANIDE BASELINE INFORMATION

(1) An application for a small miner cyanide processing facility permit must include the following baseline information on the existing conditions at the site:

(a) a map showing all wells and springs and surface water within one mile of the proposed permit area;

(b) a map showing all known significant cultural resources in the proposed permit area;

(c) analysis of surface and groundwater samples for background parameters determined by the department, from selected sites chosen in consultation with department staff;

(d) a map delineating soil units for the proposed permit area based on available information, including that available from the soil conservation district;

(e) a listing of species of game fish within one mile of the proposed permit area;

(f) identification of any hatcheries in the vicinity of the proposed permit area;

(g) baseline precipitation records;

(h) flow data for surface and groundwater identified in (b) above from available sources and water depth for identified wells; and

(i) identification of public water supply systems that withdraw water within five miles downstream from the ore processing facility. AUTH: Sec. 82-4-321, MCA; IMP: Sec. 82-4-305(7), 82-4-335(2), MCA.

RULE VIII SMES CYANIDE OPERATING PLANS

(1) An application for a small miner cyanide processing facility permit must include the following information for construction and operation of the cyanide processing facility:

(a) appropriate maps showing the location of the mine and support facilities, cyanide-processing facilities, permit boundaries, and perennial streams;

(b) the average and maximum tonnage/day and per year of ore to be processed and the amount of tailings to be generated;

(c) a narrative description of the precious metal recovery process;

(d) number, size and location of any proposed leach pads and ponds and ore and tailings piles associated with cyanide processing;

(e) leach pad, pond, and waste facility designs;

(f) a plan for a leak detection system, including a program and schedule of monitoring for possible leakage which monitors PH, electrical conductivity (EC), and cyanide as weak acid dissociable (WAD), and other constituent levels, for those constituents appropriate to the type of processing proposed;

(g) a remedial action plan for controlling and mitigating discharges to surface waters;

(h) a description of the amount of make-up water required to operate the plant for ore processing;

(i) a plan for disposal of debris generated by clearing, grubbing and logging ensuring that the debris does not impact water quality or water flow;

(j) sediment and erosion controls for surface disturbances related to cyanide-processing facilities;

(k) a road design and construction plan that provides controlled drainage, including location and number of culverts, waterbars, and slash filters;

(l) design for and map of adequate berms for placement around diversion ditches and live streams to prevent water quality degradation and erosion of disturbed areas;

(m) a plan for stabilization of disturbed stream banks to assure that they will not be left in an erosive condition;

(n) a plan to salvage and stockpile soil from all areas to be disturbed by cyanide-processing facilities, including stockpiles and wastepiles;

(o) design and construction plans for diversions and sediment impoundments to pass the 10-year, 24-hour precipitation event. A diversion must be constructed with drop structures, or energy dissipators if necessary to prevent erosion. Diversion ditch berms must be sloped to account for site-specific conditions, including soils, climate, height of structure, and existing natural slopes and must be revegetated, riprapped, or otherwise stabilized to prevent stream sedimentation;

(p) a plan for disposal of liquid and solid wastes which includes identification and application areas and the necessary discharge permits;

(q) end-of-season procedures for shutdown of the cyanide-processing facility;

(r) a plan for prevention of damage to or for documentation of any significant historic, cultural, archeological and paleontologic feature within the permit areas on state and federal lands;

(s) identification and preliminary evaluation of reasonably feasible alternative facility sites;

(t) a commitment to comply with the operational requirements of Rule VIII;

(u) a map of monitoring site locations which also identifies well depth;

(v) well logs for those wells identified in (u) above; and

(w) a commitment to avoid perennial streams wherever possible; and

(x) for facilities that are exposed to precipitation flows and that carry cyanidated solution, a plan that provides for adequate passage of a 50-year 24-hour storm even flow. AUTH: Sec. 82-4-321, MCA; IMP: Sec. 82-4-305(7), 82-4-335(2), MCA.

RULE IX SMES CYANIDE RECLAMATION PLANS

(1) An application for a small miner cyanide ore processing permit must contain a reclamation plan that includes the following:

(a) the post-mine land use;

(b) a reclamation timetable;

(c) the proposed method for handling spent ore and disposal of any heavy metal sludge remaining in ponds;

(d) a plan for monitoring water balance for the ore processing facility;

(e) a neutralization plan for tailing and solutions;

(f) a map showing regrading plans for all cyanide processing and related facilities to a stable, minimally erosive slope configuration by backfilling excavated material, consistent with the postmining land use;

(g) a narrative providing for reclamation of all buildings and structures;

(h) a plan for reclaiming all associated roads, or an appropriate waiver from the surface owner;

(i) a revegetation plan including seed mixes, method of seeding and rate of seed application (lbs/ac);

(j) a description of any permanent diversion or stream channel reconstruction process, including use of coarse noncyanidated, nonmineralized tails or borrow material to dissipate energy or riprap streams, or use of synthetic erosion control and revegetation fabrics. Streams must be reconstructed with comparable grades, pools, and meanders to pre-mine drainage;

(k) a plan for stream channel reconstruction providing that the channel may not be reconstructed through reclaimed tails; and addressing control of drainage from the tails and the adjacent areas to maximize the long-term stability of the tails; and

(l) monitoring plans for reclaimed sites.

(2) In addition, a cyanide-processing facility which would constitute a "project", as that term is defined in 75-7-103, MCA, on a perennial stream, must comply with the requirements of the Natural Streambed and Land Preservation Act, as amended, by obtaining permits required by the appropriate conservation district. AUTH: Sec. 82-4-321, MCA; IMP: Sec. 82-4-305(7), 82-4-335, MCA.

RULE X CYANIDE PROCESSING FACILITIES PERFORMANCE STANDARDS AND BONDING

(1) The small miner shall notify the department of completion dates for each of the following phases of construction, and the department shall inspect and file a report on each of these phases:

(a) foundation preparation;

(b) compaction testing;

(c) liner placement;

(d) installation of leakage detection control systems; and

(e) installation of monitoring wells.

(2) In addition to the applicable performance standards of Rule IX and ARM 26.4.101 and 82-4-305, MCA, the following are required prior to bond release:

(a) neutralization of cyanide-containing tailing and solutions to those levels considered acceptable under applicable water quality standards;

(b) submittal of construction reports for tailings, ponds, and other appropriate facilities related to cyanide processing, on a monthly basis;

(c) submittal of as-built designs for those facilities identified under Rule VIII(1)(e), (k), (l) and (o), within one month of completion of construction activities.

(2) (a) Bonding for cyanide-processing facilities must cover the actual cost to the department of reclamation. Bonds must be reviewed and, if necessary, adjusted at least once every 5 years, tied to either the rate of inflation based on the consumer price index, a change in activities, or both, as appropriate.

(3) Bond must be filed in the form of a surety, payable to the state of Montana or to the state and the appropriate federal agency, a cash deposit, an assignment of certificate of deposit, letter of credit, or other surety acceptable to the department. AUTH: Sec. 82-4-321, MCA; IMP: Sec. 82-4-305(7), 82-4-335, MCA.

4. Rules I through V are necessary to provide bonding procedures, guidance on measures to prevent water quality violations, standards for bond release, and procedures for bond forfeiture for small miners who are required to post bonds pursuant to Chapter 346, Laws of 1989. Rule I and Rules VI through X are necessary to institute permit application requirements, application review procedures and requirements, and performance and reclamation requirements for small miners required by Chapter 347, Laws of 1989, to obtain operating permits for cyanide ore-processing facilities.

5. Interested persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Sandra J. Olsen, Chief, Hard Rock Bureau, Department of State Lands, Capitol Station, Helena, Montana 59620 no later than January 2, 1991. Written data, views, or arguments that are postmarked by January 2, 1991 will be considered.

6. Sandra J. Olsen, Chief, Hard Rock Bureau, Department of State Lands, has been designated to preside over and conduct the hearing.

7. The authority of the agency to make the proposed rules is 82-4-321, MCA, and the rules implement 82-4-305(3), (4), (5), (6), and (7) and 82-4-335(2), MCA.

Dennis D. Casey
Commissioner

Certified to the Secretary of State November 19, 1990.

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

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| In the matter of the amendment of Rules 46.30.801 and 46.30.807 pertaining to child support medical support enforcement | ) ) ) ) ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 46.30.801 AND 46.30.807 PERTAINING TO CHILD SUPPORT MEDICAL SUPPORT ENFORCEMENT |

TO: All Interested Persons

1. On December 19, 1990, at 11:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of Rules 46.30.801 and 46.30.807 pertaining to child support medical support enforcement.

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

46.30.801 PROVIDING INFORMATION (1) Whenever an obligor is required under 40-5-208, MCA to provide the CSED with information regarding health or medical insurance coverage, the obligor shall provide the information within ~~30~~ 20 days following the receipt of a written request from the CSED. The information must be provided by a verified writing using a form provided by the CSED or a form provided by the obligor which contains essentially the same information.

(2) The request for health or medical insurance coverage information shall be deemed continuing, and the obligor must report changes in the information to the CSED within ~~30~~ 20 days of the change.

Subsection (3) remains the same.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-208 MCA

46.30.807 AMOUNT OF MONETARY SANCTION (1) The CSED will assess the amount of $100 per child for each month an obligor is determined to have failed to provide or maintain health or medical insurance as ordered or as required by statute. The CSED will assess an additional $100 per child for each month an obligor fails to provide or update information concerning coverage. When an obligor fails to obtain and maintain coverage and also fails to provide information regarding such coverage or lack of coverage, a total possible sanction of $200 per child per month may be assessed.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-208 MCA

3. The change in ARM 46.30.801 is necessary to decrease from 30 to 20 days the time within which a child support obligor must provide medical insurance information to the Child Support Enforcement Division (CSED) after a CSED written request. The change will bring this response time in conformity with federal timelines required for other CSED actions. This is necessary to allow medical support enforcement actions to proceed simultaneously with other CSED enforcement actions, to prevent undue confusion to the obligor and to promote agency efficiency.

The change in ARM 46.30.807 is necessary to clarify the CSED's interpretation of penalties which may be assessed pursuant to 40-5-208 MCA. It would clarify that the penalties are assessed per month, per child.

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, Montana 59604-4210, no later than December 27, 1990.

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

Julia E. Rohrer

Director, Social and Rehabilitation Services

Certified to the Secretary of State November 19, 1990.

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

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| In the matter of the amendment of Rule 46.12.3207 pertaining to transfer of resources for medical services | ) ) ) ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.12.3207 PERTAINING TO TRANSFER OF RESOURCES FOR MEDICAL SERVICES |

TO: All Interested Persons

1. On December 19, 1990, at 9:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of Rule 46.12.3207 pertaining to transfer of resources for medical services.

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

46.12.3207 TRANSFER OF RESOURCES Subsections (1) through (1)(c) remain the same.

(d) "Uncompensated value" means the difference between the property's fair market value ~~of property~~ at the time of the transfer less any outstanding encumbrances on the property and ~~minus~~ the fair market value of compensation received ~~by~~ the ~~individual~~ in exchange for the property.

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

(k) "Home" means the client's principal place of residence, adjoining land and outbuildings.

(2) The client's home is:

(a) a countable resource;

(b) will be considered an exempt resource so long as the client or a dependent relative resides in the home and ownership is retained by the client.

Original subsections (2) through (3)(d) remain the same in text but will be renumbered as subsections (3) through (4)(d).

~~(4) For transfers made before July 1, 1988:~~

~~(a) An individual's home will be considered an individual's principal residence and therefore an excluded resource for purposes of subsection (4)(a) through (c) only if the individual, his spouse, or a dependent relative was actually residing in the home at the time of the transfer.~~

~~(b) When an individual or his spouse disposes of non-excluded resources for less than fair market value within 24 months before the month of application or redetermination for medicaid, it is presumed that the transfer was made to establish eligibility unless the individual presents convincing evidence that the disposal was exclusively for some other purpose.~~

~~(c) The uncompensated value of the transferred non-excluded resources shall be counted toward the resource limitation for medicaid eligibility until it is reduced by one or more of the following:~~

~~(i) all or part of the transferred property is returned;~~

~~(ii) documented further consideration so that the individual's total nonexcluded resources are less than the general resource limit;~~

~~(iii) documented household medical expenses incurred beginning with the month of transfer.~~

~~(d) If the reductions referred to in subsection (4)(c) are less than $500 in any month beginning with the month of transfer, the uncompensated value of the transferred non-excluded property shall be reduced by a total of $500 for each of those months.~~

~~(e) When the uncompensated value of the transferred property is less than $500, it shall be counted as a resource for one month.~~

(5) All property transfers made after December 19, 1989, by either the client or his spouse, will be evaluated as if the transfer was made by the client.

Original subsections (5) through (7)(b)(ii)(B) remain the same in text but will be renumbered as subsections (6) through (8)(b)(ii)(B).

(iii) If the property had been retained, the individual's total countable resources would have been below the general resource limit during each of the preceding~~:~~ thirty months.

~~(A) thirty months if the property transfer was made on or after July 1, 1988; or~~

~~(B) twenty four months if the property transfer was made prior to July 1, 1988.~~

Original subsections (7)(b)(iv) through (8) remain the same in text but will be renumbered as (8)(b)(iv) through (9).

AUTH: Sec. 53-2-201 and 53-2-601 MCA
IMP: Sec. 53-2-601 and 53-6-113 MCA

3. This rule change is necessary due to the amendment of the MCCA (1988) by OBRA of 1989. The amendment of ARM 46.12.3207 will prevent a community spouse from transferring property to a third party. The change will also comply with changes in the SSI program regulations which regards the home as a countable resource but "exempts" it so long as the client or dependent relative resides in the home and retains ownership.

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 December 27, 1990.

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

Director, Social and Rehabilitation Services

Certified to the Secretary of State November 19, 1990.

BEFORE THE BOARD OF PHYSICAL THERAPY EXAMINERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

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| In the matter of the amendment of rules pertaining to examinations, fees, temporary licenses, licensure by endorsement, exemptions, foreign trained applicants and lists | NOTICE OF AMENDMENT OF 8.42.402, 8.42.403, 8.42.405, 8.42.406, 8.42.409, 8.42.410 and 8.42.411 |

TO: All Interested Persons:

1. On September 27, 1990, the Board of Physical Therapy Examiners published a notice of public hearing on the amendment of the above-stated rules at page 1810, 1990 Montana Administrative Register, issue number 18. The hearing was held on October 17, 1990, at 1:00, p.m. in the conference room of the Arcade Building, Lower Level, 111 N. Jackson, Helena, Montana.

2. The Board has amended ARM 8.42.402, 8.42.403, 8.42.405, 8.42.406, 8.42.409, 8.42.410, and 8.42.411 exactly as proposed.

3. The Board has thoroughly considered all oral and written comments received. Those comments and the Board's responses thereto are as follows:

COMMENT: Regarding the amendment to 8.42.402 to contract with Assessment Systems, Inc., as a testing agency, Jerome Connolly, P.T., and Gary Lusin, P.T., commented by written statements that they believe the passing score should be determined by the Board, not by the out-of-state testing agency.

RESPONSE: The Board's position is that it will be setting the passing scores required of examination candidates. Initially, the Board will determine a score before the date of examination that it feels reflects a knowledge of physical therapy and will communicate to examination candidates what that required score is. It is the goal of the Board to eventually determine what the range of scores on the ASI exam is and set the required score for successful completion of the examination by rule.

COMMENT: Kirk Hanson, P.T., Mr. Connolly, and Mr. Lusin all commented on the amendment to 8.42.405 regarding temporary licenses, which in part, deleted a rule that limited the number of examinations a candidate could take to three. They urged that the limit of three unsuccessful attempts at the licensing examination should be retained in any new rules.

RESPONSE: The Board noted that pursuant to section 37-11-304(3), MCA, any candidate failing to pass the examination is entitled to a second examination within six months with no limitation on the number of repeats. Furthermore, section 37-11-201, MCA, which defines the Board's rulemaking authority does not provide it with the power to limit the number of

times a candidate takes the examination. The Board therefore concluded it had no authority to limit by rule the number of times a candidate may take the examination.

COMMENT: As regards 8.42.406, licensure by endorsement, Mr. Connolly suggested that the lack of a set and definite score incorporated into the rule penalizes applicants for endorsement since they will not know what score is expected of them.

RESPONSE: The Board feels it is only fair and equitable to hold the candidates for licensure by endorsement to the same passing scores required of those candidates who took the examination on that date in Montana. The Board felt that this system posed no great burden on candidates for licensure by endorsement since the required score could be obtained from the Board office.

COMMENT: Connie Grenz, a member of the Board of Occupational Therapists, testified at the public hearing that the proposed amendment to 8.42.409 requiring "supervision" and "periodic checks" by a physical therapist of a physical therapy aide's implementation of a maintenance plan at least once a month does not appear to be adequate to implement the maintenance plan especially considering that the aides are receiving on-the-job training and should not be allowed so much unsupervised time in which to work with the various modalities on patients. Mr. Hanson commented in his written statement that a maintenance plan is not of such a skill level as to require the constant monitoring of the assistant or aide and modalities are not used in maintenance plans. Mr. Lusin stated that supervision of programs and on-site management needs to be conducted but that in some instances review of such programs on a monthly basis might be appropriate while in other instances review need not be done on such a regular basis. He requested language be adopted that would require review of maintenance plans once every three months but would allow more frequent review as needed.

RESPONSE: The Board decided that Ms. Grenz did not understand that a maintenance plan does not include the use of modalities and is of not such a delicate skill level as to require the constant on-site supervision of a physical therapist. The Board also felt that Mr. Lusin's suggestion that reviews be mandated no more often than once every three months was inappropriate since the circumstances and conditions underlying a patient's condition can change drastically in that time period. Because of these reasons, the Board opted to adopt the rule revision as proposed.

4. No other comments or testimony were received.

BOARD OF PHYSICAL THERAPY
EXAMINERS
BARBARA M. REED, P.T., CHAIRMAN

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, November 19, 1990.

BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of proposed amendments of rules 8.86.501, 8.86.502, 8.86.504, 8.86.505 and 8.86.514 as they relate to the statewide pooling and quota plan | ) ) ) ) ) | NOTICE OF AMENDMENT OF RULES 8.86.501, 8.6.502, 8.86.504, 8.86.505 AND 8.86.514<br><br>QUOTA AND POOLING RULES<br><br>DOCKET #2-90 |

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

1. On August 20, 1990, the Montana Board of Milk Control published notice of proposed amendments of rules 8.86.501 (1)(a)(iv), 8.86.502(9), 8.86.504(1)(j), 8.86.505(1)(b)-(g), and 8.86.514(c) as it relates to the statewide pool and quota plan. Notice was published at page 1656 of the 1990 Montana Administrative Register, issue no. 16 as MAR NOTICE 8-86-38.

2. The board has amended the rule exactly as originally proposed except for the following change: (new matter underlined, deleted matter interlined)

"8.86.501 QUOTA DEFINITIONS

(1)-(a)(iii) remains the same.

(iv) same as proposed rule.

(v) was supplying milk for the Safeway bottling arrangement at the time this plan became effective.

(b)-(h) remains the same."

Note: The Board of Milk Control and the Montana Dairyman's Association proposed to add a new subsection (iv) in paragraph 1 of this rule. Both subsections were adopted, so (iv) under the board's proposal was renumbered as (v).

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

"8.86.502 INITIAL DETERMINATION AND/OR LOSS OF QUOTA

(1)-(8) remains the same.

(9) A Montana producer (licensed or unlicensed by the Montana milk control bureau) who was actively producing and selling GRADE A milk to a plant located outside Montana on June 1, 1990, but who has begun or will begin selling all his milk to a Montana pool plant, may become an eligible producer and be assigned quota under this plan. To be assigned quota, such producer shall apply to the milk control bureau within 90 days after the effective date of this paragraph, and be a licensed producer in Montana at the time he makes such application. The quota to be assigned such producer shall be computed and

governed by the preceding paragraphs of this rule, except that each producer's quota shall be limited to the lowest percentage previously assigned to eligible producers under paragraph (4) after this plan initially became effective. If the Montana state prison applies for and is assigned quota pursuant to this paragraph, thereafter the class I and II utilization of the prison shall be included in the computation of pool utilization under ARM 8.86.511 through ARM 8.86.515."

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

"8.86.504 TRANSFER OF QUOTA

(1)-(a)(i) remains the same.

(j) same as proposed rule."

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

"8.86.505 READJUSTMENT AND MISCELLANEOUS QUOTA RULES

(1)(a) remains the same.

(b) NO QUOTA WILL BE READJUSTED BEFORE JANUARY 1990, PROVIDED THAT POOL PLANTS HAVE SUFFICIENT MILK DURING SEPTEMBER, OCTOBER, NOVEMBER AND DECEMBER OF 1989 AND 1990, NO QUOTA WILL BE READJUSTED BEFORE JANUARY 1991.

(c)~~(b)~~ No additional quota will be issued until there is less than twelve percent (12%) in class III. If the quota to be assigned is less than five-tenths of one percent (0.5%) of the quota held by all eligible producers, the entire quota pounds to be assigned shall be carried over until the following year and combined with any other quota for assignment at that time.

(d)~~(c)~~ On or before the first day of April each year where applicable, the administrator shall calculate each eligible producer's additional quota to be assigned in accordance with the following computations:

(i)-(vi) remains the same.

(e)~~(d)~~ If the established quota contains more surplus than can be effectively handled, any affected party may petition the milk control board for a hearing.

(f)~~(e)~~ Each eligible producer will have six (6) months after this plan's effective date to reduce his production to his assigned quota. Following the initial six (6) months, any freight costs and loss on the movement and sale of surplus milk over quota will be charged back to those eligible producers who produced above their quota. The proceeds for the sale of surplus milk above quota, less transportation, will be paid to the eligible producers who ship in excess of their quota.

(g) same as proposed rule."

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

"8.86.514 PROCEDURES FOR POOLING OF RETURNS FROM POOL MILK

(1)(a)-(b) remains the same.

(c) same as proposed rule.

(d) remains the same."

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

3. Principal reasons for the adoption of the amendments to the rule were as follows:

(a) The Foremost Dairy (formally Carnation) producers were denied the opportunity to participate in the initial proceedings for a statewide pool and they were entitled to that opportunity.

(b) The majority of the Foremost producers have previously shipped their milk to a Montana market for at least two generations and lost that market through no fault of their own because of plant closures.

(c) Contracts, which producers were required to sign with Foremost Dairy, made it difficult for producers to secure a Montana market for their milk.

(d) Foremost producers at the present time haven't any options but to become part of the Montana market. Joining under the new producer provisions in the plan doesn't allow for any viability and the results would be absolutely disastrous.

(e) All of the evidence and most of the testimony presented supported the contentions that the Foremost producers could not survive under the new producer provisions of the plan.

(f) Testimony submitted and evidence presented revealed that Foremost producers needed 78% of their production history as quota to attain a minimum level of viability and no way assures their survival in the future.

4. Principal reasons for denying the amendments to the rule were as follows:

(a) All of the other licensed Montana producers brought a market with them and the Foremost producers did not.

(b) There are more producers out there wanting entry into the pool. If any provisions are made for the Foremost producers, provisions will have to be made for others which will jeopardize the statewide pool and quota plan.

(c) Allowing new producers to come into the pool without bringing a market would cause an economic hardship on the present producers in the state of Montana because they have already lost a portion of their market to become a member of this pool and producer prices are currently dropping.

(d) No other business requires persons to give up a portion of their business to new businesses and neither should the existing pool producers.

(e) Petition should not be granted because it will create too much additional surplus. Other producers were denied a three year production history in the previous hearing because

it created too much surplus milk. Too much surplus creates instability in the market. This proposal should be treated similary.

(f) Foremost producers should not be given quota when there are some producers who have had to go out and purchase all their quota to become part of the pool.

5. The principle reasons for denying the objections were as follows:

(a) Persons having to go out and purchase their quota were not similarly situated to the Foremost producers and thus this does not represent unequal treatment.

(b) The additional surplus created by the addition of the Foremost producers is not relevant to the objections stated because they should have been part of the pool to begin with and they are starting at the lowest level of any new person entering the pool. Their entry is necessary to preserve the stability in the marketplace.

(c) Testimony at the hearing revealed the Foremost producers did have a market at one time but that market had been absorbed by the Meadow Gold plant in Missoula.

(d) Testimony revealed there are no other producers in Montana that are similarly situated to the Foremost producers, therefore the threat asserted by the opponents is not valid.

(e) Rebuttal indicated producer price fluctuations from month to month are greater than the reduction in blend price that will be caused by the entry of the Foremost producers into the pool. Therefore, this proposal should not create any hardship on the producers in the pool.

(f) The contention that other businesses are not required to give up a portion of their business to new businesses entering the market is not relevant because it is free enterprise and they are free to obtain a portion of anyone's market anytime they are able to. Milk is unique in that quota is created by laws and rules and requested by the very persons who hold the quota which guarantees no one else can infringe on their market.

MONTANA BOARD OF MILK CONTROL
MILTON J. OLSEN, Chairman

BY: _____
Andy J. Poole, Deputy Director
Department of Commerce

Certified to the Secretary of State November 19, 1990.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

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| In the matter of the amendment of Rules 23.3.504 and 23.3.505, licensing operators of commercial motor vehicles. | ) ) ) ) | NOTICE OF THE AMENDMENT OF RULES 23.3.504 and 23.3.505, LICENSING OPERATORS OF COMMERCIAL MOTOR VEHICLES. |

TO: All Interested Persons.

1. On September 27, 1990, the department of justice published notice of a proposed amendment of rules 23.3.504 and 23.3.505 concerning the licensing of operators of commercial motor vehicles at page 1819 of the 1990 Montana Administrative Register, issue number 18.

2. The agency has amended the rule as proposed.

3. No comments or testimony were received.

By: Judy Browning
JUDY BROWNING
Deputy Attorney General

Certified to the Secretary of State November 19, 1990.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

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| In the matter of the amendment of Rule 23.5.102, motor carrier safety regulations. | ) ) ) ) | NOTICE OF THE AMENDMENT OF RULE 23.5.102, MOTOR CARRIER SAFETY REGULATIONS. |

TO: All Interested Persons.

1. On September 27, 1990, the department of justice published notice of a proposed amendment of rule 23.5.102 concerning motor carrier safety regulations at page 1817 of the 1990 Montana Administrative Register, issue number 18.

2. The agency has amended the rule as proposed.

3. Oral statements concerning the proposed amendment were made by Mr. Pat Keim representing Burlington Northern Railroad and Mr. Richard Flink, the state coordinator for Operation Lifesaver. Both individuals stated their concern with the exceptions created by the proposed amendment which apply to vehicles engaged only in intrastate commerce. The exceptions created are necessary because of conflicts between the provisions of state law and the provisions of the adopted federal rules. Section 2-4-305(6)(a), MCA, requires that any rule be consistent with state law. Because state law differs from the provisions of the adopted federal rules, any rule not creating these exceptions would be unlawful. The exceptions for vehicles engaged only in intrastate commerce were, therefore, adopted as proposed.

By: Judy Browning
JUDY BROWNING
Deputy Attorney General

Certified to the Secretary of State November 19, 1990.

BEFORE THE BOARD OF LAND COMMISSIONERS
AND THE DEPARTMENT OF STATE LANDS
OF THE STATE OF MONTANA

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| In the matter of the ADOPTION OF A RULE PROHIBITING EXPORT OF LOGS HARVESTED FROM STATE LANDS AND REQUIRING PURCHASERS OF STATE TIMBER TO ENTER INTO NONEXPORT AGREEMENTS IMPLEMENTING THE FOREST RESOURCES CONSERVATION AND SHORTAGE RELIEF ACT OF 1990 | NOTICE OF ADOPTION OF A NEW RULE (26.6.411) REQUIRING PURCHASERS OF STATE TIMBER TO ENTER INTO NONEXPORT AGREEMENTS |

TO: All Interested Persons

1. On October 11, 1990, the Board of Land Commissioners and the Department of State Lands published notice of a proposed rule concerning restrictions on the export of unprocessed timber originating from lands owned by the state of Montana at page 1875 of the 1990 Montana Administrative Register, issue number 19.

2. The agency has adopted the rule as proposed.

3. No comments or testimony were received.

4. The authority for the rule is Section 77-5-201, MCA and the rule implements that section and the federal Forest Resources Conservation and Shortage Relief Act of 1990 (part of Public Law 101-382, the Customs and Trade Act of 1990 which may be found in the Congressional Record for July 30, 1990 at pages H5920-24).

Dennis D. Casey, Commissioner
Department of State Lands

Certified to the Secretary of State on November 19, 1990.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

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| In the matter of the amendment of ARM 1.2.419 regarding scheduled dates for the Montana Administrative Register | ) ) ) ) | NOTICE OF AMENDMENT OF ARM 1.2.419 FILING, COMPILING, PRINTER PICKUP AND PUBLICATION OF THE MONTANA ADMINISTRATIVE REGISTER |

TO: All Interested Persons.

1. On October 11, 1990, the office of the Secretary of State published a notice of proposed amendment to ARM 1.2.419 regarding the scheduled dates for the Montana Administrative Register at page 1881 of the 1990 Montana Administrative Register, Issue number 19.

2. No comments or testimony were received.

3. The rule is adopted as proposed.

MIKE COONEY
Secretary of State

Dated this 19th day of November, 1990.

VOLUME NO. 43 OPINION NO. 74

COUNTIES - County road fund and Initiative 105;
TAXATION AND REVENUE - County road fund and Initiative 105;
LOCAL GOVERNMENT - "County rural property" not a "taxing unit";
MONTANA CODE ANNOTATED - Sections 7-14-2501, 7-14-2502, 15-1-101(2), 15-10-402, 15-10-412(7)(a);
MONTANA LAWS OF 1989 - Chapter 560, section 1;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No 68 (1990), 42 Op. Att'y Gen. No. 118 (1988), 42 Op. Att'y Gen. No. 80 (1988).

HELD: 1. The increases in the number of mills allowed for county road and bridge construction and maintenance in sections 7-14-2501 and 7-14-2502, MCA, are not exceptions to the property tax freeze in I-105, as codified in section 15-10-402, MCA.

2. "County rural property" is not a "taxing unit" as defined in section 15-1-101(2), MCA.

November 5, 1990

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

Dear Mr. Paul:

You have requested an opinion on the following questions:

> May the county, under sections 7-14-2501 and 7-14-2502, MCA, increase the mill levy for construction, maintenance, or improvement of public highways or bridges above the 1986 level imposed by Initiative 105 (§ 15-10-402, MCA)? If not, may the county rural property nevertheless be considered a taxing district?

Section 7-14-2501, MCA, provides in pertinent part:

> **General road tax authorized.** (1) To raise revenue for the construction, maintenance, or improvement of public highways, each board of county commissioners may levy a general tax upon the taxable property in the county of not more than 20 mills, except in fourth, fifth, sixth, and seventh class counties, which may levy not more than 23 mills, payable to the county treasurer. The tax from freeholders shall be collected the same as other taxes, and from nonfeeholders, as the board may direct.

> (2) This section shall not apply to incorporated cities and towns which by ordinance provide for the levy of a like tax for road, street, or alley purposes.

Section 7-14 2502, MCA, provides in pertinent part:

> **Special bridge tax authorized -- combined ferry and bridge fund.** (1) Each board may levy a special tax not to exceed 8 mills on all taxable property in the county for the purpose of constructing, maintaining, and repairing free public bridges, which includes those bridges within the municipalities.

In 1989, the Montana Legislature amended this section, substituting "20 mills" for "15 mills" and "23 mills" for "18 mills." In section 7-14-2502, MCA, the number of mills allowable for county bridge construction, repair, and maintenance was also increased from 4 mills to 8 mills. You suggest that these sections are not limited by the codification of Initiative 105 (I-105), § 15-10-402, MCA, which imposes a freeze on property taxes at 1986 levels. You reason that sections 7-14-2501 and 7-14-2502, MCA, are specific statutes allowing increases in mills while section 15-10-402, MCA, is only a general restriction. You would apply the rule of statutory construction that the specific statute controls the general one. § 1-2-102, MCA.

By increasing the number of mills available for county road and bridge construction, the Legislature did not necessarily authorize an increase in property taxes. The result of the legislation could also be that the Legislature envisioned that the county road or bridge funds would merely receive a larger piece of the property tax pie. Within the taxing unit, one levy may be increased while a similar levy is decreased in order to remain within the I-105 restrictions. Such budgeting measures were expressly recognized in 42 Op. Att'y Gen. No. 118 at 449 (1988). A review of the legislative history of sections 7-14-2501 and 7-14-2502, MCA, supports this interpretation of the millage increases.

The millage increase in section 7-14-2501, MCA, was adopted as Senate Bill 77 (SB 77), Montana Laws of 1989, chapter 560, section 1. In considering SB 77, the Senate Local Government Committee directly addressed the question of whether an increase in the number of mills would affect the I-105 limitation. Gordon Morris, the executive director of the Montana Association of Counties and a proponent of the bill, stated that the bill would "enable county commissioners to shift budget amounts to areas of road need." Minutes of Senate Local Government Committee, January 12, 1989, at 2. The committee minutes further reflect:

> Senator Crippen asked Gordon Morris to explain how this bill relates to I 105 and SB 71 [the legislative clarification of I-105]. Mr. Morris responded that the only way a levy can be increased within the current statutory limitation would be offsetting that increase with a decrease somewhere else.

Id. Mr. Morris made a similar statement before the House Local Government Committee: "I-105 is in place so taxes are frozen and this [SB 77] does not represent an automatic tax increase but 'like levies' would have to be cut to remain within the guidelines of I-105." Minutes of House Committee on Local Government, March 2, 1989, at 6. The fiscal note on SB 77 under the heading of "TECHNICAL OR MECHANICAL DEFECTS OF [sic] CONFLICTS WITH EXISTING LEGISLATION" cautioned:

> Section[] 15-10-402, MCA, and temporary Section 15-10-412, MCA, (Terminates December 31, 1989) freeze county mill levies at their 1986 levels unless county taxable valuation decreases by 5% or more from the previous tax year. Counties experiencing static or only slightly decreasing taxable valuations would therefore have to reduce other county levies in order to take advantage of the provision of SB77. [Emphasis added.]

Fiscal note, SB 77 at 3.

The mill increase in section 7-14-2502, MCA, for the county bridge fund was similarly not intended as an exception to I-105. In addressing the House Committee on Highways and Transportation, Gordon Morris stated that "this [the millage increase] is not to be assumed as a personal property tax increase, but it does increase the statutory authority." Minutes of Hearing on House Bill 212, House Committee on Highways and Transportation, January 24, 1989, at 2. In the Senate Taxation Committee, Mr. Morris again pointed out that "under the provisions of I 105 language in the statutes, this would not be an automatic mill levy increase, rather it would be implemented by a reduction of millage in other areas of the county budget." Minutes of Hearing on House Bill 212, Senate Taxation Committee, March 1, 1989, at 3.

From the legislative history, it is apparent that the Legislature did not intend to circumvent or supersede the property tax freeze by increasing the number of mills available for the county road and bridge funds. Rather, the Legislature recognized that the increased millage would have to be offset by a decrease of mills in another levy in order to operate within the constraints of I-105.

You next ask whether rural county property can be considered a separate "taxing district" for purposes of calculating whether there has been a 5 percent decrease in property valuation under

section 15-10-412(7)(a), MCA. Under this subsection, a tax higher than the 1986 tax may be imposed if the "taxing unit's taxable valuation decreases by 5% or more from the 1986 tax year." You indicate that the taxable valuation of rural county property has decreased by more than the requisite 5 percent, but there has not been more than a 5 percent decrease in taxable valuation county-wide.

There is no question that the county is a "taxing unit." Section 15-1-101(2), MCA, defines the phrase "taxing unit" as including

> a county, city, incorporated town, township, school district, irrigation district, drainage district, or any person, persons, or organized body authorized by law to establish tax levies for the purpose of raising public revenue.

You suggest, however, that the "county rural property" can be considered a "taxing unit." In order to be a taxing unit, the county rural property must be an "organized body authorized by law to establish tax levies." "County rural property" is not such an "organized body." The county, not "county rural property," is authorized to levy the taxes upon rural property under section 7-14-2501, MCA.

Refuse disposal districts and rural fire districts operated by the county have not been considered "taxing units" because they do not have an independent governing body separate from the county commissioners. In 42 Op. Att'y Gen. No. 80 at 315 (1988), the following reasoning was used:

> 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.

See also 43 Op. Att'y Gen. No. 68 (1990) at 3 in which a refuse disposal district was not considered a "special taxing district" because it has no governing body independent of the county commissioners.

While certain levies may only apply to county rural property, such as the county road tax in section 7-14-2501, MCA, this characteristic alone does not mean that the county rural

property is a "taxing unit." "County rural property" is not a separate entity. It does not have a governing body separate from or independent of the board of county commissioners. As such, it cannot be considered a "taxing unit."

THEREFORE, IT IS MY OPINION:

1. The increases in the number of mills allowed for county road and bridge construction and maintenance in sections 7-14-2501 and 7-14-2502, MCA, are not exceptions to the property tax freeze in I-105, as codified in section 15-10-402, MCA.

2. "County rural property" is not a "taxing unit" as defined in section 15-1-101(2), MCA.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 75

CLERKS - Clerks of court and county clerks, disposition of fees for providing abstracts;
COUNTY OFFICERS AND EMPLOYEES - Clerks of court and county clerks, disposition of fees for providing abstracts;
COURTS, DISTRICT - Disposition by clerk of fees for abstracts;
FEES - Disposition by clerk of court and county clerk of fees for providing abstracts;
MONTANA CODE ANNOTATED - Sections 2-16-406(1), 3-2-404, 3-5-515, 7-4-2403, 7-4-2511, 7-4-2631, 25-1-201.

HELD: The clerk of the district court and the county clerk, as well as their deputies, may not retain for their personal use compensation paid to them by title companies, credit bureaus, banks, realtors, and others for the preparation on a regular basis of abstracts of instruments recorded and filed in their respective offices. Such services are "official services" provided by the officers and the fees they receive for those services must be paid to the county general fund, the district court fund, or the state, as provided by law.

November 8, 1990

Robert Slomski
Sanders County Attorney
P.O. Box 519
Thompson Falls MT 59873

Dear Mr. Slomski:

You have requested my opinion on the following questions:

1. May the clerk of the district court and the county clerk, as well as their deputies, retain for their personal use compensation paid to them by title companies, credit bureaus, banks, realtors, and others for the preparation on a regular basis of abstracts of instruments recorded and filed in their respective offices, or are those officials required to submit any such compensation to the county treasurer?

2. If the above-named officials may receive such compensation for their personal use, may the board of county commissioners adopt a policy or resolution requiring the county clerk and clerk of the district court to pay any such compensation over to the county treasurer, or

prohibiting those officials from receiving such outside compensation?

You have informed me that the Sanders County clerk of district court and the county clerk and her deputies have, for some time, prepared abstracts of documents recorded and filed in their offices for the use of private title companies, credit bureaus, banks, realtors, and other interested parties. These abstracts are prepared during office hours, as time permits. For preparing the abstracts, these county employees receive personal compensation from the requesting private entities on a regular weekly or biweekly basis.

Section 7-4-2511(1), MCA, states:

> Each salaried county officer must charge and collect for the use of his county and pay into the county treasury ... all fees now or hereafter allowed by law, paid or chargeable in all cases[.]

Subsection (2) of that section continues:

> No salaried county officer may receive for his own use any fees, penalties, or emoluments of any kind, except the salary as provided by law, for any official service rendered by him. Unless otherwise provided, all fees, penalties, and emoluments of every kind collected by a salaried county officer are for the sole use of the county and must be accounted for and paid to the county treasurer as provided by subsection (1) and credited to the general fund of the county.

Montana law also provides that "[w]henever the official name of any principal officer is used in any law conferring power or imposing duties or liabilities, it includes his deputies." § 7-4-2403, MCA. The fees collected by the county clerk and deputy clerks are for the sole use of the county. § 7-4-2631, MCA. The fees collected by the clerk of the district court are credited to the district court fund or the county general fund, or remitted to the state. §§ 3-5-515, 25-1-201, MCA.

The first issue to be resolved is whether the preparation of abstracts is an "official service" of the clerk of district court and the county clerk. If preparation of the abstracts is an official service, the fees should not be personally retained by the clerks or their deputies. In my opinion, preparation of the abstracts is an official service of the respective offices. The fees county clerks are statutorily required to charge for their respective counties include a fee "for searching an index record of files of the office for each year when required in abstracting or otherwise, 50 cents." § 7-4-2631(1)(g), MCA. This language expressly includes the type of searches described in your inquiry as being made by the Sanders County clerk and deputy clerks. The fees to be collected by the clerk of the

district court include a fee "for search of court records, 50 cents for each year searched, not to exceed a total of $25." § 25-1-201(1)(g), MCA.

In a case dealing with nearly the same question, the Supreme Court of Minnesota held nearly 90 years ago that such actions were within the scope and purview of the official employment of the clerk of the district court. Board of Commissioners of Hennepin County v. Dickey, 90 N.W. 775 (Minn. 1902). In Hennepin the clerk of the district court had previously been paid pursuant to a special fee schedule. In 1891, the clerk was given a fixed salary in lieu of all the fees he previously had been allowed to collect for his personal use. He was then required to turn over to the county treasury all fees collected by him in his official capacity. The Minnesota Supreme Court held that the services of the clerk involved in providing abstracts were official in their nature and scope and required payment of fees for abstracts to the county, stating:

> A charge is authorized "for searching the records and files *** if a copy is not required." ... We are unable to give force to the suggestion that the transcription from legal documents or from the files as made up from time to time did not require a search, nor can we force a distinction between such searches and the examination required to make the statements to the abstract men and agencies upon the theory that a search involves the looking for something that was not previously known, but would have to be found. ... The word "search" as thus used in the schedule should be treated as the equivalent of any examination the clerk must make to give an accurate report thereof; and to say that such examination is not a search within the intent of the fee bill is but the merest quibble.

90 N.W. at 777-78.

In another case involving fees, Strafford County v. Holmes, 376 A.2d 126 (N.H. 1977), the register of deeds, for a period of years, personally received money from a bank for updating titles to real estate in which the bank was interested from the time of a prior search of title to the closing of the transaction involved. Effective January 1, 1974, the statute regarding the collection and disposal of fees collected by the register was amended to require the register to pay over to the county treasurer all charges paid to him for services arising out of or because of his office as well as all fees received by him. 376 A.2d at 129. The Supreme Court of New Hampshire stated:

> We are of the opinion that the addition of "charges" to "fees", previously required to be paid to the county treasurer under RSA 478:18-a, manifests an intent on the part of the legislature to broaden the

type of remuneration which the register is to turn over to the county.

376 A.2d at 129-30. The New Hampshire court required the register to pay to the county treasurer all fees received by the register for abstracts since the change in the law. Similarly, as already noted, under Montana law, unless otherwise provided, all fees and emoluments of every kind for any official service rendered are for the sole use of the county and must be accounted for and paid to the county treasurer.[1] This language indicates a legislative intent to broadly construe the type of remuneration which the county officers are obliged to remit to the county or other government fund.

Two cases in Montana have addressed the proposition that the clerks should be able to privately retain the money they receive for preparing abstracts. However, the cases are not persuasive in this instance. The first of those cases, Anderson v. Hinman, 138 Mont. 397, 357 P.2d 895 (1960), concerned the disposition of fees collected by the clerk of the Supreme Court, rather than a district court clerk or county clerk. In Hinman, the Supreme Court held that the clerk of the Supreme Court was not required to account to the state for charges made for voluntarily furnishing uncertified and unauthenticated copies of newly issued Supreme Court opinions to West Publishing Company. The statutes regarding disposition of fees collected by the clerk of the Supreme Court do not contain the language in section 7-4-2511(2), MCA, regarding county officers requiring "all fees ... and emoluments of every kind" to be paid to the government. See §§ 2-16-406(1), 3-2-404, MCA. Hinman also concerned fees received for providing a function which the Court held was not required by any law and could have been as appropriately performed by any other person. 357 P.2d at 902-03.

The second Montana case concerning this issue is Platz v. Hamilton, 201 Mont. 184, 653 P.2d 144 (1982). In Platz, the Montana Supreme Court found that the execution of passport applications, a function of the clerk of district court authorized by federal law, was not an official duty imposed upon a clerk of district court by state statute. The Court held that, since the Legislature had not enacted a specific statute with regard to the disposition of the passport fees, the clerk could retain the fees for her personal use and was not required to remand them to the county general fund. In my opinion, the situation currently at issue is distinguishable from the Platz case because the state statutes set forth a fee for search of the court records (§ 25-1-201(1)(g), MCA), in the case of the clerk of district court, and a fee for searches when required in abstracting (§ 7-4-2631(1)(g), MCA) in the case of the county

[1]As noted above, the law does provide otherwise regarding disposal of funds collected by the clerk of district court. § 25-1-201, MCA.

clerk. I conclude that such searches of records and abstracts by the clerks are official services of the offices they hold and the clerks may not retain for their personal use the compensation they receive for those services. I therefore need not address your second question.

THEREFORE, IT IS MY OPINION:

> The clerk of the district court and the county clerk, as well as their deputies, may not retain for their personal use compensation paid to them by title companies, credit bureaus, banks, realtors, and others for the preparation on a regular basis of abstracts of instruments recorded and filed in their respective offices. Such services are "official services" provided by the officers and the fees they receive for those services must be paid to the county general fund, the district court fund, or the state, as provided by law.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 76

BANKS AND BANKING - Activities of state chartered banks;
COMMERCE, DEPARTMENT OF - Consent to activities of state chartered banks;
MONTANA CODE ANNOTATED - Sections 32-1-105, 32-1-362;
OPINIONS OF THE ATTORNEY GENERAL - 16 Op. Att'y Gen. No. 191 (1935).

HELD: Pursuant to section 32-1-362, MCA, with the consent of the Department of Commerce, a state chartered bank may directly market fixed annuities, provided that national banks are permitted to do so and that no state statute expressly prohibits such activity.

November 16, 1990

Annie M. Bartos
Chief Legal Counsel
Department of Commerce
1424 Ninth Avenue
Helena MT 59620

Dear Ms. Bartos:

You have requested my opinion concerning whether, pursuant to section 32-1-362, MCA, a state chartered bank may directly market fixed annuities provided that this activity is sanctioned for national banks by the Office of the Comptroller of the Currency (OCC). On February 12, 1990, the Comptroller issued Interpretive Letter No. 499, which determined that national banks may broker fixed annuities. The letter opines that annuities are not insurance, but rather are financial investment instruments and are a specialized product which national banks may sell as agents, so long as certain warnings are given to consumers addressing the fact that the product is not FDIC insured. The OCC ruling does not directly control state banks, but is controlling for national banks unless overturned by a court. Your question is whether state law permits state banks to act as agents in selling fixed annuities. My conclusion is that current state law permits this activity if the Department of Commerce (department) gives its consent.

Section 32-1-362(1), MCA, provides:

> With the consent of the department, every bank organized under the laws of the state shall have power to and may engage in any activity or business in which such bank could engage if it were operating as a national bank. The department may prescribe, amend, and repeal regulations affecting and controlling the exercise of the powers granted by this section,

> provided that, subject to subsection (2), such regulations and powers shall not apply to activities which are expressly prohibited or limited by the statutes of the state. [Emphasis added.]

A plain reading of this statute reveals that state banks are granted the power to engage in any activity in which national banks are permitted to engage, subject only to an express prohibition or express limitation that may be imposed by the Montana statutes or the department. The question becomes whether any Montana statute expressly prohibits or limits the brokering of fixed annuities.[1]

It is your opinion that section 32-1-105, MCA, exhaustively and exclusively lists the activities in which state banks are permitted to engage. Section 32-1-105, MCA, provides as follows:

> The term "commercial bank" means any bank authorized by law to:
>
> (1) receive deposits of money;
>
> (2) deal in commercial paper or make loans thereon;
>
> (3) lend money on real or personal property;
>
> (4) sell credit life and disability insurance on loans to its borrowers;
>
> (5) discount bills, notes, or other commercial papers; and
>
> (6) buy and sell securities, gold and silver bullion, foreign coins, or bills of exchange.

The selling of fixed annuities is not listed in this section. An opinion of one of my predecessors stated: "[S]ince a bank is created by law for certain purposes, the extent of its powers is measured not by what is prohibited but by what is granted by law." 16 Op. Att'y. Gen. No. 191 at 197 (1935). This holding, indeed, follows the general rule that state banks have only those powers which are expressly conferred by statute or such as may be fairly implied from those expressly given. Washington

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[1]It should be noted that since the OCC and other authorities have held that annuities are not insurance, see 1 J. Appelman, Insurance Law and Practice § 74 (1981), nothing in the Montana insurance statutes would directly prohibit the sale of fixed annuities by the employees of a bank. However, this opinion does not reach the question of whether the bank or its employees must be licensed under Title 33, chapter 17, MCA, in order to sell fixed annuities.

Bankers Ass'n v. Washington Mutual Savings Bank, 598 P.2d 719 (Wash. 1979); Indep. Ins. Agents of Georgia v. Dept. of Banking & Finance of Georgia, 285 S.E.2d 535 (Ga. 1982); Iowa Credit Union League v. Iowa Dept. of Banking, 268 N.W.2d 165 (Iowa 1978); Security Trust & Savings Bank v. Marion County Banking Co., 253 So. 2d 17 (Ala. 1971).

However, the opinion was issued prior to the 1973 enactment of section 32-1-362, MCA, which operates as an express grant of those powers possessed by national banks, to the extent such powers are not expressly prohibited or limited by state statute and if the department gives consent. This section effects a reversal of the general rule that banks "cannot operate on the basis that they can proceed with a new function unless it is forbidden; they must show that it is within the intendment of their statute--either granted by the statute in express terms or necessary or requisite to a granted power." Iowa Credit Union League, supra, 268 N.W.2d at 171. Now, so long as the Department of Commerce gives its consent, state banks are granted the power to engage in any activity permitted national banks.

It has been suggested that the list of activities in section 32-1-105, MCA, according to the maxim expressio unius est exclusio alterius, does pose a limitation on permissible activities. However, to follow this interpretation would be to render section 32-1-362, MCA, meaningless. Under this interpretation, section 32-1-362, MCA, would say that all powers granted to national banks are given to state banks so long as they are already enumerated by section 32-1-105, MCA. It is presumed that the Legislature does not pass meaningless legislation, and statutes relating to the same subject must be harmonized with effect given to each. Crist v. Segna, 191 Mont. 210, 622 P.2d 1028 (1981). In construing a statute, it is presumed that the Legislature intended to make some change in existing law. Cantwell v. Geiger, 228 Mont. 330, 742 P.2d 468 (1987); Foster v. Kovich, 207 Mont. 139, 673 P.2d 1239 (1983).

These principles compel the conclusion that the Legislature intended to place state banks on a par with national banks, in the absence of an express prohibition on an activity and so long as the Department of Commerce gives its consent with regard to each activity.

THEREFORE, IT IS MY OPINION:

Pursuant to section 32-1-362, MCA, with the consent of the Department of Commerce, a state chartered bank may directly market fixed annuities, provided that national banks are

permitted to do so and that no state statute expressly prohibits such activity.

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 Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 1990. This table includes those rules adopted during the period October 1, 1990 through December 31, 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 September 30, 1990, this table and the table of contents of this issue of the MAR.

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