MONTANA ADMINISTRATIVE REGISTER

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

In the matter of the amendment of Rule 2.13.102 pertaining to the use of the state's telecommunication systems	)))))	NOTICE OF PROPOSED AMENDMENT OF RULE 2.13.102 PERTAINING TO USE OF THE STATE TELECOMMUNICATION SYSTEMS NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On May 18, 1990, the Department of Administration intends to amend Administrative Rule 2.13.102 pertaining to use of the state's telecommunication systems.

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

2.13.102 USE OF THE STATE'S TELECOMMUNICATION SYSTEMS

(1) The facilities of the state's telecommunications systems are provided principally for the conduct of state business. In addition to state business, the state's telecommunications systems may be used by: (a) local political subdivisions of the state, for the conduct of their business; (b) residents in housing of the Montana University System, for their calls originating on the university system campuses; and (c) state employees and officials for local and long distance calls to latch-key children, teachers, doctors, day-care centers and baby sitters, to family members to inform them of unexpected schedule changes, and for other essential personal business. The use of the state's telecommunication systems for essential personal business must be kept to a minimum, and not interfere with the conduct of state business. Essential personal long distance calls must be either collect, charged to a third party non-state number, or charged to a personal credit card.

AUTH: Sec. 2-17-302 MCA
IMP: Sec. 2-17-302 MCA

3. The word "principally" is added to make explicit that the department of administration is authorized to provide access to additional user groups. In 2-17-302 MCA is language that the department of administration shall provide a means whereby political subdivisions of the state may utilize the state telecommunication systems. Further, in serving the units of the university system, the student residence facilities, which are currently linked to the state telecommunications systems for local calling, will be used by resident students, faculty and administration for long distance calling. This will have the effect of lowering costs for such calling for the students, and for all users of the systems through improved economies of scale.

4. Interested parties may submit in writing their data, views, or arguments concerning the proposed ammendment to John Aubry, Telecommunications Bureau, Room 219, Mitchell Building, Helena, MT 59620 no later than April 12, 1990.

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

Director, Department of Administration

Certified to the Secretary of State March 6, 1990.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF CHIROPRACTORS

In the matter of the proposed adoption of new rules pertaining to applications, minimum requirements for certification, approval of training programs, recertification and fees of impairment evaluators	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION OF NEW RULES PERTAINING TO IMPAIRMENT EVALUATORS

TO: All Interested Persons:

1. On April 12, 1990, at 9:00 a.m., a public hearing will be held in the Department of Fish, Wildlife, and Parks building, 490 North Meridian Road, Kalispell, Montana to consider amendment new rules pertaining to Impairment Evaluators.

2. The proposed new rules will read as follows:

"I. APPLICATIONS FOR CERTIFICATION OF IMPAIRMENT EVALUATORS (1) Any licensed chiropractor desiring to be certified as an evaluator to rate impairments of workers' compensation claimants or insurers shall file an application with the board.

(2) Applicants must have been in active clinical practice for a minimum of three (3) years, with at least fifty (50) percent of the applicant's practice devoted to patient management.

(3) Applicants may qualify for the certification examination by:

(a) successfully completing a board-approved program for education and training of certified chiropractic impairment evaluators; or

(b) successfully completing an educational and training program relating to chiropractic orthopedics, impairment ratings or similar course work at a CCE status chiropractic college or any other college or university approved by the board.

(4) Diplomats of the American Chiropractic Board of Orthopedists (DACBO) will not be required to take the 12 hours of the chiropractic orthopedics section of the training program.

(5) Applicants must take and pass an examination prescribed and given by the board with a minimum passing grade of 75% on all questions asked.

(6) Applications shall be accompanied by official transcripts, diplomas or similar certificates evidencing successful completion of one of the types of education and training programs approved by the board. Successful completion is deemed to mean obtaining a raw score overall of 75% on a comprehensive examination covering the entire education and training program."

Auth: Sec. 37-12-201, MCA; IMP, Sec. 37-12-201, MCA

"II. MINIMUM REQUIREMENTS FOR BOARD-APPROVED PROGRAMS TO QUALIFY FOR CERTIFICATION AS EVALUATORS (1) In order to qualify for board approval, programs for education and training of prospective chiropractic impairment evaluators must require completion of a minimum of 36 hours of classroom course work to the following extent on the following subject areas:

(a) 12 hours of chiropractic orthopedics;

(b) 12 hours of educational material specifically prepared by a medical doctor who specializes in impairment rating; and

(c) 12 hours of instruction from plaintiffs' advocate attorneys, defendants' advocate attorneys and claims examiners experienced in handling of worker's compensation cases."

Auth: Sec. 37-12-201, MCA; IMP, Sec. 37-12-201, MCA

"III. APPROVAL OF TRAINING PROGRAMS (1) Applications for approval of training programs shall be made by letter with supporting documents and must demonstrate to the satisfaction of the board that such programs fulfill the requirements of the board.

(2) The supporting documents must include a syllabus or program outline specifying the classroom hours for each segment of the program, a vitae of each instructor and the method to be employed in monitoring attendance.

(3) In evaluating proposed training programs, the board may investigate and make personal inspections, or delegate to one or more of its members or any other duly qualified persons the authority to make such investigations and inspections for the board. Such investigations and inspections will be at the expense of the program sponsors.

(4) When a training program is approved, the board will issue a letter of approval for the training program.

(5) Approval of a program may be withdrawn when the board finds that the program fails to maintain the educational standards set forth in the original application."

Auth: Sec. 37-12-201, MCA; IMP, Sec. 37-12-201, MCA

"IV. RECERTIFICATION - DENIAL - REVOCATION (1) A minimum of four (4) hours of specialized continuing education relevant to impairment evaluation every even numbered year must be demonstrated in order to qualify for renewal of certification. This requirement is in addition to the continuing education hours required for annual renewal of licenses to practice chiropractic in this state.

(2) Persistent deviation from generally accepted standards for impairment evaluation is grounds for denial of renewal of certification and for revocation of the impairment evaluator certificate."

Auth: Sec. 37-1-134, 37-12-201, MCA; IMP, Sec. 37-12-201, MCA

"V. FEES

(1) Application fee for impairment evaluators $125.00

(2) Certificate fee for impairment evaluators $ 75.00

(3) Renewal of certification fee for impaired evaluators" $ 50.00

Auth: Sec. 37-12-201, MCA; IMP, Sec. 37-1-134, 37-12-201, MCA

REASON: These rules are being proposed to provide for qualifying and certifying chiropractors to perform impairment evaluations for worker's compensation claimants and insurers as provided by Chapter 203 of the Laws of 1989. They also provide for fees to finance the administration of the program.

These rules are mandated by Chapter 203 of the laws of 1989, which requires the board of chiropractors to set standards for chiropractors to qualify as impairment evaluators for workers compensation claimants and insurers.

3. Interested persons 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 Board of Chiropractors, 1424 9th Avenue, Helena, Montana 59620-0407, no later than April 12, 1990.

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

BOARD OF CHIROPRACTORS
ROGER COMBS, D.C., PRESIDENT

BY: _____
CHARLES A. BROOKE,
ACTING DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 5, 1990.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF RADIOLOGIC TECHNOLOGISTS

In the matter of the proposed amendment of rules pertaining to permit applications, course requirements, permit examinations, temporary permits and the proposed repeal of a rule pertaining to permit restrictions	NOTICE OF PROPOSED AMENDMENT OF 8.56.602 PERMIT APPLICATION, 8.56.602B COURSE REQUIREMENTS FOR LIMITED PERMIT APPLICANTS, 8.56.602C PERMIT EXAMINATIONS, 8.56.604 TEMPORARY PERMITS AND THE PROPOSED REPEAL OF 8.56.606 PERMIT RESTRICTIONS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On May 7, 1990, the Board of Radiologic Technologists proposes to amend and repeal the above-stated rules.

2. The proposed amendments and the reasons for the amendments will read as follows: (new matter underlined, deleted matter interlined) (full text of the rules is located at pages 8-1571 through 8-1574, Administrative Rules of Montana)

"8.56.602 PERMIT APPLICATION (1) and (1)(a) will remain the same.

(b) application fee and exam fees, and

(c) through (3) will remain the same."

Auth: Sec. 37-1-134, 37-14-202, 37-14-306, MCA; IMP, Sec. 37-14-303, 37-14-306, MCA

REASON: This proposed amendment will allow applicants to pay all required fees at the same time and expedite the processing of license applications.

"8.56.602B COURSE REQUIREMENTS FOR LIMITED PERMIT

(1) All qualified courses applications for limited permits ~~shall~~ must be approved by the board in advance.

(a) Course approval shall be ~~completed by~~ based upon board review of the course outline, agenda and instructors qualifications.

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

(c) Spine - ~~16 hours~~ 8 hours

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

(g) Positioning - 8 hours

(4) and (5) will remain the same."

Auth: Sec. 37-1-131, 37-14-202, 37-14-306, MCA; IMP, Sec. 37-14-306, MCA

REASON: These proposed amendments are necessary to revise coursework requirements to reflect changes in the field of radiologic training and education. Currently it is generally felt that 8 hours' training with

respect to the spine is sufficient, but that more training with respect to positioning of patients should be offered.

"8.56.602C PERMIT EXAMINATIONS (1) will remain the same.

(2) The permit examination will be administered by at the board office at least twice a year. Applicants for examination will be notified ~~at least 30 days in advance~~ of the scheduled examination.

(a) will remain the same.

~~(b) Board members may administer the examination to applicants. Applicants shall make the request directly to the board member. If the board member agrees to proctor the examination, the applicant shall notify the board office in writing of the board member who shall be proctoring the examination, the examination date, time and place. All requests shall be received in the board office at least 10 days prior to the scheduled examination.~~

(3) through (8) will remain the same."

Auth: Sec. 37-1-131, 37-14-202, 37-14-306, MCA; IMP, Sec. 37-14-306, MCA

REASON: These proposed amendments are needed to expedite the licensing process by allowing applicants to take examinations at the first convenient opportunity without deadlines or inconvenience of board members. The examinations, in their current format, can be administered by staff. Administering examinations by persons other than board members reduces suspicions of anti-competitive attitudes and other personal bias.

"8.56.604 HARDSHIP TEMPORARY PERMITS (1) and (1)(a) will remain the same.

~~(b) a letter from the applicant stating the total number of x-rays which the department has taken in the past month and the total number of x-rays which the applicant assisted on.~~

(c) through (3) will remain the same, but will be renumbered

Auth: Sec. 37-14-202, 37-14-306, MCA; IMP, Sec. 37-14-305, 37-14-306, MCA

REASON: This subrule is being proposed for deletion because the board feels it is superfluous and archaic.

3. ARM 8.56.606 is being proposed for repeal. Full text of the rule is located at page 8-1575, Administrative Rules of Montana. The authority section is 37-14-202, MCA and the rule implements section 37-14-301, MCA. This rule is being proposed for repeal because it is archaic and unnecessarily repeats statutory language.

4. Interested persons may submit their data, views or arguments concerning the proposed amendments and repeal in writing to the Board of Radiologic Technologists, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than April 12, 1990.

5. If a person who is directly affected by the proposed amendments and repeal 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 the request along with any comments he has to the Board of Radiologic Technologists, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than April 12, 1990.

6. If the board receives requests for a public hearing on the proposed amendments and repeal from either 10 or 25, whichever is less, of those persons who are directly affected by the proposed repeal, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision of from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 18 based on the 186 licensees in Montana.

BOARD OF RADIOLOGIC TECHNOLOGISTS
CAROLE ANGLAND, CHAIRPERSON

BY: _____
CHUCK A. BROOKE, ACTING DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 5, 1990.

BEFORE THE BOARD OF REALTY REGULATION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed general amendment, repeal and adoption of rules pertaining to the administration, licensing and conduct of real estate licensees and the registration and sales of subdivisions	))))))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF 8.58.401, 8.58.404, 8.58.405, 8.58.409, 8.58.410 - 412, 8.58.414, 8.58.415A, 8.58.418 - 8.58.421; THE REPEAL OF 8.58.406 - 8.58.408, AND 8.58.417; AND THE ADOPTION OF NEW RULES I. THROUGH XII

TO: All Interested Persons

1. On April 5, 1990, at 1:00 p.m., a public hearing will be held in the Scott Hart Auditorium located at 303 Roberts in Helena, Montana, to consider the proposed amendment, repeal and adoption of the above-stated rules.

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

"8.58.401 PURPOSE OF BOARD (1) It is the purpose of this board, acting under the provisions of the act creating it, to regulate the licensing of applicants and the conduct and practice of licensees, ~~real-estate-brokers-and-salesmen~~ to safeguard the public interest in ~~real-estate~~ transactions in which licensees act, and to require the existence and continued maintenance of high levels of knowledge, competency, accountability, ethics, and professionalism ~~standards-in ethical-practices~~ by all ~~real-estate~~ licensees doing business in the state of Montana.

~~(2)--In-order-to-fulfill-the-purpose-of-this-board,-this board-may-revoke,-suspend,-censure,-reprimand-or-apply-any other-disciplinary-sanctions-contemplated-by-section-37-1-136, MCA-to-any-real-estate-licensee-for-(any)-violation-of-the provisions-contained-in-Chapter-51-of-Title-37,-Montana Code-Annotated-and-Chapter-58-of-the-Administrative-Rules-of Montana.~~ "

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-1-131, 37-51-202, 37-51-203, MCA

REASON: The amendments are needed to clarify, update, restate, and reaffirm the purpose of the board and to strike archaic phraseology and a redundant portion that is covered by statute.

"8.58.404 APPLICATIONS FOR EXAMINATION AND LICENSE IN GENERAL--BROKER AND SALESPERSON (1) Requests for information on the procedures for application for examination and license may be made to the board office.

~~(1)~~ (2) For the purpose of ~~determining~~ evaluating the qualifications of an examination, a license, ~~applicant~~ or an equivalency applicant, the chairman of the board may appoint

a person or committee to review the application and make recommendations to the board.

(3) The board may appoint a national, regional, or local testing entity to process and conduct a preliminary review of applications for examination and make recommendations to the board.

(4) In any case that the board appoints a person, committee, or entity, to review an application, the board reserves the right to intervene in the review process at any stage and conduct the final review.

~~(2) All applications must be legible and accurately completed and shall include a recent 2 x 2 photograph of the applicant;~~

~~(3) All original applications for the Montana real estate broker's and/or salesman's examinations shall be made to the board not later than the first day of the month preceding the date of examination;~~

~~(4) All repeat applications for the Montana real estate brokers and salesman's examination shall be made to the board not later than 30 days preceding the date of examination;~~

~~(5) All applications for examination shall remain current for a period not to exceed 1 year from the date of application;~~

~~(6) All applications received subsequent to the deadline date will be scheduled for the next succeeding examination without exception;~~"

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-302, 37-51-303, MCA

REASON: These amendments are needed to accommodate "walk-in" testing. "Walk-in" testing is a process wherein a testing entity approved by the board, may conduct an on-site fee collection and immediate evaluation and preliminary approval of examination applications. This expedites the application process for applicants. "Walk-in" testing is a recent development and appears to be the growing national trend.

"8.58.405 EXAMINATION (1) ~~The Real Estate~~ License examinations shall be held at such times and places as may be determined by the board~~, as provided by Title 37, Chapter 51, MCA~~.

(2) Examination schedules information shall be available through the board office ~~prepared yearly and shall be made available to all licensees and published by state wide media~~.

(3) The following rules shall be obeyed by all persons taking an examination ~~examinees~~, and ~~they may be disqualified~~ a disqualification from taking the examination, a finding of lack of good repute, a determination of unsuccessful completion, or a license denial may result from ~~for~~ any breach thereof:

(a) & (b) will remain the same

(c) the examinees shall not copy~~ing of~~ questions, make~~ing of~~ notes of test content, or revealing the contents of examination to others; ~~thereof is prohibited~~; and

(d) ~~candidates~~ examinees shall not leave the examination without permission from the examination proctor for any reason

until they have handed in the completed answer sheet and test booklet to the administrator of the examination; and

(e) examinees shall not attempt to obtain or compare answers by viewing or discussing any matter with another examinee during the course of the examination.

(4) If an applicant for examination fails to take the examination on the date scheduled, he must make application in writing to the board or the designated testing entity for rescheduling within 12 months of the date of original application.

(a) A rescheduling fee must accompany the request.

~~(5) When an applicant has been granted an equivalency by the board to take the broker examination and such applicant fails the examination twice, the applicant is no longer deemed to be equivalent for the purpose of re-examination and must be reevaluated as to equivalency status.~~

~~(6)~~ (5) The board may from time to time review and amend the examination type, format, and the score upon which the pass or fail determination is made. Prior notice of any amendment will be afforded to all applicants. ~~This amending process need not be effected through the provisions of Title 2, Chapter 4, part 3, MCA.~~

(6) The score upon which the pass-fail determination is made shall be 80 percent on broker uniform and state portions and salesperson uniform portion of the examination and 70% on salesperson state portion, all as may be scaled and equated for each specific examination by the board or testing entity providing or administering the examination."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-302, 37-51-303, MCA

REASON: These amendments are needed to make clear that violation of examination rules may result in license denial. They also clarify the requirements for "successful completion."

"8.58.409 BRANCH OFFICES REQUIREMENTS (1) For the purpose of this rule, "branch office" shall mean any office, division, room, unit, space, terminal, receptacle, or other like space, at a fixed location or open to the public, at which general business is transacted. It need not include any of the above within the principal office or any location used solely for demonstration, exhibition, or advertising purposes for referral to the principal office.

(1) & (2) will remain the same but will be renumbered (2) & (3)

~~(3)~~ (4) A branch office must be in the charge of a duly qualified and licensed resident broker in the branch office, and any salesperson employed in such branch office shall perform only the acts contemplated to be done by a salesperson under a salesperson's license; ~~and that the preparation of instruments in connection with a real estate sale and the act of closing such sales, are the functions of a broker and must be performed by or under the supervision of a person or persons duly licensed as a broker.~~

(4) through (6) will remain the same but will be renumbered (5) through (7)

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-308, MCA

REASON: The proposed amendment provides a definition of "branch office" and deletes language already provided by statute. Amendment is necessary to clarify the rule, notify licensees of the definition of branch office and provide for guidelines and continuity in board determinations.

"8.58.410 FOREIGN LAND SALES PRACTICES ACT (1) through (2) will remain the same.

(3) ~~That the following forms, identified as FLSPA-1, FLSPA-2, FLSPA-4, FLSPA-5,~~ Forms are available from the board office, 1424 9th Avenue, Helena, Montana ~~69520-0407~~ , 59620, and are hereby adopted by regulation of this board, and it is hereby directed that the same must be completed, executed and submitted by all subdividers offering out-of-state subdivided lands for sale in Montana together with an application fee in the sum of $500.

(4) through (5) shall remain the same."

Auth: Sec. 37-1-131, 37-51-203, 76-4-1203, MCA; IMP, Sec. 76-4-1203, 76-4-1211, MCA

REASON: This amendment is necessary because the identification of forms has changed and may change in the future.

"8.58.411 FEE SCHEDULE (1) ~~The~~ Except as otherwise provided by statute or rule, the following fees are required by the board for each of the licensing services listed below. All fees are subject to change by the board, within the limitations provided in section 37-51-311, MCA.

(2) No part of any fees paid in accordance with the provisions of this chapter is refundable. ~~It is~~ Fees are deemed earned by the board upon ~~its~~ receipt.

(3) Examination fees

(a) will remain the same.

(b) For each subsequent examination by the same nominee.....~~$30.00~~ $35.00

(4) For each rescheduling of examination.~~$30.00~~ $35.00

(5) through (14) will remain the same.

~~(15) Notice of intention.....$65.00~~

~~(16) Questionnaire.....$125.00~~

~~(17) Application for registration of subdivided lands.....$600.00~~

~~(18)~~ (15) Reinstatement of a license suspended or revoked within a license period.....$50.00

~~(19)~~ (16) For placing active license on inactive status.....$10.00

(17) For activating a license on inactive status.....$30.00

~~(20)~~ (18) For each original recovery fund assessment.....$35.00

~~(21)~~ (19) Late renewal fee.....$100.00

(20) Continuing education course application for approval and renewal.....$50.00

(21) Continuing education instructor application for approval and renewal.....$25.00
(22) Lists.....1-700 names.....$20.00
701 and over, per name.....$.03
all licensees.....$125.00
(23) Labels.....1-700 names.....$20.00
701 and over, per name.....$.03
all licensees.....$125.00
(24) Copies, per page.....$.25
(25) Certified copies, per page.....$.50"

Auth: Sec. 37-1-131, 37-1-134, 37-51-203, 37-51-204 MCA; IMP, Sec. 37-1-134, 37-51-202, 37-51-204, 37-51-207, 37-51-310, 37-51-311, MCA

REASON: The board is proposing to raise some existing fees and set some new fees to cover identifiable program area costs. Amendment to this rule is necessary to cover "walk-in" testing costs. The amendment isolates a reactivation fee, which was collected under a general category in the past. It also sets fees for continuing education programs and services provided by the board.

"8.58.412 INACTIVE LICENSES (1) A licensee who is unemployed must place his or her license on an inactive ~~basis~~ status by:

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

~~(2)--An-out-of-state-resident-may-be-permitted-to-sit-for the-real-estate-salesman's-exam-and-upon-receiving-a-passing score,-completing-the-required-course,-and-upon-making-the proper-application-for-licensure-will-be-issued-a-real-estate salesman's-license.--He-must-be-sponsored-for-licensure-by a-resident-real-estate-broker.--The-real-estate-license-of-a non-resident-will-be-activated-when-that-person-is-actually-in the-state.--When-the-person-leaves-the-state,-the-sponsoring broker-must-return-the-license-to-the-board-office-and-pay-the fee-for-the-license-to-be-placed-on-inactive-basis.~~

(2) Inactive licensees must pay the renewal fee annually to maintain licensed status."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-203, MCA

REASON: This amendment is needed to make clear to inactive licensees that they must pay the renewal fee regardless of status in order to avoid having their licenses lapse and terminate and being required to obtain new, original licenses if and when the practice is reentered. The amendments would also delete provisions not applicable to inactive licences.

"8.58.414 TRUST ACCOUNT REQUIREMENTS (1) Each broker shall maintain a separate bank account, which shall be designated a trust account, wherein all down-payments, earnest money deposits, or other ~~trust~~ funds received by the broker or his ~~salesman~~ salesperson on behalf of ~~his a principle~~ principal, third-party, or any other person shall be deposited. Such trust accounts may be maintained in interest-bearing accounts with the interest payable to the broker, principal, third-party, or any other person, as may

be designated by agreement. Interest payable to the broker shall be identified by agreement as consideration for services performed.

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

(4) Each broker shall only deposit trust funds received on real estate transactions in his trust account and shall not commingle his personal funds or other funds in said trust account with the exception that a broker may deposit and keep a sum not to exceed ~~$500~~ $1000 in said account from his personal funds, including the interest earned on the trust account, if the trust account is maintained in an interest bearing account and the interest accrues to the broker, which sum shall be specifically identified and deposited to cover bank service charges relating to said trust account.

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

(11) A broker shall not be entitled to any part of the earnest money or other monies paid to him in connection with any real estate transaction as part or all of his commission or fee until the transaction has been consummated or terminated. The ~~earnest money contract~~ listing agreement shall include a provision for division of monies taken in earnest, when the transaction is not consummated and such monies retained as forfeiture payment.

(12) through (16) will remain the same."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-203, MCA

REASON: The amendment is needed to clarify that the entitlement to interest accruing on trust funds must be by agreement. This rule also allows for a "maintenance fund" in trust accounts, insuring a minimum amount for avoiding service charges. It is felt necessary to increase the amount allowable for maintenance funds, as banks and savings and loans have increased their minimum amounts required.

"8.58.415A CONTINUING REAL ESTATE EDUCATION

(1) Each ~~real estate~~ licensee is ~~hereby~~ required to ~~receive and successfully~~ complete a minimum of 15 ~~classroom or equivalent~~ hours of continuing real estate education ~~in any two (2)~~ for every two year period, beginning January 1, 1988.

(2) The required hours shall be in approved real estate related courses given by instructors approved by the board.

(3) Two thirds of the required hours (10) must be in one or more of the following topics: ethics, real estate finance, real estate law and regulation, real estate taxation, consumer protection, risk reduction, agency, contract law, and principles of real estate.

(4) The required hours shall be completed within the two year period and no hours in excess shall carry over to any other two year period.

(5) No course shall be repeated for credit unless the course content has been substantially changed or been substantially updated and the provider has obtained approval from the board to offer it for repeat credit.

~~(2)~~ (6) Proof of ~~conformance~~ successful completion must be submitted to the board ~~prior to issuance of~~ with the licensee's renewal ~~license~~ application at the conclusion of

~~(any)-two-(2)~~ every two year period, except that inactive licensees shall provide proof of conformance at the time of reinstatement. No course completion certificates will be accepted by the board at any other time.

(7) The course provider must supply each licensee with a course completion certificate and student evaluation form approved by the board and must verify attendance of each licensee.

~~(3)-Only-those-courses-approved-by-the-board-may-be counted-as-and-considered-for-continuing-education-purposes.~~

~~(4)~~ (8) Passage of an examination may shall not be required for the successful completion of an approved course for continuing education purposes."

Auth: Sec. 37-1-131, 37-51-202, 37-51-203, 37-51-204, MCA; IMP, Sec. 37-51-202, 37-51-204, MCA

REASON: Please see "reason" after proposed new rule XI as the rules are part of a package addressing continuing professional education

"8.58.418 INVESTIGATIONS COMMITTEE (1) For the purposes of investigating the actions of a licensee or license applicant, the board ~~hereby-creates~~ may appoint a fact finding committee ~~to-be-appointed-by-the-chairman-of-the-board,~~ to assist in determining whether ~~complaints-may-be warranted against-the-licensee,~~ there is probable cause to believe that a statute or rule has been violated by a licensee, or that an application should be denied.

(2) shall remain the same."

Auth: Sec. 37-1-131, 37-58-203, MCA; IMP, Sec. 37-1-135, 37-51-202, 37-51-322, MCA

REASON: The amendment to this rule is needed to extend the use of a committee to license applications, since a substantial number of disputes and contested cases arise from this process. The amendment also would allow the board to appoint an ad hoc committee at times needed, instead of a standing committee. The use of such committees would reduce grounds for procedural challenges based on implied bias of board members who investigate the dual roles of investigating and then sitting in judgement.

"8.58.419 ~~SUSPENSION-OR-REVOCATION---VIOLATION-OF-RULES --UNWORTHINESS-OR-INCOMPETENCY~~ GROUNDS FOR LICENSE DISCIPLINE - GENERAL PROVISIONS - UNPROFESSIONAL CONDUCT (1) In any transaction in which a licensee is involved as a licensee or as a party, has held himself or herself out as a licensee, or in which any party has reasonably relied on a licensee's status as a licensee, violation ~~violation-of-the-following rules~~ of any statute or rule administered by the board may be considered by the board in determining whether or not the licensee:

(a) has violated section 37-51-321 (19), MCA, by "demonstrating his unworthiness or incompetency to act as a broker or salesman;"; and/or

~~(2)--A-violation-of-these-rules-may-be-considered-by-the board-in-determining-whether-a-violation-of~~ (b) has violated

section 37-51-321(17), MCA, by "intentionally violating a rule adopted by the board in the interest of the public and in conformity with this act;".

(2) If the board determines that a licensee has committed an act in such fashion that a statute or rule administered by the board has been violated, such act shall be deemed an act against the interest of the public for which the board may reprimand, suspend, or revoke the license held by the licensee or take any other action permitted by law.

(3) ~~Unworthiness-of-incompetency-may-be-demonstrated through~~ In addition to all other provisions contained in the statutes and rules administered by the board, particularly section 37-51-321, MCA (statutory grounds for license discipline) failure to comply with any of the following ~~affirmatives~~ shall constitute an act against the interest of the public:

(a) Agency, Dual Agency, and Agency Disclosure Relationships

(i) licensees shall not act as the agent of more than one principal in the same transaction unless the licensee reasonably believes that the duties owed to one principal will not directly conflict with the duties owed to the other in such fashion that adverse consequences are likely to result, and unless each principal consents after full disclosure by the licensee;

(ii) licensees shall disclose to all third parties the existence and nature of the existing agency relationship when an offer is prepared in a transaction;

(b) Violation of Laws and Regulations

~~(a)~~ (i) licensees shall be charged with knowing the applicable laws and regulations affecting ~~the~~ any transaction in which the licensee acts, including the laws and rules administered by the board;

(ii) licensees shall not violate any law applicable to a real estate transaction;

(iii) licensees shall not engage in activities that constitute the practice of law;

(c) Services of Others

(i) licensees shall recommend that legal counsel be obtained when the interests of any party require it;

(ii) licensees shall recommend that the merchantability of title to property be determined when the interests of any party reasonably require it;

(iii) licensees, prior to engaging the services of an attorney, title company, appraiser, escrow agent, insurance agent, or other like person or entity, on behalf of a principal, third party, or other person, shall inform the person obligated to pay for the services and obtain consent from that person;

(iv) licensees, in engaging or recommending the services of an attorney, title company, appraiser, escrow agent, or other like person or entity, on behalf of a principal, third party, or other person, shall disclose any financial relationship and interest that the licensee or real estate agency with which the licensee is associated may have in that person or entity being engaged or recommended;

(d) Nature of Property, Disclosure

~~(b)~~ (i) ~~the licensee~~ licensees shall endeavor to ascertain all pertinent facts concerning every property ~~for which he accepts the agency~~ in any transaction in which the licensee acts, so that ~~he~~ the licensee may fulfill ~~his~~ the obligation to avoid error, exaggeration, misrepresentation, or concealment of pertinent facts;

(ii) licensees who have listed property shall make a prompt, reasonable, visual inspection of any property listed;

(iii) licensees who have listed property shall make a prompt, reasonable, effort to verify that the principal listing the property is the owner or is authorized by the owner to list the property;

(iv) licensees shall disclose to principals and third parties all material facts concerning the property of which the licensee has actual knowledge regarding the property, provided that the fact that an occupant of the property has had AIDS or other communicable disease, or that the property was the site of a suicide, homicide, or other felony shall not be considered a material fact;

(e) Advertising

~~(c)~~ (i) the licensee or agency in advertising shall be especially careful to present a true picture and shall not advertise without disclosing his or her name and identity as a real estate licensee or licensed real estate agency. Such disclosure shall be required whenever the licensee or agency negotiates or attempts to negotiate the listing, sale, purchase, or exchange of real estate ~~as described in section 37-51-102(2),-(8),-MCA,~~ which belongs to the licensee, the agency, or ~~belonging to a third party~~ the principal.

(ii) the licensee or agency in advertising, when under a franchise agreement, shall incorporate his or her own name or agency name, other than that of the franchise, and state that the business is independently owned and operated.

~~(4)--Further actions demonstrating unworthiness or incompetency shall include but not be limited to the following:~~

~~(a)--the licensee will not engage in activities that constitute the practice of law and should recommend that the merchantability of title be determined and legal counsel be obtained when the interest of either party requires it;~~

(f) General Conduct

(i) licensees shall act to preserve and maintain that good repute, honesty, trustworthiness, and competency to transact business in a manner to safeguard the interests of the public as is required to obtain a license;

(ii) licensees shall not falsify documents, place signatures on documents without authority, or commit any act of forgery, fraud, misrepresentation, deception, misappropriation, conversion, theft, or any other like act;

(iii) licensees shall not knowingly enter or willfully continue in any transaction as a principal or agent wherein profit or gain or other benefit, or compensation from that profit or gain or other benefit, may accrue to the licensee

through the retention of payments received by one party to a transaction or agreement which reasonably should be applied to an obligation owed to another party to the same transaction or agreement;

(iv) licensees shall not enter a transaction or agreement with the intent not to perform;

(v) licensees shall make reasonable efforts to perform all obligations arising from any agreement entered into;

~~(b)~~ (vi) ~~representation by a licensee~~ licensees shall not represent to any lender, guaranteeing agency, or other interested party, either ~~verbally~~ orally or through the preparation of false documents, an amount in excess of the true and actual sale price of the real estate or terms differing from those actually agreed upon;

~~(c)~~ (vii) licensees shall ~~failure~~ to see that all agreements, financial obligations and recommendations regarding all real estate transactions are in writing;

~~(d)~~ (viii) ~~the licensee~~ licensees shall not undertake to make formal real estate appraisals that are outside the scope of ~~his~~ the licensee's experience;

~~(e)~~ (ix) ~~a licensee~~ licensees cooperating with the exclusive listing, licensee, shall not obtain the cooperation of a subsequent licensee without the written consent of the listing licensee;

(x) licensees shall not refuse, because of sex, race, creed, religion, color, age, familial status, physical or mental handicap, or national origin, to show, sell, lease, or rent any real estate to prospective renters, lessees, or purchasers, except when a distinction is based on reasonable grounds;

(g) Offers

~~(f)~~ (i) ~~the licensee~~ licensees shall ~~not fail to~~ submit all written offers to ~~an owner~~ a principal when such offers are received prior to the ~~seller accepting an offer in writing and until the broker has knowledge of said acceptance~~ listing agreement having been terminated or the transaction based on that listing having been closed, whichever occurs first;

(ii) licensees shall not disclose the name of a person making an offer or the amount or terms an offer to other persons interested in making offers, except that this shall not prohibit disclosing the existence of an offer;

(iii) licensees shall make no representation concerning prior offers to persons interested in making an offer unless the contents of the representation are based on an offer in writing;

~~(g)~~ (iv) ~~the licensee~~ a licensee shall inform any seller at the time an offer is presented that he will be expected to pay certain closing costs, such as discount points and the approximate amount of said costs;

(h) Licensees in Relation to Other Licensees and Employees

~~(h)~~ (i) licensees shall not ~~lending~~ lend a broker's license to a salesman or ~~permitting~~ permit a salesman to operate as a broker, ~~or failure of a broker to properly supervise the activities of his licensees~~;

(ii) salespersons shall not act as brokers;

~~(i)--failure-to-disclose-to-a-buyer-a-material-fact regarding-the-condition-of-a-parcel-of-real-estate-of-which the-licensee-has-knowledge;~~

~~(j)--refusing-because-of-race,-color,-sex,-national origin-or-ethnic-group,-to-show,-sell,-lease,-or-rent-any-real estate-to-prospective-renters,-lessees,-or-purchasers;~~

~~(k)~~ (iii) licensees shall ~~failure to~~ disclose to the broker-owner, responsible broker, business partner or any other responsible business associate any and all additional wages, tips, bonuses or gifts which have been, or are to be, recovered by the licensee which are not considered to be real estate commission(s); ;

~~(5)~~ (iv) A a broker ~~who signs~~ shall not sign the application of a ~~salesman as being his employee and such is determined by the board not to be the case, will render himself liable for suspension or revocation of license;~~ salesperson unless the broker and salesperson will be in lawful association, through employment contract or otherwise, and the broker will supervise the salesperson;

(v) a broker shall supervise salespersons and be responsible for their conduct;

(4) licensees shall not knowingly submit false information to the board.

(5) The revocation or suspension or other disciplinary treatment of any other professional or occupational license or privilege held by the licensee in this state or another state, whether as an attorney, salesperson, broker, appraiser, or similar occupation or profession, shall be grounds for license discipline in this state, if the grounds for that disciplinary treatment would be grounds for such treatment of a licensee under the board."

Auth: Sec. 37-1-131, 37-1-136, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-321, MCA

REASON: These amendments are being proposed to delete archaic provisions from licensee's conduct standards, to clarify conduct standards and to incorporate new standards which reflect changes in the practice.

"8.58.420 REINSTATEMENT (1) Unless a specific period of suspension or revocation is set out in any final order of the board, a suspension shall be for one year and a revocation shall be permanent.

~~(1)~~ (2) As a condition to the reinstatement of a revoked or suspended license, in addition to any other conditions allowed by law, the board may require the applicant to take and pass a qualifying examination, or course, or both.

Auth: Sec. 37-1-131, 37-1-136, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-203, 37-51-321, MCA

REASON: This amendment is needed to clarify what the effect of a license suspension or revocation will be, and to clarify what the board may require for license reinstatement.

"8.58.421 SEVERABILITY (1) If any section, subsection, sentence, clause, or phrase of these rules be for any reason held to be invalid, such holding shall not effect the validity of the remaining portion of said rules. The Montana board of ~~real-estate~~ realty regulation hereby declares that it would have passed and adopted these rules in each section, subsection, sentence, clause, or phrase thereof, separately and irrespective of the fact that any one or more of them be held invalid."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-203, MCA

REASON: This amendment is needed as housekeeping to refer to the board by its correct title.

3. The following rules are being proposed for repeal:

"8.58.406 GENERAL LICENSURE REQUIREMENTS Full text may be found at pages 8-1602 and 8-1603, Administrative Rules of Montana."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-203, MCA

REASON: This rule is proposed for repeal, because substance of this rule has been covered by amendments to existing rules and other new rules.

"8.58.407 RESIDENT BROKER LICENSURE Full text may be found at page 8-1603, Administrative Rules of Montana."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-203, MCA

REASON: This rule is proposed for repeal, because it is covered by amendments to existing rules and adoption of new rules.

"8.58.408 NON-RESIDENT BROKER LICENSURE Full text may be found at page 8-1603, Administrative Rules of Montana."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-203, MCA

REASON: This rule is proposed for repeal, because it has become unnecessary through amendment to existing rules and adoption of new rules.

"8.58.417 FRANCHISING REQUIREMENTS Full text of the rule may be found at page 8-1610, Administrative Rules of Montana.

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-203, MCA

REASON: The repeal of this rule is proposed because the rule, for the most part, merely repeated statutory language. The subsection of that portion of the rule that contained substance in addition to that provided by statute is covered elsewhere in the rules.

4. The proposed new rules will read as follows:

"I. MEANING OF TERMS USED (1) The terms used in this chapter shall have their common meaning as used in the real estate industry, and, unless the context otherwise requires, the following meanings shall also apply:

(a) "act" shall include a failure to act;

(b) "agency" or "agency relationship" shall include those which are express and those which are implied in fact or in law;

(c) "agent" shall include sub-agent;

(d) "agricultural" shall include real estate parcels over 20 acres in size principally used for, or capable and intended for use in, the production of plant or animal crops;

(e) "associate" shall include broker associate and salesperson;

(f) "buy" or "buyer" shall include purchase, purchaser, lease, lessee, and like terms;

(g) "commercial property" shall include real estate that is principally used for, or capable and intended for use in, the production, distribution, or sale of goods or services, and any real estate which has over four residential units when transferred as a group of units;

(h) "licensee" shall include broker and salesperson;

(i) "principle" shall include the seller or buyer with whom the agent has a contract;

(j) "residential property" shall include real estate having four or less units that are principally used for, or capable and intended for use as, residences, and any single unit in a group of units when transferred as a single unit;

(k) "seller" shall include vendor, lessor, and like terms;

(l) "supervision" shall include substantially day to day, active oversight;

(m) "third party" shall include any person in a transaction who is not the principal or agent in any single agency relationship."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, MCA

REASON: This rule is needed to define terms used in the balance of the rules and to make it unnecessary to specifically repeat the definitional language each time one of these terms is used.

"II. APPLICATION FOR EXAMINATION -- SALESPERSON AND BROKER (1) Applicants for examination for licensure as salespersons or brokers must make application on forms approved by the board and accompanied by the required fee.

(2) All applications must be legible, accurate, and fully completed, and must include a recent 2" x 2" face identification photograph of the applicant.

(3) In addition to all other requirements, applications for examination and successful completion of examination are prerequisites to application for license, except as provided in (new rule IV).

(4) All applications for examination shall remain valid for a period not to exceed 12 months from the date of application. Failure to take the examination within that time shall terminate the application. Thereafter the applicant must begin the application process over.

(5) Approval of an application for examination shall not constitute approval of an application for license."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-302, 37-51-303, MCA

REASON: This rule is needed to further accommodate "walk-in" testing and to clarify that the examination application is distinct from the license application. Time limits are necessary to insure that information provided and efforts made remain current.

"III. APPLICATION FOR LICENSE--SALESPERSON AND BROKER

(1) Applicants for license must make application on forms approved by the board and accompanied by the required fee.

(2) All applicants successfully completing the examination must apply for licensure within 12 months from the date of examination. Failure to make application within that time shall terminate the application. Thereafter the applicant must begin the application process over.

(3) No application for license will be accepted by the board until the applicant has made application for and successfully completed the examination, except as allowed by (new rule IV).

(4) For salesperson applicants, the board will require a recent credit rating, supervising broker certification, and references attesting to verify good repute, honesty, trustworthiness, and competency.

(5) For broker applicants, the board will require a recent credit rating, and references attesting to good repute, honesty, trustworthiness, and competence.

(6) For the purpose of determining the 37-51-302(2)c) qualifications of a broker applicant, "actively engaged" will be applied to mean "engaged substantially full time, day to day, as an occupation" and having obtained 10 listings and 10 sales and attended, participated, observed, reviewed, and conducted the various stages of these transactions and the showings, negotiations, closings, and like matters pertaining to them, to the full extent possible within the scope of a salesperson's license. This experience may be obtained while licensed within the state, or licensed in another state." This rule is advisory only, but may be a correct interpretation of the law. Ch 637, L. 1983.

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-1-135, 37-51-202, 37-51-302, MCA

REASON This rule is also needed to make clear that the license application is distinct from the exam application. It also provides a method of acquiring information upon which the board will base background investigation in the screening

of license candidates. It also indicates how the board will apply the phrase "actively engages" in evaluating license applications.

"IV. APPLICATION FOR LICENSE -- PRE-EXAMINATION AND PRE-COURSE OF EDUCATION OPTION (1) Applications for preliminary determination of qualifications may be made to the board on forms approved by the board and accompanied by the required fee.

(2) Any applicant may make application for license prior to examination and course of education for the purpose of obtaining the board's determination whether the applicant's qualifications, other than examination and course of education, are sufficient.

(3) The board will render a determination on each such application within 2 months of the time it is filed, and the determination will remain valid until the next reasonably available course of education and following scheduled examination.

(4) At the time of notification to the board of successful completion of the examination, the applicant must certify in writing to the board that the information contained in the application for license remains current, or provide information to the board about any change that may have occurred to the license application."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-302, MCA

REASON: This rule is needed in fairness to examination and license applicants. Because the exam and the course of education require substantial expenditures in both time and money by the applicant, and neither guarantees licensure, a process by which a predetermination of approval for licensure before such expenditures is warrented.

"V. APPLICATION FOR EQUIVALENCY--BROKER

(1) Application for a broker license based upon equivalent education or experience may be made on forms approved by the board and accompanied by the required fee.

(2) For the purpose of determining the section 37-51-302(2)(c) MCA, equivalency qualifications of an applicant who has not been actively engaged as a real estate salesperson for the prescribed period or has not obtained the required listings and sales, equivalent experience may be met by having been, in all other ways, actively engaged as a salesperson:

(a) for a period of 12 months and having obtained 15 listings and 15 sales in residential real estate or 5 listings and 5 sales in commercial or agricultural real estate; or

(b) for a period of 36 months and having obtained 5 listings and 5 sales in residential real estate or 3 listings and 3 sales in commercial or agricultural real estate; or

(c) any appropriate combination of the above.

(3) If the board determines that there is no equivalent education, a college degree with an emphasis in real estate and 12 months active practice as a salesperson may be considered by the board as equivalent experience.

(4) The granting of an equivalency to an applicant shall automatically be revoked for failure of examination twice."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-302, MCA

REASON: This rule is proposed to clarify the standards for equivalency licensing.

"VI. WAIVER OF EXPERIENCE REQUIREMENT -- BROKER

(1) There shall be no waiver of the experience qualifications for a broker license or reciprocity broker license."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-302, 37-51-306, MCA

REASON: This rule makes clear to broker license applicants that there will be no waiver of experience qualifications. Waiver, although discretionary to the board, is not now felt to be in the best interests of protecting the public.

"VII. NON-RESIDENT LICENSE--SALESPERSON AND BROKER

(1) In addition to all other requirements, examination shall be required of all non-resident license applicants, except as may be allowed under reciprocity.

(2) Non-resident salespersons must be under the supervision of licensed resident real estate brokers or accompanied by and under the direct supervision of licensed non-resident real estate brokers while conducting activities in this state."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-302, 37-51-306, MCA

REASON: This rule is needed to make clear to applicants the terms and conditions under which nonresidents may be licensed and practice.

"VIII. RECIPROCITY (1) Subject to Section 37-51-306(2), MCA, the board may enter into an agreement with any other state establishing the conditions through which residents of the other state may obtain a non-resident license in this state, and establishing terms of non-resident practice in this state, if the other state grants Montana resident licensees the same privileges."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-302, 37-51-306, MCA

REASON: This rule is needed to clarify the basis for non-resident licensing through reciprocity agreement with other states.

"IX. GENERAL LICENSE ADMINISTRATION REQUIREMENTS

(1) At any time that an associate's association with a broker is terminated, the license and pocket card of the associate shall be immediately mailed, by the broker, to the board office with a letter noting the termination.

(2) No dispute between an associate and a broker, arising from or causing termination, shall be cause for failure to immediately mail the license and pocket card to the board office. In the event that no reasonable communication

may be had between a broker and associate upon termination, the broker shall immediately mail the associate's license and the associate shall immediately mail the pocket card, both with a letter noting termination.

(3) Upon termination of an associate's association with a broker, the broker shall immediately notify all principals and third parties known to have been dealing with the associate.

(4) Listings and pending transactions are the responsibility of the broker upon termination of an association."

Auth: Sec. 37-1-131, 37-51-203, MCA; IMP, Sec. 37-51-202, 37-51-203, 37-51-309, MCA

REASON: This rule is needed to insure that associates' licenses are surrendered upon termination of the association relationship. Under statutes, salespersons and broker associates cannot practice independently and must be associated with particular broker owners. The rule also makes clear that the broker has continuing obligations to persons who have been dealing with one of his or her associates even after termination of the association.

"X. CONTINUING REAL ESTATE EDUCATION -- COURSE APPROVAL

(1) Requests for approval of any change in subject matter, and renewal of approval, of a continuing real estate education course must be made on forms approved by the board and submitted 45 days prior to the intended course, with payment of the required fee.

(2) Approval of a course and renewal of approval of a course shall be for two year periods, but may be revoked for cause.

(3) Courses must consist of at least three hours of instruction and must be designed so that no more than 10 minutes per hour are allowed for breaks in instruction.

(4) Approved courses must be real estate industry related and may not include exam "coaching" courses, clerical skills course, motivational courses, sales promotion meetings, trade organization orientation meetings, body language, time management, stress management, and like courses.

(5) Only 8 hours of credit for approved continuing education correspondence or video courses will be allowed for each requirement period.

(6) Subject to the foregoing; courses previously approved by the board and renewed; courses offered by accredited universities or colleges; courses offered by the National or the Montana Association of Realtors and their affiliates; courses offered by board-recognized societies, associations, institutions, and councils; and courses offered in other states and approved by those other states for continuing education, are recognized and approved."

Auth: Sec. 37-1-131, 37-51-202, 37-51-203, 37-51-204, MCA; IMP, Sec. 37-51-202, 37-51-204, MCA

REASON: Please see "reason" after new rule XI, as the

rules are part of a package addressing continuing education.

"XI. CONTINUING REAL ESTATE EDUCATION -- INSTRUCTOR APPROVAL (1) Request for approval, change, and renewal of approval of a continuing education instructor must be made on forms approved by the board and submitted 45 days prior to the intended instruction with payment of the required fee.

(2) Approval of an instructor and renewal of approval of an instructor shall be for a two year period, but may be revoked for cause.

(3) Approved instructors must have:

(a) at least a bachelor's degree in a field traditionally associated with the subject matter of real estate transactions and a broker's license or three years' experience as a licensed salesperson; or

(b) at least two years of post-secondary education in a field traditionally associated with the subject matter of real estate transactions with a generally recognized professional designation; or

(c) extensive instructional background in real estate education and a broker license or three years' experience as a licensed salesperson; or

(d) experience in the area of instruction and be a Designated Real Estate Instructor of the Real Estate Educators Association; or

(e) five years' of experience in the real estate related subject area being taught.

(4) Insofar as the real estate-related topic of instruction is limited to their fields of expertise, persons such as attorneys, investigators, government officers or employees, mortgage loan officers, may be approved as instructors or may act as speakers under the supervision of approved instructors."

Auth: Sec. 37-1-131, 37-51-202, 37-51-203, 37-51-204, MCA; IMP, Sec. 37-51-202, 37-51-204, MCA

REASON: The reason for this rule applies to the amendments of 8.58.415A and new rule X above. These amendments and new rules are needed to protect the public by, not only maintaining, but increasing, the competence of licensees through the enhanced, structured continuing education requirement and process.

"XII. DISCIPLINARY GUIDELINES--PUBLIC NOTICE

(1) The board reserves the discretion to take appropriate disciplinary action provided for in 37-1-136, MCA, against a licensee violating any law or rules of the board, and to decide on a case by case basis the type and extent of disciplinary action it deems appropriate applying the following considerations:

(a) the seriousness of the infraction;

(b) the detriment to the health, safety and welfare of the people of Montana; and

(c) past or pending disciplinary actions relating to the licensee.

(2) The board may impose one or more of the following sanctions in appropriate cases:

(a) revocation of a license;

(b) suspension of its judgement of revocation on terms and conditions determined by the board;

(c) suspension of the right to practice for a period not exceeding 1 year;

(d) placing a licensee on probation;

(e) Public or private reprimand or censure of a licensee;

(f) limitation or restriction of the scope of the license and the licensee's practice;

(g) deferral of disciplinary proceedings or imposition of disciplinary sanctions;

(h) ordering the licensee to successfully complete appropriate professional training.

(3) When a license is revoked or suspended, the licensee must surrender to the board his wall license and pocket card.

(4) Any order of license discipline, when final, including those reached by settlement agreement, may be published locally and state-wide."

Auth: Sec. 37-1-131, 37-1-136, 37-51-203, MCA; IMP, Sec. 2-4-623, 37-51-202, 37-51-321, MCA

REASON: This rule is being proposed to implement section 37-1-131, MCA, and provide the board with more options for disciplinary sanctions in cases of violation of practice standards.

5. Interested persons may submit their data, views, and arguments, either orally or in writing, at the hearing. Written data, views, and arguments may also be submitted to the Board of Realty Regulation, Department of Commerce, 1424 9th Avenue, Helena, Montana, 59620, no later than April 13, 1990.

6. Geoffrey Brazier, staff attorney, Department of Commerce, Board of Realty Regulation, has been designated to preside over and conduct the hearing.

BOARD OF REALTY REGULATION
JOHN DUDIS, CHAIRMAN

By: _____
CHARLES A. BROOKE, ACTING
DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 5, 1990.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS

In the matter of the proposed amendment of rules pertaining to fees	)))	NOTICE OF AMENDMENT OF RULES 8.61.404 AND 8.61.1203 PERTAINING TO FEES

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On May 7, 1990, the Board of Social Work Examiners and Professional Counselors proposes to amend the above-stated rules.

2. The proposed rules will read as follows:

"8.61.404 FEE SCHEDULE

(1) Application fee	$ 75.00	
(2) Original license fee	~~100.00~~	$75.00
(3) Exam fee	75.00	
(4) Renewal fee	~~100.00~~	75.00

~~(5) Continuing education accreditation 25.00 fee (for providers)~~

~~(6) Continuing education accredition 10.00 fee (for licensee)~~

~~(7)~~ (5) Retake exam fee 75.00"

Auth: Sec. 37-1-134, 37-22-201, 37-22-302, 37-22-304, MCA; IMP, Sec. 37-1-134, 37-22-201, 37-22-302, 37-22-304, MCA

"8.61.1203 FEE SCHEDULE

(1) Application fee	$ 75.00	
(2) Original license fee	~~100.00~~	$75.00
(3) Examination fee	75.00	
(4) Renewal fee	~~100.00~~	75.00

~~(5) Continuing education accreditation 25.00 fee (for providers)~~

~~(6) Continuing education accredition 10.00 fee (for licensee)~~

~~(7)~~ (5) Retake exam fee 75.00"

Auth: Sec. 37-1-134, 37-23-206, MCA; IMP, Sec. 37-1-134, 37-23-205, 37-23-206, MCA.

REASON: It is necessary to reduce fees to make them commensurate with program area costs. The proposal to repeal continuing education accreditation fees is not only monetary, but is intended to encourage licensee participation in continuing education to enhance professional competence for the benefit to the public of Montana.

3. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Social Work Examiners and Professional Counselors, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than April 12, 1990.

4. If a person who is directly affected by the proposed amendments wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any comments he has to the Board of Social Work Examiners and Professional Counselors, 1424 - 9th Avenue, Helena, Montana 59620-0407, no later than April 12, 1990.

8. If the Board receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments, from the Administrative Code Committee of the legislature, from a governmental agency or subdivison or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those person direclty affected has been determined to be 43 based on the 434 licensees in Montana.

BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
PATRICK J. KELLY, CHAIRMAN

BY _____
CHARLES A. BROOKE,
ACTING DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of States Office, March 5, 1990.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BEFORE THE MILK CONTROL BUREAU

In the matter of the amendment of rule 8.79.301 regarding assessments	)	NOTICE OF PROPOSED AMENDMENT OF RULE 8.79.301 LICENSEE ASSESSMENTS - NO PUBLIC HEARING CONTEMPLATED
	)	DOCKET #99-90

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

1. On April 16, 1990, the department of commerce proposes to amend rule 8.79.301 relating to an assessment to be levied upon licensees subject to 81-23-202, MCA. The proposed amendment will become effective July 1, 1990.

2. The purpose of the amendment is to change the amount of the assessment. The rule as proposed to be amended would read as follows. (new matter underlined, deleted matter interlined)

"8.79.301 LICENSEE ASSESSMENTS (1) Pursuant to section 81-23-202, MCA, the following assessments for the purpose of deriving funds to administer and enforce the Milk Control Act during the current fiscal year beginning July 1 and ending June 30, are hereby levied upon the Milk Control Act licensees of this department.

(a) A fee of ~~eight cents ($0.08)~~ nine cents ($0.09) per hundredweight on the total volume of all milk subject to the Milk Control Act produced and sold by a producer-distributor.

(b) A fee of ~~eight cents ($0.08)~~ nine cents ($0.09) per hundredweight on the total volume of all milk subject to the Milk Control Act produced and sold by a distributor home based in another state. Said fee is to be paid either by the foreign distributor or his jobber who imports such milk for sale within this state.

(c) A fee of ~~four cents ($0.04)~~ four and one-half cents ($0.045) per hundredweight on the total volume of all milk subject to the Milk Control Act sold by a producer.

(d) A fee of ~~four cents ($0.04)~~ four and one-half cents ($0.045) per hundredweight on the total volume of all milk subject to the Milk Control Act sold by a distributor, excepting that which is sold to another distributor."

3. The proposed amendment changes the current assessment rate from $.08 per c.w.t. to $0.09 per c.w.t. The purpose for raising the rate is to permit the collection of adequate revenue to cover budgeted expenses for administering the Act during the next fiscal year. The amendment is mandated by statute.

4. Interested persons may participate and present data, views, or arguments concerning the proposed amendments in writing to the Milk Control Bureau, 1520 East Sixth Avenue - Rm. 50, Helena, MT 59620-0512, no later than April 13, 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 comments he has to the above address no later than April 13, 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 24 persons based on an estimate of 241 resident and nonresident producers and distributors, and producer-distributors subject to this assessment.

7. The authority of the agency to make the proposed amendment is based on section 81-23-104 and 81-23-202, MCA, and implements section 81-23-202, MCA.

MONTANA DEPARTMENT OF COMMERCE

BY: _____
Charles A. Brooke, Acting Director

Certified to the Secretary of State March 5, 1990.

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

In the matter of the proposed adoption of new rules, and repeal of rules pertaining to loans made by the Montana Board of Science and Technology Development	))))	NOTICE OF PUBLIC HEARING ON PROPOSED NEW RULES, AND PROPOSED REPEAL OF RULES PERTAINING TO LOANS MADE BY THE MONTANA BOARD OF SCIENCE AND TECHNOLOGY DEVELOPMENT

TO: All Interested Persons.

1. On April 20, 1990, at 9:00 a.m., a public hearing will be held in the fourth floor conference room, at the Power Block located on the southwest corner of 6th Avenue and Last Chance Gulch, Helena, Montana, to consider the proposed adoption and repeal of rules pertaining to loans made by the Montana Board of Science and Technology Development.

2. The rules proposed to be repealed, ARM 8.122.101; 8.122.201 through 8.122.203; and 8.122.401 through 8.122.445, can be found on pages 8-4749 through 8-4788 of the Administrative Rules of Montana.

3. The proposed new rules will read as follows:

Rule I ORGANIZATIONAL RULE (1) The Montana Board of Science and Technology Development was recreated in 1989 by section 2-15-1818, MCA.

(2) The board consists of 9 members appointed by the governor in the manner prescribed in sections 2-15-1818 and 2-15-124, MCA. As required by statute, the Governor considers people with extensive interest and experience in science and technology and the application of such interest and experience to economic development in Montana.

(3) Board membership must include at least five persons from the private sector; two persons with knowledge of early stage financing of private businesses; and one person with expertise in applied technology development.

(4) The board is attached to the department of commerce for administrative purposes. The department selects and prescribes the duties for, and supervises staff to administer board activities.

(5) The board is designated a quasi-judicial board for purposes of section 2-15-124, MCA.

(6) If a board member misses three board meetings which have not been excused by the chairman, the board shall recommend to the Governor that the board member be asked to resign his or her seat on the board so that a person may be appointed to the board who can demonstrate his or her interest in board activities by attending regularly scheduled board meetings.

(7) As required by 2-4-305, notice is hereby given that sections of this rule repeat 2-15-1818 in order to inform the public as to board organization when they consult the administrative rules. (Auth: 2-4-201, MCA; Imp: 2-4-201, MCA)

Rule II PROCEDURAL RULES (1) The board hereby adopts and incorporates by reference the attorney general's model procedural rules (ARM 1.3.101 through 1.3.233). A copy of these rules may be obtained from the board's offices. Pursuant to section 90-3-521, the review of applications and the making of science and technology development project loans by the board will not be considered contested cases as contemplated by the model procedural rules or for purposes of sections 2-4-601 through 2-4-711, MCA, of the Montana Administrative Procedure Act. (Auth: 2-4-201, MCA; Imp: 2-4-201, 90-3-521, MCA)

Rule III CITIZEN PARTICIPATION RULES (1) The board hereby adopts and incorporates by reference the department's citizen participation rules as set forth in ARM 8.2.201 through 8.2.206 except that information relating to trade secrets and other proprietary matters and private financial information will be held in confidence as specified in other sections of these rules. A copy of the department's rules regarding citizen participation may be obtained from the board's offices. (Auth: 90-3-204, 2-3-103, MCA; Imp: 90-3-204, 2-3-103, MCA)

Rule IV DEFINITIONS In addition to the definitions set forth in section 90-3-102 MCA, the following definitions shall apply for purposes of these rules. (1) "Act" means the Montana Science and Technology Financing Act.

(2) "Board" means the Montana Board of Science and Technology Development created in section 2-15-1818.

(3) "Department" means the Montana Department of Commerce created in section 2-15-1801.

(4) "Substantial return" means a multiple of the loan principal returned as payback to the board achieved through one of, or a combination of, the following mechanisms, including, but not limited to: interest income on the loan, royalty payments from portfolio company product sales, sale of a convertible debenture, and sale of a warrant. The multiple of loan principal sought by the board shall be seven times, except for instances when the board shall seek a lower multiple from late-stage expansion capital project loans. Such exceptions will be made when the analysis of risk associated with the loan demonstrates that there is a likelihood, much higher than usually encountered in the board's portfolio companies, of the subject company achieving its business development goals.

(5) As required by 2-4-305, notice is hereby given that (1), (2), and (3) above repeat sections of 90-3-102 in order to provide citizens with immediate access to the definitions of words that are frequently used in these rules. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule V APPLICATION PROCEDURES FOR A SEED CAPITAL TECHNOLOGY LOAN - SUBMISSION AND USE OF EXECUTIVE SUMMARY (1) An applicant for a seed capital project loan shall submit a two page executive summary of the proposal to the board's staff.

(2) The executive summary must include the following items:

(a) a description of the technology and/or product being developed or marketed by the applicant, with particular emphasis on any proprietary characteristics that will result in a competitive advantage for the applicant;

(b) a characterization of the market for the product, including potential size, customers, and methods required to sell the product to the market;

(c) a description of the management team's experience and qualifications which are relevant to the particular industry area in which the applicant is operating or planning to enter;

(d) an estimate of projected sales revenue and new jobs to be created or existing jobs to be retained after the fifth year of operations; and

(e) the amount of capital needed for the current round of financing, along with a listing of other potential investors who could help provide the needed capital.

(3) The executive summary is considered public information and should not contain any information that the applicant does not want subject to public inspection.

(4) Upon receipt, the executive summary will be evaluated to determine whether the proposal complies with (2) above and the applicable statutory criteria. If the board determines that the executive summary meets these requirements, the applicant will be asked to submit a complete business plan and the proposal will be advanced to the threshold review phase. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule VI APPLICATION PROCEDURES FOR A SEED CAPITAL TECHNOLOGY LOAN - SUBMISSION OF BUSINESS PLAN (1) If the executive summary complies with Rule V above, and is deemed complete and appropriate for further review, the applicant must submit a full business plan to the board's staff for review.

(2) A comprehensive business plan must contain the following items:

(a) an executive summary;

(b) a table of contents;

(c) the company description including the company's history where applicable, and business development objectives;

(d) a description of the technology and its proprietary features;

(e) a market analysis and marketing plan including market size and characteristics assessment;

(f) a description and assessment of the competition;

(g) a description of the ownership structure;

(h) financial projections, including income statements, balance sheets, and cash flow projections for five years;

(i) historical financial statements of the company including balance sheets and income statements for up to three previous years or as many as are available;

(j) a description of the organization and personnel, including a description of the management team accompanied by a detailed resume for each member; and

(k) a description of the applicable manufacturing and operations plans.

(3) If deemed necessary, personal financial data may be requested through a separate submission.

(4) A cover letter must also accompany the business plan and include a description of other capital or matching fund efforts.

(5) The business plan will be subjected to threshold evaluations which will focus on the proposal's technology, the market potential of the company, the quality of the business plan, and the company's management team.

(a) As part of the threshold review process, the board's staff will discuss with the company's management team, the company's business development objectives and financing needs. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule VII APPLICATION PROCEDURES FOR A SEED CAPITAL TECHNOLOGY LOAN - REVIEW PROCESS (1) After the threshold review is completed the board's staff will present its findings and recommendation to the board.

(a) As a result of that presentation to the board, the board may vote to have its staff continue processing the application through an in-depth due diligence examination.

(b) The board may request the company to make a formal presentation to the

board on its proposal at a regularly scheduled board meeting.

(2) If the board decides to continue reviewing the proposal based on compliance with the applicable statutory criteria, the board may direct the staff to conduct its own in-depth due diligence examination.

(3) The board's staff will then formulate a recommendation to the board for its review and consideration. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule VIII APPLICATION PROCEDURES FOR A SEED CAPITAL TECHNOLOGY LOAN - BOARD ACTION (1) Upon receipt of the staff's recommendation, the board shall apply the following criteria in determining whether to make a seed capital technology loan:

(a) quality of the management team;

(b) degree of the company's competitive advantage;

(c) quality of the company's business plan and its prospects for implementation;

(d) opportunity for the board to exit the loan with a potentially substantial return; and

(e) compliance with all other provisions of the act.

(2) If the board determines that the applicant has complied with all the criteria, the board may approve a loan. If the board determines to approve a loan, a document describing the approved terms will then be presented to the applicant.

(a) The interest on board loans will be a compounded annual rate of 10.5 percent. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule IX APPLICATION PROCEDURES FOR A SEED CAPITAL TECHNOLOGY LOAN - POST DISBURSEMENT ACTIVITIES (1) The board may take an active role in working with a portfolio company in which it has loaned funds.

(2) The activities in which the board may participate include, but are not limited to:

(a) designating a person to sit on a company's board of directors or other governing body and/or hold observer rights on the company's board.

(b) assisting the company in seeking additional financing when necessary; and

(c) requiring the company to submit periodic financial and performance reports. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule X APPLICATION PROCEDURES FOR A RESEARCH AND DEVELOPMENT PROJECT LOAN - SUBMISSION AND USE OF EXECUTIVE SUMMARY

(1) An applicant for a research and development project loan must submit a brief executive summary of the project to the board's staff.

(2) The executive summary must include the following items:

(a) a description of the proposed project, including the product or process and the technology involved;

(b) an analysis of the project's commercial potential and prospective commercial partners;

(c) a discussion of the feasibility and/or availability of private matching funds;

(d) an estimate of total financing needs; and

(e) the amount of funds requested from the board, with a description of the expected use of proceeds.

(3) The summary should not contain any information that the applicant does not want subject to public inspection.

(4) The executive summary will be evaluated for determination whether the project should be advanced to the research and development proposal phase. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule XI APPLICATION PROCEDURES FOR A RESEARCH AND DEVELOPMENT PROJECT LOAN - SUBMISSION OF RESEARCH AND DEVELOPMENT PROPOSAL (1) When the executive summary is deemed complete and the proposal deemed appropriate for further consideration, the applicant must submit a research and development proposal to the board's staff for review. This proposal must contain the following items:

(a) a title page;
(b) a table of contents;
(c) an executive summary;
(d) the proposal objectives;
(e) a background review of the technology;
(f) the project design;
(g) a list of required facilities and equipment;
(h) a description of commercial potential and potential commercial partners;
(i) a description of the project's potential impact on the state's economy;
(j) a list of milestones which describes specific tasks to be achieved delineated on a time line;
(k) a proposed budget and use of proceeds, with documentation showing source of funds and use of proceeds for each line of the budget;
(l) the feasibility and/or availability of matching funds;
(m) a description of other efforts made to obtain funding for the proposed project; and
(n) the resumes of the major principals identified in the project design describing the eduction and employment experience of each. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule XII APPLICATION PROCEDURES FOR A RESEARCH AND DEVELOPMENT PROJECT LOAN - EVALUATION - DUE DILIGENCE (1) After receipt of the research and development proposal, the board's staff will determine whether it is complete. Once the proposal is deemed complete, the formal review process will begin.

(2) Upon receipt of a complete research and development proposal, the proposal may be subjected to a rigorous outside technical review conducted by reviewers selected by the board's staff. Each reviewer will be asked to comment on the technical feasibility of the proposed project design and implementation, the technical competence of the investigators, and the project's prospects for market success, when applicable.

(3) If deemed necessary, a research and development proposal may also be subjected to a rigorous financial review.

(4) If the technical and financial reviews are favorable, the board's staff will initiate and rigorously pursue its own due diligence examination on the project. The purpose of this examination will be to further verify the feasibility of the technology involved, the credibility and expertise of the project principals and the market or commercial potential of the proposed product or process. A summary of this due diligence examination will be presented to the board at its next meeting. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule XIII APPLICATION PROCEDURES FOR A RESEARCH AND DEVELOPMENT PROJECT LOAN - REVIEW PROCESS (1) In addition to the technical and financial reviews, the board will evaluate each proposal for compliance with the statutory loan criteria and goals. The applicant will be asked to attend a regularly scheduled board meeting to make a brief presentation to the board and answer any questions regarding the proposal.

(2) Based on compliance with the statutory loan criteria and goals, the reviews, the applicant's presentation, and the board staff's evaluation, and due diligence examination, a determination will be made by the board whether the applicant should be approved for a loan, whether the proposal should be modified, or whether the application should be denied. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule XIV APPLICATION PROCEDURES FOR A RESEARCH AND DEVELOPMENT PROJECT LOAN - BOARD ACTION (1) The board shall determine whether the proposal complies with the act.

(2) The board may vote to:

(a) make the loan in the research and development project as requested;

(b) make the loan in the research and development project provided certain conditions are met;

(c) make the loan in the research and development project for a larger or smaller amount than requested;

(d) refer the proposal back to the applicant for revisions; or

(e) reject the proposal for failure to comply with the act. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule XV APPLICATION PROCEDURES FOR A RESEARCH AND DEVELOPMENT PROJECT LOAN - MONITORING REPORTS (1) A loan recipient must submit progress reports to the board as specifically required in the science and technology development project loan agreement.

(2) The progress reports shall include, but not be limited to:

(a) financial status of the loan recipient;

(b) overall project performance; and

(c) progress in accomplishing milestones.

(3) A final project report is due upon completion of the project term.

(4) Annual commercialization reports are required until the funding recipient has satisfied the return or payback terms contained in the research and development project loan agreement. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule XVI FAILURE TO COMMERCIALIZE OR PRODUCE IN MONTANA - ALL SCIENCE AND TECHNOLOGY DEVELOPMENT PROJECT LOANS (1) A loan recipient must agree to use its best efforts to see that the production or manufacturing of new technology shall occur within the state of Montana.

(2) The board may determine that a loan recipient is not complying with the science and technology development project loan agreement if:

(a) commercial production, marketing and sale of the product is not commenced by the company within a reasonable time;

(b) commercial production, sale or marketing is discontinued for a continuous period without good cause;

(c) the company fails to use its best efforts to achieve the benefits of increased employment in Montana;

(d) the company fails to maintain such offices or facilities in Montana; or

(e) the company fails to comply with the reporting requirements established by the board or with any of the provisions in its science and technology development project loan agreement.

(3) Action by the board may include termination of the loan agreement and calling the loan. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule XVII RECONSIDERATION OF LOAN DECISION - ALL SCIENCE AND TECHNOLOGY DEVELOPMENT LOANS (1) If the board determines that a science and technology

development project proposal or business plan is ineligible for a loan due to failure to comply with applicable statutory and other criteria, the applicant has 30 days from receipt of notification of such determination to request the board to reconsider the proposal or business plan to determine whether the determination should stand or be modified. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule XVIII RIGHTS TO INTELLECTUAL PROPERTY - ALL SCIENCE AND TECHNOLOGY DEVELOPMENT LOANS (1) All intellectual property rights, including any patents, copyrights, trademarks, and trade secrets developed by the loan recipient with use of funds provided by the board, will be owned by the recipient, or the recipient will have appropriate rights thereto as determined in consultation and agreement with the board. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule XIX CONFIDENTIALITY OF INFORMATION AND OPEN MEETINGS (1) Unless otherwise required by law, information submitted by an applicant will be treated as confidential by the board, its staff, and technical reviewers, except the following:

(a) name and address of applicant;

(b) short description of proposed project;

(c) amount of loan;

(d) the program under which the applicant is applying;

(e) any other information in which the demand of individual privacy does not clearly exceed the merits of public disclosure; and

(f) any information in which the demand of individual privacy clearly exceeds the merits of public disclosure but the applicant has expressly waived his right to privacy.

(2) The board shall maintain public files on each completed application received which will contain the following information:

(a) items 1(a) through (f) of this rule;

(b) all written documents received or prepared concerning items 1(a) through (f) of this rule;

(c) the executive director's recommendation to the board regarding items 1(a) through (f) and his recommendation for approval or denial of the application; and

(d) a brief statement of the board's action regarding the application, including the board's approval or disapproval of the application, the terms and interest rate of financing, and the loan repayment schedule and record.

(3) The board shall open all meetings when the discussion addresses issues enumerated in 1(a) through (f), or when the demand of individual privacy does not exceed the merits of public disclosure, or when the applicant has expressly waived his right to privacy.

(4) This policy is based on the board's finding that, except for the information described in items 1(a) through (f), the demands of individual privacy clearly exceed the merits of public disclosure of the personal, financial, and business information that is contained in applications and supporting documentation submitted to the board. (Auth: 90-3-204, MCA; Imp: 90-3-204, MCA)

Rule XX MEDICAL RESEARCH FACILITY PROJECTS - APPLICATION PROCEDURES, REVIEW PROCESS, AND BOARD ACTION (1) The procedural rules set forth in Rules X, XI, XII, XIII, XIV, XV, XVII, XVIII, and XIX above, are applicable to the grants made by the board pursuant to Chapter 634, L.1989.

(2) As required by Section 1, Chapter 634, L.1989, the funds granted by the board must be used to match federally appropriated funds on at least a

four-to-one federal-to-state matching basis for construction and start-up operating costs for medical research facility projects in the state.

(3) The board may make a grant to a medical research facility project applicant, if the proposal complies with the goals and criteria set forth in section 90-4-901, and the procedural rules described in (1) above.

4. These rules are mandated by the legislature. The rules for medical research facility projects implements Chapter 634, L.1989. The proposed repeal of existing rules is to comply with White vs. State of Montana. ____M____, 759 P 2d 971, 45 St. Rep. 1310 (1988).

5. Interested persons may present their data, views or comments either orally or in writing, at the hearing. Written data, views or comments may also be submitted to Mr. Steve Huntington, Executive Director, Montana Science and Technology Alliance, 46 North Last Chance Gulch, 2B, Helena, Montana 59620, no later than April 20, 1990.

6. Stephen D. Huntington or his designee will preside over and conduct the hearing.

7. The authority of the board to make the rules is contained in sections 90-3-204 and 90-3-901, MCA.

Montana Board of Science and Technology Development
Chase T. Hibbard, Chairman

By: _____
Charles A. Brooke, Acting Director
Department of Commerce

CERTIFIED TO THE SECRETARY OF STATE: March 5, 1990

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

In the matter of the proposed amendment of ARM 10.6.101, 10.6.103; 10.6.104, 10.6.106, 10.6.119, 10.6.120 and 10.6.121; and repeal of 10.6.103A, 10.6.103B, and of 10.6.119A	))))))	NOTICE OF PROPOSED AMENDMENT AND REPEAL OF RULES FOR ALL SCHOOL CONTROVERSY CONTESTED CASES BEFORE COUNTY SUPERINTENDENTS OF THE STATE OF MONTANA

NO PUBLIC HEARING CONTEMPLATED

TO: All interested persons

1. On May 17, 1990, the Superintendent of Public Instruction proposes to amend and repeal rules for all school controversy contested cases before county superintendents of the state of Montana.

2. The proposed amendments will read as follows: (new matter underlined; deleted matter interlined). Full text of the rules is located at pages 10-51 through 10-66, ARM.

10.6.101 SCOPE OF RULES (1) These rules govern the procedure for conducting all hearings on school controversy cases appealed to the county superintendent, ~~impartial hearing officer,~~ state superintendent and the county transportation committee. These rules shall be construed to secure the just, speedy and inexpensive determination of every action. All rules promulgated by former state superintendents with regard to school controversies are hereby repealed.

(a) same as original rule.

~~(b) Due process matters concerning and arising from all handicapped children in this state shall be governed by these rules.~~

(c) through (e) remain the same but will be renumbered.

AUTH: Sec. 20-3-107(3), MCA; IMP: Sec. 20-3-107(3), MCA

10.6.103 INITIATING SCHOOL CONTROVERSY PROCEDURE PROCESS (1) A person who has been aggrieved by a final decision of the board of trustees of a school district in a contested case is entitled to commence an appeal before the county superintendent ~~except as provided in subsection (2) and (3)~~.

~~(2) Impartial due process hearings involving educating handicapped children may be initiated by a parent, legal guardian or surrogate parent of a handicapped child if the parent disagrees with action taken by a school district for which notice to parents is required.~~

~~(3) Impartial due process hearings involving educating handicapped children may be initiated by a school district board of trustees when, after reasonable efforts at mediation, a parent, legal guardian or surrogate parent either fails to provide a written parental consent for a proposed educational action, or provides a formal disapproval of education actions. A hearing may also be initiated by a school district board of trustees to show that its educational evaluation is appropriate whenever an independent evaluation is requested by the parent, legal guardian or surrogate parent.~~

~~(4) A request for an impartial due process hearing involving the education or possible identification of a handicapped child shall be made in writing to the State Superintendent of Public Instruction, State Capitol, Helena, Montana 59620, include a short and plain statement of matters asserted and comply with the notice of appeal requirements of ARM 10.6.107.~~

(52) A school controversy contested case ~~other than issues involving education of handicapped children~~ shall be commenced by filing a notice of appeal with the county superintendent within 30 days after the final decision of the governing authority of the school district is made.

AUTH: Sec. 20-3-107(3), MCA; IMP: Sec. 20-3-207(3), MCA

10.6.104 JURISDICTION (1) ~~On matters other than controversy involving the education or identification of a handicapped child, the~~ The county superintendent shall upon receipt of the Notice of Appeal, determine:

(a) through (2) same as original rule.

AUTH: Sec. 20-3-107(3), MCA; IMP: 20-3-107(3), MCA

10.6.106 NOTICE OF HEARING (1) through (3) same as original rule.

~~(4) Special Education - Access to legal assistance. The impartial hearing officer shall inform the parent of any free or low-cost legal and other relevant services available in the area.~~

AUTH: Sec. 20-3-107(3), MCA; IMP: Sec. 20-3-107(3), MCA

10.6.119 FINAL ORDER (1) ~~For all issues except those involving education of the handicapped, the~~ The final order by the county superintendent shall be in writing and shall include findings of fact and conclusions of law separately stated. Findings of fact, as set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

(a) through (c) same as original rule.

(2) The county superintendent shall insure for all cases

~~other than cases regarding education of the handicapped~~ that not later than 90 days after the receipt of the notice of appeal a final order is reached and a copy of the findings of fact, conclusions of law and order is mailed to each party. The time limitation provided here may be waived upon request of the county superintendent or a party of the school controversy contested case, upon stipulation of all parties.

(3) same as original rule.

AUTH: Sec. 20-3-107(3), MCA; IMP: Sec. 20-3-107(3), MCA

10.6.120 COUNTY ATTORNEY RULE (1) The county attorney shall serve as the legal advisor for the county superintendent of schools in all school controversy contested cases ~~except in cases involving special education~~. In the event the county attorney is unable to serve in that capacity, the county superintendent shall designate another qualified attorney to serve as a legal advisor for the county superintendent.

AUTH: Sec. 20-3-107(3), MCA; IMP: Sec. 20-3-107(3), MCA

10.6.121 APPELLATE PROCEDURE - SCOPE OF RULES (1) The superintendent of public instruction shall decide matters of controversy when they are appealed from a decision of a county superintendent ~~except for cases involving education of the handicapped~~.

(2) through (4) same as original rule.

AUTH: Sec. 20-3-107(3), MCA; IMP: Sec. 20-3-107(3), MCA

3. The proposed rules for repeal follow. Full text of the rules is located at pages 10-51 through 10-66, ARM.

10.6.103A SPECIAL EDUCATION DUE PROCESS HEARING PROCEDURES

10.6.103B

10.6.119A FINAL ORDER ON SPECIAL EDUCATION DUE PROCESS HEARING DECISIONS

AUTH: Sec. 20-7-420(2), MCA; IMP: Sec. 20-7-402(1), MCA

4. The Superintendent proposes to make the proposed amendment and repeal in order to comply with federal regulations for eligibility of federal funding, and to facilitate use of due process hearing rules. Currently, the rules for conducting impartial due process hearings in accordance with the requirements of the Education of the Handicapped Act, as amended, are commingled with the rules of procedure for all school controversy contested cases before county superintendents of the state of Montana. Persons involved in due process hearings have experienced difficulty in identifying which rules they must follow and which rules apply only to appeals to county superintendents under Sec. 20-3-107, MCA.

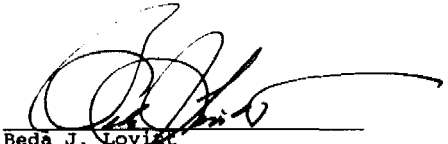
5. Interested persons may submit their data, views or arguments concerning the proposed amendment and repeal, in

writing, to the Office of Public Instruction, State Capitol, Room 106, Helena, Montana 59620 no later than April 15, 1990.

6. If a person who is directly affected by the proposed amendment and repeal wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to the Office of Public Instruction, State Capitol, Room 106, Helena, Montana 59620 no later than April 15, 1990.

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

Superintendent of Public Instruction

By: 

Beda J. Lovick
Chief Legal Counsel

Certified to the Secretary of State March 5, 1990.

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

In the matter of the proposed adoption of rules concerning special education due process matters	NOTICE OF PROPOSED ADOPTION OF RULES CONCERNING SPECIAL EDUCATION DUE PROCESS MATTERS

NO PUBLIC HEARING CONTEMPLATED

TO: All interested persons

1. On May 17, 1990, the Superintendent of Public Instruction proposes to adopt rules concerning special education due process matters.

2. The proposed rules provide as follows:

RULE I SCOPE OF RULES (1) These rules govern the procedure for conducting all due process hearings concerning and arising from the education of handicapped children in this state. All rules promulgated by former state superintendents of public instruction with regard to special education due process hearings contrary to these rules are hereby repealed.
AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE II INITIATING SPECIAL EDUCATION DUE PROCESS PROCEDURE PROCESS (1) Impartial due process matters involving educating handicapped children may be initiated by a parent, legal guardian or surrogate parent of a handicapped child if the parent disagrees with a decision of a school district for which notice to parents is required.

(2) Impartial due process hearings involving educating handicapped children may be initiated by a school district board of trustees when, after reasonable efforts at mediation, a parent, legal guardian or surrogate parent either fails to provide a written parental consent for a proposed educational action, or provides a formal disapproval of education actions. A hearing may also be initiated by a school district board of trustees to show that its educational evaluation is appropriate whenever an independent evaluation is requested by the parent, legal guardian or surrogate parent.

(3) A request for an impartial due process hearing involving the education or possible identification of a handicapped child shall be made in writing to the State Superintendent of Public Instruction, State Capitol, Helena, Montana 59620, and include a short, plain statement of matters asserted.
AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE III SPECIAL EDUCATION DUE PROCESS HEARING PROCEDURES (1) Upon receipt by the state superintendent of public instruction of a written request for a due process hearing involving a special education controversy, the state

superintendent of public instruction shall:

(a) Promptly advise the board of trustees and parent, legal guardian or surrogate parent of the request for due process hearing.

(b) Provide the board of trustees up to and including ten calendar days in which to address the special education controversy in the school district, and reach a final decision. Pending the final decision of the board of trustees or upon mutual agreement of the parties, the state superintendent of public instruction shall provide mediation so long as both parties voluntarily and freely agree to the mediation. The mediation conference is an attempt to resolve the differences and, if possible, avoid a due process hearing. The mediation shall:

(i) be an intervening, informal process conducted in a non-adversarial atmosphere;

(ii) not be used to deny or delay an aggrieved party their rights to a hearing.

(c) Appoint an impartial hearing officer to conduct a due process hearing.

(i) The state superintendent of public instruction shall maintain a list of persons who serve as impartial hearing officers.

(ii) Selection of impartial hearing officer:

(A) Upon receiving a copy of the request for hearing, the state superintendent of public instruction shall mail to each party a list of five proposed impartial hearing officers together with a summary of their qualifications.

(B) A party shall have seven days to study the list, cross off any two names objected to, number the remaining names in order of preference, and return the list to the state superintendent of public instruction. Requests for more information about proposed impartial hearing officers must be directed to the superintendent of public instruction. Unless good cause is shown, this request for more information does not extend the seven day response time.

(C) If, despite efforts to arrive at a mutually agreeable choice, the parties cannot agree upon an impartial hearing officer, the state superintendent of public instruction shall make the appointment.

(D) Notwithstanding the foregoing provisions, the parties may mutually select the impartial hearing officer from the list provided by the state superintendent of public instruction.

(iii) Disqualification:

(A) A hearing may not be conducted by a person who is an employee of a school district or other public agency which is involved in the education or care of the child, or who has a personal or professional interest which would conflict with his or her objectivity in the conduct or review of the hearing.

(B) A person who otherwise is qualified to conduct a hearing under paragraph (A) of this subsection is not an employee solely because he or she is paid by contract by the public agency to serve as impartial hearing officer.

(2) An impartial hearing officer may at any point withdraw from consideration or from service in any hearing in which the impartial hearing officer believes a personal or professional bias or interest on any of the issues to be decided in the hearing exists which might conflict with the impartial hearing officer's objectivity. Such written request to withdraw shall be directed to the state superintendent of public instruction. Any subsequent appointment of an impartial hearing officer shall be conducted as provided above.
AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE IV NOTICE OF HEARING (1) The impartial hearing officer shall within ten days of receipt of notice of appointment by the state superintendent of public instruction schedule a prehearing conference pursuant to Rule VI. The impartial hearing officer shall inform the parties of all future proceedings in this matter. The notice of hearing shall include:

(a) a statement of the time, place and nature of the hearing;

(b) references to the specific statutes and rules involved available at that time;

(c) a provision advising the parties of their right to be represented by counsel at the hearing;

(d) a provision informing the parent of any free or low-cost legal and other relevant services available in the area;

(e) a statement of issues and matters to be discussed at the hearing.

(2) The notice of hearing shall be sent by certified mail to all parties.

(3) If the impartial hearing officer does not have details of the issues and matters to be discussed at the time of issuing the notice of hearing, a party or impartial hearing officer may later demand a more detailed account of the issues and matters to be discussed. The dates scheduled by the impartial hearing officer in the notice of hearing may be continued by the impartial hearing officer to such a convenient date as stipulated by the parties and approved by the impartial hearing officer.

(a) The notice of hearing as well as all communications conducted in the hearing shall be written in language understandable to the general public and in the native language of the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication is not written language, the impartial hearing officer shall direct the notice to be translated orally or by other means to the parent in his/her native language or other means of communication.
AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE V CONFERENCE AND INFORMAL DISPOSITION (1) The impartial hearing officer may informally confer with the parties to the request for impartial due process hearing for the purpose of attempting informal disposition of any special education controversy.

(2) This conference of informal disposition may occur at any time prior to the issuing of the final findings of fact, conclusions of law and order of the impartial hearing officer. The parties may informally confer to resolve the special education controversy by stipulation, agreed settlement, consent order, or default. To be effective, any agreement made at such conference must be reduced to writing and signed by all parties. An agreed resolution shall end the proceedings and bar further proceedings.

(3) If it is appropriate, the impartial hearing officer may draft findings of fact, conclusions of law and order and shall promptly send to each party in the special education controversy.

AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE VI IMPARTIAL HEARING OFFICER'S PREHEARING - FORMULATING ISSUES (1) The impartial hearing officer shall schedule a prehearing conference to consider:

(a) the simplification of the issues;

(b) the necessity or desirability of amendments to the request for impartial due process hearing;

(c) the possibility of obtaining admissions of fact and documents which will avoid unnecessary proof;

(d) a limitation of the number of expert witnesses;

(e) such other matters as may aid in the disposition of the action.

(2) The impartial hearing officer shall make an order which recites the action taken at the conference, any amendment to the request for impartial due process hearing, the agreements made by the parties as to any of the matters considered, and which limits the issues for the hearing to those not disposed of by admissions or agreements of the parties. Such order when entered will control the subsequent course of action, unless modified at the hearing to prevent manifest injustice. The impartial hearing officer, in his/her discretion, may establish by rule a prehearing calendar on which actions may be placed for consideration as provided above.

(3) Individual privacy: the impartial hearing officer shall provide for provisions to insure the privacy of matters before him/her as is required by law. Parents maintain the right to waive their right of confidentiality and privacy in the hearing and may request that the hearing be open to the public. The impartial hearing officer shall also provide or allow an opportunity for the student to be present at the hearing upon request of the parent, guardian, surrogate parent or the student who is the subject of the hearing.

(4) Location of hearing: the impartial hearing officer shall conduct the hearing at a time and place reasonably convenient to the parties. If the parties cannot agree on such time and place, the hearing will be held in the county in which the named school district is located.

AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE VII DISCOVERY (1) The impartial hearing officer may compel, limit or conduct discovery prior to the hearing and/or prehearing conference pursuant to Rules VIII through X.
AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE VIII DISCOVERY METHODS (1) Parties may obtain discovery by one or more of the following methods:

(a) depositions upon oral examination or written questions;

(b) written questions;

(c) production of documents (or things or permission) to enter upon land or property;

(d) request for admissions.

(2) Any evidence to be introduced at the hearing or on file shall be made available for disclosure to all parties at least five days before the hearing or the evidence will not be admitted.
AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE IX SCOPE OF DISCOVERY (1) Unless otherwise limited by order of the impartial hearing officer, the scope of discovery is as follows:

(a) in general, parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible items, and the identity and location of persons having knowledge of any discoverable material;

(b) a party may discover facts known or opinions held by an expert who has been retained or especially employed by another party in anticipation of litigation or preparation for hearing.
AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE X LIMITATIONS ON DISCOVERY BY THE IMPARTIAL HEARING OFFICER (1) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the impartial hearing officer before whom the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(a) that the discovery not be had;

(b) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c) that the discovery may be had only by a method of discovery other than that selected by the parties seeking discovery;

(d) that certain matters should not be inquired into, or that the scope of the discovery be limited to certain matters;

(e) that discovery be conducted with no one present except persons designated by the impartial hearing officer.
AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE XI SEQUENCE AND TIMING OF DISCOVERY (1) The impartial

hearing officer shall provide reasonable discovery on the relevant issues for the hearing and shall establish a calendar so that discovery does not delay the hearing. A request for discovery must be made within fifteen days of filing the request for impartial due process hearing.
AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE XII ABILITY OF CROSS-EXAMINATION OR PARTICIPATION IN THE HEARING (1) The right to examine, cross-examine or to participate as a party in this action shall be limited to the attorneys, the lay advocates with special knowledge or training with respect to the problems of handicapped children who accompany and advise a particular party named in the matter, the particular parties named in the matter, and the impartial hearing officer.
AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE XIII EX-PARTE CONSULTATIONS (1) The impartial hearing officer, after the issuance of the notice of hearing, shall not communicate with any party in connection with any issue of fact or law in such case except upon notice and opportunity for all parties to participate.
AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE XIV POWERS OF THE IMPARTIAL HEARING OFFICER (1) The impartial hearing officer may:

(a) administer oaths;

(b) issue subpoenas;

(c) provide for the taking of testimony by depositions;

(d) set the time and place of the hearing and direct parties to appear and confer to consider simplifications of the issues by consent of the parties involved;

(e) fix the time for filing of briefs or other documents;

(f) request the submission of proposed findings of facts and conclusions of law at the conclusion of the hearing.

(2) The impartial hearing officer shall be bound by common law and the Montana Rules of Evidence. All evidence and objections to evidence shall be noted in the record:

(a) any part of the evidence may be received in written form;

(b) documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original. Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the impartial hearing officer's specialized knowledge.
AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE XV HEARING (1) The hearing will be conducted before the impartial hearing officer in the following order:

(a) statement and evidence of the petitioner or other party in support of its action;

(b) statement and evidence of the respondent in support of its action;

(c) rebuttal testimony;

(d) closing arguments beginning with petitioner and ending with respondent.

(2) The order of procedure may be changed by order of the impartial hearing officer upon a showing of good cause.

(3) Each party shall have the right to conduct cross-examinations for a full and true disclosure of the facts, including the right to cross-examine the authority of any document prepared by or on behalf of or for the use of all parties and offered into evidence. All testimony shall be given under oath or affirmation.

AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE XVI RECORD (1) The record in the impartial due process hearing shall include:

(a) all pleadings, motions, intermediate ruling;

(b) all evidence received plus a stenographic record of oral proceeding;

(c) a statement of matters officially noticed;

(d) questions and offers of proof, objections and proceedings thereon;

(e) proposed findings and exceptions;

(f) findings of fact, conclusions of law and order by the impartial hearing officer.

(2) A transcript of the impartial due process hearing shall be taken by a certified court reporter and transcribed and made available upon request of either party to the hearing. The state superintendent of public instruction will pay costs associated with the transcription of the record taken by the court reporter.

AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

RULE XVII FINAL ORDER ON SPECIAL EDUCATION DUE PROCESS (1) The impartial due process hearing officer shall render, in writing, findings of fact and conclusions of law separately stated and an order concerning all matters at issue in the hearing within 45 days of the state superintendent of public instruction's receipt of the request for hearing unless an extension of time has been granted by the impartial hearing officer. The impartial hearing officer may grant a request by either party for a specific extension of the 45-day period allowed for rendering a final order. The hearing officer shall mail, or personally deliver, a written copy of the findings of fact, conclusions of law and order to each of the parties and to the state superintendent of public instruction. The hearing officer shall also mail or deliver the record as defined in Rule XVI to the state superintendent of public instruction.

(2) In the event the impartial hearing officer has granted a written request from a party to extend the 45-day period in which to render a final decision, the impartial hearing officer shall notify the state superintendent of public instruction when

the decision is due. In the event the decision is not rendered within 90 days from the date the request for impartial due process hearing was filed with the state superintendent of public instruction, the state superintendent of public instruction may remove the impartial hearing officer and appoint another impartial hearing officer.

(3) The impartial hearing officer may order reimbursement for parents for the unilateral placement of their child if the school district's placement is determined to be inappropriate and the parent's placement is deemed appropriate.

(4) The decision of the impartial hearing officer shall be binding upon both parties unless the decision is appealed.

(5) Any party who feels aggrieved by the findings and decision of the impartial hearing officer may appeal to a district court or may bring a civil action under 20 U.S.C. 1415(e)(2) of the Education of the Handicapped Act.

(6) The state superintendent of public instruction shall only be responsible for paying administrative costs related to the hearing, including necessary expenses incurred by the impartial hearing officer and stenographic services. The parties involved shall each be responsible for any legal or other fees that occur.

(7) Every party to a controversy shall comply with these rules of procedure. Failure of one party to do what is required and which substantially prejudices the proceedings may necessitate a request by the impartial hearing officer of a court order for compliance.

(8) In the event that parents of a handicapped child prevail, a court of competent jurisdiction, in its discretion, may award reasonable attorney's fees as part of the costs to the parents. The awarding of attorney's fees is subject to the limitations found under 20 U.S.C 1415(e)(4) of the Education of the Handicapped Act.

AUTH: Sec. 20-7-420, MCA; IMP: Sec. 20-7-402, MCA

3. The Education of the Handicapped Act requires that each state adopt procedural rules for conducting due process hearings. Currently, Montana's rules for due process hearings are commingled with Montana's Rules of Procedure for All School Controversy Contested Cases before the County Superintendents of the State of Montana. The Superintendent proposes to remove the due process hearing rules from Chapter 6 of Title 10 of the Administrative Rules of Montana and place them in a separate Sub-Chapter of Chapter 16 of Title 10. Rules XII, XVI, and XVII have been modified to comply with federal regulations. In addition, some of the language of the other rules has been changed to reflect the separation of the commingled rules.

4. Interested parties may submit their data, views or arguments concerning the proposed adoption, in writing to the Office of Public Instruction, State Capitol, Room 106, no later than April 15, 1990.

5. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to the Office of Public Instruction, State Capitol, Room 106, Helena, Montana 59620 no later than April 15, 1990.

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

Superintendent of Public Instruction

By: 

Beda J. Lovitt
Chief Legal Counsel

Certified to the Secretary of State March 5, 1990.

BEFORE THE MONTANA FISH AND GAME COMMISSION

In the Matter of the Proposed)
Adoption of Rules Restricting)
Public Access and Fishing near) NOTICE OF PUBLIC HEARING
Montana Power Company Dams and)
amending 12.6.801)

TO: All interested persons

1. On April 5, 1990, 7:00 o'clock p.m. a public hearing will be held at the Department of Fish, Wildlife and Parks Headquarters Commission Room, in Helena, Montana.

2. No public hearings are contemplated on the rest of the waters the Commission is proposing to close.

3. Proposed Rule I does not replace or modify any section currently found in the Administrative Rules of Montana.

4. The rules as proposed provide as follows:

12.6.801 BOATING CLOSURES (1) remains the same.

~~(a) area immediately above and below Holter Dam in Lewis & Clark County;~~

~~(b) area immediately above and below Hauser Dam in Lewis & Clark County;~~

(a) ~~(c)~~ area immediately above and below Canyon Ferry Dam in Lewis & Clark County;

~~(d) area immediately above and below Milltown Dam in Missoula County;~~

~~(e) area immediately above Flint Creek Dam in Deer Lodge County;~~

(b) ~~(f)~~ area immediately above Kerr Dam in Lake County;

(c) ~~(g)~~ a portion of Brown's Lake near Ovando, Powell County, during the time period beginning April 1 and ending July 15.

AUTH: Sections 87-1-301 and 87-1-303
IMP: Section 87-1-303

RULE I USE RESTRICTIONS AT MONTANA POWER COMPANY DAMS (1) In the interest of public health, safety, or protection of property, the following regulations concerning the public use of certain waters of the state of Montana are hereby adopted and promulgated by the Montana fish and game commission.

(a) The following waters near Montana Power Company owned and operated hydroelectric dams are closed to all boating, sailing, floating and swimming:

Black Eagle: 500 feet above the dam to 100 feet below the waterfalls;

Cochran:	500 feet above the dam to 500 feet below the dam;
Flint Creek:	100 feet above the dam to the dam;
Hauser:	250 feet above the dam to 600 feet below the dam;
Holter:	150 feet above the dam to 900 feet below the dam;
Madison:	600 feet above the dam to 900 feet below the dam;
Milltown:	200 feet above the dam to 200 feet below the dam;
Morony:	500 feet above the dam to 500 feet below the dam;
Mystic:	100 feet above the dam to the dam;
Rainbow:	600 feet above the dam to 100 feet below the waterfalls;
Ryan:	500 feet above the dam to 100 feet below the waterfalls;
Thompson Falls:	1,020 feet above main channel dam to 500 feet below Powerhouse;
West Rosebud:	100 feet above the dam to the dam.

(i) The above closed waters will be identified and delineated by positive boat restraining systems or signs.

(b) The following river and stream channel areas near Montana Power Company owned and operated dams are closed to all public access below the ordinary high-water mark as defined by 23-2-301, MCA:

Black Eagle:	the dam to 100 feet below the waterfalls;
Hauser:	the dam to 100 feet below the dam from December 1 through April 1 annually;
Mystic:	the south side of West Rosebud Creek from the powerhouse to the USGS concrete weir;
Rainbow:	the dam to 100 feet below the waterfalls;
Ryan:	the dam to the east end of Ryan Island.

(i) The above closed areas will be identified by signs or fences installed by Montana Power Company.

AUTH: Section 87-1-303, MCA
IMP: Section 87-1-303, MCA

5. Rationale and reason for proposed rule: Montana Power Company has identified public safety hazards near their dams necessitating the restrictions.

6. Interested parties may submit their data, views or arguments concerning the proposed rules in writing to Erv Kent, Administrator, Enforcement Division, Department of Fish, Wildlife and Parks, 1420 East Sixth, Helena, Montana, 59620, no later than April 12, 1990.

7. Richard Clough has been designated to preside over and conduct the hearing.

6. The authority of the agency to make the proposed amendment and adoption is based on sections 87-1-301 and 87-1-303, MCA, and the rule implements section 87-1-303, MCA.

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

Certified to the Secretary of State March 5, 1990.

BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the proposed amendment of ARM 12.6.901 pertaining to Water Safety Regulations	))))	NOTICE OF PUBLIC HEARING

TO: All interested persons

1. On April 10, 1990, at 7:00 o'clock p.m., a public hearing will be held at the Whitefish High School, Lecture Room A29, East 4th Street, Whitefish, Montana to consider the amendment of this rule.

2. The proposed rule amendment would establish a no-wake speed restriction on the Whitefish River from its confluence with Whitefish Lake to the JP Road bridge.

3. The rule as proposed provides as follows:

12.6.901 WATER SAFETY REGULATIONS (1)(a) through (1)(b)(ii) remain the same.

(c) The following waters are limited to a controlled no wake speed. No wake speed is defined as a speed whereby there is no "white" water in the track or path of the vessel or in created waves immediate to the vessel:

Broadwater County through Fergus County remain the same.

Flathead County:
- (A) on Flathead Lake: Bigfork Bay;
- (B) Beaver Lake (near Whitefish) 5:00 a.m. to 10:00 a.m. and 7:00 p.m.to 11:00 p.m. each day;
- (C) Whitefish River from its confluence with Whitefish Lake to the bridge on the JP Road;

Hill County through Missoula County remain the same.

(d) through (2) remain the same.

AUTH: 87-1-303, 23-1-106(1), MCA
IMP: 87-1-303, 23-1-106(1), MCA

4. This amendment is being proposed due to an increase in the number of jet skiers using the river and resulting in potential impacts to human safety, as well as stream-side damage.

5. Interested parties may submit their data, views or arguments concerning the proposed rule in writing at the hearing. Written data, views or arguments may also be submitted to Al Elser, Region 1 Supervisor, Department of Fish, Wildlife and Parks, P.O. Box 67, Kalispell, Montana 59903, no later than 5:00 o'clock p.m. April 12, 1990.

6. Bob Lane, Chief Legal Counsel, has been designated to preside over and conduct the hearing.

K.L. Cool, Secretary
Fish and Game Commission

Certified to the Secretary of State March 5, 1990.

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

In the matter of the adoption of rules concerning Montana's minimum hourly wage rate	))))))	NOTICE OF PROPOSED ADOPTION OF RULES ESTABLISHING MONTANA'S MINIMUM HOURLY WAGE RATE NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On April 14, 1990, the Department of Labor and Industry proposes to adopt rules establishing the minimum hourly wage rate in Montana.

2. The proposed rules implement Section 39-3-409, MCA, wherein the 1989 Legislature determined to establish a minimum hourly wage rate the same as that "provided under the federal Fair Labor Standards Act (29 U.S.C. 206), but not to exceed $4 an hour."

3. The proposed rules provide as follows:

RULE I PROCEDURE FOR DETERMINING MINIMUM WAGE (1) Section 39-3-409, MCA (1989), provides that the commissioner shall adopt rules to establish a minimum rate of wage the same as that "provided under the federal Fair Labor Standards Act (29 U.S.C. 206), but not to exceed $4 an hour."

(2) Section 6(a) of the Fair Labor Standards Act (29 U.S.C. 206(a)(1)) was amended November 17, 1989, to provide for a minimum wage not less than $3.35 an hour until March 31, 1990; not less than $3.80 an hour for the year beginning April 1, 1990; and not less than $4.25 an hour after March 31, 1991.

AUTH: 39-3-403, MCA IMP: 39-3-409, MCA

RULE II MINIMUM WAGE RATE (1) Up to and including March 31, 1990, Montana's minimum hourly wage rate, excluding the new hire wage provided for in section 39-3-410, MCA, shall be $3.35 an hour.

(2) From April 1, 1990 through March 31, 1991, Montana's minimum hourly wage rate, excluding the new hire wage provided for in section 39-3-410, MCA, shall be $3.80 an hour.

(3) Effective April 1, 1991, and thereafter until further notice, Montana's minimum hourly wage rate, excluding the new hire wage provided for in section 39-3-410, MCA, shall be $4.00 an hour.

AUTH: 39-3-403, MCA IMP: 39-3-409, MCA

4. The rule is proposed to adopt the new minimum wage rates established under the federal Fair Labor Standards Act, insofar as those rates do not exceed $4 an hour.

5. Interested parties may submit their data, views or arguments concerning the proposed rule in writing to Mike Stump, employment relations division, department of labor and industry, P.O. Box 1728, Helena, MT 59624, no later than April 12, 1990.

6. If a person who is directly affected by the proposed adoption wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Mike Stump, employment relations division, department of labor and industry, P.O. Box 1728, Helena, MT 59624, no later than April 12, 1990.

7. If the agency receives requests for a public hearing on the proposed adoption from 25 persons who are directly affected by the proposed adoption; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having 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.

8. The authority of the department to make the proposed rule is based on section 39-3-403, MCA, and the rule implements section 39-3-409, MCA.

Mario A. Micone, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State: March 5, 1990

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of Rule 24.29.1415 pertaining to the impairment rating dispute procedure	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 24.29.1415 PERTAINING TO THE IMPAIRMENT RATING DISPUTE PROCEDURE

TO: All Interested Persons:

1. On Tuesday, April 10, 1990, at 9:00 a.m., or as soon thereafter as the matter may be heard, a public hearing will be held in Room 303 of the Peg Condon Building, 5 South Last Chance Gulch, Helena, Montana, to consider the amendment of Rule ARM 24.29.1415 pertaining to the impairment rating dispute procedure.

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

24.29.1415 IMPAIRMENT RATING DISPUTE PROCEDURE

(1) An evaluator must be a qualified physician licensed to practice in the state of Montana under Title 37, chapter 3, MCA, and board certified or board eligible in his area of specialty appropriate to the injury of the claimant, except that if the claimant's treating physician is a chiropractor, the evaluator may be a chiropractor who is certified as an impairment evaluator under Title 37, chapter 12, MCA. The claimant's treating physician may not be an evaluator. ~~The division will develop a list of evaluators which may include those physicians nominated by the board of medical examiners.~~

(2) The ~~division~~ department will arrange evaluations as close to the claimant's residence as reasonably possible.

(3) The ~~division~~ department will give written notice to the parties of the time and place of the examination. If the claimant fails to give 48 hours notice of his inability to attend the examination, he is liable for payment of the evaluator's charges incurred. ~~except for good cause shown.~~

(4) The ~~division~~ department may request a party to submit all pertinent medical documents including any previous impairment evaluations to the selected evaluator.

(5) Any party wanting to provide information to an evaluator or inquire about the status of an evaluation shall do so only through the ~~division~~ department.

(6) The impairment evaluators shall operate according to the following procedures:

(a) The evaluator shall submit a report of his findings to the ~~division~~ department, claimant and insurer within fifteen (15) days of the date of the examination.

(b) If another evaluation is requested within 15 days after the first evaluator mailed the first report, the ~~division~~ department will select a second evaluator who will render an impairment evaluation of the claimant.

(c) The second evaluator shall submit a report of his findings to the ~~division~~ department, claimant and insurer, within fifteen (15) days of the date of the examination.

(d) The ~~division~~ department shall submit both reports to the third evaluator, who shall then submit a final report to the ~~division~~ department, claimant and insurer within thirty (30) days of the date of the examination or, if no examination is conducted, within thirty (30) days of receipt of the first and second evaluation reports from the department. The final report must certify that the other two evaluators have been consulted.

(e) If neither party disputes the rating in the final report, the insurer shall begin paying the impairment award, if any, within 45 days of the third evaluator's mailing of the report.

(f) Either party may dispute the final impairment rating by filing a petition with the workers' compensation court within fifteen (15) days of the third evaluator's mailing of the report.

AUTH: Section 39-71-203 MCA
IMP: Section 39-71-711 MCA

3. Rationale: The 1989 Legislature passed HB 33, (Chapter 161, Laws 1989), amending section 39-71-711, MCA, Impairment evaluation -- ratings. The proposed amendments to Rule 24.29.1415 reflect the statutory changes which allow an impairment evaluation to be made by a chiropractor if a claimant's treating physician is a chiropractor. In addition, the proposed amendments to the rule implement Section 64, Chapter 613, Laws 1989, [SB 428], which transferred these and other duties to the Department of Labor and Industry from the dissolved Workers' Compensation Division.

4. Interested parties may submit their data, views or arguments concerning these changes either orally or in writing at the hearing. Written arguments, views or data may also be submitted to Gwen Kloeber, Standards Bureau, Employment Relations Division, Department of Labor & Industry, P.O. Box 8011, Helena, Montana 59604 no later than April 13, 1990.

5. The Hearings Unit, Legal Services Division, Department of Labor & Industry has been designated to preside over and conduct the hearing.

Mario A. Micone, Commissioner
Department of Labor and
Industry

Certified to the Secretary of State: March 5, 1990

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

In the matter of the adoption of new Rules I through III regarding investigation of complaints regarding effects of hard rock blasting operations.) NOTICE OF PUBLIC HEARING

TO: All Interested Persons

1. On April 5, 1990, at 7:00 p.m., a public hearing will be held at the Pintler Room (Room 207), Student Union Building, Montana College of Mineral Science and Technology, Butte, Montana, to consider adoption of Rules I through III.

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 COMPLAINT PROCEDURE (1) Affected parties, who are owners of an interest in real property or individuals who reside within an area subject to property damage or safety hazards related to the use of explosives by an operator may file a signed and dated complaint related to use of explosives associated with hardrock mining or exploration activities as follows:

(a) Complaints must be filed in writing with the Department's Hard Rock Bureau.

(b) Complaints must include the following information:

(i) name, mailing address, street address and phone number of person filing complaint;

(ii) statement of interest in real property or identification of residence within an area subject to property damage or safety hazards related to use of explosives;

(iii) name of person or company using explosives, if known;

(iv) detailed location of explosives use;

(v) date and time of use;

(vi) if property damage is alleged, type of damage including:

(A) type of structure;

(B) nature of damage;

(C) age of structure;

(D) rationale for correlating damage to use of explosives; and

(vii) if safety hazard is alleged, type of safety hazard.

(2) The department shall promptly investigate a credible complaint by:

(a) documenting the alleged damage or safety hazard with photographs and engineering reports and interviews as appropriate;

(b) requesting and evaluating all available information from the operation allegedly responsible for the problem;

(c) investigating concurrent activity which may have caused or contributed to the problem identified;

(d) conducting appropriate tests, which may include, but are not limited to:

(i) seismograph and airblast monitoring;

(ii) geologic investigation; and

(iii) evaluation of the structural integrity of the structure; and

(e) making written findings, including, if possible, a determination of whether any of the standards in Rule III(6)(a), (11)(a), or (15)(c) were exceeded.

(3) The department shall mail a copy of its written findings to the complainant and the operator.

AUTH: Sec. 82-4-321, MCA; IMP: Sec. 82-4-356, MCA.

RULE II PARTICIPATION AND COOPERATION OF PERSONS USING EXPLOSIVES (1) Whenever the department notifies the operator that it has received a credible complaint pursuant to Rule I concerning a use of explosives, the operator shall make available to the department, within 15 days of receipt of a written request, such information as the department may request, including, but not limited to, the following:

(a) identification of persons conducting blasting activities and their level of training and experience;

(b) preblasting survey information, if available;

(c) blasting schedule and records identifying as accurately as possible location of the blasting sites and timing of blasts; and

(d) seismograph measurements, if available.

(2) The operator shall make available for interviewing by the department and its consultants all persons involved in the blasting operations.

(3)(a) After the department conducts its preliminary investigation by reviewing the records supplied by the operator using explosives and performs its own appropriate tests, if needed, the department shall do one or more of the following:

(i) If the department's preliminary investigation has determined that property damage or a safety hazard could not have occurred from blasting activities, the department shall give written notification of its findings to all concerned parties;

(ii) If, after its preliminary investigation, the department cannot determine whether property damage or a safety hazard may have occurred as the result of blasting, or if it appears damage or a safety hazard has occurred as the result of blasting, the department shall perform one or more of the following:

(A) continue to conduct its own tests;

(B) conduct additional investigations, including, but not limited to, geologic structure, frequency, and delay sequencing; or

(C) hire a third party consultant to conduct a survey of the blasting operation and, if necessary, structures.

(b) A survey prepared under (a)(ii)(C) must be conducted by a recognized expert on the forces created by blasting and must document the condition of the structure, any blasting damage, any causes for the damage other than blasting, and whether blasting by the operator exceeded the standards contained in Rule III(6)(a), (11)(a) and (15)(c). Assessments of structures such as pipes, cables, transmission lines, and wells and other water systems must be limited to surface condition and readily available data. Special attention must be given to the condition of wells and other water systems used for human, animal, or agricultural purposes and to the quantity and quality of the water.

(c) The recognized expert must submit his qualifications to the department for review. At a minimum, the expert must:

(i) have field experience covering at least five previous blasting-related projects; and

(ii) provide a brief summary of the number and type of pre-blast and post-blast investigations along with any conclusions or recommendations resulting from those investigations.

(d) The department shall require that a written report of the survey be prepared and signed by the person who conducted the survey. If the report finds that the standards were exceeded or that the blasting caused damage or safety hazard, the report may include recommendations of any special conditions or proposed adjustments to the blasting procedure that should be incorporated into the blasting plan to prevent damage or hazard. The department shall provide a copy of the report to the complainant and the operator.

(4) If the third party investigation demonstrates that the operator exceeded the standards contained in Rule III(6)(a), (11)(a) or (15)(c) or that the damages or a hazard resulted from blasting by the operator, the operator shall reimburse the department for all reasonable fees and expenses it has paid to the third party consultant.

AUTH: Sec. 82-4-321, MCA; IMP: Sec. 82-4-356, MCA.

RULE III ORDERS OF THE DEPARTMENT If it determines that the preponderance of evidence indicates that property damage or safety hazards are or were caused by blasting associated with exploration or mining activities by an operator, the department shall issue an order. In the event the order is not complied with, the department shall implement noncompliance procedures. The order must impose requirements reasonably necessary to prevent property damage or safety hazards. The department may require as many of the following requirements as are reasonably necessary for this purpose:

(1) Each operator shall comply with all applicable state and federal laws in the use of explosives.

(2) All blasting operations must be conducted by experienced, trained, and competent persons who understand the hazards involved.

(3) A record of each blast occurring over a period to be determined by the department, including seismograph records, must be prepared and retained for at least 3 years and must be available for inspection by the department on request. Blasting records must be accurate and completed in a timely fashion. The records must contain the following data:

(a) name of the operator conducting the blast;

(b) location, date, and time of the blast;

(c) name, signature, and license number of blaster-in-charge;

(d) direction and distance, in feet, to the nearest inhabited building or structure either:

(i) not located in the permit area; or

(ii) not owned nor leased by the person who conducts the mining activities;

(e) weather conditions, including temperature, wind direction and approximate wind velocity;

(f) type of material blasted;

(g) number of holes, burden, and spacing;

(h) diameter and depth of holes;

(i) types of explosives used;

(j) total weight of explosives used;

(k) maximum weight of explosives detonated within any 8-millisecond period;

(l) maximum number of holes detonated within any 8-millisecond period;

(m) initiation system;

(n) type and length of stemming;

(o) mats or other protections used;

(p) type of delay detonator and delay periods used;

(q) sketch of the delay pattern;

(r) number of persons in the blasting crew;

(s) seismographic and airblast records, where required, including:

(i) the calibration signal of the gain setting or certification of annual calibration;

(ii) seismographic reading, including exact location of seismograph and its distance from the blast, airblast reading, dates and times of readings;

(iii) name of the person taking the seismograph reading; and

(iv) name of the person and firm analyzing the seismographic record.

(4) When blasting is conducted in an area where access is not restricted, warning and all-clear signals of different character that are audible at all points within a range of one-half mile from the point of the blast must be given. Each person within the permit area and each person who resides or regularly works within one-half mile of the permit area must be notified of the meaning of the signals through appropriate instructions. These instructions must be periodically

delivered or otherwise communicated in a manner that can be reasonably expected to inform such persons of the meaning of the signals.

(5) Blasting must not eject flyrock off property controlled by the operator. Access to the blasting area and to areas where blasting effects, such as flyrock, occur, must be controlled by methods such as signs and fencing to prevent the presence of livestock or unauthorized personnel during blasting and until an authorized representative of the operator has reasonably determined:

(a) that no unusual circumstances, such as imminent slides or undetonated charges, exist; and

(b) that access to and travel in or through the area can be safely resumed.

(6) (a) Airblast must be controlled so that it does not exceed the values specified below at any dwelling, public building, school, church, or commercial, public, or institutional structure, unless the structure is owned by the operator and is not leased to any other person. If a building owned by the operator is leased to another person, the lessee may sign a waiver relieving the operator from meeting the airblast limitations of this paragraph.

Lower Frequency limit of measuring system, Hertz (Hz) (±3dB)	Maximum level in decibels (dB)
0.1 Hz or lower - flat response	134 peak.
2 Hz or lower - flat response	133 peak.
6 Hz or lower - flat response	129 peak.
C-weighted, slow response	105 peak dBC.

If necessary to prevent damage based upon the consultant's report, the department shall specify lower maximum allowable airblast levels than those above.

(b) In all cases, except the C-weighted, slow-response system, the measuring systems used must have a flat frequency response of at least 200 Hz at the upper end. The C-weighted system must be measured with a Type 1 sound level meter that meets the standard American national standards institute (ANSI) S1.4-1971 specifications. Copies of this publication are on file with the Department of State Lands, Capitol Station, Helena, Montana 59620.

(c) The operator may satisfy the provisions of this section by meeting any of the four specifications in the chart in subsection (6)(a) above.

(d) The operator shall conduct periodic monitoring to ensure compliance with the airblast standards. The department may require an airblast measurement of any or all blasts, and may specify the location of such measurements, except as noted in (6)(a) above.

(7) Whenever the standards contained in (11)(a) and (15)(c) have been exceeded, or whenever, based upon the consultant's report, it has been determined to be necessary to protect public safety or property, the department may require modification of blasting activities to protect:

(a) public, private or institution building, including any dwelling, school, church, hospital, or nursing facility; and

(b) facilities including, but not limited to, disposal wells, petroleum or gas-storage facilities, municipal water-storage facilities, fluid-transmission pipelines, gas or oil-collection lines, or water and sewage lines or any active or abandoned underground mine.

(8) A blast design, including measures to protect the facilities in section (7) must be submitted to the department prior to continued blasting.

(9) Flyrock, including blasted material traveling along the ground, must not be cast from the blasting vicinity more than half the distance to the nearest dwelling or other occupied structure and in no case beyond the line of property owned or leased by the permittee, or beyond the area of regulated access required under section (5) of this rule.

(10) Blasting must be conducted to prevent injury to persons, damage to public or private property outside the permit area, adverse impacts on any underground mine, and change in the course, channel, or availability of ground or surface waters outside the permit area.

(11) (a) In all blasting operations, except as otherwise authorized in this section, the maximum peak particle velocity must not exceed the following limits at the location of any dwelling, public building, school, church, or commercial, public, or institutional structure:

Distance (D) from the blasting site, site, in feet	Maximum allowable peak particle velocity (V max) for ground vibration, in inches/second	Scaled-distance factor to be applied without seismic monitoring (Ds)
0 to 300	1.25	50
301 to 5,000	1.00	55
5,001 and beyond	0.75	65

(b) Peak particle velocities must be recorded in three mutually perpendicular directions. The maximum peak particle velocity is the largest of any of the three measurements.

(c) The department shall reduce the maximum peak velocity allowed if a lower standard is required, based upon the consultant's report, to prevent damage or to protect public safety because of density of population or land use, age or type of structure, geology or hydrology of the area, frequency of blasts, or other factors.

(12) If blasting is conducted in such a manner as to avoid adverse impacts on any underground mine and changes in the course, channel, or availability of ground or surface water outside the permit area, then the maximum peak particle velocity limitation of section (11) does not apply at the following locations:

(a) at structures owned by the operator and not leased to another party; and

(b) at structures owned by the operator and leased to another party, if a written waiver by the lessee is submitted to the department prior to blasting.

(13) An equation for determining the maximum weight of explosives that can be detonated within any 8-millisecond period is in section (14) of this rule. If the blasting is conducted in accordance with this equation, the peak particle velocity is deemed to be within the limits specified in section (11) above.

(14) The maximum weight of explosives to be detonated within any 8-millisecond period may be determined by the formula $W = (D/Ds)^2$ where W = the maximum weight of explosives, in pounds, that can be detonated in any 8-millisecond period; D = the distance, in feet, from the blast to the nearest public building or structure, dwelling, school, church, or commercial or institutional building or structure, except as noted in section (12) above; and Ds = the scaled distance factor, using the values identified in section (11) above.

(15) (a) Whenever a seismograph is used to monitor the velocity of ground motion and the peak particle velocity limits of section (11) are not exceeded, the equation in section (14) need not be used. If that equation is not used by the operator, a seismograph record must be obtained for each shot.

(b) The use of a modified equation to determine maximum weight of explosives per delay for blasting operations at a particular site may be approved by the department, on receipt of a petition accompanied by reports including seismograph records of test blasting on the site. The department may not approve the use of a modified equation if the peak particle velocity for the limits specified in section (11) are exceeded, meeting a 95% statistical confidence level.

(c) The operator may use the ground vibration limits in Figure 1 (30 CFR 816.67(d)(4)) as an alternative to paragraphs (a) and (b) above, upon approval by the department.

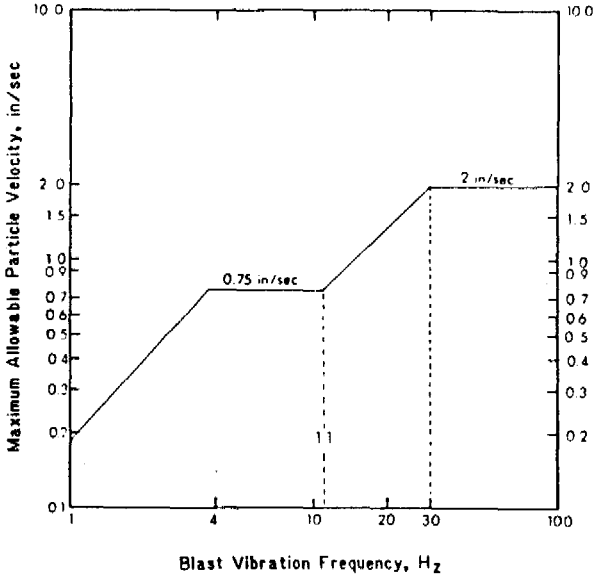


Figure 1: Blasting Level Chart

(d) The department may require a seismograph record of any or all blasts and may specify the location at which the measurements are to be taken.

AUTH: Sec. 82-4-321, MCA; IMP: Sec. 82-4-356, MCA.

4. Chapter 443, Laws of 1989, which is codified as 82-4-356, MCA, authorizes and requires the Department to investigate credible complaints that blasting by hard rock operations has caused property damage or a safety hazard and document the results of the investigation. If the Department determines that blasting has had one of these effects, it must order the operator to make changes in the use of explosives or implement other appropriate mitigation.

In the statement of intent that accompanied Chapter 443, the Legislature recommended that the Department adopt rules concerning the types and methods of investigation and specifying the methods of cooperation by the operator in the investigation and in implementing mitigation measures.

The proposed rules are necessary to notify the public what information must be contained in a complaint, to specify the types and methods of investigation that the Department will conduct upon receipt of a credible complaint, to provide requirements for operator cooperation in an investigation, and to specify the requirements and mitigations that the Department may impose on operators who have caused property damage or safety hazards. These requirements include conservative airblast and ground motion standards used by the Department of the Interior, Office of Surface Mining to protect public safety and property from coal mine blasting activities. These levels were set on the basis of U. S. Bureau of Mines tests on structures and are designed to prevent even superficial damage to structures.

5. Interested persons may present their data, views, or arguments, orally or in writing, at the hearing. Written data, views, and arguments may also be submitted to Sandi Olsen, Bureau Chief, Hard Rock Bureau, Department of State Lands, Capitol Station, Helena, Montana 59620 no later than April 12, 1990. To ensure consideration, data, views, and comments must be postmarked no later than April 12, 1990.

6. Gary Amestoy, Administrator of the Reclamation Division, has been designated to preside over and conduct the hearing.

7. The authority of the agency to make the proposed rules is based on Section 82-4-321, MCA, and the rules implementing Section 82-4-356, MCA.

Dennis D. Casey, Commissioner

Certified to the Secretary of State March 5, 1990.

BEFORE THE DEPARTMENT
OF PUBLIC SERVICE REGULATION
OF THE STATE OF MONTANA

In the Matter of Proposed Adoption of New Rules and Amendment of Existing Rules Pertaining to Motor Carrier Status, Class C Contracts, Class C Pickups and Delivery, Contract and Common Carrier Distinction, Insurance, Transfer of Authority, and Carrier Rate Increases, and Repeal of Rule Pertaining to Vehicle Identification.	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF NEW RULES I-III, AMENDMENT TO RULES 38.3.104, 38.3.702, 38.3.704, 38.3.706, 38.3.2101 and 38.3.3401, AND REPEAL OF RULE 38.3.117

TO: All Interested Persons

1. On Friday, April 6, 1990, at 9:00 a.m., a public hearing will be held in the large conference room of the Public Service Commission at 2701 Prospect Avenue, Helena, Montana, to consider the proposals identified in the above titles.

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

RULE I. STATUS OF CARRIER -- EFFECT OF LEASE OF POWER EQUIPMENT (1) Nothing in this rule shall permit the lease of power equipment from an authorized carrier to a noncertified carrier as the same is prohibited by section 69-12-611, MCA.

(2) In this rule, the term "lease" shall mean the lease of power equipment, whether or not including or accompanied by a provision for the services of an operator, and shall include sub-lease, rental agreement, and similar arrangements.

(3) In all cases, a lease shall be considered transportation "for hire" and thereby constitute the lessor a "motor carrier," except as may be otherwise permitted by law or provided herein.

(4) A lease permitted by law not to be transportation "for hire" and thereby constituting any party a "private carrier" shall be bona fide and in good faith, without guise, subterfuge, or have as its sole purpose to avoid or evade regulation.

(5) Unless otherwise required by law in any specific instance, any statute or rule providing that transportation "for hire" or "motor carrier" may arise from a lease shall not be construed to apply to any lease in which the following are observed, exist and are actually exercised:

(a) the lease shall be in writing, signed by the parties and it, or a true copy, shall be carried in the power equipment at all times during the period of the lease;

(b) there shall be no agreements or understandings between the parties pertaining to the lease of power equipment, operator or complete services, except as contained in the lease;

(c) the power equipment leased shall display, in a conspicuous place on both sides of the cab, the identity and address of the lessee and may also display the same for the lessor;

(d) at all times there shall be carried in the power equipment, bills of lading, waybills, freight bills, manifests, and other papers identifying the lading, all of which shall clearly indicate that the transportation is under the responsibility of the lessee;

(e) the lessor shall relinquish and the lessee shall have and actually exercise the exclusive right and privilege of possession, directing and controlling the equipment and the transportation and all incidents of transportation;

(f) the lessee shall use the equipment in transportation of freight or passengers within the scope of furtherance of the lessee's primary nontransportation business enterprise, or other nonregulated transportation, and for no other purpose;

(g) the lessee shall substantially assume, carry, and bear the characteristic burdens of the transportation business such as expenses for fuel, maintenance, repairs, delays, breakdowns, detours, idle time for the power equipment and operator, and like matters;

(h) the lessee shall obtain and carry personal injury and property damage liability insurance in amounts no less than that required by law for motor carriers;

(i) the lease shall state the terms of compensation, the method by which it is calculated and determined, and must be realistic in covering the true and total lease of power equipment and complete services; and

(j) if the lease includes or is otherwise accompanied by the lessor's providing the services of an operator, the lease shall be for a duration no less than 30 days.

(6) Nothing in this rule shall be construed as limiting a lessor from actually directing, conducting, or performing maintenance or repair of power equipment or obtaining insurance of any type.

(7) Nothing in this rule shall be construed as limiting the terms of a lease, so long as no provision is inconsistent with this rule.

(8) Nothing in this rule shall be construed as relieving the lessor, lessee, or operator of any power equipment from compliance with the statutes and rules pertaining to the operation of motor vehicles. AUTH: Sec. 69-12-201, MCA; IMP, Secs. 69-12-101, 69-12-106, 69-12-107 and 69-12-201, MCA

Rationale: Rule I. This rule is necessary to provide a means whereby a private agreement may demonstrate that the tests of exclusive right and privilege of directing and controlling the transportation service and assumption of a significant measure of the characteristic burdens of transportation have been met and avoids the burdensome case-by-case analysis to determine whether a private agreement is a subterfuge, proscribed by sections 69-12-101 and 69-12-106, MCA, or a permissible bona fide agreement as allowed by sections 69-12-102 and 69-12-107, MCA.

RULE II. CLASS C CARRIER CONTRACTS -- REQUIRED PROVISIONS, SUMMARY (1) Class C carrier contracts shall include:

(a) the names, addresses and phone numbers of the parties;

(b) a description of the transportation contemplated;

(c) a description of the type of freight to be transported or whether persons are to be transported;

(d) a statement of the term of the contract, which shall be no less than 180 days and commence no earlier than the date of issuance of operating authority; and

(e) a statement of rates and charges negotiated between the parties for the proposed services.

(2) In addition to all other requirements, all class C motor carriers shall submit a contract summary form for each contract and have the same approved by the commission prior to transportation commencing. AUTH: Sec. 69-12-201, MCA; IMP, Secs. 69-12-301, 69-12-302 and 69-12-313, MCA

Rationale: Rule II. This rule is necessary as a matter of convenience or clarity in assembling the requirements of the three implemented statutes, to insure that the affected carrier contracts contain the required provisions, and to clarify that approval of the contract summary form for carrying in the power unit must be obtained prior to transportation.

RULE III. CLASS C CARRIER -- PICKUP AND DELIVERY (1) "Pickup and delivery" shall mean to accept, carry, or deliver small parcels or packages commonly referred to as express. AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-302, MCA

Rationale: Rule III. This rule is needed to prevent abuse and unfair carrier practices by clarifying that "pickup and delivery" is commonly and customarily understood and used in the transportation industry as being for "express" -- small packages and parcels. "Pickup and delivery" does not have any other general meaning, such as, the transportation of full truckload lots.

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

38.3.104 "CONTRACT" VS. "COMMON" CARRIER (1) A "contract" carrier is one who hauls for six or less than six shippers under contract or special agreement.

(2) A "common" carrier is one who holds himself out to serve all the general public for business at regular rates and charges filed with this commission.

(3) A "contract" carrier may convert to a "common" carrier only through proper application and opportunity for hearing as provided in sections 69-12-312 and 69-12-321, MCA. AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-302, MCA

Rationale: 38.3.104. Amendments to this rule are necessary to bring the rule into compliance with statutes and provide a procedure for conversion of carriers.

38.3.702 ~~PUBLIC--LIABILITY~~ BODILY INJURY AND PROPERTY DAMAGE LIABILITY INSURANCE (1) Every class A, class B, class C or class D intrastate carrier must file with this commission evidence of complying with the minimum insurance requirements of this commission as applicable to ~~public liability~~ bodily injury and property damage liability insurance.

(2) For the purposes of this sub-chapter "bodily injury" shall include death. AUTH: Sec. 69-12-201, MCA; IMP Sec. 69-12-402, MCA

Rationale: 38.3.702. This amendment is necessary to clarify the types of insurance required.

38.3.704 AUTHORIZED INSURANCE COMPANIES AND CERTIFICATES OF INSURANCE (1) Policies of insurance in regard to ~~public~~ bodily injury and property damage liability~~, property damage,~~ and cargo insurance, proof of which are submitted to this commission by way of certificates of insurance, must be written by insurance companies who are authorized to conduct business within the state of Montana, as required by the state commissioner of insurance.

(2) and (3) No changes. AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-402, MCA

Rationale: 38.3.704. This amendment is necessary to clarify the types of insurance required.

38.3.706 ENDORSEMENTS (1) All insurance policies issued by the insurance company to the carrier must include, at time of issuance, the terms, conditions and requirements set forth in this rule and repeated on endorsement forms approved by the commission and identified as ~~of this Commission as contained in documents entitled~~ "Endorsement MV4" ~~(see Form 3)~~ and "Endorsement MV2" ~~(see Form 4)~~ available from the office of the commission.

(2) ~~Such~~ The following terms, conditions and requirements are hereby deemed a substantive part of all policies issued, and are hereby incorporated therein~~:~~;

(a) Cargo insurance (Endorsement MV2) shall be issued in an amount no less than $10,000.

(b) Casualty (liability) insurance (Endorsement MV4) shall be issued in an amount no less than:

(i) $500,000 for 15 passengers or less;

(ii) $750,000 for 16 to 30 passengers;

(iii) $1,000,000 for 31 passengers or more;

(iv) except any motor carrier operating under a certificate of public convenience and necessity authorizing passenger operations only within a particular city or 10 mile radius thereof is required to carry a minimum of $500,000 insurance regardless of size of vehicle used;

(v) $500,000 for transportation of nonhazardous freight;

(vi) the federal department of transportation minimum insurance limits for hazardous materials freight, as hazardous materials is defined by that department.

(3) No change. AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-402, MCA

Rationale: 38.3.706. This amendment is necessary because minimum levels of liability and cargo insurance filings have not been changed since 1972 and the proposed minimum levels more accurately reflect realistic insurance requirements. It also is necessary to remove the forms from the rules and adopt the substance thereof into the rules.

38.3.2101 SALE OR TRANSFER OF CERTIFICATE OF AUTHORITY

(1) As authorized by 69-12-325, MCA, public service commission certificates or permits may be sold or transferred. Every application for the sale or transfer of a certificate of public convenience and necessity must be accompanied by an application filing fee of one hundred dollars ($100), and shall be paid to the commission as provided in ARM 38.3.801(2). The application ~~should~~ shall be addressed to the commission, ~~must~~ be sworn to, and contain the following information:

(a) ~~Should set out~~ the name and address of the owner and the number of the certificate, together with request that authority be granted such owner to sell or transfer all rights, title and interest under such certificate to the named vendee or purchaser;

(b) ~~Should set forth~~ the name and main office address of the vendee or purchaser, ~~must state~~ that such vendee or purchaser is desirous of acquiring Certificate No. _____, ~~and represents~~ that the operations to be conducted thereunder will be in accordance with the rules and regulations of the commission, and; ~~should~~ the vendee or purchaser be a legal corporation, the officers of such corporation and their addresses ~~must be named~~;

(c) ~~Should be~~ a list of equipment the vendee or purchaser intends to operate under such certificate, giving the state license number, year and name of the vehicle, the serial number, and seating capacity thereof; (In case the vehicles are to be used in transporting property, the maximum load to be carried must also be shown.)

(d) ~~Should~~ state that the vendee or purchaser will furnish before beginning operation, insurance, surety bond, or other approved security, covering all vehicles to be operated;

(e) ~~If~~ the vendee or purchaser desires to adopt the tariffs and time schedules, etc., of the vendor on file with the commission, it ~~should~~ shall here so be stated and reference to each of such publications by number and effective date must be made; (Does not apply to class C carriers.)

(f) ~~If~~ in case the vendee or purchaser does not desire to adopt the tariffs, time schedules, etc., of the vendor, it ~~should~~ shall be so stated; ~~and that two copies each of the proposed publications, designating them by name, are attached. (Does not apply to class C carriers.)~~

(g) ~~If~~ in case the vendee or purchaser consists of more than one person (not incorporated) operating as a co-partnership under a trade name, then this item ~~should~~ shall

state that a certified copy of such partnership agreement is attached~~.~~;

(h) ~~Should~~ shall set out the date on which it is desired that such sale or transfer shall become effective~~.~~, ~~N~~no sale or transfer ~~shall~~ being retroactive~~.~~;~~-----No sale or transfer shall be~~ or effective until approved by the commission~~.~~;

(i) ~~Should~~ shall state that the original certificate is attached~~.~~;~~-----If~~ but if the original certificate issued by this commission has been lost, a statement showing the facts ~~should~~ shall be inserted under this item or a separate affidavit reciting the loss of the certificate ~~should~~ and accompanying the application~~.~~;

(j) ~~Should~~ shall set forth that the sale or transfer is not for purpose of hindering, delaying or defrauding creditors~~.~~;

(k) shall be accompanied by the vendee or purchaser's current financial balance sheet setting forth the assets, liabilities and equity of the transferee, if the purchaser is in motor carrier transportation business, then the vendee's or purchaser's current financial income statement setting forth operating revenues, operating expenses, and net operating income of the transferee if said transferee is presently in the motor carrier transportation business; and

~~(k)~~ (l) ~~Should~~ shall be signed by the owner and the purchaser as follows.

State of Montana,
County of _____)ss.

_____ and _____

being first duly sworn, each for himself, deposes and says that he is one of the parties to the proceeding entitled above; that he has read the foregoing application and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on information or belief, and as to those matters he believes it to be true.

_____

_____

Subscribed and sworn to before me this _____ day of _____, 19____.

_____
Notary public for the State of Montana.
Residing at _____
My Commission expires _____

(2) and (3) No changes. AUTH: Sec. 69-12-201, MCA; IMP, Sec. 69-12-325, MCA

Rationale: 38.3.2101. This rule is necessary to allow Commission consideration in transfer proceedings of the "fitness" of the purchaser. The Commission has in the past required the filing of balance sheets and income statements and the proposed amendment establishes this by rule.

38.3.3401 COMPARISON OF PRESENT AND PROPOSED RATES -- DEFINITION, PERMANENCE (1) Unless the context otherwise requires, in this sub-chapter the meaning of the term "increase" shall include "decrease" and any other change or modification.

(2) No temporary rate increase shall be renewed or granted unless a carrier or bureau has demonstrated that the same should be done and is permitted by law.

~~(1)~~ (3) All rate increase tariff filings must be accompanied by a cover sheet setting forth the present rate, the proposed rate, and the percentage change for each affected item. AUTH: Sec. 69-12-201, MCA; IMP, Secs. 69-12-501 and 69-12-504, MCA

Rationale: 38.3.3401. The amendment is necessary to clarify that the procedure for rate decrease or other modification is the same as for rate increase.

4. Rule 38.3.117 proposed to be repealed can be found on page 38-164 of the Administrative Rules Montana.

Rationale: 38.3.117. Is proposed for repeal because it unnecessarily repeats statutory language.

5. Interested persons may present their data, views or arguments concerning the proposed adoption, amendment and repeal, either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Martin Jacobson, Public Service Commission, 2701 Prospect Avenue, Helena, Montana 59620-2601 no later than April 13, 1990.

6. Martin Jacobson, Public Service Commission, 2701 Prospect Avenue, Helena, MT 59620, has been designated to preside over and conduct the hearing.

7. The authority of the agency to make, amend and repeal the proposed rules and the statutes being implemented by the proposed rules are set forth following each rule above.

8. The Montana Consumer Counsel, 34 West Sixth Avenue, Helena, Montana, (406) 444-2771, is available and may be contacted to represent consumer interests in this matter.

CLYDE JARVIS, Chairman

CERTIFIED TO THE SECRETARY OF STATE FEBRUARY 27, 1990.

Reviewed By

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

In the matter of the amendment of Rule 46.12.552 pertaining to reimbursement for home health services	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.12.552 PERTAINING TO REIMBURSEMENT FOR HOME HEALTH SERVICES

TO: All Interested Persons

1. On April 5, 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 46.12.552 pertaining to reimbursement for home health services.

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

46.12.552 HOME HEALTH SERVICES, REIMBURSEMENT (1) Reimbursement fees for home health services will be ~~at cost, subject to upper limits defined~~ as provided for in subsections (2), (3), and (4). ~~as determined by an audit conducted according to Title XVIII of the Social Security Act definition of allowable costs except that:~~ For periods between calculations of the reimbursement fees as provided for in subsections (2), (3) and (4), reimbursement is as provided for in subsection (5). The provider's final reimbursement will be calculated when the actual reimbursement fees based on the medicare cost settlements are determined for the period. The medicare cost settlements are derived from an audit of allowable costs conducted for medicare purposes.

~~(a) payment by the home health agency for contracted therapy services may not exceed the Montana state medicaid therapy fee schedule as an allowable cost for the contracted service;~~

(2) For home health agencies located within the borders of the state that began providing ~~and having provided~~ services before ~~prior to~~ July 1, ~~1986~~ 1989, the reimbursement fee for a category of ~~per~~ service effective January 1, 1990 is ~~will be~~ the ~~lesser~~ lowest of:

(a) the provider's billed charges;

(b) ~~the lower of~~ the average medicare cost for the category of service; ~~or upper limit; or~~

(c) the upper medicare limit for the category of service; or

(cd) the adjusted indexed fee for the category of service for state fiscal year ending June 30, ~~1986~~ 1990.

(i) The ~~1986~~ state fiscal year 1990 adjusted indexed fee for a per category of service ~~will be determined from~~ is the sum of:

(A) the lowest fee for the category of services reported in the provider's medicaid ~~settled~~ cost ~~reports~~ settlement report ending ~~state fiscal~~ calendar year ~~June 30, 1984~~ 1989, ~~which will be~~ indexed to a common fiscal year ending December 30, 1989 by the most recent home health DRI market basket index percentage ~~established for 1984~~ of the health care financing administration of the department of health and human services (HCFA); and

(B) two percent (2%) of the indexed lowest fee ~~at 5.6 percent, 1985 at 4.6 percent, and 1986 at 3.6 percent plus two percent (2%)~~. ~~The final sum will become the 1986 indexed reimbursement fee.~~ The department hereby adopts and incorporates by reference the HCFA home health DRI market basket rate which is a forecast model of market basket increase factors ~~prepared by Data Resources, Inc., 1750 K Street N.W., 9th Floor, Washington, D.C., 20006~~. The rate and a ~~A~~ description of the general methodology and variables used in formulating this model is available from HCFA, Office of the Actuary, 6325 Security Blvd., Baltimore, MD 21209 ~~the Department of Social and Rehabilitation Services, Economic Assistance Division, 111 Sanders, P.O. Box 4210, Helena, Montana 59604-4210~~.

(ii) The state fiscal year 1991 indexed fee for a category of service is the 1990 indexed fee for a category of service increased by two percent (2%).

(3) For home health agencies which are located within the borders of the state ~~and~~ that began providing services on or after ~~July 1, 1985~~ July 1, 1989, the medicaid reimbursement fee for a category of ~~per~~ service is ~~will be~~ the ~~lesser~~ lowest of:

(a) the provider's billed charges;

(b) ~~the lower of~~ the average medicare cost for the category of service; ~~or upper limit; or~~

(c) the upper medicare cost limit for the category of service; or

(~~e~~d) the ~~1986~~ adjusted averaged medicaid fee for the category of service for that state fiscal year.

(i) The adjusted averaged medicaid fee ~~will be derived by combining~~ for a category of service is the sum of:

(A) ~~tota~~l costs for the category derived from ~~those~~ the most recent medicaid cost settlements finalized before June 30, ~~1984,~~ of that state fiscal year ~~within each category of service~~ from all participating in-state home health providers and ~~dividing that sum~~ divided by the total number of delivered services. ~~The final sum will be indexed by an inflation factor for 1984, 1985 and 1986 plus~~; and

(B) two percent (2%) of to become the averaged medicaid fee ~~for the current year~~.

(4) For home health agencies located outside the borders of the state that meet ~~and having met~~ the requirements set forth in ARM 46.12.502(3), the reimbursement fee per service is ~~will be~~ the lowest ~~lesser~~ of:

(a) the provider's billed charges; or

(b) the ~~1986 plus two (2%)~~ current adjusted averaged medicaid fee as calculated in (3)(d)(i).

(5) The interim rate for a category of service is the most current medicare percent of billed charges for each provider.

(56) Total ~~payment~~ charges for home health services may not exceed $400.00 per recipient per month, ~~except with prior authorization by the department.~~ unless the department approves the additional charges prior to the end of the month during which the services are to be delivered.

~~(6) Reimbursement for nursing service provided by a licensed registered nurse in geographic areas not covered by a home health agency will be $8.25 per hour.~~

(7) A visit made by a registered nurse for the purpose of evaluating the home health needs of a recipient or to review the provision of home health ~~such~~ services by a ~~the~~ nurse aide or a licensed practical nurse is ~~considered to be~~ an administrative function and is not billable as a home health service visit.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101 and 53-6-131 MCA

3. Home health services delivered through a home health provider may include nursing services and various therapy services which are reimbursed, as are other home health services, on a per visit basis. The reference in ARM 46.12.552 (1)(a) to reimbursement of contracted for services is proposed for deletion since a home health provider would not provide home health nursing or therapy services through a contractor. Nursing or therapy services provided by a contractor other than the home health services provider are to be reimbursed as independent services as provided for in the respective rules governing reimbursement for those services.

Reimbursement for nursing services in an area not covered by a home health agency is proposed for deletion since the program no longer has need for nursing services other than through the home health agencies.

The 1986 prospective-indexed fee system was to maintain then current fee levels, instead it caused a rate reduction of 18%. In order to bring the fee levels up to the intended levels, the indexed fee system is being rebased forward to fiscal year 1989 and a 2% increase of the adjusted base is provided in each year of the current biennium.

The fee levels for new and out of state providers are also being adjusted to increase reimbursement.

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 April 13, 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. Roberts
Director, Social and Rehabilitation Services

Certified to the Secretary of State March 5, 1990.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of rules relating to veteran's employment preference	) NOTICE OF THE ADOPTION OF) RULES RELATING TO VETERAN'S) EMPLOYMENT PREFERENCE

TO: All Interested Persons.

1. On September 28, 1989, the department of administration published notice of the proposed adoption of rules relating to veteran's employment preference at page 1361 of the 1989 Montana Administrative Register, issue number 18.

2. The rules have been adopted with the following changes:

2.21.3607 ELIGIBLE VETERAN (1) To be eligible to receive employment preference, a veteran, as defined in 39-29-101(9), MCA, must:

(a) be, as provided in 39-29-102, MCA, "a United States citizen;" and

(b) ~~score~~ "receive 70 or more percentage points of the total possible points that may be granted in a scored procedure;"

(c) have been, as provided in 39-29-101, MCA, "separated under honorable conditions from active duty in the armed forces;" and

(d) have "served more than 180 consecutive days on active duty in the armed forces, other than for training."

(Auth. 39-29-112, MCA; Imp. 39-29-101 and 39-29-102, MCA)

2.21.3608 ELIGIBLE DISABLED VETERAN (1) To be eligible to receive employment preference, a disabled veteran, as defined in 39-29-101(3), MCA, must:

(a) be, as provided in 39-29-102, MCA, "a United States citizen;"

(b) ~~score~~ "receive 70 or more percentage points of the total possible points that may be granted in a scored procedure"; and

(c) have been, as provided in 39-29-101, MCA, "separated under honorable conditions from active duty in the armed forces."

(2) An eligible disabled veteran must:

(a) have, as provided in 39-29-101, MCA, "established the present existence of a service-connected disability or be receiving compensation, disability retirement benefits, or pension because of a law administered by the veterans administration or a military department; or

(b) have received a purple heart medal."

(Auth. 39-29-112, MCA; Imp. 39-29-101, and 39-29-102, MCA)

2.21.3609 ELIGIBLE RELATIVE (1) To be eligible to receive employment preference, an eligible relative, as defined in 39-29-101(4), MCA, must:

(a) be, as provided in 39-29-102, MCA, "a United States citizen;" and

(b) ~~score~~ "receive 70 or more percentage points of the total possible points that may be granted in a scored procedure."

(2) (a) same as proposed rule.

(b) be the spouse of a disabled veteran who is incapable of using his employment preference because ~~the severity of the~~ his disability prevents him from working.

(3) Same as proposed rule.

~~(4) In order for an eligible relative of a disabled veteran to receive employment preference, the hiring authority must obtain a signed statement from the disabled veteran that the disabled veteran is incapable of using his employment preference because the severity of the disability prevents him from working.~~

(Auth. 39-29-112, MCA; Imp. 39-29-101 and 39-29-102, MCA)

2.21.3615 APPLYING PREFERENCE (1) Same as proposed rule.

(a) 5 percentage points if the applicant is a veteran," as defined in 39-29-101(9), MCA; and

(b) "10 percentage points if the applicant is a disabled veteran or an eligible relative," as defined in 39-29-101(3) and (4), MCA.

(2) As provided in 39-29-102, MCA, "a disabled veteran who receives 10 percentage points under 39-29-102(1)(b), MCA, may not receive an additional 5 percentage points under 39-29-102(1)(a), MCA."

(3) A current employee of an agency, who meets the eligibility requirements of this policy, may claim and receive veteran's employment preference when he is an applicant for an initial hiring as defined in ARM 2.21.3603.

(3) through (5) renumbered (4) through (6).

~~(6)~~(7) An applicant has 90 calendar days from receipt of notice of a hiring decision to file a petition in district court. To comply with this policy, ~~T~~the public employer shall retain a record of the hiring decision for at least 90 calendar days after the notice of the hiring decision and records may be kept longer at the agency's discretion. Other federal and state law and regulation may require the retention of selection records for longer time periods. Depending on the selection procedures used, the record may include, but is not limited to the following:

(a) a copy of the vacancy announcement or external recruitment announcement;

(b) a record of the selection procedure used to screen job applicants;

(c) a record of written and oral evaluations of applicants;

(d) a copy of applications that were considered for the specific vacancy; and

(e) a record of the notice of the hiring decision, the written request for an employer's explanation of the hiring decision by an applicant, and the employer's written explanation.

(Auth. 39-29-112, MCA; Imp. 39-29-102, MCA)

2.21.3616 CLAIMING PREFERENCE -- DOCUMENTATION AND VERIFICATION (1) - (2) Same as proposed rule.

(3) When a scored procedure will be used, Aat the place where applications are received, the hiring authority or other agency receiving applications shall inform applicants of requirements for documentation of eligibility for preference which the applicant may be required to provide to the hiring authority.

(4) Same as proposed rule.

(5) When a scored procedure is used, Tthe hiring authority must obtain documentation of eligibility for employment preference from an applicant who claims preference and who is selected for the vacancy and may require documentation from others claiming employment preference.

(6) - (7)(b) Same as proposed rule.

(c) from an eligible relative of a deceased veteran, a document from the department of defense or the U.S. veterans administration certifying the service-connected death of the member of the armed services; from the unremarried surviving spouse of a deceased veteran, as veteran is defined in 39-29-101, MCA, the documentation required in (7) (a) of this rule and a copy of the death certificate or from the unremarried surviving spouse of a deceased disabled veteran, as disabled veteran is defined in 39-29-101, MCA, the documentation required in (7) (b) of this rule and a copy of the death certificate.

(d) from the eligible spouse of a disabled veteran, a document from the U.S. veterans administration certifying the veteran is disabled, is unable to use the preference because of the disability, and is married to the disabled veteran in accordance with Montana law. When the veterans administration does not certify that the disabled veteran is unable to use the preference because of the disability, the hiring authority shall obtain a signed statement from the disabled veteran that he is incapable of using his employment preference because ~~the severity of~~ his disability prevents him from working.

(e) from an eligible mother of a deceased veteran or disabled veteran, a document from the U.S. veterans administration certifying ~~the service-connected death~~ that the veteran, as provided in 39-29-101, MCA, "lost his life under honorable conditions while serving in the armed forces," or a document certifying, as required in 39-29-101, MCA, that the veteran has a service-connected permanent and total disability. The veteran's mother shall also certify in writing that her husband is permanently and totally disabled or that her husband is deceased and she has not remarried.

(f) a signed statement by the applicant attesting to U.S. citizenship. ~~At the time of hire, the applicant must provide documentation of U.S. citizenship.~~ If the hiring authority has reason to question the validity of the statement, further documentation may be required. For U.S. citizenship, such evidence may include, but is not limited to, a birth certificate, voter registration card, U.S. passport or naturalization papers.

(8) - (10) Same as proposed rule.

(Auth. 39-29-112, MCA; Imp. 39-29-103, MCA)

2.21.3617 HIRING DECISION (1) In making a hiring decision, an agency must be prepared to show that:

(a) appropriate percentage points were added if numerically scored procedures were used; and

(b) the agency made a reasonable hiring decision, in accordance with 39-29-104, MCA.

(2) Same as proposed rule.

(3) As provided in 39-29-103(3), MCA, "If an applicant for a position makes a timely written preference claim, the public employer shall give written notice of its hiring decision to the applicant claiming preference." ~~The notice shall include whether the position was filled as the result of the application of veterans employment preference by the public employer.~~

(4) - (5) Same as proposed rule.

(Auth. 39-29-112, MCA; Imp. 39-29-103, MCA)

2.21.3623 RETENTION DURING REDUCTION IN FORCE (1) As provided in 39-29-111, MCA, "Dduring a reduction in work force, a public employer shall retain" over all others a veteran, a disabled veteran or an eligible relative who:

(a) has similar job duties and qualifications;

(b) has not been rated unacceptable under a performance appraisal system; and

(c) has the same or greater length of service. Length of service means continuous employment by an individual public employer as listed in ~~rule VII.~~ ARM 2.21.3610.

(2) As provided in 39-29-111, MCA, "Aa disabled veteran with a service-connected disability of 30% or more" shall be retained over other veterans, disabled veterans and eligible relatives.

(3) Same as proposed rule.

(4) As provided in 39-29-111(3), MCA, "the preference in retention . . . does not apply to a position covered by a collective bargaining agreement."

(Auth. 39-29-112, MCA; Imp. 39-29-111, MCA)

3. A public hearing was conducted on October 23, 1989, to receive testimony on these proposed rules. Written comments and testimony are summarized below.

COMMENT: ARM 2.21.3609 2(b) (Rule VI) goes beyond the scope of the act when it requires that in order for a relative to be eligible, a disabled veteran must be incapable of using his employment preference because his disability prevents him from working. 39-29-101(4) (b), MCA, provides that for a spouse to be eligible, the disabled veteran must be "unable to qualify for appointment to a position."

RESPONSE: By interpreting this eligibility requirement in this way, the department is providing for consistent administration of this requirement. The statutory language needs additional interpretation because it is ambiguous. Did the Legislature intend that a disabled veteran who applies for any job, regardless of his personal education, experience and other qualifications, should then be able to pass along the preference to a spouse because he was "unable to qualify for appointment?" The depart-

ment believes the Legislature intended that disabled veterans who were unable to use the preference themselves to obtain work because of the severity of their disabilities should be able to pass along the preference to spouses so that at least one member of the family could be employed. The department believes this interpretation is appropriate.

COMMENT: ARM 2.21.3609(4) (Rule VI) allows a disabled veteran to provide a statement that he is unable to use his preference so that an eligible relative may use it. This documentation should come from the U.S. Veteran's Administration or a physician.
RESPONSE: The department has removed this documentation requirement from this rule, because ARM 2.21.3616 (Rule IX) covers necessary documentation and the requirement is more appropriate in that rule.

COMMENT: Are current employees of an agency eligible to receive preference when there is external recruitment for a position?
RESPONSE: Yes, a current employee is eligible. ARM 2.21.3615 (Rule VIII) has been amended to provide that current employees who meet eligibility requirements may claim and receive preference for an initial hiring as defined in the rules.

COMMENT: Add more detailed information on using scored procedures in ARM 2.21.3615 (Rule VIII).
RESPONSE: Because these rules cover not only state government, but local jurisdictions as well, the department does not want to prescribe specific scoring procedures for all employers. The department will continue to provide assistance on scoring for agencies.

COMMENT: The requirement in ARM 2.21.3615 (Rule VIII) to maintain selection records for 90 days is in conflict with other records retentions requirements.
RESPONSE: This rule has been amended to explain that in order to comply with this policy, records must be kept at least 90 days. The rule is further clarified to explain that other law and regulation may require a longer retention period.

COMMENT: Continue to have applicants sign a statement attesting to U.S. citizenship, but require additional documentation only if the hiring authority has reason to question the claim in ARM 2.21.3616 (Rule IX).
RESPONSE: The department agrees. The Veteran's and Handicapped Person's Employment Preference Policy approached documentation of citizenship in this manner. Both the new veteran's preference policy and the handicapped person's preference policy will be amended to use this approach.

COMMENT: Because points may be added at different stages of a selection procedure, it is difficult to tell applicants that a position ultimately was filled "as the result of the application of veteran's employment preference by the public employer," as required in ARM 2.21.3617 (Rule X).

RESPONSE: The department agrees. Under the old system of a substantially equal qualifications tie breaker, preference was considered at the end of the process. Because this is no longer the case, the requirement in ARM 2.21.3617(3) will be deleted.

COMMENT: ARM 2.21.3617 (Rule X) provides that in a hiring decision, an agency must be prepared to show that appropriate percentage points were added if a numerically scored procedure was used and that the agency made a reasonable hiring decision. The commenter asks on what basis these criteria were created.
RESPONSE: Section 39-29-104, MCA, requires that at the time of a court hearing on a challenged selection, "the public employer has the burden of proving by a preponderance of the evidence that the employer applied the points under 39-29-102, MCA, and made a reasonable hiring decision."

COMMENT: ARM 2.21.3623 (RUle XIII) goes beyond the statute in interpreting length of service.
RESPONSE: Length of service can have a number of definitions. Because the statute is silent, the department has interpreted the term to be consistent with the approach to defining length of service in the Reduction in Work Force policy, specifically ARM 2.21.5007. We believe this is appropriate because ARM 2.21.3623 also deals with reduction in force and is consistent with the definition of a public employer in this policy.

COMMENT: Employees under collective bargaining agreements should not be excluded from application of preference during a reduction in force. The department should require coverage in the rules.
RESPONSE: 39-29-111(3), MCA, specifically excludes positions covered by collective bargaining from this benefit. An act of the Legislature is needed to change this provision.

COMMENT: If the collective bargaining agreement does not include a reduction in force clause or if the contract defers to the administrative rules procedure for a RIF, does preference in layoff apply?
RESPONSE: 39-29-111(3), MCA, provides that preference in retention does not apply to a "position" covered by a collective bargaining agreement. If the position is covered, the procedure provided in the individual contract is not an issue. The employee would not be entitled to preference in retention under this act.

COMMENT: Throughout the rules, the terms "shall" or "must" apply to obligations of veterans, while the term "may" applies to obligations of government agencies, giving them too much discretion. The example cited was ARM 2.21.3601, (RULE I) Short Title, which provides, "This policy 'may' be cited as the veteran's employment preference policy," and should provide that the policy "must" be cited, etc.
RESPONSE: An examination of the rules shows that many of the provisions which apply to agencies are mandatory requirements. The Short Title is a shorthand way to refer to the entire policy,

rather than have to cite individual rules. It uses the standard form for a short title rule.

COMMENT: Providing points as an employment preference is too narrow. There are too many other considerations in a selection for points to be helpful.
RESPONSE: This comment appears to be addressed to the preference act itself. At this time, the percentage point preference when scored procedures are used is the preference available under the act. The act does not require that the employer use only scored procedures in making a reasonable hiring decision.

COMMENT: The department should require all agencies to use scored procedures. Scoring eliminates the effect of personalities on selections.
RESPONSE: Because the statute does not require the use of scored procedures, the department will not administratively impose this requirement. Based on another comment the department will insert language in several places in the rule to clarify that "when scored procedures are used," agencies must meet certain requirements under this act.

COMMENT: An agency has established a test for which 50% is a passing score. The agency has spent a considerable amount of time and work developing this test. How is preference applied when the statute requires a 70% passing score?
RESPONSE: The statute establishes the pass point for purposes of eligibility for veteran's employment preference at 70% and does not provide for setting an alternative pass point by an agency. The department believes the agency should apply the statute as written or should adjust its scoring procedure to bring its pass point in line with the 70% required by the statute.

COMMENT: An agency which is covered by veteran's preference for this first time under this act comments that under its selection system, numerical rating is such a small part of the overall process that the net effect of preference points will be minimal, a small reward for the expense and inconvenience of implementing these cumbersome regulations.
RESPONSE: The Legislature mandates the public policy on employment preference and has chosen to include this agency under its coverage. Because so many of the requirements are provided for in the act itself, there is little discretion for agencies in the administration of the preference. Legislative change often produces the need for administrative change. The department has no authority to modify the preference, the eligibility, or the remedies.

COMMENT: The rules contain too much statutory language and it is not always clear where it is used.
RESPONSE: The department acknowledges there is considerable use of statutory language in these rules. The department believes that this is necessary because the rules apply not only to state agencies, but also local governments who routinely tell us they

do not always have ready access to the statutes. Many state agencies outside Helena have a similar problem. We have carefully reviewed the rules to identify instances where statutory language was used, but not clearly cited, and have included citations.

COMMENT: Four persons commented in general support of the rules.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the repeal of ARM 2.21.1415, 2.21.1416, 2.21.1426, and the amendment of ARM 2.21.1412, 2.21.1413, 2.21.1414, 2.21.1417, 2.21.1421, 2.21.1423, 2.21.1424, 2.21.1425, 2.21.1429, relating to Veteran's and Handicapped Person's Employment Preference.	NOTICE OF THE REPEAL OF ARM 2.21.1415, 2.21.1416, 2.21.1426, AND THE AMENDMENT OF ARM 2.21.1412, 2.21.1413, 2.21.1414, 2.21.1417, 2.21.1421, 2.21.1423, 2.21.1424, 2.21.1425, 2.21.1429, RELATING TO VETERAN'S AND HANDICAPPED PERSON'S EMPLOYMENT PREFERENCE

TO: All Interested Persons.

1. On September 28, 1989, at 12:15 p.m., the department of administration published notice of the proposed repeal of ARM 2.21.1415, 2.21.1416, 2.21.1426, and the amendment of ARM 2.21.1412, 2.21.1413, 2.21.1414, 2.21.1417, 2.21.1421, 2.21.1423, 2.21.1424, 2.21.1425, 2.21.1429 relating to veteran's and handicapped person's employment preference at page 1361 of the 1989 Montana Administrative Register, issue number 18. ARM 2.21.1418 was noticed for amendment in error. No amendments to this rule were proposed or made.

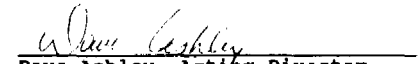
2. The rules have been repealed and amended with the following changes:

2.21.1424 CLAIMING PREFERENCE - DOCUMENTATION AND VERIFICATION (1) - (7)(b) Same as proposed rule.

(c) a statement signed by the applicant attesting to U.S. citizenship, and Montana or local residency. WHERE THE HIRING AUTHORITY HAS REASON TO QUESTION THE VALIDITY OF SUCH STATEMENT, FURTHER EVIDENCE MAY BE REQUESTED. FOR U.S. CITIZENSHIP SUCH EVIDENCE MAY INCLUDE, BUT IS NOT LIMITED TO, A BIRTH CERTIFICATE, VOTER REGISTRATION CARD, (U.S. passport), OR NATURALIZATION PAPERS. For Montana residency, evidence may include, but is not limited to, payment of state of Montana income tax, Montana driver's license, vehicle registration, or hunting and fishing license.

(8) - (10) Same as proposed rule.

(Auth. 39-30-106, MCA; Imp. 39-30-101 et seq., MCA)



Dave Ashley, Acting Director
Department of Administration

Certified to the Secretary of State March 5, 1990.

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

In the matter of the adoption of rules regarding the establishment and operations of a prelicensing education program	)))))	NOTICE OF ADOPTION OF ARM 6.6.2901 THROUGH ARM 6.6.2907 (RULES I THROUGH VII) GOVERNING PRELICENSING EDUCATION PROGRAMS

TO: All Interested Persons:

1. On January 11, 1990, the Department of Insurance (department) published a notice of public hearing on the proposed adoption of the above-stated rules at page 8 of the 1990 Montana Administrative Register, issue number 1.

2. Oral comment was taken at the public hearing held on February 6, 1990, at 9:00 a.m., in Room 160 of the Mitchell Building, 111 Sanders, Helena, Montana. The hearing, which was tape-recorded and transcribed, was attended by 18 persons. Eight persons gave oral testimony. The department received written comment from eight individuals. The tape of the hearing, a transcript of that tape, the written comments received and the hearing officer's report are on file in the department's law library.

The comments received were generally in favor of adoption of the proposed rules with some suggested changes. Comments to the proposed rules are discussed below in reference to each rule where amendments were suggested.

3. The department has adopted the rules as proposed with the following changes (new material is underlined; material to be deleted is interlined):

6.6.2901 (RULE I) PURPOSE AND SCOPE received no comments and is adopted as proposed.

AUTH: 33-1-313, MCA IMP: 33-17-207 through 33-17-209, MCA

6.6.2902 (RULE II) DEFINITIONS (1) "Approved prelicensing education program" means a course of studies which:

(a) is managed ~~proctored~~ by an approved program director;

(b) is taught by one or more ~~an~~ approved instructor(s);

(c) presents all course material as designated in Rules IV and V; and

(d) has been approved by the commissioner of insurance.

(2) A prelicensing education program includes one which meets the criteria for an "individual study program".

(3) No prelicensing education program may have more than 8 hours of instruction per day. Each hour must include at least fifty (50) minutes of continuous instruction or participation.

(4) "Individual study program" or "correspondence course" means a course of studies which:

(a) is managed ~~proctored~~ by an approved program director;

(b) presents all course materials as designated in ARM 6.6.2904 and ARM 6.6.2905 (Rules IV and V);

(c) must include an examination which requires a score of 70% or better to earn a certificate of completion. For each approved course, the sponsoring organization shall maintain a pool of tests sufficient to maintain the integrity of the testing process. A written explanation of test security and administration methods shall accompany the course examination materials. The examinations shall be administered, graded, and the results recorded by the sponsoring organization to which approval was originally granted. Completed tests shall be retained by the sponsoring organization for a period of not less than twelve (12) months and shall not be returned to any licensee.

(d) All correspondence courses or individual study programs must be submitted for approval by the organization which compiles, publishes, or sponsors the course materials and must be approved by the commissioner of insurance prior to being offered to licensees for prelicensing education credit. Any such course approval is not transferable to any other entity.

(5) "Classroom" means any classroom, office, room, building or other enclosed structure approved by the commissioner of insurance.

(6) "Structured setting" is one which meets at a set time and at a fixed location.

(7) An "approved program director" is an individual who meets the qualification requirements of ARM 6.6.2903(1) [Rule III(1)] and who is responsible to the department for maintaining a prelicensing education program at the same level as was required under these rules for initial approval."

COMMENT:

Comments were provided to the department recommending that the rules define how many minutes constitute a credit hour and also that the rules clarify if it is possible to incorporate written practice examinations and review into the required 40 hours of training.

RESPONSE:

The department has amended Rule II(3) [ARM 6.6.2902(3)] to reflect how many minutes constitute a credit hour and also to address the general type of activities that may be included in a credit hour.

COMMENT:

It was recommended to the department that the terms "proctored" and "approved program director" be clearly defined and that clarification be included as to the specific duties and not only the qualifications of an approved program director. Comment also was received recommending that "proctored" be replaced with the word "developed" wherever it appears in the rules for clarification purposes. As to (1)(b), comment was

received suggesting that the option be included to allow for more than one instructor, by "instructor" being amended to "instructor(s)".

RESPONSE:

The department considered these suggestions, but has instead replaced "proctored" with "managed," defined "approved program director" at Rule II(7) [ARM 6.6.2902(7)], and amended II(1)(b) [ARM 6.6.2902(1)(b)] to reflect that more than one instructor may teach during a 40 hour course.

COMMENT:

Comments recommended that "sponsoring organization" and "organization" as used in this section and throughout the text be more clearly defined and clarified.

RESPONSE:

The department considered this suggestion, but determined not to further define these terms. However, some language has been added to help clarify their usage.

COMMENT:

It was suggested that the allowed classroom instruction time be extended to 10 hours per day.

RESPONSE:

This suggestion has not been adopted by the department.

COMMENT:

Comments were received asking for wording to clarify that a course given in a structured classroom setting does not require an examination to be given at the end of the course and that clarification be added that the passing score for an examination given at the end of a correspondence course is 70%. An amendment was also requested to clarify how long the course provider must retain end of course examinations.

RESPONSE:

At II (4)(c) [ARM 6.6.2902(4)(c)], the department has adopted the suggestion to clarify how long a course provider must retain the end of course examinations. The department believes that the other requested amendments were sufficiently addressed by proposed Rule II [ARM 6.6.2902].

COMMENT:

One individual, encouraging the department to allow full credit for independent self-study programs and not force any full or partial classroom program or seminar requirement, recommended numerous guidelines that would allow the department to control providers through the approval process. These recommendations included such suggestions as "the provider should develop a unique examination for each course offered for prelicensing education credit and that this examination should not be the same one that is provided to all purchasers of the course.

RESPONSE:

The department considered these numerous recommendations, but has not adopted them because the language of section 33-17-209(1), MCA, permits both approval and periodical review

at the discretion of the commissioner.

AUTH: 33-1-313, MCA IMP: 33-17-207 through 33-17-209, MCA

6.6.2903 (RULE III) QUALIFICATIONS FOR PROGRAM DIRECTORS AND INSTRUCTORS (1) To qualify as an approved program director, an individual must meet the following criteria:

(a) hold a high school diploma; and

(b) acquired the following experience:

(i) 5 or more years of experience as an instructor or an education administrator; or

(ii) 5 or more years of experience in the insurance industry with 2 years in insurance management; or

(iii) earned the designation of CLU, CPCU, LUTCF, FLMI, CIC, ~~or~~/ CHFC; or

(iv) be approved by the commissioner of insurance.

(c) No person may qualify as a program director who:

(i) has been convicted of a felony; or

(ii) has had his/her insurance producer's license suspended or revoked in Montana or in any other state; or

(iii) at the time of application, has outstanding any fines imposed by the commissioner of insurance for insurance related disciplinary offenses.

(2) To qualify as an approved instructor, an individual must meet the following criteria:

(a) hold a high school diploma; and

(b) acquired the following experience:

(i) 3 or more years of managerial, supervisory or teaching experience in the insurance lines the individual plans to teach; or

(ii) earned the designation of CLU, CPCU, LUTCF, FLMI, CIC, ~~or~~/CHFC; or

(iii) be approved by the commissioner of insurance.

(c) No person may qualify as an approved instructor who:

(i) has been convicted of a felony; or

(ii) has had his/her insurance producer's license suspended or revoked in Montana or any other state; or

(iii) at the time of application, has outstanding any fines imposed by the commissioner of insurance for insurance related disciplinary offenses.

COMMENT:

Comments were received expressing concern that, assuming an approved program director is the entity who develops or writes course material, this entity could be an individual, as the rules read in this section, or it could be a corporation, such as a firm that publishes insurance texts. Therefore, it was recommended that the rule be amended to establish separate criteria for individuals and companies, corporations, or other potential providers because some of the criteria shown in the rules for individuals would not be applicable to these other entities.

RESPONSE:
The department has adopted no amendments with regard to these recommendations and believes the rule as proposed and adopted clearly indicates that an "entity" would not meet the stated requirements to be an approved program director.

COMMENT:
Four individuals who provided comment on the proposed rules recommended an amendment adding the qualifying designation of LUTCF to the criteria for approved program directors and approved instructors.
RESPONSE:
This recommendation has been adopted at ARM 6.6.2903(1)(b)(iii) and (2)(b)(ii).

COMMENT:
Comments were received that in (1)(b)(i), "education administrator" should be more clearly defined and clarified. It was also suggested that a subsection be added under (1)(b) to read "approved by the commissioner of insurance."
Additional comments were received suggesting that, within the definition of program director, use of the term "instructor" is ambiguous. One person who provided comments indicated that he assumed the commissioner means by this rule that a program director must have experience as an approved instructor as that term is defined by Rule III(2) [ARM 6.6.2903(2)]. Based on this understanding, it was requested that the rule be amended to clearly indicate that, to qualify, the program director must have 5 years experience as an approved instructor or to have 5 years experience in the industry and also have earned one of the designations listed in (iii). Otherwise, if the commissioner meant "instructor" to mean 5 years as an instructor of any subject, the individual requested the rule be amended to require 5 years teaching experience and 5 years experience in the industry or 5 years teaching experience and having earned the designations listed in (iii).
RESPONSE:
The department has adopted the suggestion to add language under (1)(b) giving the commissioner of insurance approval authority. The department believes that this will resolve concern over the term "education administrator" as well as the comments expressed about the qualifications required in the proposed rule.

COMMENT:
Another individual commented to the department that the rule should be amended to reflect the following criteria to qualify as an instructor of a registered insurance agent/solicitor program of study: 3 years of experience in the line of insurance which is to be taught, or 3 years of experience in teaching, or 3 years of experience in insurance and teaching combined.
RESPONSE:
The department believes the proposed rule, as indicated

within the text to be amended, clearly grants approval authority to the discretion of the commissioner of insurance.

COMMENT:
An amendment was recommended to clarify who actually will approve the candidates for the director and instructor positions. It was recommended that the amendment should include what would constitute approval and whether any later recertification would be required.
RESPONSE:
Just as in response to the previous comment addressed, the department believes the proposed rule, as indicated within the text to be amended, clearly grants approval authority to the discretion of the commissioner of insurance.

COMMENT:
A suggestion was received that the rule be amended to clarify whether a CLU, as a qualified life instructor, would be permitted to teach a property and casualty course, and also to clarify if it is permissible for the program director to be certified as an instructor.
RESPONSE:
Nothing in the proposed rule prohibits a program director from also becoming certified as an instructor. The department believes that any potential conflict such as that suggested by a CLU possibly applying to teach a property and casualty course is dealt with by the proposed rule, as indicated within the text to be amended, because it clearly grants approval authority to the discretion of the commissioner of insurance.

COMMENT:
One individual commented that he believes that the Montana Legislature meant for the advisory council to have an ongoing role in the evaluation of the qualifications of programs and personnel. He requested that the commissioner adopt rules specifying the process for submission and review of all requests for approval of programs and personnel, including the role of the advisory council. He therefore recommended amending Rule III(2)(b)(iii) [ARM 6.6.2093(2)(b)], [as well as Rules IV(1) & V(1)] [ARM 6.6.2904(1) and ARM 6.6.2905(1)] by adding the language "after review by and consultation with the advisory council" following the existing proposed language "approved by the commissioner of insurance".
RESPONSE:
It is the position of the department that the language of section 33-17-209(2), MCA, requires the commissioner of insurance to consult with the advisory council in formulating rules and standards for the approval of prelicensing program education courses, but does not mandate continued involvement of the advisory council beyond that point.

COMMENT:
Comment was received which requested that the forms referenced in the rule be published or have their contents described within these rules.

RESPONSE:
It is the position of the department that the language of House Bill 536 which allows the commissioner of insurance to authorize a certificate of completion form for the instructor to sign when a license applicant completes the 40th hour of instruction reasonably permits the commissioner of insurance to authorize other documentation necessary to implement the prelicensing education program.

AUTH: 33-1-313, MCA IMP: 33-17-207 through 33-17-209, MCA

6.6.2904 (RULE IV) EDUCATIONAL REQUIREMENTS FOR LIFE AND DISABILITY INSURANCE PRELICENSING EDUCATION COURSES

(1) To qualify as an approved prelicensing education program for life and disability insurance prelicensing education, the program shall include instruction in the following areas of study and for each of these areas, shall provide not less than the smaller of the below designated hours of instruction. Any departure from these designated hours must be approved by the commissioner of insurance.

I. Introduction to Life Insurance 5-7 Hours
   (a) Function of Life Insurance
   (b) Life Insurance and Annuities
   (c) Life Insurance Classifications
   (d) Forms of Life Insurance
   (e) Kinds of Policies
   (f) Registered Products
   (g) New Developments in Policies

II. Life Insurance as a Contract 5-7 Hours
   (a) General Provisions
   (b) Nonforfeiture Values
   (c) Dividends
   (d) Optional Provisions

III. Special Life Policies 5-7 Hours
   (a) Mortgage Redemption
   (b) Family Maintenance
   (c) Modified Whole Life
   (d) Universal Life
   (e) Family Income

IV. Special Annuities 2-3 Hours
   (a) Single Premium Immediate Annuity (SPIA)
   Joint/and/Survivor
   (b) Single Premium Deferred Annuity (SPDA)
   Variable
   (c) Flexible Premium Deferred Annuity (FPDA)
   Guaranteed/to/Period/Certain
   (d) Variable

V. Introduction to Health Insurance 4-6 Hours
(a) The General Nature of Health Insurance
(b) Importance of Health Insurance in Family Financial Planning

VI. Disability Insurance 5-7 Hours
(a) The General Nature of Disability Insurance
(b) The Need for Disability Income
(c) Disability Income Policies
(d) Individual vs. Group Policies
(f) Cost of Policies
(g) Important Exclusions

VII. Medical Insurance 4-6 Hours
(a) Kinds of Insurers
(b) General Provisions of Policies
(c) Service Providers
(d) Indemnity Policies
(e) Individual vs. Group Contracts

VIII. Ethics, Insurance Laws, & Regulations 4-6 Hours
(a) Montana Insurance Laws & Regulations
(b) Registered Product Regulations
(c) Ethical Practices in Sales and Marketing
(d) Codes of Professional Conduct

(2) The total hours of such prelicensing education courses must equal no less than 40 hours within the stated limitations. Nothing in this section shall preclude an approved prelicensing education program from offering additional or supplemental materials or instruction in the area of life and disability insurance provided, however, that the program continues to meet the requirements set forth above.

COMMENT:
Numerous comments were received recommending that the proposed rules be modified to allow flexibility in meeting the 40 hour prelicensure requirement. Comments suggested that if an applicant only wants a life license or perhaps a license to only sell credit life insurance, 40 hours of prelicensure should be available for that individual line of insurance, so as to enable the applicant to receive more training in the field that applicant will be pursuing.

RESPONSE:
A major purpose of the legislation which established the prelicensing education requirements is to protect insurance consumers by producing better trained and more dedicated insurance producers, solicitors and enrollment representatives. People that are involved with only a limited line of insurance still have the opportunity to address many issues with the average consumer. That a limited line producer has an extended base of knowledge further benefits the consumer.

COMMENT:
Comment was received recommending the proposed rule be

amended with (1)(iv) to read as follows:

IV. Annuities
(a) Single Premium Immediate Annuity (SPIA)
(b) Single Premium Deferred Annuity (SPDA)
(c) Flexible Premium Deferred Annuity (FPDA)

The comment indicated that these changes were recommended because Joint and Survivor, Guaranteed to Period Certain are just two of numerous settlement options available in the above mentioned annuities. The comment further stated that variable annuity products are regulated by the securities department.

RESPONSE:

Annuity products are regulated by the Montana insurance code. However, the department has adopted the suggested study categories discussed in this comment.

COMMENT:

Comment was received which requested that the forms referenced in the rule be published or that their contents be described within these rules.

RESPONSE:

It is the position of the department that the language of House Bill 536 which allows the commissioner of insurance to authorize a certificate of completion form for the instructor to sign when a license applicant completes the 40th hour of instruction reasonably permits the commissioner of insurance to authorize other documentation necessary to implement the prelicensing education program.

COMMENT:

One individual commented that he believes the Montana Legislature meant for the advisory council to have an ongoing role in the evaluation of the qualification of programs and personnel. He requested that the commissioner of insurance adopt rules specifying the process for submission and review of all requests for approval of programs and personnel, including the role of the advisory council. He therefore recommended amending Rule IV(1) [ARM 6.6.2904(1)], [as well as Rules III(2)(b)(iii) and V(1)] [ARM 6.6.2903(2)(b)(iii) and ARM 6.6.2905(1)] by adding the language "after review by and consultation with the advisory council" following the existing proposed language "approved by the commissioner of insurance".

RESPONSE:

It is the position of the department that the language of section 33-17-209(2), MCA, requires the commissioner of insurance to consult with the advisory council in formulating rules and standards for the approval of prelicensing program education courses, but does not mandate continued involvement of the advisory council beyond that point.

AUTH: 33-1-313, MCA IMP: 33-17-207 through 33-17-209, MCA

6.6.2905 (RULE V) EDUCATIONAL REQUIREMENTS FOR PROPERTY AND CASUALTY INSURANCE PRELICENSING EDUCATION COURSES

(1) To qualify as an approved prelicensing education program for property and casualty insurance prelicensing education, the program shall include instruction in the following areas of study, and for each of these areas, shall provide not less than the smaller of the designated hours of instruction. Any departure from these designated hours must be approved by the commissioner of insurance.

I. History of Property Insurance 4-6 Hours
   (a) Fire Insurance
   (b) The Standard Fire Policy
   (c) Forms
   (d) Endorsements

II. The Homeowners Policy 4-6 Hours
   (a) History, General Nature, Section 1
   (b) Coverages, Perils Insured
   (c) Optional Coverages

III. Other Personal Property Insurance 2-3 Hours
   (a) Dwelling Fire, Mobile Home, Flood Personal Marine, Earthquake
   (b) Title Insurance

IV. Commercial Property Insurance 5-7 Hours
   (a) Coverage Forms, Indirect Loss
   (b) Boiler and Machinery, Marine
   (c) Dishonesty Insurance, Package Policies

V. Negligence and Legal Liability 4-6 Hours
   (a) Tortious Acts, Obligations of Property Owners
   (b) Defenses against Liability Claims

VI. Personal Liability Insurance 3-5 Hours
   (a) Section II of the Homeowners Policy
   (b) Personal Liability and Medical Payments
   (c) Professional Liability
   (d) Umbrella Liability

VII. Commercial Liability Insurance 5-7 Hours
   (a) General Liability Insurance, Claims Made vs. Occurrence
   (b) Forms, Commercial Auto, Aviation
   (c) Excess Liability, Umbrella Liability
   (d) Workers Compensation

VIII. Ethics, Insurance Laws & Regulations 4-6 Hours
   (a) FAIR Plan, Assigned Risk, Voluntary Market Plan, Residual Markets
   (b) Ethical Practices in Sales & Marketing
   (c) Codes of Professional Conduct
   (d) Montana Insurance Laws and Regulations

IX. Personal Automobile Policy 2-3 Hours
(a) History, General Nature, Coverages; Liability, Collision, Other Than Collision, Medical Payments, Uninsured Motorist & Underinsured Motorist

(2) The total hours of such prelicensing education courses must equal no less than 40 hours within the stated limitations. Nothing in this section shall preclude an approved prelicensing education program from offering additional or supplemental materials or instruction in the area of property and casualty insurance provided, however, that the program continues to meet the requirements set forth above.

COMMENT:
One individual commented that he believes the Montana Legislature meant for the advisory council to have an ongoing role in the evaluation of the qualification of programs and personnel. He requested that the commissioner of insurance adopt rules specifying the process for submission and review of all requests for approval of programs and personnel, including the role of the advisory council. He therefore recommended amending Rules V(1) [ARM 6.6.2905(1)] [as well as Rules III(2)(b)(iii) and IV(1)] [ARM 6.6.2903(2)(b)(iii) and ARM 6.6.2904(1)] by adding the language "after review by and consultation with the advisory council" following the existing proposed language "approved by the commissioner of insurance".
RESPONSE:
It is the position of the department that the language of section 33-17-209(2), MCA, requires the commissioner of insurance to consult with the advisory council in formulating rules and standards for the approval of prelicensing program education courses, but does not mandate continued involvement of the advisory council beyond that point.

COMMENT:
Comment was received recommending that (1)VIII be amended to include instruction in the area of Montana insurance laws and regulations, since that subject is required for examination and also because that subject is listed under the equivalent section of the Life and Health curriculum of Rule V [ARM 6.6.2905].
RESPONSE:
The department has adopted this recommendation and added amending language to (1)VIII(d).

AUTH: 33-1-313, MCA IMP: 33-17-207 through 33-17-209, MCA

6.6.2906 (RULE VI) REQUIREMENTS FOR COURSE COMPLETION CERTIFICATES

(1) A certificate of prelicensing course completion may be issued to the applicant only if the applicant and instructor or program director or sponsoring organization certify to the commissioner of insurance that:

(a) the applicant has satisfactorily completed the minimum required course studies totalling not less than 40 hours; and

(b) the applicant has been present in a structured setting with an approved instructor; and/or

(c) the applicant has successfully completed an individual study program or correspondence course for those areas of study not completed in a classroom or structured setting.

(2) Credit shall be given for partial completion of the 40 hours of prelicensing education only upon completion of a course scheduled for less than 40 hours. Such course must comply with the composite requirements of an approved 40 hour course.

(3) The commissioner of insurance may refuse to accept a certificate of course completion:

(a) unless on the form provided by the commissioner of insurance the approved instructor or approved program director and the applicant certify under penalties of perjury that the applicant has received the minimum required hours of instruction at the location and times indicated on the application; or

(b) if, after notice and opportunity for hearing, the commissioner of insurance finds that any applicant has completed fewer than the minimum number of hours of instruction or that the instruction was received at a location or at a time other than that reported to the commissioner of insurance.

(4) Each instructor or program director of an approved prelicensing education program shall maintain a complete record of each person attending or enrolled in the course. The record must:

(a) indicate each person's attendance or participation;

(b) indicate his/her final grade in the course if individual study program or correspondence course;

(c) be available for review by the commissioner of insurance.

(5) Each instructor or program director for prelicensing education programs shall submit a certificate to the applicant at the completion of every course which lists the program director and/or instructor and/or sponsoring organization of the course, the location (school, if applicable, address and city/state) and times (date and hours) the course was offered if conducted in a classroom or structured setting, the line or lines of insurance included in the course, the number of approved credit hours, and the grade obtained by the student in the course if conducted as an individual study program or correspondence course. This certificate must be provided within 10 days of course completion or receipt of completed individual study program or correspondence course by the program director or sponsoring organization.

(6) An applicant for a license must submit the original certificate of completion at time of license examination.

COMMENT:

A recommendation was received to amend (1) so as to

include "sponsoring organization" among those that may certify to the commissioner of insurance completion of the requirements included in this subsection. The individuals submitting this comment indicated that their recommendation that this section be as general as possible to allow the commissioner of insurance flexibility in reviewing current and future educational programs.

RESPONSE:

The department has adopted these recommendations.

COMMENT:

Comment was received recommending that since the rule references certain forms, these forms should be placed into the rule, or the rule should at least describe their contents.

RESPONSE:

The department has adopted this recommendation as well as other minor amendments to this rule that were suggested by the same individuals.

COMMENT:

Comment was received recommending that since the rule references certain forms, these forms should be placed into the rule, or the rule should at least describe their contents.

RESPONSE:

It is the position of the department that the language of House Bill 536 which allows the commissioner of insurance to authorize a certificate of completion form for the instructor to sign when a license applicant completes the 40th hour of instruction reasonably permits the commissioner of insurance to authorize other documentation necessary to implement the prelicensing education program.

COMMENT:

Comment was received recommending amendments that would allow the provider giving the 40 hours course to also administer the license examination.

RESPONSE:

The proposed rules do not preempt this.

COMMENT:

An amendment was suggested to clarify if courses can be a combination of structured setting and partially a correspondence course, and if so, that a percentage between the two courses be considered.

RESPONSE:

This suggestion is addressed within the amendment made to (1)(b), which clearly indicates that a combination of the two types of courses would be acceptable. The department chooses not to set a percentage figure.

COMMENT:

An individual suggested that the rules be amended to clarify what the requirement is as to times and location of courses given, such as city or street, date only or hours.

RESPONSE:
The department has adopted these recommendations.

AUTH: 33-1-313, MCA IMP: 33-17-207 through 33-17-209, MCA

6.6.2907 (RULE VII) SUBMISSIONS AND CERTIFICATES

(1) All requests for approval of courses, instructors, and approved program directors and sponsoring organizations shall be submitted on forms approved by the commissioner of insurance.

(a) Requests for approval of courses must be submitted to the department no less than 60 days prior to the anticipated starting date of the course.

(b) Requests for approval of instructors, program directors and sponsoring organizations must be submitted to the department no less than 30 days prior to the first day that the individual would be active in that role.

(2) Certificates of course completion shall be upon a form approved by the commissioner of insurance.

COMMENT:
One individual commented that he believes the Montana Legislature meant for the advisory council to have an ongoing role in the evaluation of the qualification of programs and personnel. He further requested that the commissioner of insurance adopt rules specifying the process for submission and review of all requests for approval of programs and personnel, including the role of the advisory council. He therefore recommended amending the rule by adding the language "after review by and consultation with the advisory council" following the existing proposed language "on forms approved by the commissioner of insurance".

RESPONSE:
It is the position of the department that the language of section 33-17-209(2), MCA, clearly requires the commissioner of insurance to consult with the advisory council in formulating rules and standards for the approval of prelicensing program education courses, but does not mandate continued involvement of the advisory council beyond that point.

COMMENT:
Comment was received that the forms which are referenced in the rule should be published in rules or their contents described in the rules.

RESPONSE:
It is the position of the department that the language of House Bill 536 which allows the commissioner of insurance to authorize a certificate of completion form for the instructor to sign when a license applicant completes the 40th hour of instruction reasonably permits the commissioner of insurance to authorize other documentation necessary to implement the prelicensing education program.

COMMENT:
Comment was received suggesting the rule be amended to reflect "approved" program director, and also that "and

sponsoring organizations" be included within the requests for approval referred to in (1).

RESPONSE:
The department has adopted these recommendations.

COMMENT:
Comment was received that in some states the commissioner of insurance has a set number of days 60 days from submission to accept or reject the program. The individual making the comment recommended that the rule be modified to clarify submission dates.

RESPONSE: The department has adopted this recommendation and amended the rule to indicate that course offerings must be submitted at least 60 days prior to their anticipated start date and that proposed instructors, program directors and sponsoring organizations must be submitted at least 30 days in advance.

AUTH: 33-1-313, MCA IMP: 33-17-207 through 33-17-209, MCA

Andrea "Andy" Bennett
State Auditor and
Commissioner of Insurance

Certified to the Secretary of State this 5th day of March, 1990.

BEFORE THE BOARD OF MILK CONTROL
OF THE STATE OF MONTANA

In the matter of proposed amendment of Rule 8.86.505 as it relates to quota rules for producers supplying Meadow Gold Dairies, Inc.	)	NOTICE OF AMENDMENT OF RULE 8.86.505
	)	QUOTA RULES
	)	DOCKET #96-89

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

1. On Thursday, December 21, 1989, the Montana board of milk control published notice of a proposed amendment of rule 8.86.501(1)(g) relating to readjustment and miscellaneous quota rules. Notice was published at page 2099 of the 1989 Montana Administrative Register, issue No. 24, as MAR Notice No. 8-86-34.

2. The hearing was held on January 30, 1990, at 9:30 a.m. in the SRS auditorium, 111 N. Sanders Avenue, Helena, Montana. One person appeared at the hearing to offer testimony and comment on the proposed rule amendment. That person spoke in favor of the proposed rule amendment.

3. After thoroughly considering all of the testimony received, the board is adopting the amendment as proposed.

4. The authority for the board to amend the rule is in section 81-23-302, MCA, and implements section 81-23-302, MCA.

MONTANA BOARD OF MILK CONTROL
MILTON J. OLSEN, Chairman

By: _____
Charles A. Brooke, Acting Director
Department of Commerce

Certified to the Secretary of State March 5, 1990.

STATE OF MONTANA
DEPARTMENT OF COMMERCE
BOARD OF INVESTMENTS

In the matter of the amendment of rules pertaining to the Montana Capital Company Act and investments by the Montana Board of Investments	))))	NOTICE OF AMENDMENT OF RULES 8.97.802, 8.97.803, 8.97.807, 8.97.1404 AND 8.97.1502

TO: All Interested Persons:

1. On November 22, 1989, the Board of Investments published a notice of proposed amendment of the above-stated rules at page 1881, 1989 Montana Administrative Register, Issue Number 22.

2. The Board has amended ARM 8.97.807, 8.97.1404 and 9.87.1502 exactly as proposed, but has amended 8.97.802 and 8.97.803 with the following changes:

"8.97.802 DEFINITIONS (1)(a) through (c) will remain the same as proposed.

(d) "affiliate" or "affiliated group" means:

(i) any corporation that directly or indirectly owns, controls, or holds the power to vote, any stock of any other specified corporation, as defined in Section 1563 of the Internal Revenue Service Code and the related regulations thereon;

(ii) any corporation who is directly or indirectly owned, controlled, or held with the power to vote by any other specified corporation as defined by Section 1563 of the Internal Revenue Service Code and the related regulations thereon; and

(iii) any corporation that is directly or indirectly under common control with such specified corporation, through ownership, control, or holding the power to vote as defined in Section 1563 of the Internal Revenue Service Code and the related regulations thereon.

(d) through (2) same as proposed, but will be renumbered

Auth: Sec. 90-8-105, MCA; IMP, Sec. 90-8-101, 90-8-104, 90-8-201, 90-8-202, MCA

COMMENT: One comment was submitted by the Big Sky Opportunities Limited Partnership suggesting that the definition of "affiliate" be consistent with the income tax law instead of the securities law.

RESPONSE: After thorough consideration and consultation with Board counsel, Mike Mulroney, the Board concurs and changes have been made accordingly in order to be consistent with the income tax law.

"8.97.803 APPLICATION PROCEDURE TO BECOME A "CERTIFIED" MONTANA CAPITAL COMPANY (1)(a) through (p) will remain the same as proposed.

(2) through (8) will remain the same.

(9) Certification automatically expires if the company fails to become qualified pursuant to ARM 8.97.804, within eighteen months of the date it was certified for applications received after the effective date of this amendment."

Auth: Sec. 90-8-105, MCA; IMP, Sec. 90-8-202, MCA

COMMENT: One comment was submitted suggesting that the Board make clear that an effective date of the extension of time for a certified capital company to raise required capital investments applies to future applicants.

RESPONSE: After thorough consideration, the Board concurs and the applicable rule has been amended accordingly.

3. No other comments or testimony were received.

BOARD OF INVESTMENTS
WARREN VAUGHAN, CHAIRMAN

BY: _____
Charles A. Brooke, Acting Director
Department of Commerce

Certified to the Secretary of State, March 5, 1990.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the adoption of new rules relating to state equalization	) NOTICE OF ADOPTION OF 10.20.101) through 10.20.103; and 10.30.301;) AMENDMENT AND TRANSFER of 10.13.101, 10.13.102 AND 10.13.201; AND REPEAL OF 10.13.103

To: All Interested Persons.

1. On January 25, 1990, the Office of Public Instruction published notice of proposed adoption of the rules above at page 184 of the 1990 Montana Administrative Register, Issue Number 2.

2. A public hearing was held on February 15, 1990. The hearing was tape recorded and the tape is included in the file on this matter. The written and oral comments received are discussed below in reference to each rule where amendments were suggested.

3. Based upon the comments received, the rules are being adopted as proposed with those changes given below.

10.13.101 (10.30.101) APPLICATION INFORMATION received no comments and is adopted as proposed.

(AUTH: 20-3-106(18) MCA; IMP: 20-9-302 MCA)

10.13.102 (10.30.102) APPROVAL CRITERIA received no comments and is adopted as proposed.

(AUTH: 20-3-106 MCA; IMP: 20-9-302 MCA)

10.13.103 VARIANCES received no comments and is repealed as proposed.

(AUTH: 20-3-106 MCA; IMP: 20-9-302 MCA)

10.13.201 (10.30.201) APPROVAL CRITERIA--MIDDLE SCHOOL received no comments and is adopted as proposed.

(AUTH: 20-3-106 MCA; IMP: 20-6-507 MCA)

RULE I (10.30.301) APPROVAL CRITERIA--JUNIOR HIGH SCHOOL received no comments and is adopted as proposed.

(AUTH: 20-3-106 MCA; IMP: 20-6-504, 20-6-505 MCA)

RULE II (10.20.101) DEFINITIONS For purposes of calculating ANB, the following definitions shall apply:

(1) "attendance" means a student must have been present for at least a minimum amount of pupil-instruction (PI) time in the school fiscal year before the student may be counted for ANB purposes.

(2) "absent" means those pupil-instruction days the student is enrolled and not in attendance. ~~days the student is not present on pupil instruction days. A student must first meet the criteria for attendance before the student can be considered as absent.~~

(3) is adopted as proposed.

(4) "enrolled student" means a student is in attendance, or is absent because of illness, bereavements, or other reasons prescribed by the policies of the trustees. In no event shall a school district calculate ANB for a student who has not been in attendance during a semester. ~~who has been in attendance.~~

(5) is adopted as proposed.

(6) "homebound ~~instruction~~" students means those students who are receiving instructional services who were in the education program and due to medical reasons, certified by a medical doctor, are unable to be present for pupil instruction.

(7), (8), (9), (10), (11), (12) and (13) are adopted as proposed.

(AUTH: 20-9-102, 20-9-369(2), 20-9-346(1) MCA; IMP: 20-9-313, 314 MCA)

COMMENT: Comment was received from Great Falls Public Schools, Montana School Board Association and Rep. Simpkins as to application and workability of the definitions. Amendments have been made to broaden the language and clarify the definitions. Comments were also received from Legislative Council as to authority. Additional authority has been provided.

RULE III (10.20.102) CALCULATION OF AVERAGE NUMBER BELONGING (ANB) is adopted as proposed.

(AUTH: 20-9-102, 20-9-369(2), 20-9-346(1) MCA; IMP: 20-9-313, 314 MCA)

COMMENT: At the suggestion of the Legislative Council, additional authority has been included.

RULE IV (10.20.103) CIRCUMSTANCES UNDER WHICH THE REGULAR AVERAGE NUMBER BELONGING MAY BE INCREASED received no comments and is adopted as proposed.

Nancy Keenan

Nancy Keenan, Superintendent of Public Instruction

Certified to the Secretary of State on March 5, 1990.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the adoption of new rules I through V relating to guaranteed tax base	))))	NOTICE OF ADOPTION OF RULES 10.21.101-105

To: All Interested Persons.

1. On January 11, 1990, the Office of Public Instruction published notice of proposed adoption of the new rules above at page 15 of the 1990 Montana Administrative Register, issue number 1.

2. A public hearing was held on February 8, 1990, and was attended by about 10 people. Formal comments were presented by six people and the office then answered questions. The hearing was tape recorded and the tape is included in the file on this matter together with the report of the hearing officer. Six written comments were received. The comments are discussed below in reference to each rule where amendments were suggested.

3. The proposed rules were adopted without comment or change.

4. Rules I through V will be codified in the order given as rules 10.21.101 through 10.21.105.

Nancy Keenan

Nancy Keenan, Superintendent of Public Instruction

Certified to the Secretary of State on March 5, 1990.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the adoption of new rules I through IV relating to spending and reserve limits	))))	NOTICE OF ADOPTION OF RULES 10.22.101-10.22.104

To: All Interested Persons.

1. On January 11, 1990, the Office of Public Instruction published notice of proposed adoption of the new rules above at page 24 of the 1990 Montana Administrative Register, issue number 1.

2. A public hearing was held on February 8, 1990, and was attended by about 10 people. Formal comments were presented by six people and the office then answered questions. The hearing was tape recorded and the tape is included in the file on this matter together with the report of the hearing officer. Six written comments were received. The comments are discussed below in reference to each rule where amendments were suggested.

3. Based upon the comments received, the rules are being adopted as proposed with those changes given below.

RULE I (10.22.101) DEFINITIONS received no comments and is adopted as proposed.

(AUTH: 20-9-102, MCA; IMP: 20-9-104 and 20-9-315, MCA)

Rule II (10.22.102) SPENDING LIMITS (1), (3), (4) and (5) are adopted as proposed.

(2) For purposes of determining the spending limit:

(a) For FY91, the fiscal year 1989-90 general fund budget does not include comprehensive insurance amounts.

(b) For school districts participating in special education cooperatives, "foundation program amount" ~~and "general fund budget"~~ shall include a portion of the payments received by a special education cooperative in support of special education programs. ~~These payments shall be apportioned among the school districts participating in the cooperative in the manner provided in 20-9-501, MCA.~~ This apportionment will be weighted based on each participating district's ~~December child count in the most recent year for which data is available.~~ student enrollment and special education child count. By May 1 of each year, OPI will notify each school district participating in a cooperative of its apportioned payments for use in setting its spending limits for the ensuing school fiscal year.

(c) Public Law 81-874 fund are not included in calculating the spending limit.

(AUTH: 20-9-102, MCA; IMP: 20-9-315, MCA)

COMMENT: The Office received comment that the

apportionment of special education co-op payments appears to be used to determine either spending limit. An additional concern was that the apportionment of payments was being done using two conflicting methods.

RESPONSE: The Office considered the comments and revised the rule to apply special education co-op payment apportionment to the 135 percent of foundation program amount only. The conflicting methods of apportionment of the co-op payments was changed to eliminate the conflict.

Rule III (10.22.103) RESERVE LIMITS received no comments and is adopted as proposed.

(AUTH: 20-9-102, MCA; IMP: 20-9-104 and 20-9-105, MCA)

Rule IV (10.22.104) CASH REAPPROPRIATED received no comments and is adopted as proposed.

(AUTH: 20-9-102, MCA; IMP: 20-9-315 and 20-9-141, MCA)

4. Rules I through IV will be codified in the order given as rules 10.22.101 through 10.22.104.

Nancy Keenan

Nancy Keenan, Superintendent of Public Instruction

Certified to the Secretary of State on March 5, 1990.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the adoption rules I through VII relating to permissive amount, voted amount, and school levies	)))))	IN THE MATTER OF THE ADOPTION OF RULES 10.23.101-10.23.107

To: All Interested Persons.

1. On January 11, 1990, the Office of Public Instruction published notice of proposed adoption of the new rules above at page 29 of the 1990 Montana Administrative Register, issue number 1.

2. A public hearing was held on February 8, 1990, and was attended by about 10 people. Formal comments were presented by six people and the office then answered questions. The hearing was tape recorded and the tape is included in the file on this matter together with the report of the hearing officer. Six written comments were received. The comments are discussed below in reference to each rule where amendments were suggested.

3. Based upon the comments received, the rules are being adopted as proposed with those changes given below.

Rule I (10.23.101) DEFINITIONS (1) through (5) are adopted as proposed.

(6) "Foundation program" includes amounts in support of general education programs as provided in the schedules in 20-9-316 through 20-9-320, MCA, and payments in support of special education programs under 20-9-321, MCA. For school districts participating in special education cooperatives, "foundation program" includes a portion of the payments received by special education cooperatives in support of special education programs. ~~These payments shall be apportioned among the school districts participating in the cooperative in the manner provided in 20-9-501, MCA.~~ This apportionment will be ~~based on each district's December child count in the most recent year for which data is available.~~ weighted based on each participating district's student enrollment and special education child count. By May 1 of each year, OPI will notify each school district participating in a cooperative of its apportioned payments for use in calculating its permissive amount for the ensuring school year.

(AUTH: 20-9-102; IMP: 20-9-145 and 20-9-353, MCA)

COMMENT: See comment to RULE II (10.23.102).

Rule II (10.23.102) PERMISSIVE AMOUNT AND PERMISSIVE LEVY (1) and (2) are adopted as proposed.

(3) To determine the permissive net levy requirement

needed to help fund the permissive amount, the county superintendent shall subtract the other revenue available to the district for other than foundation program support~~, except as provided in (5)~~. The remaining amount is the permissive net levy requirement.

(4) To determine the permissive mills needed, the permissive net levy requirement is divided by:

(a) for districts eligible for GTB aid, ~~the product of the statewide mill value per ANB, as defined in Chapter 45, Rule I(1)(c) or (1)(d), multiplied by the district's ANB, as defined in Chapter 45, Rule I (2)(e).~~ the sum of:

(i) the district's taxable valuation as defined in 10.21.101(2)(c) divided by 1000 plus

(ii) the difference between the statewide mill value per ANB as defined in 10.21.101(1)(c) or (d) and the district mill value per ANB as defined in 10.21.101(2)(f) or (g) multiplied by the district's ANB as defined in 10.21.101(2)(c).

Formula:

(net levy requirement/~~(statewide mill value/ANB X district ANB)=permissive mills~~ (district taxable value/1000)] + ((statewide mill value per ANB - district mill value per ANB) x ANB]).

(b) for districts that are not eligible for GTB aid, the district's taxable valuation, as defined in Chapter 45, Rule I(2)(c). Formula:

net levy requirement/district taxable value=permissive mills

~~(5) Because the following other revenue has been taken into account in the GTB calculation as provided in Chapter 45, rule II, it may not be subtracted from the permissive amount in determining the permissive net levy requirement for those districts eligible for GTB subsidy:~~

~~(a) light vehicle and motorcycle fees (61-3-504 and 61-3-357, MCA);~~

~~(b) recreational vehicle fees, including motorhomes (61-3-522, MCA), travel trailers (61-3-523, MCA), campers (61-3-523, MCA), off-road vehicles (23-2-803, MCA), snowmobiles (23-2-615, MCA), boats (23-2-527, MCA), and airplanes (67-3-205);~~

~~(c) individual and district tuition and fees received by the district, in accordance with 20-5-307 and 20-5-311, MCA;~~

~~(d) personal property tax reimbursement, in accordance with 15-1-111, MCA;~~

~~(e) local government severance tax (15-36-101, MCA); and~~

~~(f) coal gross proceeds tax (15-23-701, MCA).~~

~~(6)~~ (5) Except as provided in ~~(7)~~ (6), all districts, including those eligible for GTB aid and those not eligible for GTB aid, must use total "other revenue" as defined in ~~Chapter 47, Rule I(5)~~ 10.23.101(5) to fund the permissive amount.

~~(7)~~ (6) Districts that receive Public Law 81-874 funds are not required to use these funds to finance the permissive amount. Trustees of the district may determine how these funds are spent, in accordance with federal law.

~~(8)~~ (7) Permissive mills are imposed by resolution of the trustees and may not be submitted to the electorate for approval. Trustees must send a copy of the resolution imposing the permissive amount to the county superintendent with the preliminary budget, filed in accordance with 20-9-113, MCA. The trustees' resolution imposing the permissive amount must state:

(a) the reasons and purposes for exceeding the foundation program amount; and

(b) the amount of the net levy requirement for permissive mills. ~~Trustees must send a copy of the resolution imposing the permissive amount to the county superintendent with the preliminary budget, filed in accordance with 20-9-113, MCA.~~

~~(9)~~ (8) When reporting the net general fund levy requirements to the county commissioners in accordance with 20-9-141, MCA, each county superintendent must report the following information for each district eligible for GTB aid:

(a) the final district mill value/ANB and the statewide mill value/ANB for the current fiscal year, as provided by OPI in accordance with ~~Chapter 45, Rule III(5)~~ 10.21.301(5); and

(b) the calculation used to determine the mills needed to fund the net levy requirement for the permissive amount.

(AUTH: 20-9-102, MCA; IMP: 20-9-145 and 20-9-141, MCA)

COMMENT: The Office received comment that the original formula did not provide adequate revenue to fund the permissive amount.

RESPONSE: The Office considered the comments and revised the formula to be more consistent with statute.

Rule III (10.23.103) VOTED AMOUNT AND VOTED LEVY received no comments and is adopted as proposed.

(AUTH: 20-9-102, MCA; IMP: 20-9-353, MCA)

Rule IV (10.23.104) RETIREMENT LEVIES received no comments and is adopted as proposed.

(AUTH: 20-9-102 and 20-9-369, MCA; IMP: 20-9-501 and 20-9-368, MCA)

Rule V (10.23.105) EXEMPTION FROM I-105 received no comments and is adopted as proposed.

(AUTH: 20-9-102, MCA; IMP: 15-10-412, MCA)

Rule VI (10.23.106) STATE EQUALIZATION LEVY received no comments and is adopted as proposed.

(AUTH: 20-9-102, MCA; IMP: 20-9-360, MCA)

Rule VII (10.23.107) BASIC EQUALIZATION LEVY SHORTFALL received no comments and is adopted as proposed.

(AUTH: 20-9-102, MCA; IMP: 20-9-331 and 20-9-333, MCA)

4. Rules I through VII will be codified in the order

given as rules 10.23.101 through 10.23.107.

Nancy Keenan

Nancy Keenan, Superintendent of Public Instruction

Certified to the Secretary of State on March 5, 1990.

BEFORE THE FISH AND GAME COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendments of Rule 12.6.901 pertaining to water safety regulations	NOTICE OF AMENDMENTS OF RULE 12.6.901 CLOSING CERTAIN WATERS

TO: All Interested Persons

1. On January 11, 1990 the Fish and Game Commission gave notice of proposed amendment to Rule 12.6.901 pertaining to water safety regulations, on page 35 of the Montana Administrative Register, issue number 1.

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

3. Based on the foregoing, the Commission hereby amends the rule as proposed.

Errol T. Galt

Errol T. Galt, Chairman
Fish and Game Commission

Certified to the Secretary of State March 5, 1990.

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

In the matter of the proposed repeal of ARM rule 12.9.210 Warm Springs Game Preserve	NOTICE OF REPEAL OF ARM RULE 12.9.210 WARM SPRINGS PRESERVE

TO: All interested persons

1. On January 11, 1990 the Department of Fish, Wildlife and Parks gave notice of proposed repeal to Rule 12.9.210 pertaining to the Warm Springs Game Preserve, on page 38 of the Montana Administrative Register, issue number 1.

2. The Department repealed Rule 12.9.210 as proposed.

3. One comment was received from Nick A. Rotering, Legal Counsel for the Department of Institutions.

COMMENT: Mr. Rotering stated that the preserve status has offered a buffer to the State Hospital and suggested that the commission give consideration to hunting limits that would insure public safety of patients, the staff and their families.

RESPONSE: The Department and Commission will work with the Department of Institutions to assure that hunting in the former preserve area does not pose a safety hazard to patients and others associated with the Hospital.

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

Certified to the Secretary of State March 5, 1990.

BEFORE THE PETROLEUM TANK RELEASE
COMPENSATION BOARD OF THE STATE OF MONTANA

In the matter of the proposed adoption of Rules I through XXIV for the Petroleum Tank Release Compensation Program.	))))	NOTICE OF THE ADOPTION OF RULES FOR PETROLEUM TANK RELEASE COMPENSATION BOARD

TO: All Interested Persons:

1. On January 11, 1990, the Petroleum Tank Release Compensation Board published a notice of public hearing on the proposed adoption of rules for the petroleum tank release compensation program, at pp. 40-53 of the 1990 Montana Administrative Register, issue no. 1.

2. The board has adopted all but three of the rules with minor editorial changes but substantially as proposed. The numbering of these rules and the three which have been amended is as follows:

Proposed Rule No.		ARM No.
I	amended and adopted, as	16.47.101
II	adopted as proposed, as	16.47.201
III	adopted as proposed, as	16.47.301
IV	adopted as proposed, as	16.47.322
V	adopted as proposed, as	16.47.311
VI	adopted as proposed, as	16.47.302
VII	adopted as proposed, as	16.47.303
VIII	adopted as proposed, as	16.47.323
IX	adopted as proposed, as	16.47.324
X	adopted as proposed, as	16.47.342
XI	adopted as proposed, as	16.47.334
XII	adopted as proposed, as	16.47.335
XIII	adopted as proposed, as	16.47.336
XIV	adopted as proposed, as	16.47.312
XV	adopted as proposed, as	16.47.313
XVI	amended and adopted, as	16.47.321
XVII	amended and adopted, as	16.47.316
XVIII	adopted as proposed, as	16.47.343
XIX	adopted as proposed, as	16.47.331
XX	adopted as proposed, as	16.47.341
XXI	adopted as proposed, as	16.47.344
XXII	adopted as proposed, as	16.47.332
XXIII	adopted as proposed, as	16.47.333
XXIV	adopted as proposed, as	16.47.351

3. The board has adopted proposed rules I, XVI, and XVII with the following changes:

RULE I (16.47.101) ORGANIZATION OF BOARD (1) same as proposed

(2) same as proposed

(3) Director. The board is allocated to the Department of Health and Environmental Sciences for administrative purposes only. However, the board has authority to employ its own staff and consultants, and for that purpose, ~~The~~ the seven members of the board exercise the powers of a director of a department.

(4) - (7) same as proposed

RULE XVI (16.47.321) ELIGIBLE PERSONS; COMPLIANCE; SUBSTANTIAL VIOLATIONS (1) The Act requires the operation and management of a tank to have been in compliance with applicable state and federal statutes and rules, other than for the release which led to the application for reimbursement, at the time of the release and after its detection. The board will normally consider compliance with the following requirements essential to eligibility:

(a) installation of a tank system which meets design standards (ARM 16.45.103, 16.45.104, 16.45.201, and 16.45.202);

(b) a tank system which meets the release detection requirements (ARM 16.45.401 ~~or~~ 16.45.402, 16.45.404, and 16.45.405) ~~as applicable~~;

(c) ~~upgrading--tanks--for~~ a tank system which meets the spill and overfill requirements ~~per~~ (ARM 16.45.301) and for anti-corrosion protection ~~per~~ (ARM 16.45.302);

(d) reporting of the release within 24 hours of detecting it, taking the initial response and abatement measures ~~set forth at~~ (ARM 16.45.602); and

(e) notifying the department of tank installations ~~per~~ (ARM 16.45.901 and 16.45.902).

Any other regulatory requirement must be met if an inspection by the department or any other agency having jurisdiction has called the operator's attention to it, but the above-described requirements must be met whether or not an inspector has called them to an operator's attention. The board will consider whether an operator has made a good faith effort to comply with the requirements of the department; noncompliance which is neither knowing nor negligent may be waived in such cases if the effect of such noncompliance does not increase eligible costs.

(2) same as proposed

RULE XVII (16.47.316) CRITERIA FOR DECISION--COSTS ACTUALLY, NECESSARILY, AND REASONABLY INCURRED (1) same as proposed

(2) "Actually incurred" means, in the case of corrective action expenditures, that one entity--the owner, the operator, or the insurer of either, or a contractor hired by any of them--has made a payment or that a contractor has expended time and materials and that only that entity is receiving reimbursement from the board. Time and labor contributed by the owner or operator or by an unpaid volunteer is not an

expenditure actually incurred, but the labor of an employee or a contractor reflected by checks and treated by the recipient as income is actually incurred. The board will also require proof of payment ~~such as a canceled check or an invoice marked paid in full~~ from an owner or operator or an insurer, or proof of work completed from a contractor.

EXAMPLES and (3) - (4) same as proposed.

4. At the public hearing and during the written comment period, comments were received from Jeanne Hankerson, Federated Insurance; K. Bill Clark, Citizen of the State of Montana; Debra G. Ehlert, Chief, Region VIII UST Program Section; and Doug Rogness, Corrective Action Manager, Montana UST Program; Buzz Lund, President, Montana Petroleum Marketers Association; Ray Blehm, Montana State Fire Marshal, Board Member; Ray Hoffman, Department of Health and Environmental Sciences; and John Dove, Western States Insurance Agency, Board Member.

RULE I ORGANIZATION OF BOARD

Comment: The proposed rule is drafted as if the Board is a completely independent entity among the departments of state government. However, Governor Stephens issued an Executive Order on February 12, 1990, allocating this Board, for administrative purposes only, to the Department of Health and Environmental Sciences.

Response: The Board agrees and has amended Rule I as suggested by this comment.

RULE III GUIDELINES FOR PUBLIC PARTICIPATION

Comment: Is it necessary for the board to maintain a library of publications on corrective action technologies when the department also maintains such a library? The department's library is always open to the public during normal office hours.

Response: The board may not always be located in the same building as the department, and therefore may need to have their own library on corrective action technologies. The board's staff will document the department's library and, as they feel it is needed, expand upon it.

RULE IV ASSESSMENT OF ENVIRONMENTAL IMPACT

Comment: It is not clear when the board would "find itself making a decision under circumstances where the department's environmental assessment is not adequate"; what is meant by "not adequate"?

Response: The board contemplates relying on the department at the outset to determine if an environmental assessment is

needed. Unless a third party or board staff bring other factors to the board's attention, the department's determination will stand. When an assessment is carried out, its adequacy is primarily a legal issue based on case law. If the department's assessment has overlooked factors which could make a board decision legally vulnerable, the board and its staff will endeavor to take those factors into account.

RULE VIII VOLUNTARY REGISTRATION

Comment: The rule indicates that the owner must state that the tank was not releasing a product on or before April 12, 1989. Does this mean a test is required?

Response: No, the owner or operator is stating that, to his/her knowledge, the tank was not releasing a product on or before April 12, 1989.

Comment: Is there a charge for voluntary registration?

Response: No, there is no provision in the statute which would allow the board to charge a fee for voluntary registration.

RULE X REVIEW OF CORRECTION ACTION PLAN; WHEN BOARD APPROVAL REQUIRED

Comment: The title should read "Review of Corrective Action Plan; When Board Approval Required."

Response: The board agrees with this change and it is reflected in the final rule.

Comment: Multiple comments were received on this rule concerning how the board might determine that a department-approved corrective action plan needed to be modified, who would have the ultimate authority in final approval of a corrective action plan, who would oversee the modified plan, would the board hire staff to oversee the modified plan if the department did not agree with the modification, and would the board justify and document for public record the reason for the modification.

Response: The board plans to work closely with the department on the approval of a corrective action plan. As stated in paragraph 2, the board will be accepting the department's plan as long as the department addresses the board's comments on the plan.

If the board modifies a department-approved corrective action plan, it only would be after the board heard testimony that would establish another cleanup strategy which would provide equal or greater improvement to the affected environment at

less cost. The department would be involved in the testimony, and if the modification would provide equal or greater improvement to the affected environment the department should also want to accept the strategy and modify the plan.

The board may hire staff if the department is unable to provide staff to the board. At this time the board is relying heavily on the department for technical support.

RULE XI APPLICATION PROCEDURE -- REIMBURSEMENT AFTER EXPENDITURE

Comment: The responsible party may apply after completion of any aspect of the corrective action plan. What is an "aspect"? Are there time requirements or work requirements which make up an "aspect"? Also, is it necessary that the corrective action plan be approved before any reimbursement can be made? There are situations where large amounts of money can be spent on initial remedial action activities which occur quite some time before the corrective action plan is approved. The time it takes to approve a corrective action plan depends in a large part on the adequacy of the state staff reviewing those applications for approval. Our experience in some other states has been that it can take several months for a plan to be approved because of the backlog in the agency making those decisions.

Response: An "aspect" is any work which has been done in response to a release. The term corrective action as defined in the statute is: "investigation, monitoring, cleanup, restoration, abatement, removal, and other actions necessary to respond to a release." Therefore, if a responsible party has reported a release to the department, informed the department of work to be completed, and received approval for that work, this could constitute an approved corrective action plan. The owner or operator could then submit application for reimbursement for the work which was approved by the Department.

RULE XII APPLICATION FOR GUARANTEE OF REIMBURSEMENT OF FUTURE OR UNAPPROVED EXPENDITURES

Comment: This rule indicates that the board will guarantee payment of claims submitted in certain cases. I do not fully understand why such a provision would be necessary as part of the program. Additionally, this could create problems in situations where the board guarantees that reimbursement will be made and then the responsible party ceased cooperating with the state regarding the cleanup plan, would expenses still be reimbursed under the guarantee? While this should not be a frequent problem, the threat that future expenses will not in fact be reimbursed could be useful in keeping responsible parties in compliance.

Response: The statute allows the board to guarantee reimbursement of future or unapproved expenditures. When owners or operators are using bank loans to make payments or requesting contractors to do work for which they would be paid at a future date, they may not be able to have the work done without a guarantee from the board for payment. The statute does, however, state that the reimbursement has to be for eligible costs. For costs to be eligible, the owner or operator has to comply with all state and federal law and rules. This indicates that the owner or operator would have to cooperate with the state regarding the cleanup plan. The guarantee does not mean that the responsible party could cease cooperating with the state regarding the cleanup plan.

RULE XIII REVIEW AND DETERMINATION

Comment: The first sentence refers to "department review" of applications. What exactly is the department required to review for the applications? Prior to this statement, the rules only mention department review of corrective action plans; however, the UST rules and Petroleum Storage Tank Cleanup Act indicate that the department is to review applications for eligible costs and whether the expenses were actually, necessarily, and reasonably incurred.

Response: The applications for reimbursement include statements on what corrective action work has been done. The department would review the applications to make sure that the work stated was actually done and if the work was necessary. This prevents the applicant from asking for payment of work which the department did not authorize.

RULE XIV "FUEL STORED FOR NONCOMMERCIAL PURPOSES IN FARM OR RESIDENTIAL"

Comment: This rule defines fuel stored for noncommercial purposes. There seems to be a gap between Parts 1 and 2 of this definition which leaves out some tanks. Where do tanks at non-farm locations which are not used for resale of product fall in the scheme of things? This would be like a lumberyard with a fuel tank for its own vehicles.

Response: The reason for defining noncommercial is for the purposes of tanks located on farms or at residences. This definition should not be used except for the purposes of clarifying noncommercial use at farms or residences, as stated in the statute. Tanks at non-farm locations which are not used for resale of a product are covered by the fund.

RULE XVI ELIGIBLE PERSONS; COMPLIANCE; SUBSTANTIAL VIOLATIONS

Comment: A change to sentence 3, paragraph (1), reading: "Any other regulatory requirement must be met if an inspection by the department or other agency having jurisdiction has called the operator's attention to it, ..." would reflect the responsibility of an owner or operator to comply with orders from entities such as local fire departments.

Response: The board agrees with this change and the final rule reflects it.

RULE XVII CRITERIA FOR DECISION--COSTS ACTUALLY, NECESSARILY, AND REASONABLY INCURRED

Comment: The definition of costs "actually incurred" in the proposed rule seemed to imply that the fund was a reimbursement fund. A reimbursement-only fund does not qualify under the federal regulations because it does not assure that a cleanup will go forward regardless of the responsible party's ability to initially pay for it. However, if the rule is amended to indicate that the responsible party may appoint the contractor doing cleanup work as the representative designated to receive payment, so that the contractor in essence invoices and receives payment from the board, the fund would meet the requirements of EPA's regulations.

Response: The board agrees with this comment and the final rule has been changed to reflect it.

Comment: How will the board determine who is a "qualified bidder"? Are there going to be established criteria to determine the "qualified" designation? Does the board intend to certify contractors?

Some projects require several phases of work, such as preparation of a remedial investigation work plan and implementation of each of the work plans. Is a competitive bid required at each of these "phases" of work?

Often during initial response and abatement activities it is difficult to predict the scope-of-work necessary to respond to a leak problem. Therefore, it will be difficult for an owner or operator to determine how to solicit competitive bids. Hourly rates for consultants vary considerably and are dependent on the level of expertise necessary to complete a task. Is the board going to standardize hourly rates for consulting firms and for specific tasks?

The rules should state that the board will indemnify an owner or operator for long term liability with a petroleum release site.

Response: The board will use the department's recommendation on qualified bidders. Instead of determining if a bidder is

qualified, the board may determine, due to the bidder's past history, that the bidder is not qualified. The statute does not allow the board to certify contractors and the board, at this time, does not anticipate doing this.

The owner or operator needs to look at costs when picking out contractors, and the board wants the owner or operator to look at costs and choose the contractor which will serve him/her the best. The board is not intending to limit an owner or operator from retaining the consultant of their choice, but the board does want to be advised of why one consultant is picked over another. The board is concerned that the owner or operator receives the best work available for the money spent.

The board may in the future standardize costs for typical tasks. Presently the board is planning to evaluate the costs submitted on a case-by-case basis.

If a site has been cleaned up to the satisfaction of the department and the board, and in the future another problem arises from the same release, if the original release was covered the new problem would also be covered. This is similar to the procedures which insurance companies use to determine whether a problem is covered.

RULE XVIII CORRECTIVE ACTION EXPENDITURES: DOCUMENTATION

Comment: It was suggested that the second sentence reflect that the department should be involved in the review and approval of any corrective action work completed at a site by a third party.

Response: The board would not pay a third party unless the corrective action plan, which the third party was working under, was approved by the department. The only time a third party could do work and then notify the department would be in an emergency situation.

RULE XXI THIRD-PARTY DAMAGES: DOCUMENTATION

Comment: Is a property appraiser or claims adjuster capable of determining property damage and devaluation caused by groundwater or soil contamination? The site assessment and corrective action reports available for the site should play a key role in determining third party damages. The board should also anticipate that a third party may disagree with the finding of the board and department and retain a separate consultant to conduct its own site assessment to determine damages for settlement purposes.

Response: A property appraiser or claims adjuster determines the value of a property to begin with, and therefore the

board would rely on a determination from these professionals to determine property damage.

If a third party does not agree with the initial determination of the board as to the settlement, it is their right to have a formal hearing, cross-examine the witnesses whose testimony would support the board's initial determination, and present their own expert witnesses. Should that hearing fail to persuade the board to increase the damages awarded, the third party can appeal the board's decision to district court.

RULE XXII INSURANCE COVERAGE; DISCLOSURE; COORDINATION OF BENEFITS

Comment: Change the first sentence in Rationale to coincide with the intent of the rule as follows: ~~Many~~ Operators ~~will~~ may carry ~~premises liability~~ insurance which may cover some of the same risks the Act covers.

Response: The board agrees with this change. The final rule does not restate the rationale, and therefore this change is reflected in this response.

5. The authority for these substantive rules is 70-11-318, MCA, and the substantive rules generally implement House Bill 603 (c. 528, L. 1989), codified at Title 70, chapter 11, part 3, MCA.

HOWARD WHEATLEY, CHAIRMAN
Petroleum Tank Release Compensation Board

Certified to the Secretary of State March 5, 1990.

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of rules 24.9.212 Confidentiality, 24.9.225 Procedure on Finding of Lack of Reasonable Cause, 24.9.309 Contested Case Record, and 24.9.329 Exceptions to Proposed Orders	)))))))	NOTICE OF THE AMENDMENT OF RULES 24.9.212 CONFIDENTIALITY, 24.9.225 PROCEDURE ON FINDING OF LACK OF REASONABLE CAUSE, 24.9.309 CONTESTED CASE RECORD, AND 24.9.329 EXCEPTIONS TO PROPOSED ORDERS

TO: All Interested Persons

1. On December 21, 1989, at page 2157 of the 1989 Montana Administrative Register, Issue No. 24, the Human Rights Commission published notice of proposed amendments to Rules 24.9.212, 24.9.225, 24.9.309 and 24.9.329, ARM. Rule 24.9.212 relates to confidentiality of complaints under investigation by the commission staff. Rule 24.9.225 relates to the procedure to be followed in the investigative process when the commission staff has issued a finding of lack of reasonable cause to believe discrimination occurred. Rule 24.9.309 relates to the materials which comprise the record in a contested case. Rule 24.9.329 relates to the procedure to be followed after the entry of a proposed order by the hearing examiner.

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

3. The rules as amended implement Sections 2-4-614, 2-4-621, 2-4-623, 49-2-504, 49-2-505, 49-2-509, 49-3-307, 49-3-308, and 49-3-312, MCA.

4. The commission received comments from Rick Bartos, Chief Legal Counsel for the Governor, concerning the proposed amendments to Rule 24.9.212. He questioned whether the legislature intended for the requirement of public disclosure of the governmental portion of tort claim settlements to apply to settlement of discrimination claims.

The commission reviewed the rule in light of the constitutional and statutory provisions concerning the public's right to know and an individual's right of privacy. Upon reviewing these provisions, the commission believes that a governmental entity does not have a right of privacy which overrides the public's right to know the terms of any portion of a settlement or conciliation agreement involving a governmental entity.

5. The commission also received comments from Rick Bartos concerning the proposed amendments to Rule 24.9.309. He stated that he believed the rule should

clarify that the commission will not normally utilize stenographic records which are prohibitively expensive.

The commission agrees and has further amended the rule to clarify that hearings will be recorded electronically unless a party demands and pays for a stenographic record.

6. The commission received comments from Valencia Lane, staff attorney for the Legislative Council, concerning the proposed amendments to Rule 24.9.212. She stated that the necessity statement for the change misstated the commission's intention. She stated that she believed the commission's intent was to provide that a governmental entity could not assert a claim of individual privacy rather than stating that the public's right to know exceeds any claim of individual privacy when one of the parties is a governmental entity.

The commission agrees and has amended the necessity statement to clarify the commission's intent.

7. The commission also received comments from Valencia Lane concerning the proposed amendments to Rule 24.9.309. She stated that proposed Rule 24.9.309(1)(g) omits the phrase "as evidence" which should be added to incorporate the corresponding provision of the Montana Administrative Procedure Act (MAPA) verbatim.

The commission agrees and has added this phrase to the amendments.

8. Valencia Lane also questioned whether it is proper for the commission to implement provisions of MAPA in the commission's rules.

The commission believes it is appropriate for the commission to implement the contested case provisions of MAPA as the contested case provisions of MAPA are incorporated by reference into the statutes enforced by the commission, the Human Rights Act and the Governmental Code of Fair Practices.

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

24.9.212 CONFIDENTIALITY (1) As proposed.

~~(2) The commission may disclose any record or information contained therein to any party, individual or agency pursuant to a written request by, or with the prior written consent of the individual to whom the record pertains.~~

~~(3)~~ (2) No complaint, information obtained in the investigation of a complaint, or ~~records required to be filed with~~ other information in the commission file shall be made a matters of public information, ~~or disclosed to persons without an interest in them,~~ by the commission prior to a ~~determination regarding cause or a~~ finding ~~of no cause~~ under ARM 24.9.224 ~~or 24.9.225,~~ regarding cause to believe discrimination occurred or other agency action terminating investigation and entering an order with respect to a complaint. This rule ~~does not apply to such earlier~~ shall not limit the commission's disclosures of

such information to a party , individual or agency ~~outside of the commission~~ as may be necessary to ~~the~~ carry~~ing~~ out ~~of~~ the commission's ~~functions~~ obligations under ~~the act or code provided that the reasonable expectations of individual privacy of persons named in the commission's records are protected~~ Montana statutes or these rules. The commission may disclose any record or information contained therein to any party, individual or agency pursuant to a written request by, or with the prior written consent of the individual to whom the record pertains.

(4) - (6) As proposed but renumbered (3) - (5).

24.9.225 PROCEDURE ON FINDING OF LACK OF REASONABLE CAUSE

(1) As proposed.

(2) The determination to dismiss the complaint and issue a right to sue letter or to allow the charging party or aggrieved person an opportunity for hearing before the commission shall be within the sound discretion of the administrator. If the administrator elects to allow the charging party or aggrieved person an opportunity for hearing before the commission, the notice shall specify the time ~~in~~ within which the charging party or aggrieved person must file a written request for hearing which in no case shall be less than 14 days from the date the notice of the finding ~~was~~ is mailed to the parties.

(3) - (5) As proposed.

(6) The commission may correct errors on its own motion. The commission may vacate an order on its own motion where there is a lack of jurisdiction or where there has been fraud upon the commission.

~~(7) The commission may vacate an order on its own motion where there is a lack of jurisdiction and may set aside an order for or where there has been fraud upon the commission.~~

~~(8) Any request permitted by the subsection this rule may be denied where a party has failed to comply with the provisions of these rules for appeal of findings and the failure is not attributable to one of the factors set forth in subsections (5) (4) (a), (b), or (c) of this rule.~~

24.9.309 CONTESTED CASE RECORD

(1)(a) - (1)(f) As proposed.

(1)(g) ~~Where permitted,~~ All staff memoranda or data submitted to the hearing examiner or members of the commission as evidence in connection with their consideration of the case.

(2) The hearing will be recorded electronically unless a party demands a stenographic record. If a party desires a stenographic record of any hearing or proceeding, it must be requested not less than 15 days prior to the hearing or proceeding. The party requesting a stenographic record must arrange and pay for it. Any

electronic or stenographic record of oral proceedings or any part thereof shall be transcribed on request of any party. The cost of the transcription shall be paid by the requesting party. A party who has a transcript prepared shall file an original and six copies with the commission. The original transcript shall be included in the record of the contested case.

~~(3)--If-a-party-desires-a-stenographic-record-of-any hearing-or-proceeding,-it-must-be-requested-not-less-than 15-days-prior-to-the-hearing-or-proceeding.--The-party requesting-a-stenographic-record-must-arrange-and-pay-for it.~~

(4) As proposed, but renumbered (3)

24.9.329 EXCEPTIONS TO PROPOSED ORDERS

(1) As proposed.

(2) ~~Where~~ When a ~~any~~ a party ~~seeks~~ intends to make exception to ~~any~~ a conclusion of law, and commission review will not require a review of a transcript of hearing, the party must file and serve the exceptions ~~by an-aggrieved-party-must-be-filed~~ and a supporting brief within 20 days of the date of ~~the~~ entry of the proposed order, ~~and-brief-in-support-of-the-exceptions-must-be filed-with-the-exceptions. Thereafter,-a-~~Any opposing party ~~opposing-any-such-exception-shall-have-has~~ must file and serve ~~on~~ an answer brief within ~~ten~~ 10 days of service of the exceptions and supporting brief ~~in-which to-file-an-answering-brief~~. A The party making exceptions ~~to-a-proposed-order-shall-then-have-ten~~ must file and serve any reply brief within 10 days ~~from-the~~ of service of an ~~the~~ answering brief ~~to-file-his-or-her final-brief. All-parties-filing-exceptions-under-this subsection-must-do-so-within-20-days-of-the-date-of-the entry-of-the-proposed-order,-and-no-enlargement-of-time will-be-allowed-for-such-purpose.~~

(3)(a) As proposed.

(b) a transcript of hearing has not been prepared prior to issuance of the proposed order, the party must file a notice ~~that-the-party-will~~ of intent to file exceptions ~~must-be-filed-with-the-commission~~ within 20 days of the date of entry of the proposed order. ~~When such-a~~ After the notice of intent to file exceptions is filed, the party ~~seeking-to-make~~ making exceptions must ~~request-and-make-provision~~ arrange for ~~the~~ preparation of a transcript of ~~proceedings~~ the hearing at his or her own expense. ~~All-parties-who-seek-to-make-exception-to-any finding-of-fact-or-conclusion-of-law-must-file-the-notice required-by-this-rule-within-the-stated-period-of-time, and-no-enlargement-of-time-to-file-the-notice-required-by this-subsection-will-be-allowed.--The-party-giving-notice of-intent-to-file-exceptions-must-make-arrangements-for the-preparation-of-a-transcript-and-make-payment-for-it,~~ and The party making exceptions must file an original and six copies of the transcript ~~must-be-filed~~ with the commission within 40 days of the date of filing of the

notice of intent to ~~make~~ file exceptions. If both parties give notice of intent to file exceptions, they must share equally in the cost of the transcript and copies. ~~The exceptions and supporting brief of the~~ The party making exceptions must ~~be filed~~ file the exceptions and a supporting brief within 20 days of the date of ~~the~~ filing ~~of~~ the transcript; ~~whichever date shall occur first. Thereafter a~~ Any opposing party ~~shall have ten~~ must file and serve an answer brief within 10 days ~~from the date~~ of service of the exceptions and ~~brief in support of them~~ supporting brief ~~to file an answering brief~~. The party making exceptions ~~may have ten~~ must file and serve any reply brief within 10 days ~~following the~~ of service of the answering brief ~~to file its concluding brief~~.

(4) and (5) As proposed.

(6) The commission deems the failure of a party to timely file a brief in support of exceptions to be a waiver of the right to oral argument and will not hear argument in such cases. However, if a party who has filed exceptions fails to timely file a supporting brief, any opposing party may request permission from the ~~commission~~ commission to submit a brief in opposition to the exceptions.

(7) - (10) As proposed.

10. The commission has added new subsection (5) to ARM 24.9.212 to make clear that the commission believes that a governmental entity cannot assert a claim of individual privacy when one of the parties is a governmental entity. This amendment makes the commission's position comparable to the statutes governing settlement of tort claims involving governmental entities. §§2-9-303(2) and 2-9-304(2), MCA. The commission has also amended the rule to clarify that the commission intends the individual privacy exception to apply to all subsections of the rule involving the right to know. The commission has revised ARM 24.9.309 to be consistent with 2-4-614, MCA and has deleted former subsection (1)(h) of ARM 24.9.309 to be consistent with a Montana Supreme Court decision which held that the commission staff's investigative findings were not admissible in evidence. The commission has amended ARM 24.9.329 to clarify that a brief must be filed in support of exceptions to proposed orders in all cases, that a charging party waives oral argument on exceptions by failing to timely file a brief in support of exceptions, and to clarify that transcripts filed with the commission must be prepared by a neutral person and must be in the form commonly accepted by courts of record. The commission has made the other amendments to its rules in order to clarify the rules, streamline its procedures, and eliminate redundant and unnecessary material.

MONTANA HUMAN RIGHTS COMMISSION
JOHN R. KUHR, CHAIR

BY: Anne L. MacIntyre

ANNE L. MACINTYRE
ADMINISTRATOR
HUMAN RIGHTS COMMISSION

Certified to the Secretary of State March 5, 1990.

BEFORE THE BOARD OF OIL
AND GAS CONSERVATION
OF THE STATE OF MONTANA

In the matter of the adoption by reference of a new rule pertaining to the Montana Environmental Policy Act.	)))))	NOTICE OF ADOPTION OF A NEW RULE INCORPORATING BY REFERENCE RULES PERTAINING TO THE MONTANA ENVIRONMENTAL POLICY ACT

TO: All Interested Persons.

1. On December 21, 1989, the Board of Oil and Gas Conservation published notice of the proposed adoption of RULE I (36.22.202) relating to procedures for compliance with the Montana Environmental Policy Act at page 2164 of the Montana Administrative Register, Issue number 24.

2. The Board has adopted the rule as proposed.

3. No comments or testimony were received.

Dee Rickman

Dee Rickman, Executive Secretary
Board of Oil and Gas Conservation

Certified to the Secretary of State, February 20, 1990.

BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES
OF THE
STATE OF MONTANA

In the matter of the amendment of Rule 44.10.331 pertaining to limitations on receipts from political committees to legislative candidates	) NOTICE OF AMENDMENT OF RULE 44.10.331 PERTAINING TO) LIMITATIONS ON RECEIPTS) FROM POLITICAL COMMITTEES) TO LEGISLATIVE CANDIDATES

TO: All Interested Persons

1. On January 25, 1990, the Commissioner of Political Practices published notice of proposed amendment to Rule 44.10.331 concerning receipts from political committees to legislative candidates at page 203 of the 1990 Montana Administrative Register, issue number 2.

2. The agency has amended the rule as proposed.

3. No comments were received.

4. Authority for amending rules is section 13-37-114, MCA; the amendment to rule 44.10.331 implement sections 13-37-218 and 15-30-101(8), MCA.

Dorothy Cooney
Commissioner of Political Practices

Certified to the Secretary of State March 5, 1990.

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

In the matter of the adoption of Rules I and II pertaining to transitional child care	))))	NOTICE OF THE ADOPTION OF RULES I AND II PERTAINING TO TRANSITIONAL CHILD CARE

TO: All Interested Persons

1. On January 25, 1990, the Department of Social and Rehabilitation Services published notice of the proposed adoption of Rules I and II pertaining to transitional child care at page 207 of the 1990 Montana Administrative Register, issue number 2.

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

[RULE I] 46.10.408 TRANSITIONAL CHILD CARE, REQUIREMENTS
Subsections (1) through (1)(b)(i) remain as proposed.
(ii) if under the supervision of the court and who would be a dependent child except for the receipt of benefits under supplemental security income under title XVI or foster care under title IV-E of the Social Security Act.
Subsections (2) through (4)(a) remain as proposed.

AUTH: Sec. 53-4-212 MCA
IMP: Sec. 53-4-701 and 53-4-716 MCA

[RULE II] 46.10.409 SLIDING FEE SCALE FOR TRANSITIONAL CHILD CARE (1) The following is a sliding fee scale which indicates the amount the department will contribute towards the family's child care costs at the established reimbursement rate in accordance with ARM 46.10.404:
Subsections (1)(a) through (1)(d) remain as proposed.

AUTH: Sec. 53-4-212 MCA
IMP: Sec. 53-4-701 and 53-4-716 MCA

3. No written comments or testimony were received.

4. These rules will become effective April 1, 1990.

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 1, 1990.

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

In the matter of the amendment of Rules 46.12.571, 46.12.581 and 46.12.588 pertaining to coverage requirements and reimbursement for clinic services, psychological services and clinical social work services	)))))))	NOTICE OF THE AMENDMENT OF RULES 46.12.571, 46.12.581 and 46.12.588 PERTAINING TO COVERAGE REQUIREMENTS AND REIMBURSEMENT FOR CLINIC SERVICES, PSYCHOLOGICAL SERVICES AND CLINICAL SOCIAL WORK SERVICES

TO: All Interested Persons

1. On January 11, 1990, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.12.571, 46.12.581 and 46.12.588 pertaining to coverage requirements and reimbursement for clinic services, psychological services and clinical social work services at page 71 of the 1990 Montana Administrative Register, issue number 1.

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

46.12.571 CLINIC SERVICES, REQUIREMENTS Subsections (1) through (7) remain as proposed.

(8) ~~Six--(6)~~ NO MORE THAN TWELVE (12) hours per state fiscal year may be used for psychological testing of the recipient, and or consultation with family members or agencies involved with the care of the recipient. THE TWELVE (12) HOURS SHALL COUNT AGAINST THE TIME AVAILABLE AND FOR CONSULTATION BY LICENSED CLINICAL SOCIAL WORKERS PROVIDED FOR IN ARM 46.12.588(4)(a) FOR TESTING AND CONSULTATION BY PSYCHOLOGISTS PROVIDED FOR IN ARM 46.12.581(4)(a).

Subsection (8)(a) remains as proposed.

(9) Psychological services and social worker services provided in a hospital on an inpatient basis ~~and~~ THAT ARE covered by medicaid as part of the diagnosis related group (DRG) payment under 46.12.505 are not REIMBURSABLE AS clinic services. THESE NONCOVERED SERVICES INCLUDE:

(a) SERVICES PROVIDED BY THE LICENSED CLINICAL SOCIAL WORKERS OR PSYCHOLOGISTS WHO ARE STAFF OF A MENTAL HEALTH CENTER WHICH HAS A CONTRACT WITH A HOSPITAL INVOLVING CONSIDERATION;

(b) SERVICES PROVIDED FOR PURPOSES OF DISCHARGE PLANNING AS REQUIRED BY 42 CFR PART 482.21; AND

(c) SERVICES INCLUDING BUT NOT LIMITED TO GROUP THERAPY, THAT ARE REQUIRED AS A PART OF LICENSURE OR CERTIFICATION.

Subsections (10) and (11) remain as proposed.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-101 MCA

46.12.581 PSYCHOLOGICAL SERVICES, REQUIREMENTS

Subsections (1) through (4) remain as proposed.

(a) ~~Six (6)~~ TWELVE (12) hours may be used for psychological testing of the recipient, and or consultation with family members or agencies involved with the care of the recipient. THE TWELVE (12) HOURS SHALL COUNT AGAINST THE TIME AVAILABLE FOR TESTING AND CONSULTATION BY PSYCHOLOGISTS PROVIDED FOR IN ARM 46.12.571(8) AND BY LICENSED CLINICAL SOCIAL WORKERS PROVIDED FOR IN ARM 46.12.588(4)(a). CONSULTATIONS WITH AGENCIES MAY BE CONDUCTED VIA THE TELEPHONE.

Subsection (4)(b) remains as proposed.

(c) APPROPRIATE MEDICAL RECORD DOCUMENTATION MUST BE PRESENT TO SUPPORT THE NECESSITY OF PSYCHOLOGICAL TESTING.

(d) WHEN AN ELIGIBLE CHILD RECEIVES PSYCHOLOGICAL SERVICES, AND THE PSYCHOLOGIST CONSULTS WITH THE PARENT AS PART OF THE CHILD'S TREATMENT, TIME SPENT WITH THE PARENT SHALL BE BILLED TO MEDICAID UNDER THE CHILD'S NAME. THE PROVIDER SHALL INDICATE ON THE CLAIM THAT THE CHILD IS THE PATIENT AND STATE THE CHILD'S DIAGNOSIS. HE SHALL ALSO INDICATE CONSULTATION WAS WITH THE PARENT. ANY TREATMENT DONE IN THIS MANNER SHALL BE CHARGED AGAINST THE TWENTY TWO (22) HOURS AVAILABLE TO THE CHILD.

~~(4) When an eligible child receives psychological services, and the psychologist consults with the parent as part of the child's treatment, time spent with the parent shall be billed to medicaid under the child's name. The provider shall indicate on the claim that the child is the patient and state the child's diagnosis. He shall also indicate consultation was with the parent. Any treatment done in this manner shall be charged against the 22 hours available to the child.~~

Subsection (5) remains as proposed.

(6) Telephone contacts are not a psychological service EXCEPT AS PROVIDED FOR IN PARAGRAPH (4)(a) OF THIS RULE.

(7) ~~Inpatient~~ Psychological services ~~and social worker services~~ provided in a hospital on an inpatient basis and THAT ARE covered by medicaid as part of the diagnosis related group (DRG) payment under 46.12.505 are not a REIMBURSABLE AS psychological services. THESE NONCOVERED SERVICES INCLUDE:

(a) SERVICES PROVIDED BY A PSYCHOLOGIST WHO IS EMPLOYED OR UNDER A CONTRACT WITH A HOSPITAL;

(b) SERVICES PROVIDED FOR PURPOSES OF DISCHARGE PLANNING AS REQUIRED BY 42 CFR PART 482.21; AND

(c) SERVICES INCLUDING, BUT NOT LIMITED TO, GROUP THERAPY, THAT ARE REQUIRED AS A PART OF LICENSURE OR CERTIFICATION.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-101 MCA

46.12.588 LICENSED CLINICAL SOCIAL WORK SERVICES, REQUIREMENTS Subsections (1) through (4) remains the same.

(a) SIX (6) HOURS MAY BE USED FOR CONSULTATION WITH FAMILY MEMBERS OR AGENCIES INVOLVED WITH THE CARE OF THE RECIPIENT. THE SIX (6) HOURS SHALL COUNT AGAINST THE TIME AVAILABLE FOR TESTING AND CONSULTATION BY PSYCHOLOGISTS PROVIDED FOR IN ARM 46.12.571(8) AND 46.12.581(4)(a). CONSULTATION WITH AGENCIES MAY BE CONDUCTED VIA THE TELEPHONE.

Original subsection (4)(a) remains the same in text but will be recategorized as subsection (4)(b).

(c) APPROPRIATE MEDICAL RECORD DOCUMENTATION MUST BE PRESENT TO SUPPORT THE NECESSITY OF SOCIAL WORK SERVICES.

(5) Telephone contacts are not a social work service EXCEPT AS PROVIDED FOR IN PARAGRAPH (4)(a) OF THIS RULE.

Subsection (6) remains as proposed.

(7) Inpatient Ssocial work services provided in a hospital or on an inpatient basis and THAT ARE covered by medicaid as part of the diagnosis related group (DRG) payment under 46.12.505 are not a REIMBURSABLE AS social work services. THESE NONCOVERED SERVICES INCLUDE:

(a) SERVICES PROVIDED BY A SOCIAL WORKER WHO IS EMPLOYED OR UNDER A CONTRACT WITH A HOSPITAL;

(b) SERVICES PROVIDED FOR PURPOSES OF DISCHARGE PLANNING AS REQUIRED BY 42 CFR 482.21; AND

(c) SERVICES, INCLUDING, BUT NOT LIMITED TO, GROUP THERAPY, THAT ARE REQUIRED AS PART OF LICENSURE OR CERTIFICATION.

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-101 MCA

3. The Department has thoroughly considered all commentary received:

COMMENT: Neurological evaluations of head injured patients can take as much as twelve hours.

RESPONSE: The department has amended ARM 46.12.571, Clinic Services Requirements, and ARM 46.12.581, Psychologists Services Requirements, further to allow up to twelve hours of psychological testing and/or consultation per fiscal year.

COMMENT: Comments received from the Montana Chapter of the National Association of Social Workers concern the need licensed clinical social workers have to consult with family members and agencies involved in the care of their patients.

RESPONSE: The department has amended ARM 46.12.588, Licensed Clinical Social Workers Requirements, further to include up to

six hours of consultation per fiscal year by licensed clinical social workers. This six hours will count against the twelve hours per fiscal year available for psychological testing and consultation.

COMMENT: The time spent by a psychologist with a parent of a child in active treatment should be considered part of the treatment of the child, not consultation.

RESPONSE: The coverage of time spent by a psychologist with parents of children who are in active treatment as an individual therapy service has been reinstated in the final version of ARM 46.12.581. This time will continue to be part of the twenty-two hour per fiscal year limit.

COMMENT: Providers consider telephone contacts as an important method of delivering services and in some cases a cost effective mode of providing services.

RESPONSE: We have reviewed this part of our current policy and consider the limit reasonable for therapy contacts with patients. This policy is consistent with the practice of other third party payers, such as Medicare, which do not allow coverage of telephone contacts. We have, however, made one adjustment to the policy to allow coverage of telephone consultations with agencies caring for, or involved with a recipient, by psychologists and licensed clinical social workers. Telephone consultations with family members will not be allowed as a billable charge.

COMMENT: There were several comments received concerning the inclusion of certain inpatient services provided by psychologists and social workers in the DRG payments to hospitals. The comments indicated that the policy should be revised to state those services that do not meet the criteria for determining which psychologists' and licensed clinical social workers' services covered by the DRG payments to hospitals are billable by psychologists and licensed clinical social workers.

RESPONSE: The department has added to the language in the rule a listing of services that will not be covered. The manual will be revised to clearly state that services provided in a hospital by psychologists and social workers will be covered if not specifically excluded as provided for in the rule.

COMMENTS: Comments were received promoting additional funding of psychologists' services and removing the twenty-two hour per fiscal year limit on these services.

RESPONSE: Additional funding for services is a legislative issue and is beyond the scope of the amendments contained in this ARM change.

4. These rules will be applied retroactively to March 1, 1990.

Julia E. Roberts
Director, Social and Rehabilitation Services

Certified to the Secretary of State March 5, 1990.

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

In the matter of the amendment of Rules 46.12.1823 and 46.12.1831 pertaining to hospice services	))))	NOTICE OF THE AMENDMENT OF RULES 46.12.1823 and 46.12.1831 PERTAINING TO HOSPICE SERVICES

TO: All Interested Persons

1. On January 25, 1990, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.12.1823 and 46.12.1831 pertaining to hospice services at page 205 of the 1990 Montana Administrative Register, issue number 2.

2. The Department has amended Rules 46.12.1823 and 46.12.1831 as proposed.

3. No written comments or testimony were received.

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 1, 1990.

COMMENTS: Comments were received promoting additional funding of psychologists' services and removing the twenty-two hour per fiscal year limit on these services.

RESPONSE: Additional funding for services is a legislative issue and is beyond the scope of the amendments contained in this ARM change.

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BEFORE THE DEPARTMENT OF SOCIAL
AND REHABILITATION SERVICES OF THE
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2. The Department has amended Rules 46.12.1823 and 46.12.1831 as proposed.

3. No written comments or testimony were received.

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 1, 1990.

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

In the matter of the amendment of Rule 46.12.2013 pertaining to reimbursement for certified registered nurse anesthetists	)))))	NOTICE OF THE AMENDMENT OF RULE 46.12.2013 PERTAINING TO REIMBURSEMENT FOR CERTIFIED REGISTERED NURSE ANESTHETISTS

TO: All Interested Persons

1. On January 25, 1990, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.2013 pertaining to reimbursement for certified registered nurse anesthetists at page 214 of the 1990 Montana Administrative Register, issue number 2.

2. The Department has amended Rule 46.12.2013 as proposed.

3. No written comments or testimony were received.

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 1, 1990.

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

In the matter of the amendment of Rule 46.12.3401 pertaining to transitional medicaid coverage	))))	NOTICE OF THE AMENDMENT OF RULE 46.12.3401 PERTAINING TO TRANSITIONAL MEDICAID COVERAGE

TO: All Interested Persons

1. On January 25, 1990, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.3401 pertaining to transitional medicaid coverage at page 210 of the 1990 Montana Administrative Register, issue number 2.

2. The Department has amended Rule 46.12.3401 as proposed.

3. No written comments or testimony were received.

4. This rule will become effective April 1, 1990.

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 1, 1990.

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

In the matter of the amendment of Rule 46.12.3401 pertaining to medicaid coverage for pregnant women and children up to age six	)))))	NOTICE OF THE AMENDMENT OF RULE 46.12.3401 PERTAINING TO MEDICAID COVERAGE FOR PREGNANT WOMEN AND CHILDREN UP TO AGE SIX

TO: All Interested Persons

1. On January 25, 1990, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.3401 pertaining to medicaid coverage for pregnant women and children up to age six at page 212 of the 1990 Montana Administrative Register, issue number 2.

2. The Department has amended Rule 46.12.3401 as proposed.

3. No written comments or testimony were received.

4. This rule will become effective April 1, 1990.

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 1, 1990.

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

In the matter of the amendment of Rule 46.12.4008 pertaining to earned income disregards for institutionalized individuals	)))))	NOTICE OF THE AMENDMENT OF RULE 46.12.4008 PERTAINING TO EARNED INCOME DISREGARDS FOR INSTITUTIONALIZED INDIVIDUALS

TO: All Interested Persons

1. On January 25, 1990, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rule 46.12.4008 pertaining to earned income disregards for institutionalized individuals at page 216 of the 1990 Montana Administrative Register, issue number 2.

2. The Department has amended Rule 46.12.4008 as proposed.

3. The Department has thoroughly considered all commentary received:

COMMENT: The Montana Advocacy Program, Inc. believes the $65 earned income disregard should be allowed based on net income received (after withholding taxes).

RESPONSE: The Medicaid program requires income eligibility be based on total (gross, not net) income. (See 42 CFR 435.725)

COMMENT: The Montana Advocacy Program, Inc. believes the $65 earned income disregard for institutionalized individuals is not reasonable. MAP believes the earned income disregard should be $65 plus one-half the remaining earned income.

RESPONSE: A $65 earned income disregard, in addition to Montana's $40 personal needs allowance, is considered reasonable by the Department of Social and Rehabilitation Services. A $65 earned income disregard for institutionalized individuals is consistent with other regional states' disregards. For example, South Dakota's disregards include a $30 personal needs plus $75 gross earned income; Utah's disregards include a $30 personal needs plus $75 of gross earned income; North Dakota's disregards include a $45 personal needs plus any earned income payroll deductions withheld; and Colorado and Wyoming do not allow any earned income disregard.

Director, Social and Rehabilitation Services

Certified to the Secretary of State March 1, 1990.

VOLUME NO. 43 OPINION NO. 54

EDUCATION - Residency requirement for public school employees;
RESIDENCE - Residency requirement for public school employees;
SCHOOL BOARDS - Residency requirement for public school employees;
SCHOOL DISTRICTS - Residency requirement for public school employees;
TEACHERS - Residency requirement for public school employees;
MONTANA CODE ANNOTATED - Sections 20-3-324, 20-3-324(16), (17), (24);
MONTANA CONSTITUTION - Article II, section 4;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 30 at 110 (1985).

HELD: A school board in the state of Montana may, as a condition of employment, require that employees of the school district be residents of the school district. This opinion does not address the question of whether, prior to effecting such a change during the term of a collective bargaining agreement, a school board may be obligated to bargain with its employees' collective bargaining representative.

February 16, 1990

Christine A. Cooke
Big Horn County Attorney
Drawer L
Hardin MT 59034

Dear Ms. Cooke:

You have requested my opinion on the following question:

> May a school board require school district employees to reside in the district?

Under Montana Law a school Board of trustees employs and dismisses school district personnel. § 20-3-324, MCA. A board also has implied and express authority to set reasonable conditions of employment. See, in general, §§ 20-3-324(16), (17), (24), and 39-31-303, MCA; 41 Op. Att'y Gen. No. 30 (1985) at 110. However, the residency requirement described in your question raises constitutional issues under the equal protection provision of the Fourteenth Amendment of the United States Constitution and Article II, section 4 of the Montana Constitution. Because the Montana Legislature has not addressed your question statutorily, a constitutional analysis is appropriate.

Generally, residency issues are analyzed under the Fourteenth Amendment of the United States Constitution and Article II, section 4 of the Montana Constitution by using two separate tests. If the governmental action penalizes the exercise of a "fundamental right" or involves a "suspect classification," the action is subject to strict scrutiny by the courts and must satisfy a compelling state interest in order to be sustained. If no fundamental right or suspect classification is involved, the action need only be justified according to the "rational basis test." Shapiro v. Thompson, 394 U.S. 618 (1969). Under the rational basis test, the classification must bear a reasonable relationship to the objective of the rule or statute.

If a statute burdens a suspect class and not other similarly situated persons, or a fundamental right of some but not all comparably-placed persons, the State must establish a compelling interest to justify such discrimination. See In re C.H., 210 Mont. 184, 197, 683 P.2d 931, 938 (1984). A fundamental right is, for Fourteenth Amendment purposes, one specifically or impliedly guaranteed in the United States Constitution (San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33-34 (1973)) or, for purposes of Article II, section 4 of the Montana Constitution, one specifically "found within Montana's Declaration of Rights or ... 'without which other constitutionally guaranteed rights would have little meaning." (Butte Community Union v. Lewis, 219 Mont. 426, 430, 712 P.2d 1309, 1311 (1986).)

There are no Montana cases or statutes which address the residency of public school employees. However, an overview of the cases that are available, including two recent cases from the states of Arkansas and Washington, reveals that almost without exception, courts have upheld policies of public employers which require employees to reside within the public employer's jurisdiction. Additionally, most courts use the rational basis test when reviewing residency requirements for public employees and require the rule or regulation to bear only a reasonable relationship to the object of the rule or legislation. See, e.g., Wright v. City of Jackson, Mississippi, 506 F.2d 900 (5th Cir. 1975).

The United States Supreme Court has upheld a Philadelphia, Pennsylvania, ordinance which required city employees to be residents of the city. McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 96 S. Ct. 1154, 47 L. Ed. 2d 366 (1976). Other federal and state courts have reached a similar conclusion for public employees. See Andre v. Board of Trustees of Village of Maywood, 561 F.2d 48 (7th Cir. 1977); Wardwell v. Board of Education of City of Cincinnati, 529 F.2d 627 (6th Cir. 1976); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975); Ector v. City of Torrence, 10 Cal. 3d 129, 109 Cal. Rptr. 849, 514 P.2d 433 (1973), cert. denied, 415 U.S. 935 (1974).

The Washington Court of Appeals addressed the residency policy of the Newport Consolidated Joint School District in Meyers v. Newport School District, 31 Wash. App. 145, 639 P.2d 853 (1982). In the Washington case, Mitchell Meyers was hired as a school

teacher in Newport for the 1978-79 school year. He was told during his 1978 interview that he must reside within the school district within a reasonable time. Mr. Meyers, while living less than three miles from the school in which he taught, resided not only out of the school district, but out of the state of Washington. Meyers v. Newport, 639 P.2d at 854.

The Washington court, in upholding Meyers' termination for failing to reside within the school district, discussed two types of residency requirements, continual and durational. A continual residency requirement requires an employee to maintain residency in the district in order to obtain or retain employment. A durational residency requirement mandates a period of residency before an applicant becomes eligible for employment. Durational residency requirements have frequently failed to survive constitutional scrutiny, and the United States Supreme Court has found that durational residency requirements for the receipt of welfare benefits or hospital care, or for voter registration, infringe the right of interstate travel and thus are violative of the Fourteenth Amendment. Shapiro v. Thompson, 394 U.S. 618; Dunn v. Blumstein, 405 U.S. 330 (1972); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

In Meyers, the Washington court upheld the school district's residency policy because the policy allowed teachers to be hired so long as they moved into the district in a reasonable amount of time. The residency requirement was continual, not durational, and did not violate the fundamental right to travel. The Court specifically found that the residency policy satisfied the rational basis test and specifically found that the school board's desire for its teachers to live within the district "for the purpose of community involvement and in order to educate their children within the district in which they work" was reasonable. Meyers v. Newport, 639 P.2d at 857.

In a more recent case, McClellan v. Paris Public Schools, 294 Ark. 292, 742 S.W.2d 907 (1988), the Arkansas Supreme Court also applied the reasonableness or rational basis standard to a school district's residency policy. The Paris, Arkansas, school policy required certified personnel to reside within the district boundaries or within a ten-mile driving distance of the city limits of Paris. Employees of the district when the policy was enacted were "grandfathered" in under the policy so long as they remained at their current residences. If those employees of the district who resided out of the district moved, the policy required them to move within the district boundaries or within ten miles driving distance of the city in order to retain their employment. McClellan v. Paris Public Schools, 742 S.W.2d at 908. McClellan was terminated because she moved from her in-district residence to another residence outside the designated boundaries. Id.

The Arkansas court specifically found the goals pronounced by the school district were essentially the same as those articulated in other jurisdictions where school teacher residency requirements had been upheld.

> Those goals are basically community involvement and district identity as it relates to the tax base and support of district tax levies. The latter goal is tied to district residency and not to distance from school while the former requires only a reasonable commuting distance from the city and not necessarily district residency. The district evidently decided not to restrict employment only to district residents but in allowing non-district residents to teach, they must meet some other reasonable commuting distance to achieve some aspect of the goals to be served .... We find nothing irrational in this formulation.

McClellan v. Paris, 742 S.W.2d at 911.

In summary, neither the federal nor the state constitution prohibits the establishment of a continuous residency requirement as long as the policy has a rational basis. In many of the cases reviewed, the ordinances or rules involved granted a grace period during which current employees could move within the boundaries of the district. District regulations that exempt employees who acquired outside residence prior to the effective date of the residency regulation have survived challenges generally on the ground that "grandfather" type exemptions are not unreasonable. The new regulations need only be uniform in their prospective operation. See Board of Education v. Philadelphia Federation of Teachers, 397 A.2d 173 (Pa. 1979). In all cases, the ordinance or rule was supported by an articulated reason rationally related to a legitimate government goal.

This opinion, finally, should not be construed as reaching the question of what effect an existing collective bargaining agreement may have on the Board's ability to adopt residency requirements or whether, prior to [such] a mid-contract term adoption, the Board would be statutorily obligated to bargain with its employees' representative. These questions must be resolved by reference to the collective bargaining agreement's provisions and are outside the scope of the present opinion.

THEREFORE, IT IS MY OPINION:

> A school board in the state of Montana may, as a condition of employment, require that employees of the school district be residents of the school district. This opinion does not address the question of whether, prior to effecting such a change during the term of a collective bargaining agreement, a school board may be obligated to bargain with its employees' collective bargaining representative.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 55

CITIES AND TOWNS - Authority of city with self-government powers to enact ordinance superseding state law;
CITIES AND TOWNS - Sale of city property held in trust;
LOCAL GOVERNMENT - Authority of city with self-government powers to enact ordinance superseding state law;
LOCAL GOVERNMENT - Sale of city property held in trust;
MUNICIPAL GOVERNMENT - Authority of city with self-government powers to enact ordinance superseding state law;
MUNICIPAL GOVERNMENT - Sale of city property held in trust;
PROPERTY, PUBLIC - Sale of city property held in trust;
PROPERTY, REAL - Sale of city property held in trust;
MONTANA CODE ANNOTATED - Sections 7-1-105, 7-1-111, 7-1-111(1), 7-1-113, 7-1-114, 7-8-4201(2)(b);
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen. No. 41 (1989), 41 Op. Att'y Gen. No. 42 (1986).

HELD: The governing body of a local government unit with self-government powers may enact an ordinance providing for the disposition by majority vote of the council of property held in trust for a specific purpose.

February 21, 1990

James L. Tillotson
Billings City Attorney
P.O. Box 1178
Billings MT 59103

Dear Mr. Tillotson:

You have requested an Attorney General's Opinion concerning the authority of the Billings City Council to adopt an ordinance allowing the sale of city property by majority vote of the council, where such property is held in trust for a specific purpose. Such an ordinance would conflict with state law requiring that sale or lease of city property held in trust for a specific purpose be approved by a majority vote of the electors of the municipality. § 7-8-4201(2)(b), MCA. Billings has adopted a charter form of government with self-government powers, reserving the full spectrum of such powers permitted by law. Your question is whether its self-government status allows the Billings City Council to supersede by ordinance section 7-8-4201(2)(b), MCA.

In 43 Op. Att'y Gen. No. 41 (1989), I concluded that a city with self-government powers could enact an ordinance permitting the sale of city property by a simple majority

vote, despite the requirement of state law that such sale may only be had by a two-thirds majority vote of the governing body. The statute under consideration, § 7-8-4201(2)(a), MCA, was found not to be binding upon local government units with self-government powers. Specifically, I found that the sale of city properties is not among the powers denied to self-government units under section 7-1-111, MCA, and is not within any of the mandatory provisions of state law set forth in section 7-1-114, MCA. Finally, my opinion concluded that the sale of city land is not in an area affirmatively subjected to state control within the meaning of section 7-1-113, MCA. The opinion did not address subsection (2)(b) of section 7-8-4201, MCA--the sale of property held in trust for a specific purpose--and that is the issue presented by your request.

Section 7-8-4201(2)(b), MCA, has been interpreted by both the Attorney General and the Montana Supreme Court. In Prezeau v. City of Whitefish, 198 Mont. 416, 646 P.2d 1186, 1188-89 (1982), the Court concluded that under section 7-8-4201(2)(b), MCA, an election must be held to approve the sale or lease of municipal property held in trust for specific purposes, irrespective of whether such sale or lease is in abrogation of or substantially interferes with the specific trust purpose. Following Prezeau, an Attorney General's Opinion concluded that park dedication language in a subdivision plot dedicating certain lands "to the use of the public forever" creates a trust for a specific purpose and requires an election to dispose of such property. 41 Op. Att'y Gen. No. 42 at 164 (1986). The opinion was requested by the city of Missoula, however, which has not adopted self-government powers.

Although the city of Whitefish does have self-government powers, its authority to supersede state law was not at issue in Prezeau, and the Court thus only considered state law. Absent a superseding ordinance, all state statutes are applicable to self-government local units. § 7-1-105, MCA. Neither Prezeau nor 41 Op. Att'y Gen. No. 42 considered the effect of self-government powers upon section 7-8-4201(2)(b), MCA, and neither provides controlling authority for the question presented here.

The only distinguishing factor between the ordinance proposed by the city of Billings and the proposed Great Falls ordinance considered in 43 Op. Att'y Gen. No. 41 is the nature of the property to which the ordinance would apply. As a general rule, "[p]roperty once acquired and devoted to public use is held in trust for the public and cannot be alienated without legislative authority, either express or implied." Nelson v. Pacific County, 36 Wash. App. 17, 671 P.2d 785, 789 (1983). As noted in the recent opinion, however, Montana has "changed the role and power of local governments" through its constitution. D & F Sanitation Service v. City of Billings,

219 Mont. 437, 444, 713 P.2d 977, 981 (1986). The doctrine of implied preemption no longer applies to local governments with self-government powers. Id. at 445, 713 P.2d at 982. Under Montana law, a city with self-government powers may supersede state law by ordinance, so long as it is not expressly prohibited from doing so by its charter or by state laws or constitution. See 43 Op. Att'y Gen. No. 41, slip. op. at 2-3.

A statutory provision not implicated in 43 Op. Att'y Gen. No. 41 which possibly could be applicable in this case is section 7-1-111(1), MCA. Under that section, a local government unit with self-government powers may not exercise "any power that applies to or affects any private or civil relationship, except as an incident to the exercise of an independent self-government power." Arguably, the disposition of trust property affects a private relationship because it affects the trust res and may trigger a reversionary interest.

Whatever the statute means with respect to a private or civil relationship, however, it does not apply here because the sale of government property would simply be incidental to the exercise of an independent self-government power, and would not, of course, impact contractual obligations. The legislature already has granted local governments the power to dispose of property held in trust, and the contemplated ordinance would apply only to the manner by which such disposition is to be accomplished. Accordingly, it is my opinion that section 7-1-111(1), MCA, creates no barrier to the enactment of the proposed ordinance.

Finding no other applicable provision in either section 7-1-111 or section 7-1-114, MCA, and consistent with the conclusion in 43 Op. Att'y Gen. No. 41 that this does not involve an area affirmatively subjected to state control, the analysis and conclusion of 43 Op. Att'y Gen. No. 41 are equally applicable to subsection (2)(b) of section 7-8-4201, MCA.

THEREFORE, IT IS MY OPINION:

> The governing body of a local government unit with self-government powers may enact an ordinance providing for the disposition by majority vote of the council of property held in trust for a specific purpose.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 56

CITIES AND TOWNS - Power to consolidate municipal fire department with rural fire district;
CITIES AND TOWNS - Provision of fire protection services by interlocal agreement;
CONSOLIDATION - Consolidation of municipal fire department with rural fire district;
DISASTER AND EMERGENCY SERVICES - Provision of fire protection services by interlocal agreement;
ELECTIONS - Use of initiative for interlocal agreement;
FIRE DEPARTMENTS - Consolidation with rural fire district;
FIRE DEPARTMENTS - Provision of fire protection services by interlocal agreement;
INITIATIVE AND REFERENDUM - Use of initiative for interlocal agreement;
INTERGOVERNMENTAL COOPERATION - Provision of fire protection services by interlocal agreement;
LOCAL GOVERNMENT - Power to consolidate municipal fire department with rural fire district;
MUNICIPAL GOVERNMENT - Power to consolidate municipal fire department with rural fire district;
MONTANA CODE ANNOTATED - Title 7, chapter 11, part 1; sections 7-5-131 to 7-5-137, 7-11-103, 7-11-104, 7-11-105(6), 7-11-106, 7-33-2104, 7-33-2105, 7-33-2106(2), 7-33-2108, 7-33-4101, 7-33-4112;
MONTANA CONSTITUTION - Article XI, sections 1, 4(2), 7;
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att't Gen. No. 84 (1988), 40 Op. Att'y Gen. No. 17 (1983), 39 Op. Att'y Gen. No. 73 (1982), 39 Op. Att'y Gen. No. 37 (1981), 38 Op. Att'y Gen. No. 87 (1980), 37 Op. Att'y Gen. No. 117 (1978), 37 Op. Att'y Gen. No. 22 (1977), 36 Op. Att'y Gen. No. 4, (1975), 35 Op. Att'y Gen. No. 71 (1974).

HELD: A municipal fire department may not be merged with a rural fire district into a single fire protection agency; however, fire protection services may be provided in a cooperative fashion through an interlocal agreement which city voters may, by initiative, require the governing body of the city to pursue.

February 22, 1990

Jim Nugent
Missoula City Attorney
201 West Spruce
Missoula MT 59802-4297

Dear Mr. Nugent:

You have requested an Attorney General's Opinion on several questions pertaining to the validity of a proposed city initiative which seeks to merge the City of Missoula Fire

Department and the Missoula Rural Fire District into a new fire protection agency with an Urban Division and a Rural Division. Although your request includes a number of technical questions, the primary issues are these:

1. Does Montana law permit the merger of a municipal fire department and a rural fire district into a single fire protection agency?

2. If not, is there another method by which fire services may be consolidated or transferred?

3. Is such consolidation a proper subject for the initiative process?

The proposed initiative provides that the Missoula Fire Department and the Missoula Rural Fire District shall merge fire and emergency services through an interlocal agreement whereby current employees of both agencies shall be retained and all facilities shall be utilized in such a way as to provide the most efficient emergency services possible in the greater Missoula area. The measure provides for the creation of a five-member Consolidation Committee to draft and oversee implementation of an interlocal agreement with a three-year phase-in period. The new fire protection agency would be governed and/or advised by a single Fire Commissioners' Board, members of which initially would be appointed by the governing bodies of the merged agencies and subsequently elected. A primary objective of the initiative is to require that the closest available units respond to incidents in all cases, regardless of political boundaries.

Both the City and County of Missoula are local government units with general government powers, and have not been consolidated as allowed by Montana law. See Tit. 7, ch. 3, pts. 11, 12, 13, MCA. Thus, analysis of the proposed initiative must begin with examination of the powers of each unit as a general powers government. The 1972 Montana Constitution adopted the "shared powers" concept for local governments in Montana, and requires that the powers of incorporated cities and towns and of counties be liberally construed. Mont. Const. Art. XI, § 4(2). Nonetheless, if a local government chooses to retain general government powers, the local government has only the powers given to it by the Legislature. D & F Sanitation v. City of Billings, 219 Mont. 437, 445, 713 P.2d 977, 982 (1986).

> In addition, when the state has exercised a power through its statutes which clearly show [sic] that the state legislature deems the subject matter of the legislation to be a matter of general statewide concern rather than a purely local municipal problem, the city is then without the essential

> authority or power to pass or adopt any ordinance dealing with that subject matter.

State ex rel. City of Libby v. Haswell, 147 Mont. 492, 495, 414 P.2d 652, 654 (1966). "Where powers of a local government unit are in question, the initial inquiry is whether there is an express grant of such powers. If not, the inquiry becomes whether there is a grant by necessary implication or whether the power is indispensable to the accomplishment of the object of the corporation." 38 Op. Att'y Gen. No. 87 at 301, 302 (1980).

Municipal fire departments are established by state law, which provides:

> In every city and town of this state there shall be a fire department, which shall be organized, managed, and controlled as provided in this part.

§ 7-33-4101, MCA. State law further specifies that the chief of the fire department shall have sole command of the department, shall possess full authority to discipline firefighters, and shall be responsible for the engines and other property furnished the fire department. § 7-33-4104, MCA. Under these provisions, "[i]t is clear ... that every city must have a municipal fire department." Billings Firefighters Local 521 v. City of Billings, 214 Mont. 481, 490, 694 P.2d 1335, 1339 (1985). The Montana Supreme Court has held that the statutory requirement for provision of a municipal fire department is mandatory, even for a city with self-government powers. Id., 214 Mont. at 490-91, 694 P.2d at 1340. Billings Firefighters mandates that the City of Missoula comply with the requirement in section 7-33-4101, MCA, that a municipal fire department be maintained. Further, in view of the fact that the city has only general government powers, State ex rel. City of Libby v. Haswell, supra, indicates that Missoula may not adopt any ordinance which conflicts with the provisions of state law concerning the organization, management, and control of municipal fire departments.

The proposed initiative provides for creation of a fire protection agency, the Urban Division of which is to "provide Urban Level fire protection within the city limits of Missoula (in accordance with Montana State Law concerning fire protection requirements for Class I cities)[.]" As in the Billings Firefighters case, although it appears that the intent of the measure is for the City to "continue to provide fire prevention and suppression service," the language of the initiative is unambiguous in that it proposes to supersede a mandatory provision of state law requiring establishment of a municipal fire department. Id., 214 Mont. at 491, 694 P.2d at 1340. The proposal clearly contemplates consolidation of the two fire service units, creating one new entity to govern

and control all fire protection services. Under the provisions of the initiative, neither the Rural Fire District nor the Missoula Fire Department would maintain its own identity. Therefore, since the proposed merger would abrogate the Missoula Fire Department as a separate entity, it is my opinion that such a merger would be an invalid exercise of general government powers. Within the framework of the controlling statutes, there is no allowance for the type of consolidation sought by the initiative.

Illustrative of this conclusion is the fact that state law expressly permits the consolidation of a municipal police department with a county sheriff's department to form a department of public safety. See §§ 7-32-101 to 129. Thus, where such services have been so consolidated, the requirement of section 7-32-4151, MCA, that a police commission be established in all cities and towns is inapplicable. 42 Op. Att'y Gen. No. 58 (1988). These provisions constitute an express grant by the Legislature of authority for cities and counties to consolidate law enforcement services by actually merging each government unit's department. No such authority is provided for consolidation of fire protection services. The Legislature's explicit provision for consolidation of law enforcement services lends further support to the conclusion that such express authority would be required for the consolidation of fire protection services.

The fact that fire services cannot be merged as contemplated by the initiative does not, however, mean that the objective of cooperative provision of services cannot be achieved. Of course, the fire protection statutes specifically permit the governing body of a municipality to enter into a mutual aid agreement with fire district trustees concerning protection against natural or manmade disasters. § 7-33-4112, MCA. See also § 7-33-2108, MCA.

For more comprehensive provision of services, the City of Missoula could consider an interlocal agreement with the Missoula Rural Fire District. Notwithstanding the proposed initiative's use of the term "interlocal agreement," it in fact provides for a merger, and thus is not a true interlocal agreement as contemplated by state law. Intergovernmental cooperation is permitted by Article XI, section 7 of the Montana Constitution, which provides in pertinent part:

> (1) Unless prohibited by law or charter, a local government unit may
>
> (a) cooperate in the exercise of any function, power, or responsibility with,
>
> ....

> (c) ... one or more other local government units, school districts, the state, or the United States.

The term "local government units" includes, but is not limited to, counties and incorporated cities and towns. Mont. Const. Art. XI, § 1.

Pursuant to this constitutional mandate, the Legislature adopted the Interlocal Cooperation Act, Tit. 7, ch. 11, pt. 1, MCA. Under the terms of the Act:

> Any one or more public agencies may contract with any one or more other public agencies to perform any administrative service, activity, or undertaking which any of said public agencies entering into the contract is authorized by law to perform. Such contract shall be authorized and approved by the governing body of each party to said contract. Such contract shall set forth fully the purposes, powers, rights, obligations, and responsibilities of the contracting parties.

§ 7-11-104, MCA. Any such agreement must be submitted to the Attorney General for approval. § 7-11-106, MCA. The Act provides for the creation of an administrator or joint board responsible for administering the cooperative undertaking. § 7-11-105(6), MCA.

You raise the question whether a rural fire district is a local governmental unit for the purpose of having authority to enter into an interlocal agreement.

> In its general sense, the term "local governmental unit" is used to distinguish governmental units of limited regional jurisdiction from state agencies which administer on a state-wide basis. Typical characteristics of any local governmental unit are the delegation of limited powers over a specific, geographically defined region of the state and accountability to a local electorate or other unit of local government.

37 Op. Att'y Gen. No. 22 at 91, 95 (1977). It has been held that a fire district is a political subdivision of the county in which it is located, and thus not a "local governmental unit" per se. 38 Op. Att'y Gen. No. 87 at 301, 302 (1980). Nonetheless, the Interlocal Cooperation Act does not impose a requirement that each contracting party be a "local governmental unit." Rather, it allows such contracts to be entered into between "public agencies," which are defined as "any political subdivision, including municipalities, counties, school districts, and any agency or department of the state of Montana." § 7-11-103, MCA. The list should not be interpreted as exhaustive: "When 'include' is utilized, it is generally improper to conclude that entities not specifically enumerated are excluded." 2A N. Singer, Sutherland Statutory Construction § 47.23, at 194 (4th ed. 1984).

In concluding that a municipal housing authority was a "public agency" within the meaning of the Interlocal Cooperation Act, a previous Attorney General's Opinion observed:

> The statutory provisions pertaining to interlocal agreements do not include a definition of "political subdivision." However, since the purpose of the interlocal agreement is to allow "political subdivisions" to provide services more efficiently, to the ultimate benefit of the taxpayers and citizens of Montana, a broad definition of the term is clearly appropriate.

39 Op. Att'y Gen. No. 37 at 147, 151 (1981). As noted, a fire district has been held to be a political subdivision. 38 Op. Att'y Gen. No. 87 at 302; 35 Op. Att'y Gen. No. 71 at 173, 174 (1974). It has also been held that fire districts operated by trustees are political subdivisions distinct from counties, and are thus governmental entities within the meaning of the Montana Tort Claims Act. 42 Op. Att'y Gen. No. 84 (1988). Rural fire districts operated by a board of trustees possess all the characteristics of a public agency as that term is used in the Interlocal Cooperation Act. Fire district trustees govern and manage the affairs of the fire district; have the authority to provide firefighting apparatus, equipment, housing, and facilities for the protection of the district; appoint and form fire companies; and prepare annual budgets. §§ 7-33-2104, 7-33-2105, MCA. Each district has political boundaries, and trustees are elected by electors within the fire district. § 7-33-2106(2), MCA. Based upon the delegation of powers and accountability to a local electorate, it is my opinion that rural fire districts operated by trustees, such as the Missoula Rural Fire District, are political subdivisions within the meaning of the Interlocal Cooperation Act.

You also raise the question whether fire protection is a proper subject for an interlocal agreement. Previous Opinions of the Attorney General have found interlocal agreements appropriate for health services, 35 Op. Att'y Gen. No. 48 at 113, 115-16 (1973); police services, 37 Op. Att'y Gen. No. 117 at 500, 503 (1978); 35 Op. Att'y Gen. No. 72 at 178, 180 (1974); use of jail facilities, 42 Op. Att'y Gen. No. 70 (1988); and cable television franchises, 42 Op. Att'y Gen. No. 87 (1988). Opinions of other state attorneys general have approved the use of interlocal agreements for cooperative fire protection services. See Fla. AGO 84-40 (1984); Ky. OAG 77-632 (1977); Miss. AG June 12, 1987 (Opinion to Hon. C. R. Montgomery; interlocal agreement regarding provision of fire protection services permitted so long as not an attempt to contractually modify statutory provisions).

Intergovernmental cooperation has been defined as "an approach or device by which two or more governmental entities work together for a public purpose." 1 E. McQuillin, The Law of Municipal Corporations § 3A.03, at 421 (3d ed. 1987). It is one solution

to making government more responsible, efficient, and effective. Id. "However, any intergovernmental cooperation on the local level must be voluntary. Essential control of the cooperative action or arrangement must be vested in the elected governing bodies of the units involved. And the identities of the existing units of government must be preserved." Id. at 422 (emphasis added).

Montana law encourages local governments to enter into interlocal agreements "and thus share the expenses common to each." 37 Op. Att'y Gen. No. 117 at 503 (1978). An interlocal agreement does not change the status of the employees of the contracting governmental agencies. 36 Op. Att'y Gen. No. 4 at 296, 297 (1975). Thus, employees retain their personal benefits such as vacation leave, sick leave, and retirement. Id. at 298. Given the purposes for which the Interlocal Cooperation Act was intended, and provided that any interlocal agreement complies with other mandatory provisions of law, I conclude that the cooperative provision of fire protection services is an appropriate subject for interlocal agreement.

The principal problem with the proposed initiative, viewed in the context of the Interlocal Cooperation Act, is that, as already noted, it would not only create a new legal entity but would abolish two other public entities, one of which is mandated by state law. It is important to recognize that the Act does not confer any additional powers on the cooperating agencies; it merely provides for their joint exercise. See § 7-11-104; 40 Op. Att'y Gen. No. 17 at 63, 68 (1983). The initiative errs in assuming that the City of Missoula has the power to legislate a fundamental change in the structure and administration of its fire department. So long as the separate identities of the two governmental units are preserved, creation of a joint board for administration of the interlocal agreement is permissible, but replacing the fire department and fire district with a single agency is not.

Finally, addressing the third inquiry, interlocal agreements may be accomplished by demand of the voters. The Constitution allows the qualified electors of a local government unit to require, by initiative or referendum, that the local government cooperate with another local government unit in the exercise of any function. Mont. Const. Art. XI, § 7. Sections 7-5-131 to 137, MCA, set forth the procedures by which electors of local government units may exercise the powers of initiative and referendum. You question whether the consolidation of fire protection services is an appropriate subject for the initiative process. It is a general rule that "all matters in which the voters have an interest are subject to the referendum and that statutes in aid of these reserved powers should be liberally construed." 39 Op. Att'y Gen. No. 73 at 278, 281 (1982). By statute, however, the powers of initiative do not extend to:

(a) the annual budget;

(b) bond proceedings, except for ordinances authorizing bonds;

(c) the establishment and collection of charges pledged for the payment of principal and interest on bonds; or

(d) the levy of special assessments pledged for the payment of principal and interest on bonds.

§ 7-5-131, MCA. In addition, it has been held that the initiative and referendum procedures apply to legislative actions but not to acts that are administrative in character. 39 Op. Att'y Gen. No. 73 at 280. The Montana Supreme Court has held:

> The initiative and referendum apply only to matters of general legislation, in which all the qualified electors of the city are interested, and not to matters of purely local concern such as the creation of a special improvement district, in which only the inhabitants or property owners are interested.

Allen v. City of Butte, 55 Mont. 205, 208, 175 P. 595, 596 (1918) (followed in 39 Op. Att'y Gen. No. 73 at 281-82).

In my opinion, a city initiative to require the governing body of the city to pursue an interlocal agreement with a rural fire district for cooperative provision of services is a proper utilization of the initiative process. Although it may have a fiscal impact, such an initiative would not affect the annual budget directly so as to be proscribed by section 7-5-131(2)(a), MCA. Further, notwithstanding any argument that the cooperative provision of fire protection services is an administrative act, the constitution's express permission of use of the initiative to require such interlocal agreements overrides any potential statutorily or judicially created roadblocks. Mont. Const. Art. XI, § 7. The transcript of the 1972 Constitutional Convention supports this conclusion. The Committee Report on Article XI, section 7, shows that the section was intended to be a complete grant of authority to all local government units to cooperate in the exercise of powers and functions, share the services of officers, and transfer functions and responsibilities to other units of government. II Mont. Const. Conv. at 798-99 (1972). During the floor debate on this section, Delegate Blend stated:

> The section specifically makes it clear that the people, through an initiative and referendum measure, may force their local government to cooperate if government itself does not take it upon itself to arrive at these conclusions.

VII Mont. Const. Conv. at 2535 (1972). Accordingly, I conclude that the electors of the City of Missoula could, by initiative, require the city to pursue an interlocal agreement with the

Missoula Rural Fire District regarding the cooperative provision of fire protection services, within the confines of other mandatory provisions of law.

In summary, it is my opinion that although the City of Missoula Fire Department and Missoula Rural Fire District may not be merged by initiative into a single fire protection agency, the cooperative provision of fire protection services may be achieved by interlocal agreement, subject to approval of the Attorney General under section 7-11-106, MCA. I do not consider the issue whether an initiative for interlocal agreement would be appropriate within a rural fire district, because it appears that in this instance the fire district is willing to enter into a cooperative arrangement and therefore resolution of that issue is not necessary to the disposition of your request.

Having reached these conclusions, I find it unnecessary to address the remaining questions contained in your request.

THEREFORE, IT IS MY OPINION:

> A municipal fire department may not be merged with a rural fire district into a single fire protection agency; however, fire protection services may be provided in a cooperative fashion through an interlocal agreement which city voters may, by initiative, require the governing body of the city to pursue.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

VOLUME NO. 43 OPINION NO. 57

CITIES AND TOWNS - Definition of term "local governments" for purposes of reimbursements for personal property tax reductions;
COUNTIES - Definition of term "local governments" for purposes of reimbursements for personal property tax reductions;
FIRE DISTRICTS - Definition of term "local governments" for purposes of reimbursements for personal property tax reductions;
LOCAL GOVERNMENT - Definition of term "local governments" for purposes of reimbursements for personal property tax reductions;
TAXATION AND REVENUE - Definition of term "local governments" for purposes of reimbursements for personal property tax reductions;
MONTANA CODE ANNOTATED - Sections 7-6-1101, 7-12-1103, 15-1-111, 15-6-138, 15-6-145, 15-6-147, 15-10-401, 61-3-509;
MONTANA CONSTITUTION - Article XI, section 1;
OPINIONS OF THE ATTORNEY GENERAL - 43 Op. Att'y Gen No. 4 (1989), 42 Op. Att'y Gen. No. 80 (1988), 42 Op. Att'y Gen. No. 73 (1988), 42 Op. Att'y Gen. No. 21 (1987), 37 Op. Att'y Gen. No. 22 (1977).

HELD: The term "local governments" as used in section 15-1-111(6), MCA, includes all local government entities, including those generally considered "taxing jurisdictions," that lost revenue as a result of personal property tax reductions.

February 26, 1990

Mike McGrath
Lewis and Clark County Attorney
Lewis and Clark County Courthouse
Helena MT 59623

Dear Mr. McGrath:

You requested an opinion concerning:

> What is the meaning of the term "local governments" as used in secton 15-1-111(6), MCA?

The answer to your question involves interpretation and reconstruction of the efforts during the 1989 special legislative session to provide tax relief for certain classes of personal property. See H.B. 20, 51st Leg. Spec. Sess., 1989 Mont. Laws, 2560. After reviewing the legislative history, as discussed further below, I conclude that the term "local governments" includes all entities that lost revenue as a result of House Bill 20, the personal property tax relief bill.

Section 15-1-111, MCA, appropriates funds to taxing jurisdictions in order to reimburse them for funds lost through

personal property tax reductions. Under subsection (3) of this statute, the Department of Revenue calculates the amount of revenue

> lost to each taxing jurisdiction, using current year mill levies, due to the annual reduction in personal property tax rates set forth in 15-6-138, and any reduction in taxes based upon recalculation of the effective tax rate for property in 15-6-145 and 15-6-147.

Section 15-6-138, MCA, describes class eight property, which includes, among other things, agriculture and mining equipment, and imposes a 9 percent tax. Prior to its amendment during the 1989 special legislative session, class eight property was taxed at 11 percent of its market value. The reimbursement therefore includes the difference between the 11 percent and the 9 percent. Section 15-6-145, MCA, describes class fifteen property as railroad transportation property, and section 15-6-147, MCA, describes class seventeen property as airline transportation property. Because the amount of tax on railroad and airline transportation property is tied to the tax on other property under sections 15-6-145 and 15-6-147, MCA, taxing jurisdictions were also to be reimbursed for any loss incurred through recalculation of the effective tax rate on airline and railroad transportation property. Under section 15-1-111(1)(a), MCA, the reimbursement must also include funds lost through reclassification of new industrial property from class five property to class eight property.

Your question concerns which entities are included in the reimbursement scheme. The body of section 15-1-111, MCA, is written in terms of "taxing jurisdictions." However, section 15-1-111(6), MCA, states:

> For the purposes of this section, "taxing jurisdiction" means local governments and includes school districts, each municipality with tax increment financing, and the state of Montana.

Under rules of statutory construction, the plain meaning of the words used in the statute must be looked at first, to determine legislative intent. If intent cannot be determined from the context of the statute, the legislative history must be examined. Lewis and Clark County v. Department of Commerce, ___ Mont. ___, 728 P.2d 1348 (1986), citing Thiel v. Taurus Drilling Ltd., 218 Mont. 201, 710 P.2d 33 (1985); Dorn v. Board of Trustees of Billings School District, 203 Mont. 136, 661 P.2d 426 (1983).

The term "local governments" does not necessarily denote a particular government entity: it is ambiguous. Article XI, section 1 of the Montana Constitution defines the term "local government units":

> The term "local government units" includes, but is not limited to, counties and incorporated cities and towns. Other local government units may be established by law.

It has been suggested that the use of the term "local governments" connotes governmental entities vested with general government or self-governing powers. Such entities are generally cities, towns, or counties. See, e.g., § 7-6-1101(2), MCA, defining local government as "any city, town, county, consolidated city-county, or school district"; § 7-12-1103(6), MCA, defining local government as "a municipality, a county, or a consolidated city-county government." These definitions are not applicable here, however, since they are expressly limited to their respective parts of the Montana Code. The term "local governments" may therefore include local government entities, other than cities, towns, or counties, if the Legislature so intended or the statutory funding scheme suggests such an intent. See also 37 Op. Att'y Gen. No. 22 (1977), 43 Op. Att'y Gen. No. 4 (1989).

There is little, if any, doubt in reviewing the legislative history of section 15-1-111, MCA, that the Legislature intended that smaller local government entities, such as special districts, be included in the local government reimbursement scheme. Section 15-1-111, MCA, was part of House Bill 20 passed during the 1989 special legislative session. House Bill 20 began as the "Canola Bill," designed to classify equipment used in processing canola seed oil as class five property which is taxed at 3 percent of its market value. During the special session, two important bills were amended into House Bill 20: Senate Bill 22, the Governor's personal property tax relief bill; and House Bill 50, the original bill designed to reimburse local governments for money lost through property tax reductions. The minutes of the hearings on Senate Bill 22 are helpful in providing the context for the development of the methods eventually adopted for property tax relief and reimbursement for local government services.

During the Senate Taxation Committee hearing on Senate Bill 22, Don Peoples, former chief executive for Butte-Silver Bow, testified in support of personal property tax reductions. He voiced a concern, however, for replacement revenues. He wanted a guarantee in the bill that there would be replacement revenues "dollar for dollar, at the local government level and at the school district level." He expressed the need to maintain good schools and good local government services. June 24, 1989, Senate Taxation Committee Minutes at 10 (1989 Spec. Sess.). Others echoed Mr. Peoples' concern. See testimony of Alec Hansen, Gordon Morris, and Wayne Phillips. Id. at 11, 12, 17.

Senate Bill 22 passed the Senate and was referred to the House Committee on Natural Resources. At the hearing, there was again

significant testimony that Senate Bill 22 should not pass without reimbursement or replacement of revenues supporting the services provided at the local government level. Many advocated that coordination instructions be used so that the passage of Senate Bill 22 would be conditioned upon passage of House Bill 50. July 6, 1989, House Committee on Natural Resources (1989 Spec. Sess.). See testimony of Don Peoples, Evan Barrett, Representative Bradley, Senator Eck. Id. at 4, 8, 12-13, 14.

During the House Committee hearing, Representative Cohen asked Representative Rehberg if he knew how much money would be lost to "tax jurisdictions." Representative Rehberg, who was carrying Senate Bill 22 for its primary sponsor, Senator Gage, stated that he could not get a definite figure at that time, but that he intended to "make every effort to see that local governments lose no money." Id. at 16.

Although Senate Bill 22 was tabled by the Natural Resources Committee, many of the property tax relief provisions in Senate Bill 22 resurfaced on the Senate floor and were amended into House Bill 20, the "Canola Bill." House Bill 20 was then sent into a free conference committee. The minutes of the free conference committee hearings show that the committee intended to amend House Bill 20 to alleviate all concerns about reimbursing those local government entities that would lose revenue from personal property tax reductions. On July 13, 1989, Senator Lynch moved to adopt amendments to reimburse local governments and school districts for money lost in personal property tax reductions. Representative Schye, noting the reference to "local governments" in the amendments, asked Senator Gage, chairman of the free conference committee, if "that [local governments] has been changed in that report to taxing jurisdictions." July 13, 1989 (a.m.), Free Conference Committee on House Bill 20 Minutes at 9 (1989 Spec. Sess.). The minutes indicate the following:

> Chairman Gage responded yes that, where it says local governments, it is his understanding that it has been changed to taxing jurisdictions.

Id. at 10. Chairman Gage's response shows how the legislative members in their discussion of the reimbursement scheme used the terms "local government" and "taxing jurisdictions" interchangeably. The main concern was that if an entity lost revenue through property tax reductions it would be reimbursed for that loss. There was to be no decrease or interruption in services provided at the local government level. Senator Lynch's amendments, while initially defeated, were reintroduced and adopted later in the day with his assurance that "everyone is protected." July 13, 1989 (p.m.), Free Conference Committee on House Bill 20 Minutes at 8 (1989 Spec. Sess.).

The committee minutes referred to above indicate a legislative intent to replace revenues supporting all services provided at

the local government level. The minutes do not show an intent to limit reimbursements solely to counties, cities, and towns. They do not show any attempt to create fine distinctions as to what type of entities must be reimbursed. The intent was simply that all local government services--whether administered by cities, towns, counties, school districts, or special districts--dependent upon revenue from personal property taxes were to be reimbursed for losses from personal property tax reductions contained in House Bill 20.

In effect, the use of the term "local governments" does not limit the accepted meaning of "taxing jurisdictions." See §§ 15-10-401 to 412, MCA; 42 Op. Att'y Gen. No. 21 (1987); 42 Op. Att'y Gen. No. 73 (1988); 42 Op. Att'y Gen. No. 80 (1988). As shown by the legislative history, the terms "taxing jurisdictions" and "local governments" were used interchangeably. The intent therefore was that those local government taxing jurisdictions dependent upon revenue from personal property taxes must be reimbursed for losses resulting from passage of House Bill 20.

If local government entities, such as special districts, were not included in the meaning of "local governments" as used in section 15-1-111(6), MCA, much of the purpose of the reimbursement legislation would be defeated. A statute will not be interpreted to defeat its evident object or purpose.

The objects sought to be achieved by the legislation are of prime consideration in interpreting statutes. Lewis and Clark County v. Department of Commerce, 224 Mont. 223, 728 P.2d 1348, 1351 (1986), citing Montana Wildlife Federation v. Sager, 190 Mont. 247, 620 P.2d 1189 (1980). The object of the reimbursement scheme was to reimburse all local government entities that lost revenue as a result of the personal property tax reductions contained in House Bill 20.

THEREFORE, IT IS MY OPINION:

> The term "local governments" as used in section 15-1-111(6), MCA, includes all local government entities, including those generally considered "taxing jurisdictions," that lost revenue as a result of personal property tax reductions.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

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

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

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

Definitions:

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

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

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter

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

Statute Number and Department

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

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 1989. This table includes those rules adopted during the period January 1, 1990 through March 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 December 31, 1989, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1989 and 1990 Montana Administrative Registers.

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