MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 9

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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NOTICE SECTION

BEFORE THE BOARD OF MEDICAL EXAMINERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of rules pertaining to definitions, reinstatement, hearings and proceedings, temporary certificate, annual registration and fees, approval of schools, requirements for licensure, application for licensure, and fees, and repeal of rules pertaining to supervision of licensees, application for examination and reciprocity	NOTICE OF PROPOSED AMENDMENT OF 8.28.402, 8.28.412, 8.28.413, 8.28.414, 8.28.418, 8.28.420, 8.28.501, 8.28.502, 8.28.503 AND 8.28.504 AND PROPOSED REPEAL OF 8.28.415, 8.28.505 AND 8.28.506 PERTAINING TO THE BOARD OF MEDICAL EXAMINERS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On June 16, 1990, the Board of Medical Examiners proposes to amend and repeal the above-stated rules.

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

"8.28.402 DEFINITIONS (1) The term "act" means the medical practice act of the state of Montana being sections 37-3-101 through 37-3-405, MCA, inclusive, as ammended from time to time.

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

~~(3) "The term "board" used herein for brevity means the Montana state board of medical examiners. "Persons dealing with the board will, of course, use the official title of the Montana state board of medical examiners.~~

~~(4)~~ (3) will remain the same.

~~(5)~~ (4) ~~Parties.~~

~~(a)~~ The term "complainant" means a person filing a complaint.

~~(b) "Defendant" means a licensee against whom a complaint alleging unprofessional, or other prohibited conduct, has been filed for the purpose of revoking, suspending or limiting his certificate.~~

~~(c)~~ (5) "Applicant" means a person who has applied for a license or certificate to practice medicine in the state of Montana ~~and has been refused such license pursuant to law.~~

~~(6) "The term "pleading" means a complaint, answer, reply, application, motion or petition.~~

~~(7) "The term "practitioner" means a person authorized by the board to appear before it in a representative capacity.~~

~~(8)~~ (6) ~~Use of gender and number.~~

~~(a)~~ Words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; and words importing

the masculine gender may be applied to females."

Auth: Sec. 37-3-203, MCA; IMP, Sec. 37-3-102, 37-3-201, MCA

REASON: Amendment of subsection (1) is needed to correct a misspelled word. Deletion of subsection (3) is needed because it is an improper extension of authority. Deletion of subsection (5)(b) is needed because it is a superfluous and unnecessary definition. The term does not appear in the statute. Amendment of subsection (5)(c) is needed because the term "applicant" also applies to applicants for an examination and for renewal of license under the Practice Act. It is necessary to delete subsections (6) and (7) because the terms do not appear in the statute. It is necessary to delete subsection (8) because it is an internal catch phrase.

"8.28.412 REINSTATEMENT (1) The board will decide reinstatement on an individual basis upon the facts in ~~each~~ the case ~~where there has been neither a suspension or a revocation.~~"

Auth: Sec. 37-3-203, MCA; IMP, Sec. 37-3-324, MCA

REASON: This amendment is needed because the present wording conflicts with 37-3-324, MCA.

"8.28.413 HEARINGS AND PROCEEDINGS (1) Attorneys at law who are admitted to practice before the supreme court of the state of Montana may represent any person before the board. Persons who are not attorneys at law may appear in their own behalf ~~but may not represent any other person before the board.~~"

Auth: Sec. 37-3-203, MCA; IMP; Sec. 37-3-203, MCA

REASON: This amendment is needed to delete phraseology which may conflict with statutes governing the practice of law.

"8.28.414 TEMPORARY CERTIFICATE (1) and (2) will remain the same.

~~(3) Physicians on temporary certificates must appear before the board at least once a year at the board's request.~~

~~(4) All persons holding a temporary certificate conditioned on taking the Federal licensing Examination shall take the examination the next time given.~~"

Auth: Sec. 37-3-203, MCA; IMP, Sec. 37-3-304, 37-3-307, MCA

REASON: This amendment is needed to delete archaic language and to reflect current needs.

"8.28.418 ANNUAL REGISTRATION AND FEES (1) Annual registration notices are to be sent by the department on or before February 1 of each year ~~and a second notice on or before March 1 of each year.~~

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

Auth: Sec. 37-3-203, MCA; IMP, Sec. 37-3-313, MCA

REASON: This amendment is needed to make the board's practices more consistent with department practices and save the board substantial administrative costs.

"8.28.420 FEE SCHEDULE (1) through (c) will remain the same.

(d)	Examination fee		
(i)	Component I	~~240.00~~	270.00
(ii)	Component II	~~290.00~~	325.00
(iii)	Component I and II	~~465.00~~	520.00

(e) through (h) will remain the same."

Auth: Sec. 37-1-134, 37-3-203, MCA; IMP, Sec. 37-1-134, 37-3-308, MCA

REASON: These fee increases are needed because the testing service (FLEX) raised its fees to the Board. The increases will make the fees commensurate with program area costs.

"8.28.501 APPROVAL OF SCHOOLS (1) Acupuncture schools or colleges which offer a minimum course of 1000 hours of recognized branches of acupuncture and are approved by the ~~American Medical Association~~ national accreditation commission for schools and colleges of acupuncture and oriental medicine or have any equivalent curricula as determined by the board, will be approved by the board.

(2) will remain the same."

Auth: Sec. 37-13-201, MCA; IMP, Sec. 37-13-302, MCA

REASON: This amendment is needed to harmonize the rule with statutory amendments in Ch. 327, L. 1989.

"8.28.502 REQUIREMENTS FOR LICENSURE (1) Applicants for licensure must meet the ~~following~~ requirements for and pass the examination prepared and administered by the commission for the certification of acupuncturists.

~~(a) have a basic science certificate as defined by the National Board of Medical Examiners or its equivalent as approved by the board or;~~

~~(b) Have completed at an approved school, college or university each of the following courses or their substantial equivalent in the board's judgement;~~

~~(c) Human Anatomy~~

~~(d) Biochemistry~~

~~(e) Microbiology or Bacteriology~~

~~(f) Pharmacology~~

~~(g) Physiology~~"

Auth: Sec. 37-13-201, MCA; IMP, Sec. 37-13-201, MCA

REASON: The amendment is needed to identify the examination which is required for licensure in Montana.

"8.28.503 APPLICATION FOR LICENSURE (1) All applications shall be made on a printed form provided by the board and no application made otherwise will be accepted. Each applicant must provide the names of 3 references who

are knowledgeable as to the applicant's moral character and competence as an acupuncturist. Each application shall be accompanied by a recent photograph of the applicant which has been signed by the applicant and dated as to when taken. All applicants shall submit two classifiable sets of fingerprints on cards provided by the department for investigation. Each applicant shall submit a sworn affidavit that he is reasonably able to communicate verbally and in writing in the English language."

Auth: Sec. 37-13-201, MCA; IMP, Sec. 37-13-302, MCA

REASON: The reduction in the number of references required is needed to make the requirement consistent with current requirements of other professional regulatory boards allocated to the Department of Commerce, and to make the application process less cumbersome.

"8.28.504 FEES ~~(1)--Applicants for licensure by examination shall remit a $50 examination fee with their application.~~

~~(2)~~ (1) An ~~A~~applicants for licensure ~~by reciprocity~~ shall remit a ~~$20~~ $50 license fee with ~~their~~ his or her application.

~~(3)--Applicants who successfully pass the examination and are so notified shall remit a $20 licensure fee before his license will be issued.~~

~~(4)--Each applicant shall submit as a part of his application a $350 deposit to be used to defray the expenses of the required investigation of each applicant's background and training.--In the event the costs of investigation exceed the sum deposited, no further consideration shall be given to the application until the applicant has tendered in full such additional investigative fee as the board deems reasonably necessary to complete the required investigation of the applicant's backgrounds, professional training and experience. If the cost of investigation do not equal the deposit, the balance will be refunded to the applicant.~~

~~(5)~~ (2) The annual renewal fee to practice acupuncture will be $20.00. An additional $5 $20 will be charged for late renewal."

Auth: Sec. 37-13-302, 37-13-304, 37-13-305, 37-13-301, MCA; IMP, Sec. 37-13-302, 37-13-304, 37-13-305, 37-13-306, MCA

REASON: It is necessary to delete subsection (1) because the board no longer administers the acupuncture license examination. Amendment of subsection (2) is needed because the board now imposes only one fee which covers both application and licensure. An increase of this fee from $20 to $50 is needed to make it commensurate with program area costs. It is necessary to delete subsection (3) because only one fee is now being charged for initial licensure. This fee covers both the application and license. It is necessary to delete subsection (4) because the fee is an improper extension of statutory authority. Amendment of subsection (5) is needed to make the fee commensurate with program area costs.

3. The following rules are being proposed for repeal.

8.28.415 SUPERVISION OF LICENSEES Full text of the rule is located at page 8-861, Administrative Rules of Montana. Repeal of this rule is needed because the information is covered by statute and is therefore redundant.
Auth: Sec. 37-3-203, MCA; IMP, Sec. 37-3-202, MCA

"8.28.505 APPLICATION FOR EXAMINATION Full text of the rule is located at page 8-868, Administrative Rules of Montana. Repeal is needed because the rule conflicts with section 37-13-302, MCA."
Auth: Sec. 37-13-201, MCA; IMP, Sec. 37-13-302, MCA

"8.28.506 RECIPROCITY Full text of the rule is located at pages 8-868 and 8-869, Administrative Rules of Montana. Repeal of this rule is needed because the rule an improper extension of statutory authority."
Auth: Sec. 37-13-201, MCA; IMP, Sec. 37-13-305, MCA

4. Interested persons may submit their data, views or arguments concerning the proposed amendments and repeals in writing to the Board of Medical Examiners, 1424 - 9th Avenue, Helena, Montana 59620, no later than June 14, 1990.

5. If a person who is directly affected by the proposed amendments and repeals 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 Medical Examiners, 1424 - 9th Avenue, Helena, Montana 59620, no later than June 14, 1990.

6. If the board receives requests for a public hearing on the proposed amendments and repeals from either 10% or 25, whichever is less, of those persons who are directly affected by the proposed amendments and repeals, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 20 for medical and 4 for acupuncturists based on the 2000 licensees for medical and the 45 licensees for acupuncturists.

BOARD OF MEDICAL EXAMINERS
RICHARD W. BEIGHLE, M.D.

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, May 7, 1990.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the proposed adoption of rules relating to special education cooperatives)	NOTICE OF PUBLIC HEARING ON RULES RELATING TO SPECIAL EDUCATION COOPERATIVES, RULES I THROUGH VI.

To: All Interested Parties.

1. On June 8, 1990, at 9:00 a.m., in the conference room at the Office of Public Instruction, 1300 11th Avenue, Helena, Montana, a public hearing will be held to consider the adoption of rules which relate to special education cooperatives.

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 DURATION OF COOPERATIVE (1) The interlocal agreement creating a cooperative must provide for a term of at least 3 years encompassing state fiscal years.

(2) A district that elects to participate shall agree to participate for a period consistent with the term of the existing interlocal agreement.

(3) Notification of intent to withdraw from a cooperative shall be provided no later than October 1 of the third year of the district's participation.

(4) Interlocal agreements, recognizing the time requirements stated above, may provide for the following options:

(a) a three-year commitment, renewable annually;

(b) a schedule of withdrawal notice on a three year cycle.

(AUTH: Sec. 20-7-457, MCA; IMP: Sec. 20-7-452, MCA)

RULE II MANAGEMENT BOARD (1) The management board is responsible for administering the cooperative and is comprised of trustees of the contracting districts or their authorized representatives.

(2) Designation of the representative shall be by formal action taken annually. Formal action shall be in the form of a resolution of the trustees of a contracting district which names one of the trustees or an authorized representative to serve on the management board. The same person may be the authorized representative of more than one board of trustees.

(3) The interlocal agreement shall specify the voting powers of the member districts.

(AUTH: Sec. 20-7-457, MCA; IMP: Sec. 20-7-452, MCA)

RULE III APPROVAL OF COOPERATIVES (1) This approval criteria will act as a guidance model for the Superintendent of Public Instruction to determine whether or not an existing cooperative is eligible for certain funding from the state special revenue fund for state equalization aid. Changes to

existing cooperatives will be reviewed for their consistency with these rules. In order to maintain funding levels based on reduced caseloads, existing cooperatives must show that changes are in the direction of the approval criteria. The approval criteria is as follows:

(a) Enrollment. A total school district enrollment of 3,000 or more, except in the case where a cooperative services a four-county area which does not reach 3,000 student enrollment.

(b) Number of schools participating. The required number of schools participating is dependent upon total enrollment of schools; generally 10 or more school districts.

(c) Geography of participating districts. All schools within the service boundaries of the cooperative shall be included unless they are a "stand alone" district whose enrollment is 3,000 or more.

(d) Caseload. The caseload shall be sufficient to meet requirements of the superintendent of public instruction for employment of no less than 2 FTE speech therapists and 2 FTE school psychologists.

(e) Service pattern. It shall be a full service special education cooperative, making available itinerant services in the form of speech pathology, school psychology, occupational therapy, physical therapy, and itinerant instructional services through employment of or contract with these professionals.

(f) Any other factors determined to be relevant by the superintendent of public instruction.

(AUTH: Sec. 20-7-457, MCA; IMP: Sec. 20-7-452, MCA)

RULE IV NON-PARTICIPATING DISTRICTS (1) The interlocal agreement shall provide that notification of opportunity to join shall be provided annually to nonparticipating districts with a student enrollment of under 3,000 within the geographic service pattern of the cooperative.

(AUTH: Sec. 20-7-457, MCA; IMP: Sec. 20-7-452, MCA)

RULE V APPROVAL MECHANICS (1) A draft of the interlocal agreement shall be submitted to superintendent of public instruction for initial review and approval on or before December 1. Upon completion of initial review and approval by the superintendent, the agreement shall be submitted to the attorney general. Within 10 days of the attorney general's approval, the agreement shall be submitted to the superintendent for final approval. Upon final approval, the cooperative contract shall be filed with the county clerk and recorder of the county or counties in which the school districts involved are located and with the secretary of state.

(AUTH: Sec. 20-7-457, MCA; IMP: Sec. 20-7-453, 20-7-454, MCA)

RULE VI FUNDING OF ITINERANT PERSONNEL WITH REDUCED CASELOADS (1) Cooperatives meeting the standards for approval may receive funding based on reduced caseloads. Funding is provided only for approved cooperatives for personnel assigned to service multiple school districts in the cooperative.

(2) Minimum caseloads for itinerant personnel (school psychologists, speech therapists, occupational therapists, physical therapists) may be as much as 20% less than caseload requirements for non-qualifying cooperatives or stand alone districts. Additional reduction of caseload may be allowed when documentation of necessity for travel time exceeding 20% of available work hours is provided.

(3) Aide support for itinerant resource teachers is not subject to the same caseload and contact hour requirements of non-qualifying cooperatives or stand-alone districts.

(AUTH: Sec. 20-7-457, 20-7-458, MCA; IMP: Sec. 20-7-458, MCA)

4. The Office of Public Instruction is proposing these rules in order to implement Section 5, Chapter 343, Montana Session Laws of 1989.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written testimony may be submitted to Robert Runkel, Office of Public Instruction, State Capitol, Room 106, Helena, Montana 59620, until 5:00 p.m. on June 14, 1990.

6. Beda Lovitt of the Office of Public Instruction 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 20-7-457, MCA.

By: _____
Beda S. Lovitt
Chief Legal Counsel

Certified to the Secretary of State on May 7, 1990.

BEFORE THE BOARD OF PUBLIC EDUCATION
OF THE STATE OF MONTANA

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

TO: All Interested Persons

1. On June 8, 1990 at 10:00 A.M., or as soon thereafter as it may be heard, a public hearing will be held in the Conference Room, Education Offices, 33 South Last Chance Gulch, Helena, Montana, in the matter of the proposed amendment to ARM 10.57.601, Emergency Authorization of Employment and ARM 10.57.211, Test for Certification.

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

10.57.107 EMERGENCY AUTHORIZATION OF EMPLOYMENT

(1) remains the same.

(2) In accordance with section 20-4-111, MCA, school administrators who have exhausted all possibilities for obtaining a regularly certified teacher may request that the superintendent of public instruction issue an emergency authorization of employment to the district to employ a person to teach in the emergency situation. The requirements and standards set forth below must be met to assure consideration of a request for an emergency authorization of employment:

(a) remains the same.

(b) The position must have been advertised through the teacher placement offices of the Montana employment security commission and the Montana university system, or its equivalent, far enough in advance ~~of the new school year~~ to reasonably enable qualified applicants to submit applications and credentials and to be interviewed. ~~The salary for the position shall be advertised and must be comparable to and competitive with the salaries for certified teachers throughout the state.~~

(c) The individual for whom the emergency authorization is being sought:

~~(i) shall be within one academic year (50 quarter hours) of meeting the requirements for certification; and~~

~~(ii) shall be on a college approved, planned program leading to certification; and~~

~~(iii) shall have completed 12 quarter hours of appropriate course work by August 31 of the year of which authorization is being sought; and~~

~~(iv) shall not be eligible for certification in Montana nor shall have held a valid class 5 certificate~~

~~within--the--year--preceding--the--year--for--which--emergency authorization-of-employment-is-being-sought.~~

(i) shall have previously held a valid teacher or specialist certificate; or

(ii) shall hold a bachelor's degree related to the area for which the emergency authorization of employment is being sought; or

(iii) shall provide acceptable evidence of cultural expertise related to the area for which the emergency authorization of employment is being sought.

(d) The individual for whom the emergency authorization is being sought shall not have held a valid class 5 certificate within the year preceding the year for which emergency authorization of employment is being sought.

~~(3) in--reviewing--request--for--emergency--authorizations to--teach,--the--superintendent--of--public--instruction--may consider--emergency--situations--caused--by--extreme--physical conditions--isolation,--poor--roads--and--road--conditions--and other-unforeseen-emergencies-that-might-arise.~~

~~(4)~~ (3) An emergency authorization of employment is valid for ~~only~~ one year. ~~in-the-district-for-each-person-for which-it-is-granted.~~

AUTH: Sec. 20-4-102 MCA
IMP: Sec. 20-4-111 MCA

3. The board is proposing this amendment to update and clarify the wording of the rule.

10.57.211 TEST FOR CERTIFICATION (1) Effective July 1, 1986, all new applicants for initial class 1, 2 or 3, ~~or~~ 5 certification must provide evidence of having completed the national teacher examination core battery with a minimum score established by the board. Exception: teachers currently holding a class 2 standard certificate will not be required to take the test to qualify for a class 1 certificate if they obtain the class 1 certificate before October 1, 1991.

(2) and (3) remain the same.

AUTH: Sec. 20-2-121(1)
IMP: Sec. 20-4-102(1) and (3)

4. The board is proposing this amendment in an attempt to alleviate hardships to school districts caused by the test dates for teachers coming from out-of-state.

5. Interested persons may present their data, views or arguments either orally or in writing to Bill Thomas, Chairperson of the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana 59620, no later than June 14, 1990.

6. Bill Thomas, Chairperson, and Claudette Morton, Executive Secretary to the Board of Public Education, 33 South Last Chance Gulch, Helena, Montana, have been designated to preside over and conduct the hearing.

Bill Thomas
BILL THOMAS, CHAIRPERSON
BOARD OF PUBLIC EDUCATION

BY: Claudette Morton

Certified to the Secretary of State May 7, 1990.

BEFORE THE MONTANA FISH AND GAME COMMISSION

In the Matter of the Proposed)
Amendment 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 June 19, 1990, at 7:00 o'clock p.m. a public hearing will be held at the International Fly Fishing Center, Rainbow Room, West Yellowstone, Montana.

2. The proposed rule amendment would close areas of Hebgen Dam to boating, sailing, floating and swimming.

3. A previous notice proposing to restrict public access and fishing near Montana Power Company Dams was published as Notice No. 12-2-176 in MAR 1990, Issue No 5 at page 449. This notice serves to add Hebgen Dam to RULE I USE RESTRICTIONS AT MONTANA POWER COMPANY DAMS.

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

RULE I USE RESTRICTIONS AT MONTANA POWER COMPANY DAMS

(1) Remains the same.

(a) through Hauser remain the same.

Hebgen: 100 feet above the dam and 100 feet below the outlet works

Holter through (b)(i) remain the same.

AUTH: Sections 87-1-301 and 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 this dam necessitating the restrictions. Hebgen Dam was not included in the first proposal because the hearing was not set until much later, thereby causing none of the restrictions to be effective until a later date.

6. Interested parties may submit their data, views or arguments concerning the proposed amendment in writing to Erv Kent, Administrator, Enforcement Division, Department of Fish, Wildlife and Parks, 1420 East Sixth, Helena, Montana, 59620, no later than June 22, 1990.

7. Bud Hubbard has been designated to preside over and conduct the hearing.

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

Certified to the Secretary of State May 7, 1990.

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

In the matter of the adoption of rules I through X relating to procedures and criteria regarding the wastewater treatment works revolving fund	)))))	NOTICE OF DATE CHANGE OF PUBLIC HEARING FOR ADOPTION OF NEW RULES (Water Quality)

To: All Interested Persons

1. On June 22, 1990, at 9:00 am, the Board will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the adoption of the above-captioned rules. This hearing was previously scheduled for the Board's meeting on June 8, 1990 and has been rescheduled to June 22, 1990 at the request of the Chairman of the Board.

2. The proposed rules would implement the Wastewater Treatment Revolving Fund Act.

2. The rules, as proposed, appear in the Montana Administrative Register, 1990 Issue No. 8, dated April 26, 1990, pages 799-804.

3. Interested persons may submit their data, views, or arguments concerning the proposed rules, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Scott Anderson, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than June 22, 1990.

HOWARD TOOLE, Chairman
BOARD OF HEALTH AND
ENVIRONMENTAL SCIENCES

By 
DONALD E. PIZZINI, Director

Certified to the Secretary of State May 7, 1990.

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

In the matter of the amendment of rules 16.8.921, 16.8.925, 16.8.927, 16.8.928, 16.8.941	NOTICE OF DATE CHANGE OF PUBLIC HEARING FOR AMENDMENT OF RULES

(Air Quality Bureau)

To: All Interested Persons

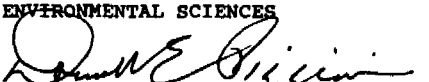
1. On June 22, 1990, at 9:30 am, the Board will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the above-captioned rules. This hearing was previously scheduled for the Board's meeting on June 8, 1990 and has been rescheduled to June 22, 1990 at the request of the Chairman of the Board.

2. The proposed amendments would require the department to enforce recently promulgated federal requirements involving new major stationary sources of air pollution which are planning to locate in any portion of Montana which is attaining the national ambient air quality standards. The proposed facility will be required to demonstrate that emissions of nitrogen dioxide from the facility, in conjunction with other affected facilities, will not degrade ambient air quality beyond specific ambient air quality increments. The proposed rules will preclude the department from issuing a permit unless such a demonstration is made.

3. The rules, as proposed to be amended, appear in the Montana Administrative Register, 1990 Issue No. 8, dated April 26, 1990, pages 805-808.

4. Interested persons may submit their data, views, or arguments concerning the proposed amendments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Jeff Chaffee, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than June 22, 1990.

HOWARD TOOLE, Chairman
BOARD OF HEALTH AND
ENVIRONMENTAL SCIENCES

By 
DONALD E. PIZZINI, Director

Certified to the Secretary of State May 7, 1990.

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

In the matter of the adoption of rules I through XI concerning eligibility for the handicapped children's program, payment for services, covered conditions, record-keeping, application procedure, advisory committee and fair hearings	NOTICE OF PUBLIC HEARING FOR ADOPTION OF NEW RULES FOR THE HANDICAPPED CHILDREN'S SERVICES PROGRAM

(Handicapped Children's Services Program)

To: All Interested Persons

1. On June 6, 1990, at 1:30 p.m., in Room C307 of the Cogswell Building, 1400 Broadway, Helena, Montana, the Department of Health and Environmental Sciences will hold a public hearing to consider the adoption of the above-captioned rules establishing, for the Handicapped Children's Services program, the eligibility requirements for both clients and providers, procedures for payment for services to clients as well as the methods for determination of the amounts providers will be paid, covered conditions, application procedure, conditions for obtaining a fair hearing before the department, and HCS record-keeping requirements.

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

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

RULE I PURPOSE OF RULES (1) The purpose of the handicapped children's services program is to develop, extend, and improve services for locating, evaluating, and treating children who are physically handicapped or are suffering from physical conditions which might lead to handicapping.
AUTHORITY: 50-1-202, MCA; IMPLEMENTING: 50-1-202, MCA

RULE II GENERAL REQUIREMENTS FOR HCS ASSISTANCE (1) In order to receive HCS financial assistance for a particular service, an HCS applicant must meet the eligibility requirements of RULE IV, the service in question must be one of the covered services cited in RULE V, and the service provider must meet the standards of RULE VI.
AUTHORITY: 50-1-202, MCA; IMPLEMENTING: 50-1-202, MCA

RULE III DEFINITIONS (1) Unless otherwise indicated, the following definitions apply throughout this subchapter:

(a) "Advisory committee" means a committee of representative medical providers and consumers appointed by the depart-

ment director to advise the department on HCS program operation.

(b) "Applicant" means a person who has applied for benefits from HCS.

(c) "Benefits" means payment by HCS for authorized medical, corrective, or surgical treatment, including evaluation and transport.

(d) "Child" means an individual who is under 21 years of age.

(e) "Client" means an HCS applicant who has been approved by HCS for HCS benefits.

(f) "Clinic" means a place where health care providers with specialties appropriate to treating handicapped children come together to evaluate children with a specific handicap.

(g) "Evaluation" means the medical examination and testing needed to determine the cause and possible treatment for a suspected or known handicapping condition.

(h) "Family" means a group of related or non-related individuals who are living together as a single economic unit.

(i) "HCS" means the handicapped children's services program of the department, authorized by section 50-1-202, MCA.

(j) "Handicap" means any physical defect or characteristic, congenital or acquired, which prevents or restricts normal growth or capacity for activity.

(k) "High-risk pregnant woman" means a woman who has one or more fetuses in utero and who is subject to circumstances that increase the likelihood of premature delivery, congenital malformations, fetal death, or other potentially handicapping conditions.

(l) "ICD-9-CM" means the World Health Organization's International Classification of Diseases, Clinical Modification, 9th Revision.

(m) "Initial diagnosis and evaluation" means taking a medical history and performing a physical examination, medical procedures, laboratory tests, hearing tests, or other procedures deemed necessary for the diagnosis of a condition for the purpose of establishing HCS eligibility.

(n) "Medical director" means a physician licensed by the state of Montana who serves as an advisor to HCS.

(o) "Poverty income guidelines" means the poverty income guidelines revised annually pursuant to the Omnibus Reconciliation Act of 1981 and published in the federal register by the U.S. department of health and human services.

(p) "Program" means the handicapped children's services program of the department authorized by section 50-1-202, MCA.

(q) "Provider" means a supplier of medical care or services, a medical appliance, drugs, or prescribed infant formula.

(r) "SSI" means the supplemental security income program administered by the state department of social and rehabilitation services.

(s) "Third party" means a public or private agency which is or may be liable to pay all or part of the medical costs of an applicant or client, including, but not limited to, private

insurance, CHAMPUS, medicaid, medicare, and trust funds available to the applicant or client for medical care.

(t) "Treatment" means medical, corrective, and/or surgical intervention to alleviate a handicapping condition.

AUTHORITY: 50-1-202, MCA; IMPLEMENTING: 50-1-202, MCA

RULE IV APPLICANT ELIGIBILITY (1) With the exception noted in (7) below, an applicant, to be eligible for HCS benefits, must be:

(a) either a high-risk pregnant woman or a child with either a handicapping physical deformity that can be substantially improved or corrected with surgery or a medical condition/disease which can be either cured, improved, or definitely stabilized with medical treatment; a child must also either:

(i) be under 18 years of age; or

(ii) if older, have a handicap for which a delay in treatment is necessary (e.g. cleft palate repair), prior treatment for which began before s/he was 18 and was paid for by HCS;

(b) a resident of the state of Montana;

(c) a member of a family whose income during the 90-day period [or, if self-employed, during the year] prior to the date of application, less any out-of-pocket expenses for health insurance during that period, is at or less than 185% of the federal poverty income guidelines; and

(d) either ineligible for medicaid or SSI benefits, or, if eligible, in need of treatment that is not covered by medicaid or SSI but is covered by HCS.

(2) Eligibility for program benefits will be determined on an annual basis after a person desiring HCS assistance submits an application to the department.

(3) Eligibility, once determined, is valid for one year after the date the application is signed by the applicant or his/her parent or legal guardian, if a minor, or earlier on the date of his/her birthday if s/he becomes ineligible during the year due to the circumstances cited in (1)(a) above.

(4) A new application for a subsequent year must be submitted to the department in order for the department to determine if eligibility is to continue and must be completed and approved before any HCS benefits in a subsequent year may be provided.

(5) Financial eligibility limits will be established annually after consultation with the advisory committee.

(6) (a) Income includes the following:

(i) monetary compensation for services, including gross income from wages, salary, gratuities, commissions, and fees;

(ii) net income from farm and non-farm self-employment;

(iii) social security benefits;

(iv) dividends or interest on savings or bonds, income from estates or trusts, and net rental income;

(v) public assistance or welfare payments;

(vi) government civilian employee or military retirement, pension, or veteran's payments;

(vii) unemployment compensation;

(viii) private pensions or annuities;

(ix) alimony and/or child support payments;
(x) regular cash contributions from persons not living in the household;
(xi) workers' compensation payments and disability benefits;
(xii) net royalties;
(xiii) strike benefits;
(xiv) payments from the bureau of Indian affairs; and
(xv) other cash income, including, but not limited to, cash amounts received or withdrawn from any source, including savings, investments, proceeds from the sale of property, cash gifts, prizes and awards, inheritances, income tax refunds, and other resources which are readily available to the family.

(b) Income does not include student financial assistance received from any program funded in whole or in part under Title IV of the Higher Education Act of 1965 or payments received under the Job Training Partnership Act [P.L. 97-300, Sec. 142(b), 29 U.S.C. 1552(b)].

(7) The above financial eligibility limits do not apply to a child who has or is suspected of having a condition covered by HCS and wishes to attend a clinic that is specifically for that condition and that is funded entirely by HCS.

(8) Effective July 1, 1990, the department hereby adopts and incorporates by reference the 1990 federal poverty income guidelines published by the U.S. department of health and human services in the February 16, 1990, federal register [55 FR 5664]. Copies of the federal poverty income guidelines may be obtained from the Family/Maternal and Child Health Services Bureau, HCS Program, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620 [phone: (406)444-4740].

AUTHORITY: 50-1-202, MCA; IMPLEMENTING: 50-1-202, MCA

RULE V HCS SERVICES (1) To the extent HCS funding allows and up to a maximum of $12,000 per state fiscal year (unless the HCS medical director grants a waiver), HCS will pay for the cost of providing the following to an eligible client, subject to the exclusions set out in (2) below and the payment limits set out in RULE VII:

(a) transport of a high-risk pregnant woman to a hospital for delivery of her baby;

(b) emergency medical transport of a high-risk newborn under six weeks of age from one hospital to another;

(c) transport to a hospital of a child six weeks or more of age for emergency medical treatment of a life-threatening condition otherwise covered by HCS;

(d) treatment for cystic fibrosis;

(e) an initial evaluation and diagnosis to determine if a condition is HCS-eligible and the applicant is financially eligible;

(f) treatment of a handicapping physical deformity that can be substantially improved or corrected surgically;

(g) treatment of a handicapping condition/disease that can be either cured, improved, or definitely stabilized with

medical treatment;

(h) infant formula or low phenylalanine dietary supplement food that is prescribed by a physician.

(2) Excluded from HCS benefits are:

(a) conditions which are usually non-remediable with no potential for long-term habilitation;

(b) behavioral, emotional, and learning disabilities and developmental delays; primary psychiatric diseases covered by numbers 290 through 319 in ICD-9-CM; blood dyscrasias; growth disorders; acute care for injuries and illnesses; and catastrophic diseases, including neoplasms and other cancers.

(c) all appliances, with the exception of orthopedic braces and those appliances required for the correction of an orthodontic condition that affects an otherwise HCS-covered condition, such as that caused by the presence of a cleft palate or another syndrome-caused craniofacial anomaly;

(d) diseases associated with prematurity;

(e) medicaid and/or SSI-eligible services, if the client is receiving medicaid and/or SSI benefits;

(f) any expenses of travel for medical care, with the exception of the emergency medical transports described in subsection (1)(a), (b), and (c) above;

(3) The department hereby adopts and incorporates by reference the World Health Organization's International Classification of Diseases, Clinical Modification, 9th Revision (ICD-9-CM), which systematically classifies and assigns code to diseases and medical conditions for use by medical professionals. Copies of ICD-9-CM may be obtained from ICD-9-CM, P.O. Box 971, Ann Arbor, Michigan 48106. A volume is also available for examination at the Family/Maternal and Child Health Bureau, HCS Program, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620 [phone: 444-4740].

AUTHORITY: 50-1-202, MCA; IMPLEMENTING: 50-1-202, MCA

RULE VI HCS PROVIDER REQUIREMENTS (1) In order to receive HCS payment for his/her services to an HCS client, a provider must meet whichever of the following requirements are applicable to him/her:

(a) A physician or surgeon must:

(i) be either currently licensed by the State of Montana pursuant to Title 37, chapter 3, MCA, to practice medicine as defined by state law if a Montana resident, or currently licensed to practice medicine in the state in which s/he resides;

(ii) be board-eligible or board-certified in the specialty for the condition being treated or working in cooperation with a physician who is;

(iii) provide the department, upon request by the department, with adequate documentation of credentials needed to prove program eligibility on a form provided by the department.

(b) An orthodontist must be currently licensed as a dentist in the state of Montana or the state in which she or he resides, have completed two years of graduate or post-graduate orthodontic training recognized by the council of dental educa-

tion of the American dental association, and limit his/her practice to the area of orthodontics.

(c) A pediatric dentist may treat children under the age of ten for orthodontia and must:

(i) be currently licensed as a dentist by the state of Montana or the state in which s/he resides; and

(ii) have completed a minimum of two academic years of a graduate or post-graduate pediatric dentistry program accredited by the council on dental accreditation of the American dental association.

(d) A hospital must be accredited by the Joint Commission of Accreditation of Healthcare Organizations and be currently licensed and certified by the department, if in-state, or by the state in which it is located, if out-of-state.

(e) Any provider other than those listed in (a) through (d) above must:

(i) be certified and/or licensed by the appropriate Montana authority, or if Montana has no certification or licensure requirements for the provider, be certified by a nationally recognized professional organization in their area of expertise; and

(ii) shall provide services as ordered or prescribed by the attending physician.

(f) A provider must immediately supply HCS with reports requested by the latter in order to permit effective evaluation of payment claims.

(2) A provider, in order to be eligible to receive HCS payment for his/her services to an HCS client, must refrain from seeking additional payment from the client or those financially responsible for the client for services for which HCS provides reimbursement.

AUTHORITY: 50-1-202, MCA; IMPLEMENTING: 50-1-202, MCA

RULE VII PAYMENT LIMITS AND REQUIREMENTS (1) DHES will be responsible for paying for HCS-eligible services for an HCS client only:

(a) if HCS has sufficient federal HCS funds left to pay for the services;

(b) up to a maximum of $12,000 per year, unless the HCS medical director approves a waiver;

(c) if a third party is responsible for all or part of the medical bills and the provider bills the client directly, if the client submits the claim in turn to the third party within six weeks after receiving the bill from the provider;

(d) after all third parties, if any, have paid the provider, in which case HCS pays any balance remaining, within HCS limits for the services in question.

(2) HCS will not reimburse clients for medical expenses; rather, it will pay directly to the provider for services rendered.

(3) HCS will pay eligible providers only:

(a) after all third-party carriers have paid or denied payment on HCS-authorized care; and

(b) after HCS receives documentation that the service has

already been provided, including a completed authorization form obtained from the department.

(4) A provider, family, or individual who erroneously or improperly is paid by HCS must promptly refund that payment to HCS.

(5) If a provider provides HCS-eligible services to an HCS client and accepts the HCS-approved level of payment for those services from HCS and/or an insurance company, the provider must refrain from seeking additional payment from the HCS client or his/her family.

(6) HCS will pay up to the following limits for orthodontics:

(a)	initial exam	$20	
(b)	records (per phase)	160	
(c)	phase I orthodontics (expansion	450	
	monthly phase I	55	
(d)	phase II partial banding	450	
	monthly phase II	55	
(e)	phase III full banding	750	
	monthly phase III	55	
(f)	retainer repair or replacement	115	
(g)	maintenance visit	35	(maximum $105/yr.)
(h)	specialty treatment	by report, 90%	

(7) For his/her services to an HCS client, a physician will be paid the amount calculated by using the CPT-4 codes published by the American Medical Association (Physician's Current Procedures Terminology, AMA, 4th edition) together with the relative value scales (RVS) for those codes as stated in the Montana medical association's RVS (or, if Montana has no code for the particular procedure, the RVS used by Colorado, California, or any other state that has such a code), multiplied times the following conversion factors, whichever is relevant:

(a)	medical services (90000-99199)	$1.85
(b)	surgical services (10000-69999)	79.00
(c)	radiology services (70000-79999)	8.50
(d)	laboratory services (80000-89399)	.70
(e)	anesthesia services (90000 series, 10000-69999, 70000 series with modifier of -30)	30.00

(8) Hospitals and surgicenters will be paid 90% of the actual submitted charge on the date of occurrence for in-patient and out-patient services.

(9) Dentists will be paid only for dental extractions related to active or anticipated orthodontia treatment, at the rate of $22 per unit (as rounded up to the nearest whole unit) identified in the American Dental Association's Code on Dental Procedures and Nomenclature.

(10) In addition to the above, HCS will pay:

(a) either the actual charge for drugs and other prescribed materials, or the price, plus $4 dispensing fee, cited in the Annual Pharmacists' Reference 1989 Redbook, whichever is less;

(b) 90% of the cost of orthotics and prosthetic devices (orthopedic only);

(c) for physical therapy at the rate of $1.85 multiplied times the relevant unit found in the 90000 series identified in (7)(a) above.

(d) for ambulance services at the rates established by the department's improved pregnancy outcome project, as revised November 1987, with the exception of ancillary services, which will be paid at 90% of the charge; and

(e) 100% of the cost of infant formula or low phenylalanine dietary supplement food that is prescribed by a physician.

(11) The services provided at a clinic funded entirely by HCS must be provided free of charge, regardless of income.

(12) An individual utilizing a clinic supported in part by HCS may not be billed for the clinic operating expenses funded by HCS, but may be billed by the clinic for services provided that HCS does not pay for.

(13) The department hereby adopts and incorporates by reference the Physicians' Current Procedures Terminology, published by the American Medical Association, 4th edition, which assigns value units to the various medical procedures; the relative value scales adopted by the Montana Medical Association, Colorado, and California, which assign value units to medical procedures; the American Dental Association's Code on Dental Procedures and Nomenclature, which assigns units of value to the various dental procedures; the Annual Pharmacist's Reference 1989 Redbook, which suggests prices for drugs; the rates for ambulance services set by the department's improved pregnancy outcome project, as revised November 1987. Anyone wishing to examine any of the above references may do so by contacting the department's HCS Program, Cogswell Building, Capitol Station, Helena, Montana 59620 [phone: 444-4740].

AUTHORITY: 50-1-202, MCA; IMPLEMENTING: 50-1-202, MCA

RULE VIII APPLICATION PROCEDURE (1) A person who desires HCS benefits must submit a completed application, along with documentary evidence required by the department, to the department on a form it prescribes.

(2) If the department notifies the applicant that the application is incomplete and is not provided with the requested information within four weeks after the date the applicant was notified of the deficiency, the application will be considered inactive.

(3) If the application is denied, the department will send the applicant a notice of denial stating the reasons for denial and explaining how a fair hearing may be obtained pursuant to RULE IX.

(4) If the applicant is found eligible for HCS benefits, the department will send the applicant a notice of that fact that also specifies which condition(s) are eligible for HCS assistance.

AUTHORITY: 50-1-202, MCA; IMPLEMENTING: 50-1-202, MCA

RULE IX FAIR HEARING PROCEDURE (1) An applicant who has

been denied participation in HCS, a provider who has been denied reimbursement for HCS-eligible services, or anyone who is otherwise adversely affected by an action taken by HCS may have a fair hearing before the department director by requesting such a hearing within 60 days after notice of the adverse action in question has been placed in the mail or otherwise communicated to the aggrieved party.

(2) A request for a hearing, in order to be effective, must be in writing and postmarked at least by the 60th day after notice of the adverse action referred to in (1) above was given.

(3) If the department receives a request for a fair hearing, it will hold the hearing within 30 days after the date the request is received unless both the requestor and the department agree to a later date.

(4) The department will send a hearing requestor written notice of the date, time, and place of the hearing.

(5) A fair hearing will be conducted in accordance with the procedures prescribed for informal proceedings in section 2-4-604, MCA.

(6) The decision by the department's director after a fair hearing is final.

AUTHORITY: 50-1-202, MCA; IMPLEMENTING: 50-1-202, MCA

RULE X PROGRAM RECORDS (1) HCS shall retain records of HCS services provided for a client for a period of five years from the date on which the last service was provided unless the records are required for litigation or audit before the five years are up, in which case they must be retained until the litigation or audit is completed or until the end of the regular five-year period, whichever is later.

(2) Prior to destroying records over five years old, HCS shall advertise the availability of the records to the program clients or their legal guardians by publishing a notice in Montana's major newspapers once per week for three consecutive weeks.

(3) Records remaining unclaimed for three months after the public notice described in (2) above is completed will be destroyed after the department receives the approval of the state records committee required by 2-6-212, MCA.

AUTHORITY: 50-1-202, MCA; IMPLEMENTING: 50-1-202, MCA

RULE XI ADVISORY COMMITTEE (1) The HCS advisory committee:

(a) will review the administration of the program and provide consultations and recommendations concerning program operations;

(b) will have a minimum of six members and be composed of health care providers representing those specialties most often needed by HCS, as well as consumers of HCS benefits, including one each of the following: physician, orthodontist, hospital administrator, public health nurse, and parent of an HCS-eligible child;

(c) members will be appointed by the department's direc-

tor for three-year terms;

(d) will meet at least once per year; and

(e) will advise the department concerning the financial eligibility limits for HCS beneficiaries.

AUTHORITY: 50-1-202, MCA; IMPLEMENTING: 50-1-202, MCA

4. The rules proposed to be adopted are necessary to implement section 50-1-202(13), MCA, which requires the department to adopt rules establishing standards for the department's program providing services to handicapped children.

5. Interested persons may submit their data, views, or arguments concerning the proposed rules, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Thomas Ellerhoff, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, but, to be considered, must be received by the department no later than June 14, 1990.

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

DONALD E. PIZZINI, Director

Certified to the Secretary of State May 7, 1990.

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

In the matter of the amendment of rules 16.32.308 and 16.32.328 concerning retention of medical records by health care facilities	NOTICE OF PROPOSED AMENDMENT OF RULES (Health Care Facilities)

NO PUBLIC HEARING CONTEMPLATED

To: All Interested Persons

1. On June 16, 1990, the department proposes to amend the above-listed rules, found at pages 16-1481 and 16-1487 of the Administrative Rules of Montana.

2. The rules proposed to be amended provide as follows (matter to be stricken is interlined, and new material is underlined):

16.32.308 MINIMUM STANDARDS FOR ALL HEALTH CARE FACILITIES--MEDICAL RECORDS (1)-(2) Remain the same.

(3) A medical record may be microfilmed or preserved via any other electronic medium that yields a true copy of the record if the health care facility has the equipment to reproduce records on the premises.

(4) Remains the same.

AUTHORITY: 50-5-103, 50-5-404, MCA;
IMPLEMENTING: 50-5-103, 50-5-106, 50-5-204, 50-5-404, MCA

16.32.328 MINIMUM STANDARDS FOR A HOSPITAL--MEDICAL RECORDS Medical records shall comply with the following requirements:

(1) A patient's entire medical record~~, in either original or microfilmed form,~~ must be maintained, in either its original form or that allowed by ARM 16.32.308(3), for not less than 10 years following the date of a patient's discharge or death, or, in the case of ~~patients who are minors~~ a patient who is a minor, for not less than 10 years following the date the patient either attains ~~attainment of~~ the age of majority or dies, if earlier.

(2)-(6) Remain the same.

AUTHORITY: 50-5-103, 50-5-404, MCA;
IMPLEMENTING: 50-5-103, 50-5-106, 50-5-404, MCA

3. The proposed amendments are needed to allow health care facilities, including hospitals, to utilize advances in electronic storage of records, rather than to limit them to microfilming; also, ARM 16.32.328 required amending to clarify what record retention limit applied if an underage patient died before age 18.

4. Interested persons may submit their data, views, or arguments concerning the proposed amendments, in writing, to Thomas Ellerhoff, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than June 14, 1990.

5. If a person who is directly affected by the proposed amendments wishes to express his or her data, views, or arguments orally or in writing at a public hearing, such person must make written request for a hearing and submit this request along with any comments to Thomas Ellerhoff, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than June 14, 1990.

6. If the department 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 fewer than 25 members who will be directly affected, a public hearing will be held at a later date. The department has determined that the number representing 10% of the class of potentially affected persons will be over 25. Notice of the hearing will be published in the Montana Administrative Register.

DONALD E. PIZZINI, Director

Certified to the Secretary of State May 7, 1990 .

STATE OF MONTANA
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

In the matter of proposed new rule to reject or modify permit applications for consumptive uses and to condition permits for nonconsumptive uses in Walker Creek Basin	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION OF NEW RULE TO REJECT OR MODIFY APPLICATIONS IN WALKER CREEK BASIN

To All Interested Persons:

1. On June 26, 1990, at 7:00 P.M., a Public Hearing will be held at St. Charles Parish Hall, 230 Baker Ave. in Whitefish, Montana to consider the adoption of a new rule to reject permit applications in Walker Creek Basin.

2. The definitions set out in ARM 36.12.1010, except 36.12.1010(4), apply to the following proposed new rule:

"RULE I WALKER CREEK BASIN CLOSURE (1) Walker Creek Basin means the Walker Creek drainage area, located in hydrologic Basin 76LJ, a tributary of the Whitefish River in Flathead County, Montana. The entire Walker Creek drainage, from its headwaters in Section 10 of Township 31 North, Range 21 West, MPM to its confluence with the Whitefish River in Section 8 of Township 30 North, Range 21 West, MPM including all unnamed tributaries is contained in the closure area.

(2) The department shall reject consumptive use applications for surface water permits within the Walker Creek Basin for any development, including infiltration galleries within 50 feet of Walker Creek or any of its tributaries, requesting to appropriate water or use water during the period July 1 through March 31.

(3) Permits for nonconsumptive uses during the closure period shall be modified or conditioned such that there will be no decrease in the source of supply, no disruption in the stream conditions below the point of return, and no adverse affect to prior appropriators within the reach of stream between the point of diversion and the point of return. Any permit for a nonconsumptive use shall include at a minimum the following conditions:

(a) All nonconsumptive water uses shall be constructed such that the inflow and outflow can be measured.

(b) One set of inflow and outflow measurements shall be taken during both July and August in the first full year of operation. The permittee shall keep a written record of the flow rate, method of measurement, place of measurement, and date of measurement, and shall submit said records by November 30th to the Water Rights Bureau Field Office, P.O. Box 860, Kalispell, MT 59903.

(c) All ponds or other storage facilities shall be filled during spring runoff or before June 1st of each year, which ever occurs first.

(d) All ponds or other storage facilities shall be designed according to U.S. Soil Conservation Service specifications or designed by a registered engineer to minimize seepage.

(e) All nonconsumptive water uses which do not utilize the natural stream channel shall be constructed such that water is conveyed to the use and returned to the stream by pipe to minimize loss due to seepage.

(4) The applicant for a nonconsumptive use shall prove by substantial credible evidence the applicant's ability to meet the conditions imposed by (3) above.

(5) Permit applications which would utilize an offstream storage facility to impound water outside the closure period of July 1 through March 31, and which is of sufficient size to store adequate water for use during the closure period, is exempt from these rules. All applications for provisional permit for completed stockwater pit or reservoir (form 605) will be rejected.

(6) These rules apply to all surface water within the Walker Creek Basin.

(7) The department will make periodic inspections to determine compliance with these rules and conditions.

(8) Emergency appropriations of water as defined in ARM 36.12.101(6) and 36.12.105 shall be exempt from these rules.

(9) These rules apply only to applications received by the department after the date of adoption of these rules.

(10) The department may, if it determines changed circumstances justify it, reopen the basin to additional appropriations and amend these rules accordingly after public notice and hearing."

AUTH: 85-2-112 and 85-2-319, MCA; IMP: 85-2-319, MCA

3. The rationale for Rule I is that unappropriated water may only exist in Walker Creek basin during extremely high stream flow events. On May 2, 1989, a petition was filed according to § 85-2-319, MCA, with the Department of Natural Resources and Conservation. The petition was signed by eight water uses on Walker Creek requesting the Department to close the basin to all new consumptive appropriations of water. The petitioners state that the creek's low to nonexistent water volume during summer and winter causes hardships on prior appropriators. When the creek is low, it is hard for the cattle to find water or to get access to small pools in the dry creek bed. They claim subdivisions continue to appear in the upper basin and new landowners are using creek water and causing adverse affect to the existing water users. The department in response to the petition for basin closure made a water availability study. The department's study showed a water shortage during the period of July 1 through March 31. As a result of this study the department is proposing to reject water use permit applications for certain uses of water from July 1 through March 31. This rule is intended to assist in preserving existing stream flows for senior appropriators. Since unappropriated waters exist so infrequently in the source of supply from July 1 through March 31, any further

uses during that time will adversely affect prior appropriators. This rule sets out the period for closure, the class of applications affected and the type of appropriations that are exempt from the rule. This rule also allows the department in its discretion to reopen the basin to additional appropriations if changed circumstances justify it. Reopening of the basin would necessitate amending these rules after public notice and hearing.

4. Interested parties may present their data, views or arguments in writing or orally at the hearing. Written data, comments or arguments in support of or in opposition to the adoption must be submitted to the Department of Natural Resources and Conservation, Water Rights Bureau, P.O. Box 860, Kalispell, MT 59903 no later than July 5, 1990.

5. Questions concerning the proposed adoption or requests for a copy of the Walker Creek Basin map of the affected area or water availability study should be directed to the Department of Natural Resources and Conservation at the above Kalispell address, or call 752-2288. In Helena, Montana, call 444-6610.

6. Keith Kerbel has been designated to preside over and conduct the hearing.

Karen L. Barclay, Director
Department of Natural Resources
and Conservation

CERTIFIED to the Secretary of State, May 7, 1990.

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

In the matter of the proposed adoption of a new rule concerning mandatory training	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF A NEW RULE CONCERNING REQUIRED TRAINING

TO: ALL INTERESTED PERSONS:

1. On June 15, 1990, at 9:30 a.m., a public hearing will be held in the Glacier Room of the Department of Natural Resources and Conservation Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption of a new rule concerning mandatory training for license renewal.

2. The proposed rule will read as follows:

"I. REQUIRED TRAINING (1) Licensees shall obtain a minimum of 4 hours of board approved training prior to license renewal each July. This requirement will be effective starting with the renewal year of July 1, 1991.

(2) The training may include, but is not limited to, national water well association, Montana water well drillers association, board sponsored workshops, or other board approved training, relating to the specific area of licensure.

(3) The training must have prior board approval to count towards the training requirement. A course outline must be submitted, along with the instructor's name(s), length of the training, and an explanation of how it relates to the area of licensure.

(4) Credit may be requested for training classes that a licensee has completed without prior board approval, provided the licensee can supply verification of actual attendance, a course outline, and an explanation as to why prior approval was not obtained. These courses will be approved on a case by case basis.

(5) A new licensee will not be required to obtain the training until the second renewal year following issuance of his license.

(6) Separate training is required for apprentices."

Auth: 37-43-202, MCA; Imp. 37-43-202 (6), (7), MCA.

3. The adoption of the mandatory training is proposed as a method to keep licensees up-to-date on changes in the drilling industry, in state and federal law and rules, and in other areas that directly relate to the profession. The adoption of mandatory training or continuing education for licensees was requested by the Montana Water Well Drillers Association. It was felt that with the many changes occurring

in the industry, including the increase in the amount of monitoring wells being drilled, as well as the diversification which is occurring in some firms, the need for continual training exists. The primary goal of the board is to protect the public and the groundwater resource through reasonable regulation of drillers, contractors and monitoring well constructors. Ensuring that each licensee receives a minimal amount of training each year is another method by which this can be accomplished.

4. Interested parties may present their data, views, and arguments, either orally or in writing, at the hearing. Written, data, comments, or arguments may also be submitted to the Board of Water Well Contractors, 1520 East Sixth Avenue, Helena, Montana 59620 no later than June 14, 1990.

5. Fred Robinson, Attorney, Department of Natural Resources and Conservation, Helena, will preside over and conduct the hearing.

BOARD OF WATER WELL CONTRACTORS
WESLEY LINDSAY, CHAIRMAN

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

Certified to the Secretary of State, May 7, 1990.

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

In the matter of the amendment of Rules 46.12.541 and 46.12.542 pertaining to hearing aid services	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 46.12.541 AND 46.12.542 PERTAINING TO HEARING AID SERVICES

TO: All Interested Persons

1. On June 6, 1990, at 10:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of Rules 46.12.541 and 46.12.542 pertaining to hearing aid services.

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

46.12.541 HEARING AID SERVICES, REQUIREMENTS

Subsections (1) through (3)(c) remain the same.

(i) for persons over 21 years of age, the audiological examination results show that there is an average pure tone loss of at least forty (40) decibels ~~plus or minus five (5) decibels~~ over the frequency at 1,000, 2,000, 3,000 and 4,000 hertz in the best ear~~.~~. The following criteria shall apply to adults aged 21 years or older for binaural hearing aids:

(A) the two frequency average at 1khz and 2khz must be greater than 40 db in both ears;

(B) the two frequency average at 1khz and 2khz must be less than 90db in both ears;

(C) the two frequency average at 1khz and 2khz must have an interaural difference of less than 15db;

(D) the interaural word recognition or speech discrimination score must have a difference of not greater than twenty percent (20%);

(E) demonstrated success in using a monaural hearing aid for at least six months; and

(F) documented need to understand speech with a high level comprehension based on an educational or vocational need.

Subsections (3)(c)(ii) through (5) remain the same.

~~(6) Reimbursement for hearing aid rentals is limited to a maximum of thirty (30) days.~~

(6) The date of service is defined as the date the hearing aid(s) is ordered by the dispenser.

(7) Hearing aid repairs shall be limited to the invoice cost from the manufacturer plus a $10.00 handling fee. The cost of repair shall not exceed $175.00 per calendar year for each hearing aid.

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

46.12.542 HEARING AID SERVICES, REIMBURSEMENT

Subsections (1) through (1)(b) remain the same.

~~(2) Effective July 1, 1989, the reimbursement rates listed will be increased by two percent (2%). All items paid by report will remain at the rate indicated.~~

(~~3~~2) Medicaid payment for hearing aid purchase or rental will cover only the following items in the amounts indicated:

List of Services	Fee
Purchase of instrument	Manufacturer's invoice plus a dispensing fee of ~~$200.00~~ $208.08 for a monaural (single) hearing aid and ~~$300.00~~ $312.12 for binaural (two hearing aids, one for each ear) hearing aids.
~~Hearing aid rental ..... $1.21 per day~~	
Hearing aid service & repair (which includes a 6 month warranty)	~~$72.60 maximum per year per aid~~ Invoice price plus $10.00 handling fee
Hearing aid recasing	~~$36.30 maximum per year per aid~~ Invoice price plus $10.00 handling fee
Accessories (Cords, receivers, etc.)	~~$42.35 maximum per year per aid~~ Invoice cost plus $10.00 handling fee
Bone ossilator	~~$78.65 maximum per year per aid~~ Invoice cost plus $10.00 handling fee
Ear mold	~~$18.15~~ Invoice cost plus $10.00 handling fee
Hearing aid batteries	~~$1.00~~ $1.04 per cell

(~~4~~3) The dispensing fee consists of the initial ordering, the fitting, the orientation, the counseling, two return visits for the services listed, and the insurance for loss or damages covered under an ~~extended~~ one year warranty.

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

3. This rule is intended to clearly define coverage of hearing aids under the Montana Medicaid program. This rule clarifies the forty decibel loss requirement for adults and establishes criteria for binaural hearing aids.

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 June 15, 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. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State May 7, 1990.

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

In the matter of the amendment of Rule 46.12.303 pertaining to medicaid billing, reimbursement, claims processing and payment	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.12.303 PERTAINING TO MEDICAID BILLING, REIMBURSEMENT, CLAIMS PROCESSING AND PAYMENT

TO: All Interested Persons

1. On June 8, 1990, at 11:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of Rule 46.12.303 pertaining to medicaid billing, reimbursement, claims processing and payment.

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

46.12.303 BILLING, REIMBURSEMENT, CLAIMS PROCESSING, AND PAYMENT (1) Providers shall submit clean claims to medicaid within 12 months from the latter of: ~~180 days of the date the service was performed, within 180 days after the applicant's eligibility is determined, or within 180 days after a written notice from a third party resource, whichever occurs last. For providers of hospital services, the service shall be deemed to have been performed upon the recipient's discharge from one continuous confinement. A written inquiry to the department or to the local county welfare department regarding eligibility within the 180 day limit shall constitute evidence of an effort to bill medicaid for these services.~~

(a) the date of the service;

(b) the date retroactive eligibility was determined; or

(c) the date disability was determined.

(2) For purposes of this section:

(a) "Clean Claim" means a claim that can be processed without additional information or documentation from or action by the provider of the service;

(b) for inpatient hospital services, date of service is the date of discharge;

(c) the date of submission to the medicaid program is the date the claim is stamped "received" by the department or it's designee;

(d) according to ARM 46.12.304(4) a provider may submit a bill to medicaid after 90 days of a prior submission to another third party insurer.

(~~a~~3) Claims must be submitted in accordance with this rule to be valid.

(~~b~~4) Except as provided in subsection (~~17~~)~~(e)~~ of this rule, all medicaid claims submitted to the department are to be submitted on a state claim form either:

(~~i~~a) personally signed by that provider; or

(~~ii~~b) personally signed by a person who has actual written authority to bind and represent the provider for this purpose. The department may require a provider to furnish this written authorization.

(e5) All medicaid claims submitted to the department by a hospital for services provided by a physician who is required to relinquish fees to the hospital are to be submitted on a state claim form with the personal signature of either:

(~~i~~a) the physician provider; or

(~~ii~~b) a person who has actual written authority to bind and represent the physician provider for this purpose. The department may require a provider to furnish this written authorization.

(~~d~~6) The department may require a hospital provider to obtain on the claim form the signature of a physician providing services for which fees are relinquished to the hospital.

(e7) Electronic media claims may be submitted by a provider who enters into an agreement with the department for this purpose and who meets the department's requirements for documentation, record retention and signature requirements.

(~~i~~8) Claims submitted for the professional component of electrodiagnostic procedures which do not involve direct personal care on the part of the physician and performed by physicians on contract to the hospital may be submitted on state approved claim forms signed by the person with authority to bind the hospital under subsection (b) above.

(~~ii~~a) Electrodiagnostic procedures include echocardiology studies, electroencephalography studies, electrocardiology studies, evoked potential studies, holter monitors, telephonic or teletrace checks and pulmonary function tests.

(~~iii~~b) If, after review, the department determines that claims for hospital-based physician services are not submitted by a hospital provider in accordance with this subsection, the department may require the hospital provider to obtain the signature of the physician providing the service on the claim form.

Original subsections (2) through (3)(a) remain the same in text but are recategorized as subsections (9) through (10)(a).

(b) A provider may bill a recipient for services not covered by the medicaid program ~~for which the recipient has agreed in writing not to use medicaid coverage~~.

Original subsections (3)(c) through (7)(b) remain the same in text but are recategorized as subsections (10)(c) through (14)(b).

AUTH: Sec. 53-2-201 and 53-6-113 MCA
IMP: Sec. 53-6-101, 53-6-111 and 53-6-131 MCA

3. The proposed amendment will extend the billing deadline from 180 days to 12 months. However, the proposed amendment will require that providers submit a "clean claim" within the 12-month time line. The providers will be responsible for submitting claims early and monitoring the claim to be sure all necessary action has been taken within the 12-month deadline. These changes are necessary to revise billing procedures to clarify the respective responsibilities of the department and providers, and to impose a deadline by which clean claims must be submitted.

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 June 18, 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. Rolwes

Director, Social and Rehabilitation Services

Certified to the Secretary of State May 7, 1990.

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

In the matter of the amendment of Rule 46.12.505 pertaining to diagnosis related groups (DRGs)	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.12.505 PERTAINING TO DIAGNOSIS RELATED GROUPS (DRGS)

TO: All Interested Persons

1. On June 7, 1990, at 10:00 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 46.12.505 pertaining to diagnosis related groups (DRGs).

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

46.12.505 INPATIENT HOSPITAL SERVICES, REIMBURSEMENT

Subsections (1) through (2)(b) remain the same.

(c) The department computes a Montana average base price per case. This average budget neutral base price per case is ~~$1,416.00~~ 1,471.31 for fiscal year ending June 30, ~~1990~~ 1991.

Subsections (2)(d) through (12) remain the same.

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

3. The medicaid prospective payment diagnostic related group (DRG) system creates incentives for hospitals to contain the cost of services. Under the DRG system hospitals are paid a set price per service provided. If hospitals are able to provide the service at a cost less than the DRG payment, the hospital may retain the savings. The proposed amendment increases reimbursement to hospital providers.

The budget neutral base price per case has been developed by the department to maintain aggregate medicaid inpatient hospital expenditures at a level equal to what would have been expended under the previous reimbursement system based upon medicare cost reimbursement principles. The base price has been calculated by inflating forward the most recent audited cost data available for inpatient hospital services. For the rate year beginning July 1, 1990, the base price is calculated by multiplying the previous year's base price by 3.9%. This increase reflects the legislatively mandated inflation factor appropriated by the 1989 Legislature considering estimates of the increase in the Hospital Market Basket.

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 June 18, 1990.

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

Julie E. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State May 7, 1990.

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

In the matter of the amendment of Rule 46.12.703 pertaining to reimbursement for outpatient drugs	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.12.703 PERTAINING TO REIMBURSEMENT FOR OUTPATIENT DRUGS

TO: All Interested Persons

1. On June 6, 1990, at 11:00 a.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of Rule 46.12.703 pertaining to reimbursement for outpatient drugs.

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

46.12.703 OUTPATIENT DRUGS, REIMBURSEMENT Subsection (1) remains the same.

(2) The dispensing fee for filling prescriptions shall be determined for each pharmacy provider annually. The dispensing fee shall include the average sum of the individual provider's direct and indirect costs which can be allocated to the filling of prescriptions, plus an additional sum as an incentive factor, which shall be 7 1/2% of the average of all Montana pharmacy prescription charges for the year the cost survey is conducted. If the individual provider's usual and customary average dispensing fee for filling prescriptions is less than the foregoing method of determining the dispensing fee, then the lesser dispensing fee shall be applied in the computation of the payment to the pharmacy provider. The cost of filling a prescription shall be determined from the Montana dispensing cost survey. A copy of the Montana dispensing cost survey form is available upon request from the department. This Montana dispensing cost survey shall outline the information used in determining the actual average cost of filling a prescription for each pharmacy. A provider's failure to submit the cost survey form properly completed will result in the assignment of the minimum dispensing fee offered. The average cost of filling a prescription will be established on the basis of a determination of all direct and indirect costs that can be allocated to the cost of the prescription department and that of filling a prescription. The dispensing fees assigned shall range between a minimum of $2.00 and a maximum of ~~$4.00~~ 4.08. Out-of-state providers will be assigned a $3.50 dispensing fee.

(3) Notwithstanding subsection (2) above, effective July 1, ~~1989~~ 1990, all in-state pharmacies which became or become

providers after November 30, 1986, will be assigned an interim $3.50 dispensing fee until a dispensing fee survey, as provided for in subsection (2) above, can be completed for six months of operation. At that time, a new dispensing fee will be assigned which will be the lower of the dispensing fee calculated in accordance with subsection (2) for the pharmacy or the ~~$4.00~~ 4.08 dispensing fee. Failure to comply with the six months dispensing fee survey requirement will result in a dispensing fee of $2.00 being assigned.

Subsection (4) remains the same.

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

3. The reimbursement rate for the maximum allowed medicaid drug dispensing fee has had only one increase (July 1, 1989) since July of 1982. House Bill 100 passed by the 51st Legislature authorized an increase for each year of the biennium. This proposed rule change will implement the second increase for this biennium.

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 June 15, 1990.

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

6. This rule change will become effective July 1, 1990.

Director, Social and Rehabilitation Services

Certified to the Secretary of State May 7, 1990.

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

In the matter of the amendment of Rule 46.12.3803 pertaining to medically needy income levels	))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.12.3803 PERTAINING TO MEDICALLY NEEDY INCOME LEVELS

TO: All Interested Persons

1. On June 11, 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 46.12.3803 pertaining to medically needy income levels.

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

46.12.3803 MEDICALLY NEEDY INCOME STANDARDS Subsections (1) through (2) remain the same.

(3) The following table lists the amounts of adjusted income, based on family size, which may be retained for the maintenance of SSI and AFDC-related families. Since families are assumed to have a shelter obligation, an amount for shelter obligation is included in each level.

MEDICALLY NEEDY INCOME LEVELS
FOR SSI and AFDC-RELATED INDIVIDUALS
AND FAMILIES

Family Size	One Month Net Income Level	Two Month Net Income Level	Three Month Net Income Level
1	~~$368~~ 386	$ ~~736~~ 772	$~~1,104~~ 1,158
2	~~383~~ 400	~~766~~ 800	~~1,149~~ 1,200
3	~~408~~ 423	~~816~~ 846	~~1,224~~ 1,269
4	~~433~~ 445	~~866~~ 890	~~1,299~~ 1,335
5	~~507~~ 519	~~1,014~~ 1,038	~~1,521~~ 1,557
6	~~580~~ 594	~~1,160~~ 1,188	~~1,740~~ 1,782
7	~~654~~ 669	~~1,308~~ 1,338	~~1,962~~ 2,007
8	~~727~~ 744	~~1,454~~ 1,488	~~2,181~~ 2,232
9	~~762~~ 780	~~1,524~~ 1,560	~~2,286~~ 2,340
10	~~795~~ 814	~~1,590~~ 1,628	~~2,385~~ 2,442
11	~~826~~ 846	~~1,652~~ 1,692	~~2,478~~ 2,538
12	~~854~~ 876	~~1,708~~ 1,752	~~2,562~~ 2,628
13	~~882~~ 904	~~1,764~~ 1,808	~~2,646~~ 2,712
14	~~907~~ 930	~~1,814~~ 1,860	~~2,721~~ 2,790
15	~~930~~ 954	~~1,860~~ 1,908	~~2,790~~ 2,862
16	~~951~~ 976	~~1,902~~ 1,952	~~2,853~~ 2,928

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101 and 53-6-131 MCA

3. This change is being made because the Aid to Families with Dependent Children (AFDC) benefit standards are increasing effective July 1, 1990. The Medically Needy Income Standards are based on the AFDC benefit standards. This change is necessary because federal law requires that these standards follow AFDC benefit standards.

4. This rule change will become effective July 1, 1990.

5. 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 June 18, 1990.

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

Director, Social and Rehabilitation Services

Certified to the Secretary of State May 7, 1990.

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

In the matter of the amendment of Rule 46.12.4101 pertaining to qualified medicare beneficiaries eligibility for medicaid	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.12.4101 PERTAINING TO QUALIFIED MEDICARE BENEFICIARIES ELIGIBILITY FOR MEDICAID

TO: All Interested Persons

1. On June 11, 1990, at 10:00 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 46.12.4101 pertaining to qualified medicare beneficiaries eligibility for medicaid.

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

46.12.4101 QUALIFIED MEDICARE BENEFICIARIES, APPLICATION AND ELIGIBILITY FOR MEDICAID Subsections (1) through (1(b) remain the same.

(c) has countable resources not in excess of two times the resource limitation applicable to the federal supplemental security income (SSI) resource limitation at 42 USC 1382a. The department hereby incorporates 42 USC 1382a as amended through April 1, 1989, which sets forth the resource limitation applicable to the federal (SSI) program. Copies of 42 USC 1382a, as amended through April 1, 1989, are available from the ~~Economic~~ Family Assistance Division, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana ~~59620~~ 59604-4210; and

(d) has countable income not in excess of~~:~~ 100% of the federal poverty income standard.

~~(i) in 1989, 85% of the current federal poverty income standard;~~

~~(ii) in 1990, 90% of the federal poverty income standard;~~

~~(iii) in 1991, 95% of the federal poverty income standard; and~~

~~(iv) in 1992 and each succeeding year, 100% of the federal poverty income standard.~~

Subsections (2) through (6) remain the same.

AUTH: Sec. 53-6-101 MCA
IMP: Sec. 53-6-131 MCA

3. The amendment to section 46.12.4101 of the ARM would increase the Qualified Medicare Beneficiaries (QMB) income

level to 100% of poverty effective July 1, 1990. We are mandated to be at 90% of poverty at present. There is approximately a 70% federal match for Medicare buy-in premiums for individuals determined QMB eligible. There is no match for Medically Needy buy-in premiums. Raising the QMB income level to 100% would mean federal participation in buy-in premiums for individuals eligible for both the Medically Needy and Medicare programs.

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 June 18, 1990.

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

6. This rule change will be applied retroactively to July 1, 1990.

Director, Social and Rehabilitation Services

Certified to the Secretary of State May 7, 1990.

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

In the matter of the amendment of Rule 46.12.304 pertaining to third party liability	)))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULE 46.12.304 PERTAINING TO THIRD PARTY LIABILITY

TO: All Interested Persons

1. On June 8, 1990, at 10:00 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 46.12.304 pertaining to third party liability.

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

46.12.304 THIRD PARTY LIABILITY (1) ~~The department is subrogated to the recipient's right to third party recoveries to the extent necessary to reimburse the department for services provided by the Montana medicaid program, when the third party's liability is established after assistance is granted, and in any other case in which the liability of the third party exists, but was not treated as a current source of payment.~~ No payment shall be made by the department for any medical service for which there is a known third party who has a legal liability to pay for that medical service except those services specified in Section (6) below.

(2) ~~Before payments can be made to providers, all other identifiable sources of payment must be exhausted by recipients and/or providers, as follows:~~ A third party is defined as an individual, institution, corporation, or public or private agency that is or may be liable to pay all or part of the cost of medical treatment and medical-related services for personal injury, disease, illness, or disability of a recipient of medical assistance from the department or a county and includes but is not limited to insurers, health service organizations, and parties liable or who may be liable in tort.

~~(a) For known medicaid-eligible individuals, the provider shall use its usual and customary procedures for inquiring about sources of payment for non-medicaid patients. This inquiry includes ascertaining the identity of any potentially liable tort feasor only if such identity may be learned using the provider's usual and customary inquiry procedures.~~

~~(b) Prior to billing the Montana medicaid program for services rendered to a medicaid eligible individual, the provider shall bill any other source of payment identified by~~

~~means of the provider's usual and customary inquiry procedures, and which has been properly assigned by the individual to the provider if the provider requires assignment. The provider shall not be required to send to an identified source of payment more than one billing statement.~~

~~(c) For bills for which no source of payment is identified other than a potentially liable tort feasor and the Montana medicaid program, the provider shall bill the Montana medicaid program indicating that services were rendered as the result of a possible tortious act, and, if known, the identity of the tort feasor.~~

~~(d) If the provider receives no payment or notice of rejection from the liable third party within 45 days of the date of billing, it may bill the Montana medicaid program noting the lack of timely response. Medicaid will make payment for services rendered to the medicaid eligible individual in all cases within 180 days of the date of receipt of the bill.~~

~~(e) If the provider receives partial payment or notice of rejection of the claim within 45 days, it may bill the Montana medicaid program noting the rejection or the amount of credit. The Montana medicaid program will make payment of the balance due for services rendered to medicaid eligible individuals up to the maximum allowed by the rules of the department as soon as the normal course of business allows, and in all cases within 180 days of receipt of the bill.~~

(3) ~~In the event the provider receives payments from the Montana medicaid program and one or more third party sources, any amount received over and above the amount reimbursed by the Montana medicaid program shall be promptly (within 60 days) refunded by the provider to the Montana medicaid program. At the option of the provider, refunds shall be accomplished either by mailing a check made out to "State Department of Social and Rehabilitation Services" directly to that department at Box 4210, Helena, MT 59604, or by notifying the department in writing of the receipt and the amount of payment over and above the amount reimbursed by the Montana medicaid program, which amount shall then be automatically deducted from future payments to the provider. Regardless of the method of repayment chosen, the provider shall identify on the check or notifying document, the patient, by name and claim number, who received services for which the double payment was made and specify the dates of services for which double payments were received.~~ For known recipients, the provider shall use its same usual and customary procedures for inquiring about possible third party resources as is done for non-recipients.

(4) ~~In~~f the ~~event a~~ provider delivers to a ~~known medicaid~~ recipient or a recipient's legal representative a copy of a billing statement for services ~~for~~ which ~~payment has been received or is being sought from the Montana medicaid program~~ have been or may be billed to the department, the ~~provider~~ statement must clearly indicate ~~on the recipient's~~

~~copy that the department is subrogated to the right of the recipient to recover from liable third parties~~ that third party benefits or payments have been assigned to the department by the patient or that the department may have a lien upon such benefits.

(a) The words ~~"subrogation notice--billed to medicaid," or a similar statement giving clear notice of the department's subrogation rights, indelibly stamped, typed or printed on the statement~~ "medicaid has assignment of, or may have a lien upon third party benefits or payments" shall be sufficient to meet the notification requirement of ~~subsection (3)~~ this section.

(b) If a provider ~~fails to~~ does not meet the notification requirements of this section ~~(3),~~ the department may withhold or recover from the provider any amount ~~lost to the department as a result of that failure~~ equal to any amounts paid by a third party towards the services described in the statement given to the recipient.

(5) ~~Referrals shall be made to the Program Integrity Bureau, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, Montana, 59604. The program integrity bureau may send referrals to the department of revenue for recovery.~~ If a provider learns of the existence of a third party, that provider shall bill the third party prior to billing the department. If the department has knowledge of a third party and the provider has not complied with Sections (6) or (7) below, the department shall deny payment of the services.

(6) The department shall not deny payment of services solely because of the existence of a third party in the following circumstances:

(a) The primary diagnosis on the claim is for certain prenatal and preventive pediatric care as specified in the medicaid provider manual, copies of which may be obtained from the Montana Department of Social and Rehabilitation Services, P.O. Box 4210, 111 Sanders, Helena, MT 59604-4210. The provider may bill the third party or the department in this circumstance.

(b) The third party is an insurer under a health insurance policy provided by the absent parent of a recipient and that health insurance is obtained or maintained as a result of an enforcement action taken by the child support enforcement division against that absent parent, if the following provisions are met:

(i) the provider submits evidence that the third party has been billed;

(ii) the claim is submitted to the department thirty (30) or more days beyond the date of service and in compliance with the timely filing rules in ARM 46.12.303(1);

(iii) the provider certifies on the claim that notice of payment or denial of the claim has not been received from the third party; and

(iv) the claim is submitted directly to the third party liability unit (hereafter referred to as the TPL unit) within the department.

(c) The provider has billed the third party and has not received a reply from the third party, if the following provisions are met:

(i) the provider submits evidence of the date the third party was billed;

(ii) the claim is submitted ninety (90) or more days beyond the date established in (c)(i) and in compliance with the timely filing rules in ARM 46.12.303(1);

(iii) the provider certifies on the claim that notice of payment or denial has not been received; and

(iv) the provider submits the claim directly to the TPL unit.

(d) The claim is for services for which the department has been granted a waiver from use of the cost avoidance method and the department has chosen to use and continue to use that waiver, as identified in the medicaid provider manual.

(e) The provider is unable to obtain a valid assignment of benefits, if the following provisions are met:

(i) the provider submits documentation that it attempted to obtain assignment;

(ii) the provider certifies on the claim that assignment could not be obtained; and

(iii) the provider submits the claim directly to the TPL unit.

(7) The department shall pay its allowed amount for services, less any known third party payments for those services, for any claim where a known third party exists in the following circumstances:

(a) the claim is submitted under the provisions of subsection (6);

(b) the submitted claim clearly indicates the amount paid by the third party and includes documentation from the third party showing the amount paid by that third party; or

(c) the claim is submitted with a denial document which clearly shows that the third party denied the claim.

(8) In the event the provider receives a payment from a third party after the department has made payment, the provider shall refund to the department, within sixty (60) days of receipt of the third party payment, the lesser of the amount the department paid or the amount of the third party payment.

(a) The refund shall be made as described in ARM 46.12.303(2)(c) and shall indicate the name of the third party payor.

(b) The provider is entitled to retain any third party payments which exceed the medicaid allowed amount if all medicaid payments toward those services have been refunded to the department as required in this subsection.

(9) The department shall make no payment for services in those cases where, if the patient were not a medicaid recipient, the third party payment would constitute full payment with no further obligation owing from the recipient.

(10) For any inpatient stay where the patient is determined eligible as a recipient for any portion of that stay, and where there was any third party payment towards any portion of that stay, any and all third party payments will be reported to the department by the provider and those payments will be deducted from the department's allowed amount for that entire stay.

(11) For any service where an identified third party has only a potential liability as a tort-feasor, the provider may file a medical lien against that third party. The provider may bill the department prior to determination of liability of the third party if the provider notifies the TPL unit of the identity of the third party and its name and address if known. The provider may keep its lien in place and receive payment from the third party. If payment is received from the third party, the provider must refund to the department as described in subsection (8).

(12) A provider may not refuse to furnish services to a recipient based upon a third party's potential liability for the service.

AUTH: Sec. 53-6-113 MCA
IMP: Sec. 53-6-101 and 53-1-111 MCA

3. Current Medicaid third party liability related rules have become outdated due to many recent changes in federal and state law. The proposed rules are necessary to comply with federal law and to clarify the department's method of implementing federal rules.

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 June 18, 1990.

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

Julia E. Rohrer
Director, Social and Rehabilitation Services

Certified to the Secretary of State May 7, 1990.

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

In the matter of the adoption of Rule I and the amendment of Rules 46.12.602 and 46.12.605 pertaining to orthodontia and dentures	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF RULE I AND THE AMENDMENT OF RULES 46.12.602 AND 46.12.605 PERTAINING TO ORTHODONTIA AND DENTURES

TO: All Interested Persons

1. On June 8, 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 adoption of Rule I and the amendment of Rules 46.12.602 and 46.12.605 pertaining to orthodontia and dentures.

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

46.12.602 DENTAL SERVICES, REQUIREMENTS Subsection (1) remains the same.

(2) Medicaid reimbursement for dental care is limited to services specified in ~~this rule~~ [Rule I] or as otherwise provided for under ARM 46.12.605(13)(r).

Subsections (3) and (3)(a) remain the same.

(b) must be listed in ~~this rule~~ [Rule I] or as otherwise provided for under ARM 46.12.605(13)(r).

Original subsections (4) through (14) will be deleted and readopted and amended as [Rule I].

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

46.12.605 DENTAL SERVICES, REIMBURSEMENT Subsections (1) through (16) remain the same.

(17) Reimbursement for orthodontia shall be made in accordance with the fees in effect on February 28, 1990 plus two percent.

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

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

[RULE I] DENTAL SERVICES, COVERED PROCEDURES (1) The following dental services are covered by the program:

(a) Diagnostic and prevention:

(i) covered services:
(A) simple extractions;
(B) full mouth x-rays, or panorex, or cephalometric radiograms, the foregoing allowed at three year intervals;
(C) annual bite-wing x-rays;
(D) single periapical x-rays when required to diagnose a condition other than dental caries. The need for x-rays must be indicated on the claim;
(E) intra-oral occlusal maxillary or mandibular x-rays when required to diagnose a condition other than dental caries. The need for x-rays must be indicated on the claim;
(F) extra-oral, panoramic type maxillary or mandibular lateral x-rays when required to diagnose a condition other than dental caries. The need for x-rays must be indicated on the claim;
(G) examinations at twelve month intervals;
(H) prophylaxis and fluoride treatments at six month intervals;
(I) full mouth x-rays on edentulous patients prior authorized by the designated peer review organization;
(J) house calls;
(K) vitality tests;
(L) consultation, written justification for consultation must be provided;
(M) hospital and nursing home calls; and
(N) palliative emergency treatment of dental pain, including minor procedures, temporary fillings, incisions and drainage, topical medicaments, irrigation for pericoronitis.
(b) restoration of carious and fractural teeth:
(i) covered services:
(A) amalgam restorations on deciduous and permanent teeth;
(B) retention pins, up to 2 per tooth;
(C) silicate restorations;
(D) composite and resin restorations;
(E) acrylic jacket for immediate treatment of fractured anterior permanent tooth, including pulp testing, pulp capping, and use of metal band or crown form with sedative filling authorized by the designated review organization;
(F) treatment fillings;
(G) recementing of inlays; and
(H) pulpotomys prior authorized by the designated review organization.
(c) oral surgery:
(i) covered services:
(A) extensive oral surgery prior authorized by the designated review organization:
(B) hospital dental treatment prior authorized by the designated review organization;
(C) I and D of extra-oral abscess;
(D) removal of tooth including shaping of ridge bone;

(E) surgical removal of tooth, soft tissue impaction;
(F) surgical removal of tooth, partial bone impaction;
(G) surgical removal of tooth, complete bone impaction;
(H) alveolectomy, not in conjunction with extractions;
(I) excision of hyperplastic tissue necessary due to medication reaction;
(J) removal of retained or residual roots and foreign bodies in bony tissue;
(K) removal of cyst;
(L) removal of retained or residual roots and foreign bodies in maxillary sinus;
(M) frenectomy;
(N) removal of exostosis, torus, maxillary or mandibular;
(O) biopsy;
(P) maxilla, open reduction;
(Q) fracture, simple, maxilla, treatment and care;
(R) mandible, open reduction;
(S) fracture, simple, mandible, treatment and care; and
(T) oral surgery procedures not listed in this rule if they are:
(I) listed in ARM 46.12.2003;
(II) performed by a dentist;
(III) provided in a medical emergency arising out of trauma; and
(IV) authorized by the designated review organization.
(d) endodontic services:
(i) general requirements:
(A) nonemergency endodontics must be prior authorized by the designated review organization.
(ii) covered services:
(A) root canal treatment on upper or lower six anterior teeth including chemotherapy and mechanical preparation, and filling;
(B) root canal treatment on posterior teeth except third molars including chemotherapy and mechanical preparation, and filling, maximum of three roots per tooth;
(C) emergency root canals and apicoectomies justified by means of finished x-ray's attached to claims;
(D) root canal and apicoectomy combined operation; and
(E) apicoectomy not in conjunction with root canal.
(e) dentures or the relining or jumping of dentures:
(i) general requirements:
(A) services described in subsections (1)(e)(ii)(A) through (F), (J), (K), (M), (N), (1)(e)(iii)(A), (B) and (C) must be prior authorized by the designated review organization;
(B) services must be provided by a dentist or prescribed by a dentist and provided by a licensed denturist;

(C) requests for full prosthesis must show the approximate date of the most recent extractions, and/or the age and type of the present prosthesis.

(ii) covered services:

(A) replacement of lost dentures if the loss is documented by a caseworker;

(B) cured and resin relines, upper and lower, on immediate dentures no earlier than three months after placement of denture;

(C) cured and resin relines, upper and lower, at three year intervals;

(D) duplicate (jump) upper and/or lower complete denture or partial dentures prior authorized by the peer review organization;

(E) complete maxillary denture, acrylic, plus necessary adjustment;

(F) complete mandibular denture, acrylic, plus necessary adjustment;

(G) broken denture repair, no teeth or metal involved;

(H) denture adjustment as a separate service when dentist or denturist did not make dentures;

(I) replacing broken teeth on denture;

(J) jumps or replacement for dentures that are between five (5) and ten (10) years old;

(K) replacement of dentures over ten years old when the treating dentist documents the need for replacement;

(L) tissue conditioners in conjunction with placement of dentures;

(M) replacement of partial dentures that are over five (5) years old with full dentures; and

(N) placing name on a new, full or partial denture.

(iii) the limits on coverage of denture services may be exceeded when the designated review organization determines that the existing dentures are causing the recipient serious physical health problems.

(f) partial dentures:

(i) general requirements:

(A) services must be prior authorized by the designated review organization; and

(B) services must be provided by a dentist or prescribed by a dentist and provided by a licensed denturist.

(ii) covered services:

(A) acrylic upper or lower partial denture with two chrome or gold clasps and rests and adjustments, to replace a minimum of 4 posterior teeth or any number of anterior teeth;

(B) maxillary or mandibular cast chrome partial denture replacing any number of posterior teeth but must include one or more anterior teeth and adjustments;

(C) acrylic denture, without clasps, supplying 1 to 4 anterior teeth (flipper);

(D) additional teeth, permanent - on acrylic denture (flipper);
(E) adding teeth to partial to replace extracted natural teeth;
(F) replacing clasp, new clasp; and
(G) repairing (welding or soldering) palatal bars, lingual bars, metal connectors, etc. on chrome partials.
(g) periodontal services:
(i) general requirements:
(A) services must be prior authorized by the designated review organization.
(ii) covered services:
(A) deep scaling and curettage up to four one hour sessions for disabled and up to two one hour sessions for non-disabled; and
(B) gingival resection for the treatment of gingival hyperplasia due to medication reactions. Treatment shall cover posterior and anterior teeth on uppers and lowers (sextants).
(h) crowns and fixed bridges:
(i) general requirements:
(A) services must be prior authorized by the designated review organization.
(ii) covered services:
(A) polycarbonate (ion type) with acrylic liner crowns for the upper and lower 6 anterior teeth;
(B) chrome crowns on posterior teeth not restorable by conventional filling material;
(C) fixed bridges on anterior teeth only;
(D) ceramic bridges replacing no more than 2 teeth;
(E) ceramic pontics;
(F) steele's facing type pontics; and
(G) cured acrylic, laboratory processed, veneer pontics.
(i) pedodontic services:
(i) covered services:
(A) spacers and crowns;
(B) amalgam restorations;
(C) chrome crown prior authorized by the designated peer review organization;
(D) immediate treatment of fractured anterior permanent tooth, including pulp testing, pulp capping and use of metal band or crown form with sedative filling;
(E) chrome crown and loop spacer or other types of space maintainers prior authorized by the designated review organization;
(F) bilateral space maintainer or lingual arch, prior authorized by the designated peer review organization, at least one tooth must be missing on each side of the mouth; and
(G) stainless steel band.
(j) orthodontia for recipients age twenty-one and older who have maxillofacial anomalies that must be corrected surgi-

cally and for which the orthodontia is a necessary adjunct to the surgery.

(2) X-rays are required with requests for the following dental services:

(A) all crowns;
(B) endodontic cases;
(C) all extractions except simple extractions;
(D) any case where pulp chamber is involved; and
(E) removal of impacted teeth.

(3) Cosmetic dentistry is not a benefit of the medicaid program.

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

4. In 1988, the coverage of replacement dentures was significantly reduced and coverage of new orthodontic cases was eliminated in response to the need for reduced medicaid expenditures. After almost two years of experience with the more restrictive coverage of dentures and the elimination of orthodontia, these limitations need to be adjusted to allow for the provision of orthodontia that is necessary to the provision of surgical services for the correction of maxillo-facial anomalies; and allow for the replacement of partial dentures with full dentures at an earlier period if necessary. The listing of services that may be provided will be generally reformatted.

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 June 18, 1990.

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

6. These rules will be applied retroactively to January 1, 1990.

Julia E. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State May 7, 1990.

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

In the matter of the amendment of Rules 46.12.522, 46.12.527, 46.12.537, 46.12.547, 46.12.573, 46.12.582, 46.12.589, 46.12.605, 46.12.905, 46.12.915, 46.12.1015 and 46.12.1025 pertaining to a two per cent (2%) increase in medicaid fees for provider services	))))))))))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 46.12.522, 46.12.527, 46.12.537, 46.12.547, 46.12.573, 46.12.582, 46.12.589, 46.12.605, 46.12.905, 46.12.915, 46.12.1015 and 46.12.1025 PERTAINING TO A TWO PER CENT (2%) INCREASE IN MEDICAID FEES FOR PROVIDER SERVICES

TO: All Interested Persons

1. On June 7, 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 Rules 46.12.522, 46.12.527, 46.12.537, 46.12.547, 46.12.573, 46.12.582, 46.12.589, 46.12.605, 46.12.905, 46.12.915, 46.12.1015 and 46.12.1025 pertaining to a two per cent (2%) increase in medicaid fees for provider services.

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

46.12.522 PODIATRY SERVICES, REIMBURSEMENT/GENERAL REQUIREMENTS AND MODIFIERS Subsections (1) through (3) remain the same.

(4) Effective July 1, ~~1989~~ 1990, the reimbursement rates listed in ARM 46.12.523 and 46.12.524 will be increased by ~~two~~ four percent (~~2~~4%). All items paid by report will remain at the rate indicated.

Subsection (5) remains the same.

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

46.12.527 OUTPATIENT PHYSICAL THERAPY SERVICES, REIMBURSEMENT Subsections (1) through (1)(c) remain the same.

(2) Effective July 1, ~~1989~~ 1990, the reimbursement rates listed will be increased by ~~two~~ four percent (~~2~~4%). All items paid by report will remain at the rate indicated.

Subsection (3) remains the same.

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

46.12.537 AUDIOLOGY SERVICES, REIMBURSEMENT Subsections (1) through (2)(c) remain the same.

(3) Effective July 1, ~~1989~~ 1990, the reimbursement rates listed will be increased by ~~two~~ four percent (~~2~~4%). All items paid by report will remain at the rate indicated.

Subsection (4) remains the same.

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

46.12.547 OCCUPATIONAL THERAPY SERVICES, REIMBURSEMENT Subsections (1) through (2)(c) remain the same.

(3) Effective July 1, ~~1989~~ 1990, the reimbursement rates listed will be increased by ~~two~~ four percent (~~2~~4%). All items paid by report will remain at the rate indicated.

Subsection (4) remains the same.

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

46.12.573 CLINIC SERVICES, REIMBURSEMENT Subsection (1) remains the same.

(a) group I procedures $~~232.00~~ 237.00;
(b) group II procedures $~~275.00~~ 281.00;
(c) group III procedures $~~297.00~~ 303.00; and
(d) group IV procedures $~~338.00~~ 345.00.

Subsections (3) remains the same.

(4) The negotiated rate for each mental health center shall be based on the allowable rate for each service for the state fiscal year 1985 established by the department of institutions plus ~~two~~ four ~~(2)~~ percent (4%).

Subsection (4)(a) remains the same.

(i) individual therapy - $~~14.30~~ 14.59;
(ii) day treatment - $~~1.87~~ 1.91;
(iii) group therapy and family therapy - $~~3.58~~ 3.65; and
(iv) emergency services - $~~14.49~~ 14.78

Subsections (4)(b) through (5)(c) remain the same.

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

46.12.582 PSYCHOLOGICAL SERVICES, REIMBURSEMENT Subsections (1) through (2)(c) remain the same.

(3) $~~42.28~~ 43.12 for individual psychological services, family therapy and psychological testing; or

(4) $~~12.66~~ 12.92 per hour and one half session for group psychological services.

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

46.12.589 LICENSED CLINICAL SOCIAL WORK SERVICES, REIMBURSEMENT Subsections (1) through (3) remain the same.
(a) ~~$33.80~~ 34.49 per hour for individual counseling;
(b) ~~$10.14~~ 10.34 per hour and one half session for group counseling; or
(c) ~~$33.80~~ 34.49 per hour for family therapy.

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

46.12.605 DENTAL SERVICES, REIMBURSEMENT Subsections (1) through (1)(c) remain the same.
(2) Effective July 1, ~~1989~~ 1990, the reimbursement rates listed will be increased by ~~two~~ four percent (~~2~~4%). All items paid by report will remain at the rate indicated.
Subsections (3) through (16) remain the same.

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

46.12.905 OPTOMETRIC SERVICES, REIMBURSEMENT Subsections (1) through (1)(c) remain the same.
(2) Effective July 1, ~~1989~~ 1990, the reimbursement rates listed will be increased by ~~two~~ four percent (~~2~~4%). All items paid by report will remain at the rate indicated.
Subsection (3) remains the same.

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

46.12.915 EYEGLASSES, REIMBURSEMENT Subsections (1) through (1)(c) remain the same.
(i) Effective July 1, ~~1989~~ 1990, the reimbursement rates listed will be increased by ~~two~~ four percent (~~2~~4%). All items paid by report will remain at the rate indicated.
Subsections (2) through (4)(b) remain the same.

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

46.12.1015 SPECIALIZED NONEMERGENCY MEDICAL TRANSPORTATION, REIMBURSEMENT Subsections (1) through (4) remain the same.

(a) Transportation under 16 miles.....$ ~~9.87~~ 10.07 one way
$~~17.63~~ 17.98 round trip

Transportation over 16 miles.....$ ~~.62~~ 63 per mile

Waiting time for transportation over 16 miles.....$ ~~4.93~~ 5.03 per hour Computed in 15 minute increments or fraction thereof

Waiting time for under 16 miles....No payment
When one way transportation is over 16 miles and the unloaded miles exceed ten percent of the loaded miles, the miles from the departure point to the pick-up point plus the miles from the delivery point to the departure point shall be paid for at the rate of.....$ ~~.32~~ .33 per mile

Subsections (4)(b) and (4)(c) remain the same.

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

46.12.1025 AMBULANCE SERVICES, REIMBURSEMENT Subsections (1) through (5)(b) remain the same.

(c) the individual provider's June ~~1989~~ 1990 medicaid rate plus 2%.

Subsection (6) remain the same.

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

3. The reimbursement rates for the services in this proposed rule have had only a 2% increase (July 1, 1989) since July of 1982. House Bill 100, passed by the 51st Legislature authorized for the services a 2% increase for each year of the biennium. These proposed rules implement the second of those 2% increases.

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 June 18, 1990.

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

Julia E. Robinson

Director, Social and Rehabilitation Services

Certified to the Secretary of State May 7, 1990.

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 ADOPTION OF AMENDMENT TO RULE 2.13.102

TO: All Interested Persons

1. On March 15, 1990, at pages 397-398, issue number 5, Montana Administrative Register, the Department of Administration published notice of proposed amendment of administrative rule 2.13.102 relating to the use of state telecommunications systems.

2. One comment was received. The Legislative Council inquired into the reasonable necessity of the rule amendment. The department responds that the university system made the request to facilitate student access to the state's telecommunications network stating that student access to these facilities would further the educational objectives of the system and do so at a lower overall cost to the university and the students that it serves.

3. The rule is amended as noticed.

David P. Ashley
Director, Department of Administration

Certified to the Secretary of State May 7, 1990.

BEFORE THE FINANCIAL DIVISION
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the adoption of new rules pertaining to the application procedure for engaging in the escrow business, change of ownership of business, and examination of business

) NOTICE OF ADOPTION OF NEW RULE I (8.80.701) APPLICATION PROCEDURE FOR AUTHORIZATION TO ENGAGE IN THE ESCROW BUSINESS, II (8.80.702) CHANGE OF OWNERSHIP IN ESCROW BUSINESSES AND III (8.80.703) EXAMINATION OF ESCROW BUSINESS

TO: All Interested Persons:

1. On December 7, 1989, the Department of Commerce, Financial Division, published a notice of public hearing on the proposed adoption of the above-stated rules at page 2015, 1989 Montana Administrative Register, issue number 23. The hearing was held on January 3, 1990, in Helena, Montana.

2. The Department adopted new rules 8.80.702 and 8.80.703 exactly as proposed and adopted 8.80.701 as proposed but with the following changes:

"8.80.701 APPLICATION PROCEDURE FOR AUTHORIZATION TO ENGAGE IN THE ESCROW BUSINESS (1) through (4) will remain as proposed.

(5) An application fee of ~~five-hundred-dollars-($500)~~ three hundred fifty dollars ($350) shall be paid to the state of Montana at the time of application, and thereafter shall not be refundable either in whole or in part."

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

3. The Department has thoroughly considered all comments received. Those comments and the Department's responses are as follows:

COMMENT: Three witnesses commented on the amount of the license application fee referred to in paragraph (5). The witnesses argued the $500 fee was excessive.
RESPONSE: The Department concurred that the fee could be a little high as proposed and could be revised in the light of actual cost experience and has amended subsection (5) to reflect a change from $500 to $350 for the application fee.

COMMENT: One witness inquired whether there would be a periodic license fee.
RESPONSE: The proposed license is not subject to periodic renewal.

COMMENT: Four witnesses testified on 8.80.703 Examination of Escrow Business. The witnesses stated that their concerns centered on what an examination or audit would cover, potentially high cost, frequency of examinations, reasons for scheduling an examination or audit, who would perform the

examination or audit and whether a CPA "audit" would be an acceptable alternative.

RESPONSE: Section 32-7-108, MCA, mandates the director to perform examinations as necessary and requires him to "establish fees commensurate with the costs ... of examining an escrow business." Section 32-7-110, MCA, also authorizes fees charged for examinations. Section 32-7-115, MCA, requires that "licensees annually submit to the director a statement of condition, certified by an independent public accountant ..." In lieu of the statement of condition, the licensee may request an examination by the department. This section also details the records to be maintained by the licensees "... to enable the director at any time to determine whether the escrow transactions performed by the licensee comply with the provisions of this part." Section 32-7-122, MCA, provides the conditions under which the director may "investigate" an escrow business. Section 32-7-122(2)(a), MCA, gives the director supervisory authority in different situations, including when "it appears ... that the assets or capital of any escrow business or company are impaired or the licensee's affairs are in an unsafe condition ..." Because these concerns are addressed by statute, the Department finds no reason to amend the rule.

4. No other comments or testimony were received.

FINANCIAL DIVISION

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, May 7, 1990.

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

In the matter of amendment of quota rules and the adoption of pooling rules as a method of payment of milk producer prices	NOTICE OF REFERENDUM APPROVAL NOTICE OF AMENDMENT OF RULES 8.86.501 through 8.86.506 QUOTA RULES AND THE ADOPTION OF NEW RULES 8.86.511 THROUGH 8.86.515 POOLING RULES DOCKET #98-89

TO: ALL LICENSEES UNDER THE MONTANA MILK CONTROL ACT (SECTION 81-23-302, MCA, AND FOLLOWING), AND ALL INTERESTED PERSONS:

1. On December 21, 1989, the Montana Board of Milk Control published notice of the proposed amendment of rules 8.86.501, 8.86.502, 8.86.503, 8.86.504, 8.86.505 and 8.86.506; and proposed adoption of new rules 8.86.511, 8.86.512, 8.86.513, 8.86.513, 8.86.514 and 8.86.515 as a method of payment of milk producer prices. Notice was published at page 2109 of the 1989 Montana Administrative Register, issue no. 24, as MAR NOTICE 8-86-36.

2. On April 12, 1990, the Montana Board of Milk Control published notice of amendment of rules 8.86.501 through 8.86.506, quota rules, and adoption of rules 8.86.511 through 8.86.515, pooling rules. This was published at page 705 of the 1990 Montana Administrative Register, issue no. 7.

3. The rule numbers 8.86.511 through 8.86.515 and amendments to rule numbers 8.86.501 through 8.86.506 will become effective because the statewide pooling arrangement was approved by referendum of the affected milk dealers. These previously adopted pooling rules and the amended quota rules will be effective June 1, 1990. They will be in the form originally adopted by the board of milk control on April 12, 1990.

4. Referendum ballots were mailed to all affected producers, producer-distributors, and distributors on April 9, 1990. The results of the ballots were officially tabulated on April 27, 1990. The results of the referendum were that 123 interested persons voted in favor of the proposal and 50 voted against it. Based on each producer's average Montana monthly production for the twelve month period immediately preceding

the referendum, those persons voting in favor of the plan represented more than 50% of the total pounds of milk produced in Montana that is to be included in the pool.

5. This notice of referendum approval is intended to put into effect the matters contemplated by MAR NOTICE 8-86-36 and to satisfy all requirements of rule making proceedings under sections 81-23-302, 2-4-302, 2-4-305, and 2-4-306, MCA.

MONTANA BOARD OF MILK CONTROL
MILTON J. OLSEN, Chairman

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

Certified to the Secretary of State May 7, 1990.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the 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 10.6.119A	))))))	NOTICE OF AMENDMENT AND REPEAL OF RULES FOR ALL SCHOOL CONTROVERSY CONTESTED CASES BEFORE COUNTY SUPERINTENDENTS OF THE STATE OF MONTANA

TO: All Interested Persons.

1. On March 15, 1990, the Office of Public Instruction published notice of proposed amendment and repeal of the rules above at page 436 of the Montana Administrative Register, 1990 Issue No. 5.

2. No comments were received and the rules are being amended and repealed as proposed.

By: Nancy Keenan
Nancy Keenan
Superintendent of Public Instruction

Certified to the Secretary of State on May 7, 1990.

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the adoption of new rules I through XVII relating to special education due process procedures	NOTICE OF ADOPTION OF RULES 10.16.2401 THROUGH 10.16.2417

TO: All Interested Persons.

1. On March 15, 1990, the Office of Public Instruction published notice of proposed adoption of the new rules above at page 440 of the Montana Administrative Register, 1990 Issue No. 5.

2. Based on the comments received, the reference to Section 20-7-420, MCA, in all the rules is an error and should read 20-7-402.

3. The federal Office of Special Education Programs (OSEP) requested that a parenthetical statement be added to Rule III (10.16.2403) (1)(b) and (1)(c)(ii)(B) to clarify that the ten days and the seven days referenced in these subsections are counted as part of the 45-day time period allowed for the issuance of the final order in a due process hearing pursuant to Rule XVII (10.16.2417). Based on this comment, the rule is being adopted as proposed with the underlined changes given below.

RULE III (10.16.2403) SPECIAL EDUCATION DUE PROCESS HEARING PROCEDURES (1) through (1)(a) same as proposed rule.

(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. (This ten days is counted as part of the 45-day period allowed for the issuance of the final order in a due process hearing. See ARM 10.16.2417). 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) through (ii)(A) same as proposed rule.

(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. (This seven days is counted as part of the 45-day period allowed for the issuance of the final order in a due process hearing. See ARM 10.16.2417). 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) through (iii)(B)(2) same as proposed rule.

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

4. No additional comments were received and the new rules are being adopted as proposed.
(AUTH: Sec. 20-7-402, MCA; IMP: Sec. 20-7-402, MCA)

5. Rules I through XVII will be codified in the order given as ARM 10.16.2401 through 10.16.2417.

By: Nancy Keenan
Nancy Keenan
Superintendent of Public Instruction

Certified to the Secretary of State on May 7, 1990.

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

In the Matter of the Adoption of Rules I through VII, pertaining to disposal of underground coal mine waste, Rules VIII through XI pertaining to individual civil penalties, and Rule XII, pertaining to restrictions on financial interests of multiple interest advisory boards; and amendment of ARM 26.4.301, 26.4.303, 26.4.304, 26.4.305, 26.4.313, 26.4.321, 26.4.324, 26.4.325, 26.4.404, 26.4.405, 26.4.501, 26.4.522, 26.4.624, 26.4.639, 26.4.711, 26.4.721, 26.4.805, 26.4.836, 26.4.837, 26.4.1129, and 26.4.1221.	NOTICE OF ADOPTION AND AMENDMENT OF STRIP AND UNDERGROUND COAL AND URANIUM MINING AND RECLAMATION RULES

TO: All Interested Persons

1. On September 14, 1989, the Department of State Lands and Board of Land Commissioners published notice of hearing on proposed adoption of Rules I through VII, pertaining to disposal of underground coal mine waste, Rules VIII through XI pertaining to individual civil penalties, and Rule XII, pertaining to restrictions on financial interests of multiple interest advisory board members and amendment of ARM 26.4.301, 26.4.303, 26.4.304, 26.4.305, 26.4.313, 26.4.321, 26.4.324, 26.4.325, 26.4.404, 26.4.405, 26.4.501, 26.4.522, 26.4.624, 26.4.639, 26.4.711, 26.4.721, 26.4.805, 26.4.836, 26.4.837, 26.4.1129, and 26.4.1221 at page 1309 of the 1989 Montana Administrative Register, Issue No. 17. On February 22, 1990, the Department and Board gave Supplemental Notice of rulemaking and reopening of the comment period at page 366A of the 1990 Montana Administrative Register, Issue No. 4.

2. The Department and Board have adopted Rules IV (26.4.925), VIII (26.4.1217), IX (26.4.1218), X (26.4.1219), XI (26.4.1220), XII (26.4.1255) as proposed. The other new rules have been adopted with the following modifications:

RULE I (26.4.920) PLACEMENT AND DISPOSAL OF UNDERGROUND DEVELOPMENT WASTE: SPECIAL APPLICATION REQUIREMENTS (1) Each application must contain, where applicable, a narrative and appropriate maps and cross-sections prepared to meet the standards of ARM 26.4.305, describing the proposed disposal methods

and sites for placing underground development waste in accordance with Rules III, IV, V, and VI.

(2) Each plan must describe the geotechnical investigation, design, construction, operation, maintenance, and removal, if appropriate, of the site or structure and be prepared in accordance with ARM 26.4.320. (AUTH: 82-4-204, 205, and 231, MCA; IMP: 82-4-222, MCA.)

RULE II (26.4.930) PLACEMENT AND DISPOSAL OF COAL PROCESSING WASTE: SPECIAL APPLICATION REQUIREMENTS (1) through (2)(a)(ii) Same as proposed.

(iii) contain ~~preliminary~~ hydrologic and geologic information required to assess the hydrologic impact of the structure;

(2)(a)(iv) through (2)(b)(iv) Same as proposed.

RULE III (26.4.924) DISPOSAL OF UNDERGROUND DEVELOPMENT WASTE: GENERAL REQUIREMENTS (1) To the extent that underground development waste is not proposed for backstowing, it must be demonstrated, to the satisfaction of the department, that valid physical, economic, safety, environmental or other reasons exist for not doing so. Underground development waste to be returned to underground mine workings must be disposed in accordance with a program approved by the department and the mine safety and health administration.

(2) through (3)(e) Same as proposed.

(4) Each waste disposal structure must be designed using current prudent design standards, certified by a registered professional engineer experienced in the design of similar earth and waste structures, and approved by the department. Coal waste refuse structures must meet the requirements of 30 C.F.R. 77.214 and 77.215.

(5) and (6) Same as proposed.

(7) Except for head-of-hollow and valley fills, disposal structures must be located on the most moderately sloping and naturally stable areas available, except that the department may approve disposal in another area upon ~~finding~~determining that disposal in that area would be more environmentally protective. Materials suitable for disposal must be placed upon or above a natural terrace, bench, or berm, if such placement provides additional stability and prevents mass movement.

(8) through (11) Same as proposed.

(12) If the disposal area contains springs, natural or man-made watercourses, or wet-weather seeps, an underdrain system consisting of durable rock must be constructed ~~from the wet areas~~ in a manner that prevents infiltration of the water into the underground development waste material and to ensure stability of the disposal structure.

(13) through 18(a) Same as proposed.

(b) The inspections must be made at least quarterly throughout construction and during critical construction periods. The department may require more frequent inspections during any construction period, as necessary. Critical construction periods include, at a minimum:

(18)(b)(i) through (18)(b)(iv) Same as proposed.

(c) ~~Regular~~Quarterly inspections by the engineer or specialist must also be conducted during placement and compaction of underground development waste. More frequent inspections must be conducted if the department determines that a danger of harm exists to the public health and safety or the environment or that more frequent inspection is necessary to ensure compliance. Inspections must continue until the refuse structure has been finally graded and revegetated or until a later time as required by the department.

(d) The qualified registered professional engineer shall provide a certified report to the department ~~promptly~~ within 7 working days after each inspection that the structure has been constructed and maintained as designed and in accordance with the approved plan and this sub-chapter. The report must include appearances of instability, structural weakness, and other hazardous conditions.

(18)(e) and (18)(f) Same as proposed.

(19) If any inspection discloses that a potential hazard exists, the department must be informed promptly of the finding and of the emergency procedures formulated for public protection and remedial action. If adequate procedures cannot be formulated or implemented, the department must be notified immediately. The department shall then notify the appropriate emergency agencies that other emergency procedures are required to protect the public. The department shall also notify the owner of land upon which the disposal structure is located (if that owner is different from the mining company), adjacent landowners, residences, and businesses ~~as appropriate~~ that could be adversely affected, including those at least 1 mile down gradient from the disposal site, of the potential hazard and of the actions being taken. (AUTH: 82-4-204, 205, and 231(10)(h), MCA; IMP: 82-4-227, 231, 232, and 233, MCA.)

RULE V (26.4.926) DISPOSAL OF UNDERGROUND DEVELOPMENT WASTE: HEAD OF HOLLOW FILL (1) Disposal of underground development waste in a head-of-hollow fill must meet all the requirements of Rules III and IV~~, except that a rock-core chimney drain may be utilized instead of the subdrain and surface diversion system if the fill is not located in an area containing an intermittent or perennial stream~~.

~~(2) The alternative rock-core chimney drain system incorporated into head-of-hollow fills must be designed and constructed as follows:~~

~~(a) The fill must have, along the vertical projection of the main buried stream channel or fill a vertical core of durable rock at least 16 feet wide, or such greater width as the department may require, which must extend from the toe of the fill to the head of the fill, and from the base of the fill to the surface of the fill. A system of lateral rock underdrains must connect this rock core to each area of potential drainage or seepage in the disposal area. Rock used in the rock core and underdrains must meet the requirements of Rule III(13).~~

~~(b) A filter system to ensure the proper functioning of the rock core must be designed and constructed using standard geotechnical engineering methods.~~

~~(c) The grading must drain surface water from the outslope of the fill toward the rock core. The maximum slope of the top of the fill must be 1v:5h, unless otherwise approved in writing by the department. A drainage sump may be maintained at the head of the fill during and after construction, to intercept surface runoff and discharge runoff through or over the rock drain, if stability of the fill is not impaired. In no case may this sump have a potential for impounding more than 10,000 cubic feet of water. Terraces on a fill must be graded with a 3 to 5 percent slope toward the fill and a 1 percent slope toward the rock core.~~

(2)~~(3)~~ The drainage control system for the head-of-hollow fill must be capable of passing safely the runoff from a 100-year, 24-hour precipitation event, or larger event specified by the department. (AUTH: 82-4-204, 205, and 231(10)(h), MCA; IMP: 82-4-227, 231, 232, and 233, MCA.)

RULE VI (26.4.927) DISPOSAL OF UNDERGROUND DEVELOPMENT WASTE: DURABLE ROCK FILLS (1)(a) The department may approve disposal of underground development waste in a durable rock fill on a site-specific basis, provided the method of construction is certified by a registered professional engineer experienced in the design of earth and rockfill embankments and provided the requirements of Rule III and this rule are met. Underground development waste is eligible for disposal in durable rock fills if it is rock material consisting of at least 80 percent by volume of sandstone, limestone, or other rocks that do not slake in water and that are non-acid, non-toxic, non-acid-forming and non-toxic-forming. Resistance of the waste to slaking must be determined by using the slake index and slake durability tests in accordance with guidelines and criteria established by the department. Underground development waste must be transported and placed in a specified and controlled manner that will ensure stability of the fill.

(1)(b) and (1)(c) Same as proposed.

(2)(a) ~~Stability analyses must be made by a~~ A qualified registered professional engineer shall conduct stability analyses in accordance with Rule I and shall certify that the design of the durable rock fill will ensure the stability of the fill and meet all other applicable requirements.

(2)(b) through (7)(b) Same as proposed.

(c) A ditch must be constructed on the inside of each terrace to intercept runoff and divert it toward the channels specified in (6) of this rule. (AUTH: 82-4-204, 205, and 231(10)(h), MCA; IMP: 82-4-227, 231, 232, and 233, MCA.)

RULE VII (26.4.932) DISPOSAL OF COAL PROCESSING WASTE (1) To the extent that coal processing waste is not proposed for backstowing, it must be demonstrated to the satisfaction of the department that valid physical, economic, safety, environmental or other reasons exist for not doing so. Coal processing

waste to be returned to underground mine works must be disposed of in accordance with a program approved by the department and the mine safety and health administration.

(2) Same as proposed.

(3) Coal processing waste may be disposed of in head-of-hollow or valley fill configurations, including in an underground development waste fill, if ~~the total drainage area above the disposal area is less than one square mile and~~ the processing waste is:

(3)(a) through (9) Same as proposed.

(10) Coal processing waste fires must be extinguished by the operator in accordance with a plan approved by the department and in compliance with the applicable requirements of the mine safety and health administration. The plan must contain, at a minimum, provisions to ensure that only those persons authorized by the operator and who have an understanding of the procedures to be used may be involved in the extinguishing operations. (AUTH: 82-4-204, 205, and 231(10)(h), MCA; IMP: 82-4-227, 231, 232, and 233, MCA.)

3. The Department and Board have amended the existing rules as proposed except for ARM 26.4.301, 26.4.305, and 26.4.805. These rules have been amended as follows:

26.4.301 DEFINITIONS The following definitions apply to all terms used in the Strip and Underground Mine Reclamation Act and sub-chapters 3 through 13 of this chapter:

(1) through (31) Same as proposed.

~~(31)~~(32) "Cumulative hydrologic impact area" means the area, including but not limited to the permit and mine plan area, within which impacts to the hydrologic balance resulting from the proposed operation may interact with the impacts of all previous, existing and anticipated mining on surface and ground water systems. "Anticipated mining" includes, at a minimum, the entire projected lives through bond release of all operations with pending applications and all operations required to meet diligent development requirements for leased federal coal for which there is actual mine-development information available.

(33) through (47) Same as proposed.

~~(47)~~(48) "Head-of-hollow fill" means a fill structure consisting of any material, other than non-coal ~~processing waste and~~ organic material, placed in the uppermost reaches of a hollow or a naturally occurring drainage where side slopes of the existing hollow or drainage measured at the steepest point are greater than 20% or the average slope of the profile of the hollow or drainage from the toe of the fill to the top of the fill is greater than 10%. In head-of-hollow fills, the top surface of the fill, when completed, is at approximately the same elevation as the adjacent ridge line, and no significant area of natural drainage occurs above the fill draining into the fill area. (See ARM 26.4.520(14).)

(49) through (127) Same as proposed.

~~(126)~~(128) "Valley fill" means a fill structure consisting of any material other than non-coal ~~waste and~~ organic material

that is placed in a valley where side slopes of the existing valley measured at the steepest point are greater than 20% or the average slope of the profile of the valley from the toe of the fill to the top of the fill is greater than 10%.

(129) through (135) Same as proposed.

26.4.305 MAPS

Subsection (1) remains the same.

(2) Maps must be prepared in accordance with the following procedures:

~~(a) Maps, plans, and cross-sections required under subsections (l), (m), (o), (s), and (t) of section (1) above must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, registered land surveyor, or professional geologist, with assistance from experts in related fields such as land surveying and landscape architecture, except that:~~

~~(i) maps, plans and cross-sections for sedimentation ponds may only be prepared by a qualified registered professional engineer; and~~

~~(ii) spoil disposal facility, maps, plans, and cross-sections may only be prepared by a qualified registered professional engineer;~~

~~(b)~~(a) Each map containing information pursuant to section (1) above must be certified as follows: "I, the undersigned, hereby certify that this map is correct and shows to the best of my knowledge and belief all the information required by the mining laws of this state." The certification must be signed and notarized in affidavit form. The department may reject a map as incomplete if its accuracy is not so attested. ~~The department may require maps other than those prepared pursuant to section (1) above to be certified.~~

(b) Maps, plans, and cross-sections required under subsection (l), (m), (o), (s), and (t) of section (1) above must be prepared by, or under the direction of, and certified by a qualified registered professional engineer, registered land surveyor, or professional geologist, with assistance from experts in related fields such as land surveying and landscape architecture, except that:

(i) maps, plans and cross-sections for sedimentation ponds may only be prepared by a qualified registered professional engineer; and

(ii) spoil disposal facility, maps, plans, and cross-sections may only be prepared by a qualified registered professional engineer.

(c) All detail on maps must be clearly legible.

(3) Maps other than those outlined in (1) and (2) above necessary to meet the requirements of this rule or other rules adopted pursuant to the Act must also be certified as in subsection (2)~~(b) and submitted~~(a). (AUTH: 82-4-204, 205, MCA; IMP: 82-4-222, MCA.)

26.4.805 ALLUVIAL VALLEY FLOORS: SIGNIFICANCE DETERMINATION (1) The significance of the impact of the proposed

operations on farming is based on the relative importance of the vegetation and water of the grazed or hayed alluvial valley floor area to the farm's production, or any more stringent criteria established by the department as suitable for site-specific protection of agricultural activities in alluvial valley floors. The effect of the proposed operations on farming is "significant" if the operations would ~~remove from production~~, over the life of the mine, have more than a negligible impact on the farm's agricultural production. In making the determination of "significance", the department shall consult with the affected landowner(s) ~~that would decrease the expected annual production from agricultural activities normally conducted at the farm~~. (AUTH: 82-4-204, 205, MCA; IMP: 82-4-227, 231, MCA.)

4. The Department and Board received comments from Ellen Pfister, Bull Mountains Landowners, Les Darling, Meridian Minerals Company, Nick Golder, Forsyth, Northern Plains Resource Council, Patty Kluver, Forsyth, Theodore L. Hanks, Meridian Minerals Company, and Jerry Ennis, Office of Surface Mining, Casper, Wyoming. A summary of their comments and the Department and Board's responses to those comments are as follows:

COMMENT (Pfister): The department could have presented these new rules and amended rules in a better and clearer format and without legalese.
RESPONSE: This format is dictated by rules regarding public notice of proposed rulemaking. Because the proposed rules deal with technical issues and must be legally enforceable, they must use technical and legal language.

COMMENT (Pfister): Since these new rules are really being drawn for the benefit of a proposed new mine which, according to the plans that I have seen, proposes to fill about three sections of land with unmarketable earth materials, some thought needs to be given to the specifics that such a mine may produce. On the lowest level of proposed production at 500,000 tons per year, the percentage of waste coal will run from 11% to 17%, or between 55,000 and 85,000 tons per year. That is a lot of excess combustible material placed close to the surface of the ground to be buried under 4 to 8 feet of material depending upon the acidic composition of the coal. I would say that the 1984 Hawk Creek fire was virtually unstoppable and it fired the coal seams in a good many places over there and there are some of them that are still burning. It is not uncommon for plant roots to go 4 feet down. In some cases in the '84 fire, plant roots were the introductory factor causing the coal seams to catch fire. Does the department know of substances that would adequately prevent combustion under circumstances like the 1984 Hawk Creek fire?
RESPONSE: Rule VII(7)(a) would require that the coal processing waste must be placed in 2-foot lifts and compacted to achieve a 90% standard proctor. This compaction level would reduce the permeability of this material and limit exposure of subsurface coal processing waste to oxygen and, therefore, reduce the possibilities of spontaneous combustion. Moreover, a minimum of

4 feet of the best available non-toxic and non-combustible material would be required as final cover on a coal processing waste structure. In addition, under Rule VII (10) the operator must have an approved plan for suppressing any fires which may occur during the construction of the coal processing waste fill structure.

Coal processing waste is by no means a homogeneous material consisting of only coal fines; on the contrary, this material will most likely be a heterogeneous conglomeration of coal fines/fragments, non-coal minerals and rock found in the coal, including parting, roof, and floor materials. The organic (coal) content of coal processing waste generated under today's technology is much lower than that of a coal seam or of coal processing waste produced by historic mining. Therefore, the combustibility of modern coal processing waste should be significantly lower than these other materials.

As a result of these conditions, the department (DSL) believes that the above practices for constructing and reclaiming coal processing waste refuse piles should present sufficiently low risks to ignition from range or forest fires.

COMMENT (Pfister and NPRC): There is no mention in the proposed rules as to the disposal of the coal processing water. Where will it be retained? How will it be treated? What will be the effect of leachate on areas surrounding the gob piles? Does the department think its drainage system will bring the leachate to the quality of runoff from surrounding undisturbed areas?
RESPONSE: The allowance of surface waste disposal creates no special exemption from existing regulations regarding water quality. Montana Pollutant Discharge Elimination System (MPDES) standards (similar to national "NPDES" standards) are applicable in all discharges to state waters; MPDES permits are applied for and administered through the Department of Health and Environmental Sciences (DHES). Specific standards are determined by the DHES for each permit condition, and both DSL and DHES receive regular reports on the quantity and quality of discharges. DSL regulations addressing a proposed operation's affect on water quality, and requirements for water treatment include: ARM 26.4.304(5) and (6), 308(4), 314, 315, 325, 501(3), 505, 631, 633, 635-646, 648-650, 801-806, and others.

COMMENT (Pfister and NPRC): It seems that these rules require a certain kind of rock and most of the time that rock isn't found in association with the coal. Where will enough of that rock be found to dilute the various kinds of undesirable materials including coal-processing waste to a proper proportion?

Where will sufficient non-slaking materials be found? Does the Department have a scenario in the event that underground development waste is not composed of a sufficient percentage of non-slaking rocks?
RESPONSE: Rule III(13) would require size and quality standards (including non-slaking properties) for rocks used in constructing the underdrains, if required, for a fill structure. These materials may be derived from the surface disturbance when

developing the entry area for the mine or may be borrowed from off-site, if approved by the DSL. In any case, it is the company's responsibility for locating appropriate rock materials in sufficient quantities for underdrains.

Regarding the comment on diluting undesirable materials with material of acceptable quality, undesirable materials - acid, toxic-forming, combustible, etc. - must be handled in accordance with ARM 26.4.505 and 26.4.510. These rules require a suitable depth of burial for such materials and could require isolation in the fill, mixing with suitable materials, or other measures as necessary to protect reclaimed vegetation and water quality.

Rule VI(1)(a) would require certain standards of rock type be used in the construction of durable rock fills. Under this rule, underground development waste would be eligible to be placed in such fills if it is composed of "at least 20% by volume of sandstone, limestone, or other rocks that do not slake in water." If the waste does not meet this test, it cannot be disposed of in a durable rock fill. However, such waste would still be eligible to be placed in another type of surface disposal fill or structure if the requirements of Rules III, IV, and/or V, as applicable, were met.

COMMENT (Pfister and NPRC): There should be a definition for "promptly" as to when the inspection report should be filed as the structures are being built.
RESPONSE: The DSL agrees that a time period for submittal of this report is needed and, therefore, Rule III(18)(d) will be changed indicating that the certified reports must be submitted within 7 working days of the on-site inspection.

COMMENT (Pfister): Where does the permanent liability for the safety of these waste disposal structures rest? It should be jointly with the State of Montana and the coal owner.
RESPONSE: These rules cannot impose liability for failure of waste structures. They are designed to require stable, safe structures. Should a structure fail, and result in damage or injury, liability would be determined in accordance with tort law established by the courts and the Montana Legislature.

COMMENT (Pfister): An 80-foot high dike across any valley is a very serious matter and during its construction it should have more than just quarterly inspections at critical times in its construction. I suspect that in light of the frequency of inspection, i.e., quarterly, that the 2-foot compaction rule and the 90% density rule for coal processing waste burial in Rule VII(8)(a) might be violated as often as kept.
RESPONSE: The DSL agrees that more frequent inspections of fill structures may be necessary, not only during critical construction periods, but also throughout the construction process. Thus, to Rule III(18)(b) and (c) will be added language clarifying that the quarterly inspection requirement applies to placement and compaction and giving DSL the authority to require more frequent inspections by the operator, as necessary. This fre-

quency of inspection will be determined on a case-by-case basis depending on the quality of the coal refuse material, topographic location, foundation conditions, design of the fill structure, etc. In addition, it should be understood that DSL is on-site on at least a monthly basis as required by ARM 25.4.1201 to inspect coal mining operations. DSL would make every effort to do a technical examination of disposal structures, as necessary, during these inspections.

COMMENT (Pfister): Rule VIII(2) is the Reagan rule of violation. If the violation notice can be kept in motion long enough the department can delay indefinitely the issuance of a cessation order, and therefore the assessment of any civil penalties.
RESPONSE: Rule VIII is the same as Federal regulation 30 C.F.R. 846.12(b). It provides a civil penalty for a corporate director, officer, or agent who knowingly or willfully causes the corporation to violate a DSL order or a permit condition. Section (2) provides that this individual penalty is assessable only when DSL has issued a cessation order and the corporation refuses to abate the violation. However, the corporate violation subjects the corporation to civil penalties whether or not an individual civil penalty is assessed.

COMMENT (Pfister): The changes in the definitions section allowing head of the hollow fills with coal processing waste make me wonder if we may have the beginnings of a Buffalo Creek, Virginia disaster at some time in the future, particularly if the waste is not compacted properly and tightly.
RESPONSE: DSL acknowledges the obvious necessity of enforcing the rules to attain environmental objectives of the Montana Strip and Underground Mine Reclamation Act and these rules, including the compaction requirements.

COMMENT (Pfister and NPRC): The various inspection reports should be available to the public some place within reasonable proximity to the mine, and not only in Helena. Inspection reports retained at the mine site should also be open for public inspection.
RESPONSE: It is questionable whether DSL has authority to require inspection reports to be available at mine offices. However, copies of all inspection reports received from a permittee under these rules and copies of all DSL inspection reports are available for public review in the Helena and Billings offices of DSL and by mail. This provides adequate public access.

COMMENT (Pfister and NPRC): The language dealing with willful violations is much clearer in the current Montana rules than in the proposed language. The phrase "intended that the result actually occurred" as found in the definition of "willful violation" should be included in the definition of "willfully". The proposed language is a weaker definition and the kind of stuff that lawyers can argue over all day and no one will ever turn out to have done anything to violate the law.

RESPONSE: "Willful violation," which is defined in ARM 26.2.301(131) of the current rules, is a term used in 82-4-251, MCA. Under that statute a permit may be suspended or revoked if the permittee intended the violation. The definition of "willfully" in 26.2.301(135) applies only to individual civil penalties imposed on corporate directors, officers or agents. It is taken directly from federal regulation 30 C.F.R. 846.5. The conduct described in this definition is actually broader because it also includes violations that result from intentional disregard or plain indifference to the laws. For this reason and the reason that the broader definition is required by the federal rules, DSL will retain the proposed definition.

COMMENT (Pfister): Will these rules permit the 1920 plus acres proposed for the mine dump to be anything other than a mine dump in the future? Will it grow a timber crop again in 80 years? Can homes be built on it if it is subdivided? Will its surface and groundwater again be clear and potable? Will it provide a continuing tax base contribution to the county in which it is located? Will it provide a non-toxic livestock and wildlife habitat? Will it ever grow a hay crop again? All of these uses are current and existing uses in the area. The question is will there again be uses for this land in the future under these rules?
RESPONSE: The rules as proposed would require that lands permitted for and disturbed by surface waste disposal be reclaimed to productive post-disturbance uses as required presently for all coal mining operations. Surface waste disposal structures would also be required to meet vegetative cover and water quality standards as currently required for all coal mining operations.

COMMENT (NPRC and Pfister): How much serious consideration is going to be given the idea of backstowing underground coal mining waste back into the mine from which it came? It has become obvious by reviewing the proposed rules that little or no detailed attention has been given to backstowing. There is no specific reference to the how, when or why backstowing would be required. What criteria would be used to determine if it should be stored above ground or underground? If the coal seam is basically dry, then it would seem that there would be less problem with leaching and weathering with underground storage and much less surface disturbance for many reasons.
RESPONSE: Section 82-4-231(3)(h), MCA, requires backstowing of "as much stockpiled waste material as possible." Rule III (1) therefore requires the operator to demonstrate why backstowing would not be feasible if it is not proposed. If backstowing is not proposed, DSL would require appropriate documentation to demonstrate that backstowing cannot be done. This documentation would include, but not be limited to, technical and economic feasibility studies, consultation with Montana's Safety Bureau, and addressing alternatives that would allow complete or partial backstowing. Although these rules provide no specific standards

for backstowing, DSL would consider environmental and safety concerns.

COMMENT (Pfister): Both sets of regulations, i.e., those in which the approximate contour provisions apply and those where they do not apply, do not define the maximum size of the waste disposal structures which would be allowed. One or two of these structures on a small ranch could just about put the owner out of business. I would question the success of revegetating the outslope side. The highway department does not have outstanding success in revegetating angle of repose areas. The angle proposed for the outslope area would not be conducive to livestock use.

RESPONSE: The draft rules issued for public comment in late summer of 1989 do not impose approximate original contour provisions. Any proposal to place a limit on the size (volume, height, length) of a disposal structure would be arbitrary and would not necessarily have any relation to environmental conditions at a specific site proposed for waste disposal. It is more appropriate to apply standards of stability, design, erosion and water controls, revegetation, and environmental impacts to water, ranching interests, vegetation, wildlife, etc. on a site-specific basis in evaluating waste disposal structures.

The effects of disposal structures on a rancher's operation also appears to relate to the legal right of a mining company to conduct disposal operations on property owned by someone else. This is a private property matter that the DSL would be involved in only to the extent that the mining company would have to show a legal right to enter property for that purpose, pursuant to ARM 26.4.303(14) and (15).

The operator is required to revegetate disturbed areas to provide for soil protection and the postmining land use. If this cannot be accomplished on steep slopes under local conditions, then more gradual slopes must be established. The slopes specified in the rules are the maximum allowable and might not necessarily be permitted because of local conditions. Steep slopes might affect livestock use, but this varies with type, breed, and age of the animals. Runoff control terraces on the outslope and the flatter slopes on the top of the fill would at least partially compensate for any reduced usefulness due to slope. Steep slopes are frequently necessary features of wildlife habitat, and, as such, must be considered in the reclamation plan.

COMMENT (Pfister): How does the department propose to control off-site drainage and erosion while the construction of the proposed gob piles is going on?

RESPONSE: ARM 26.4.633, 638 and 639, among others, require appropriate sediment control measures to be in-place prior to any mine-related or construction activities. Off-site drainage and erosion must be controlled by ditches, traps, sediment ponds, and other appropriate measures.

COMMENT (Pfister): Does the department have a solution for springs or wells that may be buried under a gob pile, including one which crosses ownership lines, and would apparently then run out through the drain on somebody else's property?
RESPONSE: Should a disposal facility be proposed to go over an existing well, the DSL would require the proper abandonment and sealing of that well, and in certain instances provisions for a replacement source. An application is required to adequately monitor and/or describe premining wells, springs, ponds and other aspects of surface and groundwater systems to assist in the determination of probable hydrologic consequences, both on and off-site, of mining-related activities. Changes to the premining hydrologic system must be minimized to prevent adverse affects to the postmining land use, and violation of applicable state and federal laws and regulations. If the proposed operation is expected to (or later is discovered to) interrupt, diminish or otherwise adversely impact existing water sources (natural or developed), the operator is required to describe alternative water sources that could be developed to replace those impacted by mining. (See ARM 26.4.304(5) and (6), 314, 631-632, 635, 637, 643-648, and 651).

Waters draining through the underdrain of a waste disposal structure would have to meet the standards of ARM 26.4.631 and 26.4.633 before such waters could be discharged as surface water from the permit area surrounding the waste disposal area and onto, perhaps, someone else's property. If necessary, such wastes would have to be treated (e.g., by a sediment pond) before discharge. Also, please note that Rule III(13) requires underdrains to be constructed with non-degradable, non-acid and non-toxic forming rocks which should assist in minimizing the effects of a waste disposal structure on water quality degradation of spring water draining through the underdrains.

COMMENT (Pfister and NPRC): There would be a greater probability of successful revegetation of the smaller gob piles allowed in the approximate contour regulations. It might be very difficult in some areas to obtain enough topsoil from the site proposed for the big gob pile allowed under the other set of regulations to cover it with even a skim of topsoil, certainly not enough to withstand mild erosion. Where would additional needed topsoil come from? Would there be more surface disturbance to cover up the gob piles?

It is also certain that more surface area would be disturbed under the approximate original contour provisions. It would seem that the potential safety of such structures would be greater.
RESPONSE: In terms of revegetating the fill structure, the operator would be required to salvage all viable soil material from the area designated for coal refuse disposal. The quantity of soil material to be salvaged would depend on the pre-disturbance soil resource available. Regardless of the quality of the coal refuse material, the disposal area would have to be covered with a minimum of 4 feet of suitable material (8 feet if the coal refuse is acid and/or toxic forming in nature) which may

consist of a combination of spoil or underground development waste of acceptable quality and soil. Should the unconsolidated material in the proposed disposal site location be inadequate to meet the 4-foot cover requirement, the operator could propose to borrow the material from another location; this would have to meet the approval of DSL. The company would be responsible for identifying adequate quantities of suitable material to meet the rules. If this could not be done, no permit would be issued.

Considering the design criteria stipulated within the regulations, the DSL feels that the stability of the disposal structure would not be compromised as a result of size. These design criteria include: installation of overland flow diversion channels, installation of underdrains, compaction/bridge lift/static safety factor limitations, maximum outslope gradient, terracing, etc. Overall, the DSL feels that the additional drainage (i.e., draw, coulee, gulch, arroyo, hollow, swale) disturbance that would be required to construct coal refuse disposal areas at approximate original contour mitigates against a requirement to reclaim such areas to approximate original contour. Note that fills must be designed and constructed to provide long term stability.

COMMENT (Pfister): There does not seem to have been any consideration given to the effect on the proposed chimney drains of the freeze and thaw cycle. That might soften the overall structure and increase the possibility of high erosion rates in the spring. Snow drifts on top of the structures could also cause problems.
RESPONSE: Chimney drains would no longer be allowed under these proposed rules because subsection (2) of Rule V will be deleted and all reference to chimney drains will be removed from subsection (1). These changes are being made in response to OSM comments below.

COMMENT (Pfister): If the hollow that the proposed non-original contour gob pile would be sited in had a basic shale composition to start with and high run-off characteristics, in spite of the best efforts at drainage, etc., it would seem that the bond between the gob pile and its base hollow would be problematic at best.
RESPONSE: The overall engineering design of the fill would provide for underdrains, diversions, or a combination of these drainage structures. These drainage structures must be properly designed to account for the erosive forces presently occurring in hollows. Also, the foundation of the fill would undergo appropriate testing to ensure stability. The proposed rules have been structured from the federal regulations. The Office of Surface Mining (OSM) has adopted these rules based upon conditions occurring east of the Mississippi River. The climate in this region includes heavy rainfall. In reviewing designs for fill structures, DSL would be relying on its experience of Montana conditions and using engineering criteria (adopted by OSM) in its rules to ensure that these structures would have long-term stability.

COMMENT (Pfister): It would seem that the first test one would have to pass on the non-original contour regulation would be a landowner who would be willing to have such a structure built on his land. I think the structure proposed under this regulation could have real reclamation and public safety problems. The department could retain both sets of regulations, with the non-original contour regulation being useable only with the consent of the surface owner.
RESPONSE: The extent of DSL's authority regarding the legal right of a company to use someone else's property for surface disposal of wastes is provided for in ARM 26.4.303(14) and (15). The applicant must provide documentation in its application that it has the legal right to enter and conduct such operations on any lands. If the landowner does not want a structure built on his or her property and has the right to prohibit that structure, he or she may use whatever legal means are available to prevent that from occurring. However, a rule granting a surface owner the right to prohibit non-approximate original contour (AOC) structures when that landowner did not otherwise have that right would not be appropriate where the requirements of the Act could be met without an AOC structure. Also, such a rule might fail constitutional muster. See Western Energy Co. v. DSL, Genie Land Co., 227 Mont. 74, 737 P.2d 478 (1987).

COMMENT (Pfister): There did not seem to be any specific requirement that old, previously mined tunnels be mapped out in respect to location in or under the proposed gob piles. The collapse of old tunnels under a gob pile could cause serious problems.
RESPONSE: Old mine tunnels are very hazardous to public safety and may present stability problems to gob piles. Rule III (17) requires the company to address this subject to ensure that the foundation is suitable to support the gob pile. This rule may require extensive mapping or a downhole drilling and camera survey to ensure the integrity of the foundation.

COMMENT (Pfister): In an area where timbering has been a use of the proposed gob pile land, can the gob pile be reclaimed to produce timber again, should it be desired?
RESPONSE: If timbered areas are a part of the landscape before the disposal site is disturbed, then timbered areas will have to be a part of the landscape when the site is revegetated. If the ability to restore the vegetation cannot be demonstrated, then a disposal site cannot be permitted. However, because under 82-4-233, MCA the postmining land use must be grazing and wildlife habitat (unless alternate reclamation is allowed under 82-4-232), the purpose of returning trees to the site is to re-establish vegetative diversity and wildlife habitat, not commercial forest production.

COMMENT (Pfister): What does a "long term static safety factor of 1.5" mean?
RESPONSE: Safety factor is defined as a ratio between the resisting force and the driving force along a failure surface.

When the driving force due to weight is equal to the resisting force due to shear strength, the factor of safety is equal to 1 and failure is imminent. A long-term static safety factor of 1.5 would indicate that a permanent structure, at rest, would have a resisting force that is 50% greater than the driving force, providing for a sufficient level of stability.

COMMENT (Pfister): What kind of shale does the Department mean in Subchapter 9, Rule II Valley Fill (3)(d) under predominant type of fill material?
RESPONSE: The language containing the term "shale" being referred to in this comment is in Rule III(13)(d) as published in the draft rules in August of 1989. The meaning of this term in this rule is the conventional geologic meaning: Shale is a sedimentary rock formed by a mixture of clay-size (less than 0.002 mm) and silt-sized (0.002-0.05 mm) particles. Shale splits parallel or nearly parallel to the plane of stratification.

It must be understood that the shale referred to in this rule involves the composition of the fill, not the composition of the underdrain materials.

COMMENT (Pfister): Does the 100-year, 24-hour precipitation event include spring thaw?
RESPONSE: The precipitation-frequency values were generated from daily precipitation records by the National Weather Service (see Miller et al. 1973), and do not reflect seasonal snowpack accumulation.

A comparison of the 100-year, 24-hour precipitation event and a rough estimate of average annual snow accumulation follows:

The 100-year, 24-hour precipitation event for the coal-producing regions of southeast Montana ranges from about 3.2 to 3.8 inches, while annual precipitation averages in the range of about 12 to 16 inches. Miller et al. (1973) indicate that approximately 30% to 50% of the average annual precipitation in Montana occurs as snow (below and above 4,000 feet elevation, respectively), suggesting that the average accumulated snowpack in these regions may range as high as 4 to 8 inches (water equivalent).

These estimates imply that average snowmelt runoff could be comparable to or possibly much greater than a 100-year, 24-hour storm runoff event, depending on the percentage of annual precipitation occurring as snow. Other factors that could affect this estimate include the extent of water losses to evaporation, sublimation, transpiration and infiltration, although frozen ground during snowmelt can limit infiltration losses. Also, snowmelt runoff typically occurs over an extended period rather than as a brief, concentrated flood event like those associated with storm events. Therefore, a specific relationship between the magnitude and frequency of snowmelt and storm-derived runoff events is presently not clear.

Reference cited: Miller, J. F., R. H. Frederick, and R. J. Tracey. 1973. Precipitation-Frequency Atlas of the Western

United States: Volume I - Montana. NOAA Atlas 2. US Dept. of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Springs, Maryland. 41 pp.

COMMENT (Pfister): Under Subchapter 9, Rule V, Coal Processing Waste (5), the landowner on whose land the gob pile sits and those one mile down gradient from it should also be informed that a potential hazard exists if the department cannot implement immediate remedy.
RESPONSE: Rule III(19), which contains the language of concern in this comment, will be revised to indicate that the owner of land upon which the disposal structure is located, if that owner is different from the mining company, will also be notified. Also a phrase will be added to encompass the idea of notifying landowners one mile down gradient of a potential hazard associated with the disposal structure.

COMMENT (Pfister and NPRC): 12(b) would stand further clarification for public safety (why allow a variation for dewatered fine coal waste?), as would best available non-toxic and non-combustible material in (13).
RESPONSE: The reference to (12)(b) is apparently to what has been published as Rule VII(8)(b), and the reference to (13) is to what has been published as Rule VII(9).

In terms of disposal of dewatered fine coal waste (Rule VII(8)(b)), a variance from the lift and compaction requirements for coal processing waste may be considered because a fine textured material (minus 28 sieve size) of this nature may be easily compacted to limit permeability (air and water flow) and, as such, lift thickness and compaction restrictions may not be necessary. The stability of disposal sites consisting of dewatered fine coal waste would not be compromised in any case, as the disposal structure must be designed in order to attain a 1.5 minimum static safety factor (as per Rule III (8)).

Rule VII (9) states that "the best available non-toxic and non-combustible material" must be utilized as cover material for the coal processing waste disposal area. Rule 26.4.301(118) defines toxic-forming material as "earth materials or wastes which, if acted upon by air, water, weathering, or microbiological processes, are likely to produce chemical or physical conditions in soils or water that are detrimental to biota or uses of water". Rule 26.4.301(25) defines combustible material as "organic material that is capable of burning, either by fire or through oxidation, accompanied by the evolution of heat and a significant temperature rise". These types of materials (i.e., toxic and/or combustible) must be avoided in selecting a viable cover material for the disposal site. The "best available" means that material which is most suitable for its intended purpose, i.e., as a cover over the coal processing waste and as a plant growth medium. DSL would make the determination on a case-by-case basis of what would constitute the best available non-toxic and non-combustible material to support the postmining land use.

COMMENT (Golder): I am not able to comment very well on the rules because of the mis-sequencing of pages of the copy I received.
RESPONSE: DSL apologizes for the mis-sequencing of your copy of the draft rules which caused so much confusion. In future major rule-making activities, DSL will number the pages to avoid such problems.

COMMENT (Golder): We must be careful not to put our minds on automatic pilot and just take the rules that others have used. All we are doing is just setting in place, making legitimate, some very grave mistakes that are being made otherwise around the country. We can write rules for expediency or we can consider what we are leaving to our grandchildren.
RESPONSE: The Strip and Underground Mine Reclamation Act, specifically 82-4-231(3)(h), authorizes the surface disposal of wastes where backstowing is not possible under rules adopted by DSL. The proposed rules were prepared by utilizing the rules of the States of Colorado and Utah and OSM rules as a guide and then adapting them to the requirements of Montana law and other regulations as best DSL could determine.

COMMENT (Golder): I recognize parts of rules here and there that are just legitimatizing a travesty and I think we need to take a hard look at the whole implication here and not just follow the kinds of rules that have fit somebody else somewhere else, however much long-term good they did being disregarded.
RESPONSE: Please see response to the preceding comment. These draft rules were published to allow public scrutiny and comment on the specifics proposed so that improvements and warranted changes could be made. The Montana Strip and Underground Mine Reclamation Act does not prohibit the surface disposal of underground development or coal processing wastes. Thus, DSL is in the position of having to promulgate rules governing such disposal in ways that are consistent with the environmental protection and reclamation standards of the Montana Act and the rest of the coal regulatory rules.

COMMENT (Hanks and Darling): We suggest that the first sentence of Rule III (7) be changed to read as follows:

> Except for head-of-hollow and valley fills, disposal structures must be located in areas approved by the Department.

The effect of this revision is to delete the requirement that disposal structures must be located on the most moderately sloping and natural stable areas available unless there is a finding by the department that another area is more environmentally protective.

Our reasons for this suggestion are two-fold. First is the fact that the most moderately sloping and naturally stable area may not be the most environmentally protective area and to permit these requirements to remain in the regulations creates

a kind of presumption that they are the most environmentally protective. Second is the circuitous and cumbersome approach to siting which is built into this regulation. Of necessity, it requires that identification of all moderately sloping and naturally stable areas in order that the most moderately sloping and naturally stable area can be identified in some undefined large area around a proposed mine. Then it requires a "finding" by the Department that another site is more environmentally protective. We don't know what the Department has to do to make a "finding," but almost certainly it is more than is required for a simple decision. It seems to us that the number of steps required to comply with the regulation, as written, will require a great deal more money, time and effort by a mine operator and the department than would compliance with the regulation, as revised.

RESPONSE: Because the language of concern exempts head-of-hollow fills and valley fills from this requirement and because of the additional exemption regarding use of a more environmentally protective area, DSL does not believe this will be a burdensome requirement. However, to remove the uncertainty about what "finding" means, this word will be replaced by "determining".

COMMENT (Hanks and Darling): We suggest that Rule VII(3) be amended by deleting the words "total drainage area above the disposal area is less than one square mile."

With all the design and performance requirements for drainage areas contained throughout these rules, this constraint seems unnecessary. Moreover, this constraint may well preclude the siting of such facility in the most environmentally preferred location.

RESPONSE: DSL agrees and will remove the language regarding the 1 square mile limitation.

COMMENT (Hanks and Darling): We suggest that the first sentence of Rule VII 8(a)(ii) be modified to read as follows:

"compacted to prevent spontaneous combustion and to provide the strength required for stability of the coal processing waste."

The effect of this modification is to eliminate the 90% compaction requirement which, as the DSL knows, has been eliminated from the federal rules because it has been determined to be unnecessary and can be difficult to achieve in waste that is not entirely homogeneous.

As stated by the court in National Wildlife Federation v. Hodel, 839 F.2d 694 (D.C.Cir. 1988), the Secretary of Interior has concluded that the specific numerical requirement for compaction is more appropriately determined based upon the particular design, site conditions and waste characteristics. To place a percentage figure in the regulations is superfluous because the two critical concerns motivating the adoption of the 90% compaction rule in 1979, namely, stability and incombustibility, are adequately addressed without any specific percentage requirement. Stability is assured by the generous 1.5 long-term

safety rating required by the rules. Incombustibility is assured by the absolute requirement that mine operators "prevent combustion." Inclusion of the 90% compaction rule unnecessarily burdens mine operators and enforcement officials and should be removed.

RESPONSE: DSL feels that this requirement should be retained in order to assure, with a clear enforceable standard, that coal processing waste is adequately compacted to prevent spontaneous combustion and limit permeability of this material. By limiting permeability, the risks of instability problems and oxidation of potentially acid and/or toxic constituents within the coal processing waste would be minimized. Periodically conducting standard proctor tests for maximum dry density during construction is a straightforward procedure for an operator and equally straightforward for DSL to verify.

The DSL realizes that the compaction requirement for fill structures has been deleted from the federal rules due to a U. S. Court of Appeals decision in 1988. However, some state regulatory authorities (SRA) within the intermountain region still retain the 90% compaction requirement for coal refuse disposal areas. According to Colorado and Utah SRA personnel and coal operators in these states, the compaction levels have been easily achieved on fill structures simply in the process of shaping the coal refuse pile utilizing dozers and front end loaders. For example, the Mid-Continent Resources underground coal mine located south of Carbondale, Colorado utilizes a large valley fill for disposal of both underground development waste and coal processing waste. This operator has experienced no problems in achieving the 90% compaction level. At this particular mine, numerous standard proctor tests have been run on the compacted fill and have shown material compaction levels exceeding 90% of the maximum dry density. Another underground coal mine located in Florence, Colorado (Energy Fuels' Southfield Mine) utilizes a hilltop coal refuse disposal area for disposal of coal processing waste and underground development waste. At this mine, dozers and a sheepsfoot roller are utilized for compaction of the fill material. Standard proctor tests run on compacted fill material at the Southfield Mine have also shown compaction levels exceeding 90%.

COMMENT (Kluver and NPRC): The proposed change in Rule 26.4.805(1) ALLUVIAL VALLEY FLOORS: SIGNIFICANCE DETERMINATION is particularly offensive in that it allows a judgment call by those unqualified to do so, the coal company personnel and the Dept. of State Lands Staff. They are not the farmers who receive salt laden water, either in the alluvium, or in a lower aquifer.

This change has shifted the burden of proof to the producer to prove whether there is "negligible impact". The burden should stay with the miner.

RESPONSE: The DSL proposed these changes to correct language that was grammatically incorrect and was confusing. Beyond that, DSL does not have the authority to define "significance" in this rule as meaning any decrease in agricultural production.

The reason for this is that 82-4-227(3)(b)(i) of the Montana Strip and Underground Mine Reclamation Act includes language on "significance" and "negligible impacts" similar in principle to the proposed rule. The proposed language does not shift the burden of proof from the applicant. However, to ensure that the surface owner has input into the decision, DSL has added a requirement that DSL consult with the surface owner.

In addition, the proposed deletion of "would" has been eliminated to clarify the intent of this rule.

COMMENT (NPRC): The type of material that will come from both the waste materials from the mine and the coal processing wastes will be acid forming. It is our contention that the wastes go back into the mine. If they can get the coal out on conveyor they can certainly get the wastes back in the mine on a conveyor. If these materials can be isolated on the surface then they could also be isolated in the room and pillar areas. This would hopefully lessen the impacts of subsidence and solve the surface waste problems.

RESPONSE: Please see earlier comment of Pfister and NPRC and response thereto on backstowing. Should the coal refuse designated for surface or underground disposal be potentially acid- and/or toxic-forming in nature, the permittee must develop a disposal plan that satisfies the requirements of ARM 26.4.505(2) and 501(2). These rules require that the deleterious material be disposed of in a manner which prevents groundwater contamination and provides adequate plant growth media for vegetative establishment and maintenance. Specifically, the DSL can envision that coal processing waste which is high in iron sulfides (pyrite) that are reactive or other potentially toxic-forming constituents would have to be properly isolated to prevent exposure of such materials to air and water and the formation of toxic leachate. If this cannot be done, a permit for such an operation would not be granted.

COMMENT (NPRC): The ability of gob (waste) piles to withstand the test of time is in serious doubt.

RESPONSE: The criteria and standards contained in the proposed rules are not intended to be short-term. DSL believes they will provide for long term stability.

COMMENT (NPRC): It is our understanding that even if the longwalling method of extraction is used, there are some room and pillar operations going on as well. Surely the room and pillar method lends itself to backstowing and would significantly reduce the surface disposal.

RESPONSE: See response to previous comments by Pfister and NPRC on backstowing. Also, the question of mining method is a mine-specific one to be dealt with on that basis.

COMMENT (NPRC): These rules refer to bringing materials from the areas not within the permit boundaries. Does this mean other mine wastes could be moved onto the permit area for disposal? If this is the case the problems of quantity and content

of the off permit material could create even greater problems.
RESPONSE: Under Rules III(2) and VII(4), the permittee may dispose of coal refuse from activities off the permit area with prior approval from the DSL. This off-site material must be characterized physiochemically to determine if the material is suitable for disposal within the permit area. The intent here is to minimize additional sites from being impacted by these off-site wastes and disposal of these wastes in an uncontrolled manner outside the jurisdiction of DSL.

COMMENT (NPRC): Rule II(2)(a)(iii). What preliminary hydrologic impacts? Where are they defined?
RESPONSE: The part of the rule referenced states: "Each general plan must contain preliminary hydrologic and geologic information required to assess the hydrologic impact of the structure." The term "preliminary" modifies "hydrologic and geologic information". Nevertheless, because use of the term "preliminary" may be somewhat confusing and is unnecessary and extraneous, it will be deleted from this rule.

COMMENT (NPRC): Rule III(5). Organic material needs to be specified.
RESPONSE: Under Rule III(5) and VII(5)(c), reference is made to removal of organic material from the disposal area. Organic material anticipated by this rule would consist primarily of woody or other vegetative debris encountered during clearing and grubbing activities. However, other organic material would also be removed, if encountered. What organic material might be encountered is difficult to foresee. Therefore, it does not appear to be prudent to attempt to further specify.

COMMENT (NPRC): Rule III(8). Yes it should be compacted if it adds to the stability. The "as necessary" needs to be defined.
RESPONSE: Rule III(8) states that underground development waste "must be compacted as necessary to ensure mass stability and prevent mass movement". The standard for "as necessary" would be to ensure mass stability and prevent mass movement. As indicated, the compaction requirements would be determined on a case-by-case basis depending on the physicochemical nature of the underground development waste.

COMMENT (NPRC): Rule III(12). This portion of the rules does not address how the waste material will not get in the water.
RESPONSE: The intent of this rule is to describe situations in which an underdrain system is needed. Rule III(13) describes the design criteria that must be met to ensure the underdrain system is functional. Rule III(13) also describes a filter system that would ensure waste material would not enter the water. The DSL would be required to review the filter system and make a determination as to the adequacy of the proposal. In addition, the impact of such structures on water quality must be minimized in accordance with ARM 26.4.314.

COMMENT (NPRC): Rule III (19). The term "promptly" needs to be defined as does "as appropriate".
RESPONSE: In Rule III(19), the term "promptly" will be replaced by "immediately" and the term "as appropriate" will be replaced by "that could be adversely affected." Also, please refer to the final adopted revision of this rule for some additional revisions.

COMMENT (NPRC): 26.4.301(32). The phrase "but not limited to" must be added for clarity after the word "including" on line 2.
RESPONSE: DSL agrees that this suggested language for 26.4.301(32) does clarify the rule's intent. This language will be incorporated.

COMMENT (NPRC): 26.4.301(48). It is not clear from this section that coal product waste material must be kept out of the fill material.
RESPONSE: To avoid confusion, the term "non-coal" will be inserted before "organic material" so that the phrase of concern will now read "other than non-coal organic material". For the sake of consistency, the same change will be made to 26.4.301(128), regarding the definition of valley fill.

COMMENT (NPRC): 26.4.301(63). The department should leave in "changes of land use or uses . . . subject to department approval."
RESPONSE: This sentence is redundant because changes in land use must be approved pursuant to ARM 26.4.824 and 825. It is also misleading because it implies that land which had a premine use other than grazing and wildlife habitat can be returned to that use without imposing the alternate land use requirements. Thus, DSL will maintain its proposed deletion of this sentence.

COMMENT (NPRC): 26.4.305. Should change the "may" to "must."
RESPONSE: The DSL agrees with the intent of this comment inasmuch as review of 82-4-222(2), MCA, reveals that all maps submitted with permit applications to meet the rules must be certified. Thus DSL will delete the proposed additional sentence at the end of 26.4.305(2)(a) and will retain section (3), except for the following changes: ". . . must also be certified as in subsection 2~~(b)~~(a)."

COMMENT (NPRC): 26.4.639(22)(a)(i). This is not a good change. It weakens this considerably and should not be changed. Also in this rule what is a "small area"? This needs clarification.
RESPONSE: Part (ii) under this rule was deleted because it was in direct conflict with (i). Also, the last part of (i) was the same as new part (iii). The constraints provided in (ii) and (iii) as revised provide ample protection against sedimentation problems. The rationale of removing sedimentation ponds before the entire disturbed area meets revegetation standards is to avoid having areas of disturbed land created by the ponds that must be reclaimed (and thus redisturbed in the process) long after surrounding lands have been reclaimed.

The term "small area" is not found in this portion of the rule.

COMMENT (NPRC): 26.4.836. Add "and prove to the department's satisfaction the reclamation plan will not increase the overall reclamation costs of the site to the department." The taxpayers need this assurance.
RESPONSE: Under the proposed rule, the costs that may remain eligible for abandoned mine funding would be those associated with reclamation of disturbed sites or problems for which a remining operation is not responsible under its permit. It is unlikely that reclamation activities of a remining operation would adversely affect the cost of reclamation of disturbance for which abandoned mine land funding could be used in accordance with this rule. Moreover, the reclamation of known abandoned coal mine sites which pose a health, safety, or environmental threat in Montana will be completed in the next 2-3 years. Thus, DSL does not believe the additional language suggested in this comment is necessary.

COMMENT (NPRC): 26.4.837(2). Keep "prior to any remining operation".
RESPONSE: The focus of the proposed rule is the cost of reclamation in accordance with the approved remining/reclamation plan. The term "prior to the remining operation" is extraneous language, because the bond would be based upon estimated reclamation costs prior to the remining operation, although it would be focused on the reclamation of areas actually disturbed by the remining operation. Thus, no change is necessary.

COMMENT (Ennis): Montana's proposed Rule I is similar to Federal regulation 30 CFR 784.19. However, the proposed state rule only requires that the plans be in accordance with the general requirements of Rule III that address disposal of underground development wastes. The Federal regulations require plans in accordance with not only the general requirements for disposal of excess spoil (30 CFR 817.71) but also the rules governing valley fill/head-of-hollow fills (817.72) and durable rock fills (817.73). Montana should reference its proposed Rules IV, V and VI.
RESPONSE: DSL will revise Rule I to reference Rules III, IV, V and VI.

COMMENT (Ennis): Montana's proposed Rules III(1) and VII(1) require that underground development waste and coal processing waste that is going to be disposed of in underground mine works must be disposed of in accordance with a program approved by the department. Federal regulations 30 CFR 817.71(j) and 817.81(f) also require that the waste be disposed of in accordance with a plan approved by MSHA. Montana should revise its proposed language, accordingly.
RESPONSE: DSL will add a reference to MSHA, as requested.

COMMENT (Ennis): Montana's proposed Rule III(4) requires that each disposal structure be designed using current prudent design standards, certified by a registered professional engineer, and approved by the department. Federal regulations 817.71(b)(1) and 817.81(c)(1) also require that the design be certified by a qualified registered professional engineer experienced in the design of earth and rock fills (817.81(c)(1)). Montana should revise its proposed language, accordingly.
RESPONSE: DSL will add the phrase "experienced in the design of similar earth and waste structures."

COMMENT (Ennis): Proposed Rule III (12) requires that if the disposal area contains springs, natural or man made water courses, or wet weather seeps, an underdrain system consisting of durable rock be constructed from the wet areas in a manner that prevents infiltration of water into the waste material. Federal rules 817.71(f)(1) and 817.83(a)(1) also require that underdrains must be designed and constructed to control erosion and ensure stability. The state should add language to its proposed rule, accordingly.
RESPONSE: DSL will change Rule III(12) to read as follows: "If the disposal area contains springs, ... , an underdrain system must be constructed in a manner that prevents infiltration of water into the underground development waste material and to ensure stability of the disposal structure."

Diversion and erosion are already covered under Rule III(15), (16), and certain subchapter 5 and 6 rules.

COMMENT (Ennis): The state proposes to require that runoff from the area above and from the surface of the waste structures be diverted in stabilized channels designed to pass the runoff from a 100-year, 24-hour precipitation event or larger event specified by the department. Federal regulations cite a 100-year, 6-hour design precipitation event for excess spoil fills and refuse piles. OSM recognizes that certain watershed features and storm characteristics may generate a higher peak flow from a 24-hour precipitation event than for a 6-hour precipitation event. Therefore, use of a 24-hour standard may be as effective as the 6-hour standard in some cases.

States electing to use the 24-hour design standard in their rules must demonstrate that the standard produces a higher peak flow than the 6-hour standard. This written demonstration must include the following information for each region within a state that has significant hydrologic or watershed differences:

1) Method used for estimating peak flow;
2) Parameter values selected for use with the method;
3) Total precipitation and distribution of precipitation for the 6- and 24-hour design storm and;
4) Table of specific output including a comparison of the peak flow for the 6- and 24- hour design storm.

RESPONSE: All previous comparisons of 6-hour vs. 24-hour design standards for 10-, 25- and 100-year storm events have resulted in consistently higher runoff volume and peakflow estimates for Montana's 24-hour standards.

COMMENT (Ennis): Montana's proposed Rule V (2)(a) requires that for a rock-core chimney the fill must have, along the vertical projection of the main buried stream channel or fill, a vertical core of durable rock at least 16 feet wide. The counterpart Federal rule, 817.72(b)(1) uses the word "rill" rather than "fill." This appears to be a typographical error and should be corrected. Also, the Federal rule requires that the underdrain system and rock core shall be designed to carry the anticipated seepage of water due to rainfall away from the excess spoil fill and from seeps and springs in the disposal area. The state's proposed rules lack a counterpart to this requirement and should be revised, accordingly.
RESPONSE: Subsection (2) of Rule V will be deleted, rendering this comment moot.

COMMENT (Ennis): Proposed Rule V (2)(b) requires a filter system to ensure the proper functioning of the rock core must be designed and constructed using standard geotechnical engineering methods. The proposed State rule is similar to Federal regulation 817.72(b)(2) except that the Federal regulation requires that the functioning be long term. Because head-of-hollow fills are permanent structures, it is necessary to ensure the long term functioning of the rock core. Such a requirement needs to be added to the proposed state rule.
RESPONSE: Subsection (2) of Rule V will be deleted, rendering this comment moot.

COMMENT (Ennis): State proposed Rule V (2)(c) requires that the maximum slope of the top of the head-of-hollow fill must be 1v:5h, unless otherwise approved in writing by the department. However, Federal regulation 817.72(b)(3) limits the maximum slope of the top of the fill to 1v:33h (3 percent) in order to minimize sedimentation and prevent clogging of chimney drains. To be no less effective than the Federal regulation Montana must limit this slope to 1v:33h (3 percent).
RESPONSE: The 1v:5h maximum slope for the top of a head-of-hollow fill is necessary to allow for the replacement of appropriate vegetative diversity, wildlife habitat types, and post-mining land uses as required by subchapter 7 of the Montana rules. To resolve this conflict of the OSM regulations with Montana rules, subsection (2) of Rule V will be deleted. Also, subsection (1) will be revised to remove any reference to chimney drains. Therefore, the use of chimney drains will not be an option for operators.

COMMENT (Ennis): Proposed Rule VI (1)(a) states that underground development waste is eligible for disposal in durable rock fills if it is rock material consisting of at least 80 percent by volume of sandstone, limestone or other rocks that do not slake in water. The counterpart Federal regulation, 817.73(b), requires that the durable rock also be nonacid- and nontoxic-forming rock. Montana must require that the 80 percent rock material that does slake also be nonacid- and nontoxic-forming rock.

RESPONSE: DSL will add the requested language.

COMMENT (Ennis): Proposed State Rule VI (2)(a) requires a stability analysis must be made by a qualified registered professional engineer in accordance with Rule I. Federal regulation 817.73(c) requires that a qualified registered professional engineer certifies that the design will ensure the stability of the fill and meet other applicable requirements. Montana must add such a certification requirement for durable rock fills.
RESPONSE: DSL will modify the rule as requested.

COMMENT (Ennis): Federal regulations 30 CFR 780.25 (a)(1)(iii) and 784.16(a)(8)(iii) require a general plan for each coal processing waste bank, dam or embankment that contains preliminary hydrologic and geologic information required to assess the hydrologic impact of the structure. The State's September 26, 1989 proposed draft rules contained a counterpart at Rule II(2)(a)(iii). However, in response to a public comment during the initial comment period, Montana removed this proposed rule because the State felt it was "redundant to the information required under ARM 26.4.304 and 314 and may also be confusing." The regulations at ARM 26.4.304 and 314 are the general hydrology requirements comparable to the Federal requirements at 30 CFR 780.21 and 784.14. The regulations at 30 CFR 780.25(a) and 784.16(a) are specific requirements for structures including sedimentation ponds, water impoundments and coal processing waste banks, dams and embankments. Montana must include a counterpart to 30 CFR 780.25(a)(1)(iii) and 784.16(a)(1)(iii).
RESPONSE: DSL's response to the comment referenced has been revised such that the language of concern has been re-inserted with the following exception. The word "preliminary" has been deleted because it is extraneous, unnecessary, and possibly confusing.

COMMENT (Ennis): Montana has included a revised definition of "previously mined area" in the informal package. This revision was made in response to OSM's November 21, 1988 letter. Montana's proposed definition of "previously mined area" is substantively identical to the Federal definition at 30 CFR 701.5. However, in the case of National Wildlife Fed'n v. Lujan, Nos. 87-1051, 87-1814, and 88-2788 (D.D.C. Feb. 12, 1990), the court addressed two concerns pertaining to the Federal definition. The first was whether "previously mined" means that mining occurred (1) before the date Congress enacted SMCRA (August 3, 1977), or (2) before the various dates that SMCRA's substantive requirements began to apply to specific mining operations or sites.

The court found that "a definition using the date of SMCRA's enactment more closely conforms to the Act and the court's previous ruling on the issue". Consequently, the court held that the date of enactment of SMCRA (August 3, 1977) "must be the time from which the temporal concepts of 'preexisting' and 'previous' are measured."

With respect to the second issue, the court held that a definition cannot stand that lets full reclamation of a previously mined area be undone by partial reclamation of the same area after a subsequent mining operation.

Based on the above and the court's remand of the Federal definition of "previously mined area" to "correct both of the flaws identified" in the decision, the Director will, in the future, inform Montana of regulatory changes need to amend this definition. However, if Montana wishes to submit a revised definition of "previously mined area" it must be consistent with the court's decisions, in that any proposed definition must combine the language of the 1983 and 1987 versions and exclude all highwalls created after August 3, 1977.

RESPONSE: Montana's proposed definition is consistent with the court's decision. The State Act was passed March 16, 1973. All coal mining operators meeting the definition of "operator" in the Act were required to submit permit applications pursuant to the provisions in the Act within 90 days after the effective date. Lands subject to permit at that time and thereafter were those lands that were considered an active part of the disturbance associated with a coal mining operation conducted by an "operator."

Lands mined and reclaimed under a permit issued pursuant to the 1973 Act would, by definition, not be previously mined areas, and, thus any secondary mining of such areas would not be remining. Any lands mined and reclaimed after the effective date of the State Act, but without a state permit for whatever reason, also would not be previously mined areas as defined in this rule.

Any disturbance of old highwalls, i.e., to start mining again where old mining stopped, is not remining under Montana regulations (see ARM 26.4.834). A mined and reclaimed site that is subsequently redisturbed to recover another coal seam is mining, not remining (see ARM 26.4.834).

5. The authority of the Department and Board to adopt and amend the rules is based on Sections 82-4-204 and 82-4-205, MCA, and the rules implementing Sections 82-4-203, 221, 222, 226, 227, 231, 232, 233, 235, 237, 239, 242, and 254, MCA.

Dennis D. Casey, Commissioner

Certified to the Secretary of State May 7, 1990.

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

In the Matter of the Amendment of ARM 26.4.724 through 26.4.726, 26.4.728, 26.4.730 through 26.4.733, and 26.4.1301A and repeal of ARM 26.4.727, 26.4.729, 26.4.734 and 26.4.735, all pertaining to revegetation of land disturbed by coal and uranium mining operations.	NOTICE OF REPEAL AND AMENDMENT OF STRIP AND UNDERGROUND COAL AND URANIUM MINING AND RECLAMATION RULES

TO: All Interested Persons

1. On November 22, 1989, the Department of State Lands and Board of Land Commissioners published notice of public hearing on proposed repeal of ARM 26.4.727, 26.4.729, 26.4.734, and 26.4.735 and amendment of ARM 26.4.724 through 26.4.726, 26.4.728, 26.4.730 through 26.4.733, and 26.4.1301A concerning revegetation of land disturbed by coal and uranium mining operations at page 1885 of the 1989 Montana Administrative Register, Issue No. 22.

2. The Department and Board have amended and repealed the rules as proposed.

3. During the comment period, the Department received written comments from Westmoreland Coal Company, Western Energy Company, Peabody Coal Company, and Spring Creek Coal Company. Summaries of those comments and the Board and Department responses to those comments are as follows:

COMMENT: Although the rules may require fine tuning, Westmoreland and Western Energy support the rules as proposed.
RESPONSE: No response necessary.

COMMENT: The proposed rules are needlessly complex, too restrictive, and unrealistic from an ecological standpoint. A number of the items addressed in the rules (e.g., portions of 26.4.726) would be better placed in guidelines rather than in the rules. The promulgation of very specific rules will not allow for the flexibility needed in reclamation plans and bond release situations. (Peabody)
RESPONSE: The rules have been written with the detail necessary in the Department's opinion, to notify operators and the public of the standards that will be applied to determine vegetation success. Specific objectionable provisions are identified in later comments, and the Department has addressed those specific comments.

COMMENT: Proposed rule 26.4.724(1) states that reference areas must be established for all native community types to be disturbed. Throughout the remaining revegetation rules, allowance is made for the use of the reference area or historical record approach. If an operator chooses to use the historical record approach, must that operator go through the additional cost and effort of establishing reference areas as well? The establishment of reference areas should be an option to the operator, either as a backup to the historical record approach or as the primary measure. (Peabody, Spring Creek)
RESPONSE: Reference areas are necessary to insure that sufficient and appropriate data will be accessible for bond release purposes if alternative revegetation comparison standards prove to be inadequate. The Department will not therefore make reference areas optional.

COMMENT: Proposed rule 26.4.724(2) requires a map scale of 1 inch = 400 feet with no provision for any other map scale to be approved by the Department. The rule should provide for other than 1:400 map scale, if approved by the Department. (Spring Creek)
RESPONSE: 26.4.304(9)(a) permits, upon approval, the use of other scales for mapping vegetative communities on the mine site. However, the Department believes that the special role of reference areas in determining reclamation performance requires a certain amount of precision in the delineation and characterization of their communities, and that 1 inch = 400 feet meets this need.

COMMENT: Proposed rule 26.4.724(3) requires management, assumed to be grazing, of reference areas at a minimum level of "good" condition class. Since revegetation success is to be evaluated by comparison with reference areas, the intent of this section is to require a minimum acceptance level in direct contradiction to the language of 82-4-233, which requires a level comparable to premining condition. In many cases, this would be lower than "good" condition.

It is entirely possible that areas disturbed by mining operations were in poor or fair range condition prior to topsoil stripping operations. Reclamation would be in compliance with the intent of the Act if such land was reclaimed to poor or fair range conditions, but it would not meet the requirements of the proposed revegetation rules. (Spring Creek)
RESPONSE: Section 82-4-233(1)(c) requires that the vegetative cover on the reclaimed lands be capable of withstanding grazing pressure comparable to that which the land could have sustained prior to mining. Thus, the reclaimed land must have at least the same land use capabilities as its premine capability under proper management. A good or better range condition reflects proper management of specific land units and therefore is a minimum condition necessary for comparison with reclaimed lands. No change will be made.

COMMENT: Proposed 26.4.724(4)(a) specifies that grazing be conducted during at least two years out of the last five of the liability period. Neither Federal regulations nor State or Federal law require grazing of reclaimed lands. This provision is inconsistent with law. Two years of data is not going to provide any significant documentation as to whether the reclaimed areas can withstand grazing pressure, but production and species composition data can provide a good indication. It is difficult to understand the reason for this rule or what will be achieved by specifying grazing in this time frame. (Peabody, Spring Creek)
RESPONSE: Neither federal rules nor state or federal laws preclude the use of grazing to test the ability of reclaimed areas to withstand grazing. The Department believes that grazing response, in conjunction with other data, is the best way to assess the ability of reclaimed land to feed livestock and withstand grazing pressure because of the variability of community development and the dietary selectivity of grazing animals. The rule states that at least two years of grazing will be performed. If two years of grazing is not adequate on a particular site to demonstrate revegetation success, then additional grazing will be required.

COMMENT: Regarding management of reference areas, range condition can be maintained with methods other than grazing, although it is assumed to be the generally accepted approach. Rule 26.4.724(3)(a) and (4)(a) require that range condition be established or improved to good condition, then exposed to grazing at an approved level to maintain the achieved range condition. It would be equally effective to mechanically remove an appropriate level of vegetative growth since the effects of livestock grazing on rangelands are related primarily to the direct effects that defoliation has on the growth and reproduction of individual plants. This method would produce similar results while avoiding the problem of grazing small isolated areas. Grazing of reference areas is not dictated by the Act, therefore should not be the only method allowed under the rules. Greater flexibility needs to be incorporated into this section of the rules. Similar comments are provided below regarding the requirement to graze revegetated areas. (Spring Creek)
RESPONSE: Mechanical removal does not simulate the selectivity of grazing animals. Selectivity can affect the survival of plant species and the composition of plant communities. Since reclaimed areas must be capable of withstanding grazing and such areas may be compared with reference areas for bond release purposes, then the reference areas must be grazed.

COMMENT: Proposed 26.4.726 outlines data collection requirements for assessing the success of reclamation. It proposes clipping and weighing of each of 8 morphological classes, gathering production data, estimating total cover, and determining density, and then comparing these parameters at the 90% confidence interval between reference area data and/or techni-

cal standards derived from historical data. In addition, the rule requires that sample adequacy be demonstrated for each parameter.

When land management agencies like the SCS conduct field surveys to determine range condition class, they utilize much simpler, but equally effective methods. The other major land managers, including the Forest Service, BLM and Bureau of Indian Affairs, use similar techniques. Range condition of millions of acres involved in the Conservation Reserve Program are assessed by field methods less complex than those proposed by the Department. Would it not be possible to adopt similar assessment techniques to satisfy the requirements of the Act and eliminate the unnecessary detailed scrutiny proposed in this rule? It seems plausible that diverse, effective, and permanent cover of the same seasonal variety can be detected by the less cumbersome methods already in use by other agencies responsible for many millions of acres. (Spring Creek)
RESPONSE: The methods used by the agencies listed are designed to assess the condition of existing rangelands, the trends in condition over time, and the impacts of grazing on those lands, not to determine the adequacy of mined land reclamation. The methods required by the rules are designed to assess vegetation that is established on mined lands where the predisturbance vegetation has been completely destroyed. The Department believes that the methods required by the rules will provide the information needed to assess the production, cover, density, diversity, and utility of the post-mine vegetation.

COMMENT: The requirement in 26.4.726 that post-mine diversity, density, morphological classes, and distribution of morphological classes be comparable to premine conditions is not realistic because the native plant communities that represent the premine conditions are subclimax or climax communities. Comparability to these communities cannot be achieved in 10 or 20 years. (Peabody)
RESPONSE: Reclamation is expected to give a head start to natural successional processes so that premine conditions can be adequately approximated within the 10-year responsibility period.

COMMENT: Rule 26.4.726(1) requires a demonstration of sample adequacy. Western Energy hopes that the permittee and the Department can agree on an acceptable number of samples on a case-by-case basis.
RESPONSE: The number of samples necessary can be derived using one of several standard sample adequacy formulas.

COMMENT: As long as there is good distribution of plant communities, the need for certain species or class distribution in proposed 26.4.726(7) is questionable and difficult to document. Also, the rule requires that distribution be "the same or greater extent provided by premine...". As stated earlier,

the requirement to exceed premined conditions is excessive. (Spring Creek)
RESPONSE: Plant communities are composed of particular species and morphological classes. Therefore, a good distribution of communities is essentially synonymous with effective distribution of species and classes. The rule does not require more effective distribution. The words "or greater" are included so that more effective distribution does not violate the rule.

4. The authority of the Department and Board to amend and repeal these rules is based on sections 82-4-204 and 82-4-205, MCA, and these rules implement sections 82-4-233 and 82-4-235, MCA.

Dennis D. Casey, Commissioner

Certified to the Secretary of State May 7, 1990.

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 March 31, 1990. This table includes those rules adopted during the period April 1, 1990 through June 30, 1990 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 1990, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1989 and 1990 Montana Administrative Registers.

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