MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 2

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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NOTICE SECTION

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the proposed amendment of rules pertaining to the regulatory status and use of aquatic herbicides	)))	NOTICE OF PROPOSED AMENDMENT of 4.10.311, 4.10.312 4.10.313, 4.10.314 and 4.10.315, 4.10.316

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On March 2, 1991, the Department of Agriculture proposes to amend the above-stated rules that pertain to the sale and use of aquatic herbicides.

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

4.10.311 ~~SALE OR USE OF AQUATIC HERBICIDES RESTRICTED EXCEPTION~~ DESIGNATION OF RESTRICTED-USE AQUATIC HERBICIDES

(1) The sale ~~or~~ and use of ~~all~~ aquatic herbicides that contain one or more of the following active ingredients ~~or chemicals~~ intended for remission of aquatic vegetation, ~~except copper sulfate and alkanolamine complex copper compounds and those products specifically labeled for swimming pool use,~~ shall be designated as restricted-use:~~r~~

(a) xylene
(b) acrolein
(c) endothall

AUTH: 80-8-105 MCA IMP: Sec. 80-8-105 MCA

4.10.312 ~~SALE OF AQUATIC HERBICIDES~~ SALE OF RESTRICTED-USE AQUATIC HERBICIDES (1)Only licensed pesticide dealers ~~licensed under the Title 80, Chapter 8 MCA~~ may sell~~, exchange, or distribute~~ a registered, restricted-use aquatic herbicide and only under the following conditions:

(~~1~~a) Sale or distribution can only be made to a certified applicator who holds an aquatic pest control license or permit issued by the department. ~~Sale of a pesticide labeled for both terrestrial and aquatic weed control and not restricted by the Environmental Protection Agency is exempt from the requirements of this rule if it is sold only for terrestrial uses.~~

(~~2~~b) Each dealer must maintain a complete record of each restricted-use aquatic herbicide sale. These records must be retained for a period of two (2) years. ~~The~~ Records shall include all requirements ~~from~~ contained within ARM 4.10.504.

AUTH: Sec. 80-8-105 MCA IMP: Sec. 80-8-105 MCA

4.10.313 ~~USE OF AQUATIC HERBICIDES~~ USE OF RESTRICTED-USE AQUATIC HERBICIDES (1) Only persons certified and holding an aquatic pest control applicator license or permit issued by the department may purchase, or use ~~and apply~~ a restricted-use aquatic herbicide.

(~~1~~a) To initially qualify a person must attend a department approved aquatic herbicide training course and pass an aquatic herbicide examination.

(~~2~~b) To maintain qualifications for certification, all ~~commercial and government~~ applicators, except farm applicators, must comply with ARM 4.10.203(5), MCA.

(c) All ~~P~~farm applicators must attend one six (6) hour aquatic training course, or pass an aquatic herbicide examination to maintain qualifications. The permit issued will conform to the five year qualification period established for the district in which the farm applicator resides.

(d) The department may require additional training if significant changes occur in aquatic herbicide use patterns or aquatic vegetation control techniques.

AUTH: Sec. 80-8-105 MCA IMP: Sec. 80-8-105 MCA

4.10.314 ~~APPLICATION OF AQUATIC HERBICIDES~~ APPLICATION OF RESTRICTED-USE AQUATIC HERBICIDES (1) All Certified licensed or permitted aquatic pest control applicators who plan to apply a restricted-use aquatic herbicide shall:

(~~1~~a) Submit for approval a preseason aquatic vegetation management plan to the department by ~~April 15th, or~~ at least two (2) weeks prior to the first aquatic herbicide application. No applicator shall apply a restricted-use aquatic herbicide without management plan approval by the department. Management plan forms are available upon request from the department. The management plan must contain:

(a~~i~~) ~~This management plan must include:~~ a legible map of the ditch (preferably drawn on a USGS 7.5' topographic map or other appropriately detailed base map) area showing the location of:

(~~1~~A) ~~a map of the ditch including all locations where irrigation waters cross or discharge into state waters;~~ all ditch or canal segments, or other surface waters to be treated;

(~~ii~~B) ~~herbicide to be used;~~ all structures (flumes, siphons, wiers, waste gates, etc.) along treated segments;

(~~iii~~C) ~~approximate amount of herbicide to be applied;~~ all state waters within the general area which treated waters parallel, cross or could potentially contaminate;

(~~iv~~D) ~~approximate application dates;~~ all herbicide application points;

(~~v~~E) ~~rates to be used;~~ all areas where treated water will be discharged;

~~(vi) weed(s) to be controlled;~~

~~(vii) application techniques;~~

~~(viii) points where the chemical will be applied.~~

(~~i~~ii) application date(s);
(~~ii~~iii) herbicide to be used;
(iv) amount and rate of herbicide to be used;
(v) application techniques, and
(vi) weed(s) to be controlled.

(~~2~~b) Maintain and update the plan as changes or modifications occur that differ from the original management plan submitted to the department. This management plan will remain on file at ~~in~~ the department.

(c) If no changes in the management plan are anticipated, the applicator must still notify the department in writing of their intent to treat. This written notification will serve as that year's plan. A letter of approval from the department will still be required before the application may proceed.

(~~3~~)(d) Allow an inspection of the treatment area by the department or its authorized agents prior to approval of the plan and application by the applicator. The department will notify the applicant of ~~the plan's~~ its decision for approval once any required inspections are completed. If the applicant desires an inspection of the treatment area, advance notice to the department of at least one (1) week is recommended.

(~~4~~)(e) Consult the Montana department of fish, wildlife and parks ~~before~~ prior to applying a restricted-use aquatic herbicide.

~~(5) Submit, upon request of the department, a postseason application report to the department by November 15th to include:~~
~~(a) name and license or permit number of the applicator;~~
~~(b) name of the ditch, canal, or area treated;~~
~~(c) miles of canal treated or volume of area treated;~~
~~(d) herbicide(s) used and amount;~~
~~(e) rate and date of application;~~
~~(f) weeds controlled;~~
~~(g) application technique;~~
~~(h) accidental spills and misapplication.~~

AUTH: Sec. 80-8-105 MCA IMP: Sec. 80-8-105 MCA

4.10.315 APPLICATOR RECORDS (1) All ~~each~~ applicators, including farm applicators, must maintain and submit, upon request by the department, a record of each restricted-use aquatic herbicide application ~~according to ARM 4.10.207. The report required in rule 4.10.314 (5) will satisfy the requirements of rule 4.10.207 (8).~~

(a) These records shall include:

(i) name of the applicator and/or operator;

(ii) name of the ditch, canal, or area treated and county where located;

(iii) application point(s) and areas of ditch, canal or other surface waters treated;

(iv) company name, trade name, and the EPA registration number or formulation of the herbicide(s) used;

(v) date of application and amount and rate of herbicide used;

(vi) weeds controlled;
(vii) type of equipment used and method of application.
(b) These records will satisfy reporting requirements for all non-farm applicators described within ARM 4.10.207(1), MCA. The records required in ARM 4.10.315, MCA will satisfy the requirements for applicators subject to ARM 4.10.208(8), MCA. Farm applicators are exempt from the reporting requirements of ARM 4.10.207(8), MCA.

AUTH: Sec. 80-8-105 MCA IMP: 80-8-105 MCA

4.10.316 APPLICATOR INCIDENT REPORT (1) Any person who, through their ~~his~~ own actions or omissions or the actions or omissions of persons under their ~~his~~ direction or control, causes or allows any restricted-use aquatic herbicide to escape into or be deposited into any public waters or private waters, or causes or allows any aquatic herbicide to escape onto or be deposited on any person, lands or property, shall provide notice to the department by the quickest means possible immediately following said herbicide misapplication or escape. The notice shall give the geographic location of the incident, the name of the pesticide involved and the name(s) and address(es) of the person(s) whose waters, land, person or property, including the state of Montana's, was subjected to the herbicide application.

AUTH: Sec. 80-8-105 MCA IMP: Sec. 80-8-105 MCA

3. Administrative rules pertaining to the sale and use of aquatic herbicides are being amended to more accurately reflect the use-patterns and risks associated with these compounds. The proposed changes have been reviewed and approved by personnel of other state agencies which oversee programs associated with the protection of Montana's aquatic systems. Regulatory and monitoring procedures currently employed for aquatic herbicides which have been previously implicated in the degradation of state-owned waters will not be changed. Other narrative changes to the rules were made to standarize record-keeping requirements and to further clarify pre-existing rules.

4. Interested parties may submit their data, views and arguments either orally or in writing to the Environmental Management Division, Department of Agriculture, Capitol Station, Helena, MT 59620-0205, no later than February 28, 1991.

5. If a person who is directly affected by the proposed rule changes wishes to express their data, views and arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written comments they have to the above listed address, no later than February 28, 1991.

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

DEPARTMENT OF AGRICULTURE

BY: Everett M. Snortland
Everett M. Snortland, Director

Certified to the Secretary of State, January 21, 1991.

BEFORE THE DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed adoption of a new rule for the administration of the 1991 Federal Community Development Block Grant Program	))))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED ADOPTION OF A NEW RULE PERTAINING TO THE ADMINISTRATION OF THE 1991 FEDERAL COMMUNITY DEVELOPMENT BLOCK GRANT (CDBG) PROGRAM

TO: All Interested Persons:

1. On February 20, 1991, at 1:30, p.m., a public hearing will be held in Room C-209, of the Cogswell Building, Helena, Montana, to consider the adoption by reference of rules governing the administration of the 1991 Federal Community Development Block Grant (CDBG) Program.

2. The proposed adoption will read as follows:

"I INCORPORATION BY REFERENCE OF RULES FOR ADMINISTERING THE 1991 CDBG PROGRAM (1) The department of commerce herein adopts and incorporates by this reference the Montana Community Development Block Grant Program 1991 Application Guidelines and the Montana Community Development Block Grant Program, February 1991 Grant Administration Manual published by it as rules for the administration of the 1991 CDBG program.

(2) The rules incorporated by reference in (1) above, relate to the following:

(a) the policies governing the program,
(b) requirements for applicants,
(c) procedures for evaluating applications,
(d) procedures for local project activities,
(e) environmental review of project activities,
(f) procurement of goods and services,
(g) financial management,
(h) protection of civil rights,
(i) fair labor standards,
(j) acquisition of property and relocation of persons displaced thereby,
(k) administrative considerations specific to public facilties, housing rehabilitation and neighborhood revitalization, and economic development projects,
(l) project audits,
(m) public relations, and
(n) project monitoring.

(3) Copies of the regulations adopted by reference in subsection (1) of this rule may be obtained from the Department of Commerce, Local Government Assistance Division, Capitol Station, Helena, Montana 59620."

Auth: Sec. 90-1-103, MCA; IMP, Sec. 90-1-103, MCA

3. It is reasonably necessary to adopt the rule because the federal regulations governing the states' administration of the 1991 CDBG program and section 90-1-103, MCA, require the Department to adopt rules to implement the program.

4. Interested persons may present their data, views or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to the Local Government Assistance Division, Department of Commerce, Capitol Station, Helena, Montana 59620, no later than February 28, 1991.

5. Richard M. Weddle will preside over and conduct the hearing.

DEPARTMENT OF COMMERCE
LOCAL GOVERNMENT ASSISTANCE
DIVISION

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, January 21, 1991.

BEFORE THE COAL BOARD
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed adoption of new rules for the implementation of the Montana Environmental Policy Act	) NOTICE OF PROPOSED ADOPTION) OF NEW RULE I INCORPORATION) BY REFERENCE OF RULES FOR) IMPLEMENTING MEPA AND NEW) RULE II CATEGORICAL) EXCLUSIONS FROM ENVIRON-) MENTAL REVIEW PROCESS

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On March 2, 1991, the Coal Board proposes to adopt the above-stated rules. The proposed new rules will read as follows:

"I INCORPORATION BY REFERENCE OF RULES FOR IMPLEMENTING MEPA (1) The board hereby adopts and incorporates by reference the department's rules for implementing Title 75, chapter 1, MCA, the Montana Environmental Policy Act (MEPA) as set forth in ARM 8.2.302 through 8.2.401."

Auth: Sec. 90-6-205, MCA; IMP, Sec. 75-1-201, 75-1-202, MCA

"II CATEGORICAL EXCLUSIONS FROM ENVIRONMENTAL REVIEW PROCESS (1) As authorized by ARM 8.2.304(5), the Board categorically excludes the following projects from MEPA requirements and will not normally prepare either an environmental assessment or an environmental impact statement in considering applications for grants or loans to finance these projects:

(a) projects that will be partially funded by, or for which the applicant must obtain a permit from, a state or federal agency which, by reason of its funding or permitting function, has primary responsibility to consider the environmental impacts of the project under MEPA or the National Environmental Protection Act;

(b) projects primarily involving the acquisition of capital equipment;

(c) projects primarily involving planning studies or scientific research and analysis; or

(d) projects primarily involving the provision of human services.

(2) If information available to the board suggests that a proposed project in one of the categories described in subsections (1)(b) through (1)(d) may significantly affect the quality of the human environment, the board may, in its discretion, require an applicant to provide additional information relevant to environmental concerns and the board will prepare an environmental assessment or environmental impact statement as may be appropriate."

Auth: Sec. 90-6-205, MCA; IMP, Sec. 75-1-201, MCA

REASON: It is reasonably necessary to adopt the proposed rules in order to establish the procedure by which the coal Board will carry out its responsibility under the Montana Environmental Policy Act (sections 75-1-101 et seq., MCA) to consider the potential impacts on the human environment of projects proposed for Coal Board funding.

3. Interested persons may present their data, views or arguments concerning the proposed adoption in writing to the Montana Coal Board, Local Government Assistance Division, Department of Commerce, Capitol Station, Helena, Montana 59620, no later than February 28, 1991.

4. If a person who is directly affected by the proposed adoption wishes to present 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 Montana Coal Board, Local Government Assistance Division, Department of Commerce, Capitol Station, Helena, Montana 59620, no later than February 28, 1991.

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

COAL BOARD
G.C. (JERRY) FEDA, CHAIRMAN

BY: _____
ANDY POOLE, DEPUTY DIRECTOR
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, January 21, 1991.

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

In the matter of the amendment of Rule 26.3.149 pertaining to mortgaging of state leases and licenses	)))))	NOTICE OF PROPOSED AMENDMENT OF RULE 26.3.149 NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On March 18, 1991 the Board of Land Commissioners proposes to amend rule 26.3.149 which requires a copy of any assignment in escrow signed by the mortgagor and mortgagee to be filed with the department upon the renewal of each lease or license.

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

26.3.149 MORTGAGES AND PLEDGES (1) As provided in Section 77-6-401 through 404, MCA, state land leases or licenses and leasehold interests may be pledged or mortgaged by the lessee or licensee. The pledgee or mortgagee shall file the pledge or mortgage or certified copy thereof with the department within 30 days of its receipt by him. Within 30 days after payment of the indebtedness, termination of the pledge agreement, or release of the mortgaged leasehold interest, the lessee or licensee shall file proof of that fact with the department.

(2) If a lessee or licensee mortgages his leasehold interest in state lands pursuant to section 77-6-401, MCA, then there must be an assignment, signed by the lessee or licensee/mortgagor and the mortgagee, and placed in escrow. A copy of such escrow assignment must be filed with the department. ~~A new escrow assignment, signed by the lessee or the licensee/mortgagor, and the mortgagee, must be placed in escrow and a copy filed with the department each time a lease is renewed.~~ An assignment is effective for the lease term during which it is made and any subsequent renewal term as long as the assignor continuously holds the lease. Failure to execute the terms of this rule shall be cause for the department not to recognize the mortgage.

3. The amendment is reasonably necessary to allow effective mortgages and pledges of state leases.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendment in writing to Jeff Hagener, Montana Department of State Lands, Capitol Station, Helena, Montana, 59620, no later than March 1, 1991.

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

for a hearing and submit this request along with any written comments he has to Jeff Hagener, Montana Department of State Lands, Capitol Station, Helena, Montana, 59620 no later than March 1, 1991. To guarantee consideration, mailed comments must be postmarked no later than March 1, 1991.

6. If the agency receives requests for a public hearing on the proposed amendment from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment; from the Administrative Code Committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 900 persons based on approximately 9,000 state surface lessees.

7. The authority of the agency to make the proposed amendment is based on section 77-1-209, MCA, and the rule implements sections 77-6-401 through 77-6-404, MCA.

Dennis D. Casey, Commissioner

Certified to the Secretary of State January 22, 1991.

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

In the matter of the amendment of Rule 26.4.1301A pertaining to the modification of existing coal and uranium permits	)))))	NOTICE OF PROPOSED AMENDMENT OF RULE 26.4.1301A NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons

1. On March 18, 1991 the Board of Land Commissioners proposes to amend rule 26.4.1301A which requires each operator and test pit prospector to submit proposed modifications to their permits by January 13, 1991 in order to comply with current reclamation standards.

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

26.4.1301A MODIFICATION OF EXISTING PERMITS: ISSUANCE OF REVISIONS AND PERMITS (1) By ~~January 13, 1991~~ July 13, 1991 each operator and each test pit prospector shall submit to the department:

(a) an index to the existing permit cross-referencing each section of the permit to sub-chapters 3 through 12, as they read on January 12, 1989 and as they read on January 13, 1989;

(b) a modified table of contents for the existing permit;

(c) maps showing each portion of the permit area on which each of the following had been completed as of 11:59 p.m. on January 12, 1989:

(i) removal of overburden only;

(ii) removal of overburden and coal only;

(iii) removal of overburden and coal and backfilling and grading only;

(iv) removal of overburden and coal, backfilling and grading, and soiling only; and

(v) removal of overburden and coal, backfilling and grading, soiling and seeding and planting;

(d) an application for all permit revisions necessary to bring the permit and operations conducted thereunder into compliance with this rule and ARM 26.4.414 through 26.4.1122.

(2) A permit revision application submitted solely for purposes of subsection (1)(d) above is a minor revision for purposes of sub-chapter 4. The department shall issue written findings granting or denying the application within 5 months of its receipt.

(3) No permittee may continue to mine under an operating permit after ~~July 13, 1991~~ January 13, 1992 unless the permit has been revised to comply with subchapters 3 through 12, as amended January 13, 1989.

(4) As of the date that a permit is revised to comply with sub-chapters 3 through 12, as amended on January 13, 1989, the

permittee shall conduct all operations in compliance with the permit and sub-chapters 3 through 12, as amended, except that:

(a) any area in which backfilling and grading operations had been completed on January 12, 1989 is subject to the backfilling and grading requirements as they read on that date;

(b) any area in which soiling operations had been completed on January 12, 1989 is subject to the soiling requirements as they read on that date; and

(c) any area for which the final minimum period of responsibility for establishing vegetation, as provided in ARM 26.4.-725(1), had commenced on or before May 17, 1990 of ARM 26.4.724 through 26.4.735, as amended is subject to:

(i) the seeding and planting and related requirement as they read on that date; or

(ii) the seeding and planting requirements on or after May 18, 1990 of ARM 26.4.724 through 26.4.735, as amended.

(5) Each new permit and each amendment to an existing permit applied for and issued on or after January 13, 1989 must be in compliance with sub-chapters 3 through 12 as they read on January 13, 1989.

3. This amendment is reasonably necessary to allow complete submission and orderly processing of strip mine permit modifications. All strip mine permit holders have recently submitted permit modifications to the Department pursuant to ARM 26.4.1301A. Many of these modifications are complete and require processing within five months. Others, because of the large amount of work required to modify larger permits, are incomplete. The rule amendment allow operators more time to submit complete modifications and thereby allow the Department more time for review of the modifications.

4. Interested parties may submit their data, views, or arguments concerning the proposed amendment in writing to Bonnie Lovelace, Montana Department of State Lands, Capitol Station, Helena, Montana, 59620, no later than March 1, 1991. To guarantee consideration, mailed comments must be postmarked no later than March 1, 1991.

5. If a person who is directly affected by the proposed amendment wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Bonnie Lovelace, Montana Department of State Lands, Capitol Station, Helena, Montana, 59620 no later than March 1, 1991.

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

be published in the Montana Administrative Register. Ten percent of those persons directly affected have been determined to be one person based on fewer than ten active coal mines.

7. The authority of the agency to make the proposed amendment is based on section 82-4-205, MCA, and the rule implements section 82-4-221, MCA.

Dennis D. Casey, Commissioner

Certified to the Secretary of State January 22, 1991.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.27.118 relating to Prepayment of Motor Fuels Tax	NOTICE OF PUBLIC HEARING on the PROPOSED AMENDMENT of ARM 42.27.118 relating to Prepayment of Motor Fuels Tax

TO: All Interested Persons:

1. On February 22, 1991, at 9:30 a.m., a public hearing will be held in Room 107, Social and Rehabilitation Services Building, Sanders Street, Helena, Montana, to consider the amendment of ARM 42.27.118, relating to prepayment of motor fuels tax.

2. The amendment as proposed provides as follows:

42.27.118 PREPAYMENT OF MOTOR FUEL TAXES (1) A licensed gasoline distributor may overpay its known motor fuel tax liability. The overpayment must be designated as such by the distributor. The credit balance created by the overpayment will be applied to future tax deficiencies if the gasoline is reported and tax is paid within 30 days after the due date. No penalty or interest will be imposed on future tax deficiencies to the extent the overpayment credit balance is sufficient to pay the deficiency. If the overpayment credit balance is not sufficient to cover the entire deficiency, penalty and interest will be assessed against the remaining deficiency. No interest will be accrued on the overpayment credit balance.

3. The department's authority to amend this rule is 15-70-104, MCA, and the rule implements 15-70-210, MCA.

4. The department is proposing the amendment because the current rule does not give a time limit regarding payment of the tax. The department is receiving the tax three to seven months after the due date and no penalty and interest are being charged.

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:

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

no later than March 4, 1991.

6. Cleo Anderson of the Department of Revenue, Office of Legal Affairs, has been designated to preside over and conduct the hearing.

Denis Adams, Director
Department of Revenue

Certified to Secretary of State January 21, 1991.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMEND-) MENT of ARM 42.12.115) relating to Liquor License) Renewal)	NOTICE OF PROPOSED AMENDMENT of ARM 42.12.115 relating to Liquor License Renewal

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On April 12, 1991, the Department of Revenue proposes to amend ARM 42.12.115 relating to Liquor License Renewal.

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

42.12.115 ASSESSMENT OF LICENSE RENEWAL LATE PAYMENT PENALTY FEE - GROUNDS FOR WAIVER (1) The department will assess a license renewal late payment penalty fee in all cases where a licensee fails to pay the license renewal fee prior to July 1 of the license year. The renewal application and fee is timely filed and paid if mailed in an envelope postmarked by the United States postal service prior to July 1. If June 30 falls on a Saturday, Sunday, or state legal holiday, a postmark for the following business day or a payment received at the liquor division on the following business day is timely.

(2) The department may waive a license renewal late payment penalty fee assessment upon receipt of a written request by the licensee. The request must state the reason for late payment and be supported by documentation. A waiver of the license renewal late payment penalty fee assessment shall be granted under the following conditions:

(a) a department error;

(b) the department mailed a license renewal notice less than two weeks prior to July 1;

(c) a delay in payment caused by the death or serious illness of the licensee;

(d) a United States postal service error; or

(e) a renewal application and fee was erroneously mailed to the internal revenue service~~.~~;

(f) a delay in payment due to bankruptcy or foreclosure action; or

(g) the late payment is the only payment within the most recent five consecutive years or since the license was acquired, whichever is less, and payment was received at the liquor division office by August 15.

(3) A licensee's neglect, lack of funds, or ignorance of the law are not sufficient reasons for waiver of a license renewal late payment penalty fee assessment.

3. The Department's authority to amend the rule is found at 16-1-303 MCA, and the rule implements 16-4-501 MCA.

4. ARM 42.12.115 is proposed to be amended because 16-4-501, MCA, was amended during the 1983 Legislative Session adding subsection (10) providing for the department to assess a penalty for late payment. The amendment was intended to encourage licensees who were chronically late paying their license renewal fee to pay on time. The department decided to uniformly assess licensees a late payment penalty fee in accordance with 16-4-501(10), MCA, when the renewal fee was unpaid on July 1 of each year. Because special circumstances can exist that prohibit a licensee from meeting the payment deadline, a rule was promulgated to allow for those instances. ARM 42.12.115 identifies the grounds upon which a licensee may request and be granted a waiver of the late payment penalty fee assessment. Additional grounds, not anticipated at the time the rule was developed, are proposed. The rule is too restrictive and places an unreasonable burden on those who rarely are late paying the license renewal fee.

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

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

no later than February 28, 1991.

6. If a person who is directly affected by the proposed amendments wishes to express his data, views and arguments orally or in writing at a public hearing, he must make written request for a hearing and submit this request along with any written comments he has to Cleo Anderson at the above address no later than February 28, 1991.

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

Denis Adams

DENIS ADAMS, Director
Department of Revenue

Certified to Secretary of State January 21, 1991.

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

In the matter of the amendment of Rules 46.12.503 and 46.12.505 pertaining to inpatient hospital services and medical assistance facilities	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 46.12.503 AND 46.12.505 PERTAINING TO INPATIENT HOSPITAL SERVICES AND MEDICAL ASSISTANCE FACILITIES

TO: All Interested Persons

1. On February 20, 1991, 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 46.12.503 and 46.12.505 pertaining to inpatient hospital services and medical assistance facilities.

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

46.12.503 INPATIENT HOSPITAL SERVICES, DEFINITION

Subsections (1) through (16) remain the same.

(17) "Medical assistance facility" means a limited-service rural hospital as defined in 50-5-101, MCA, and licensed by the Montana department of health and environmental sciences and participating in a demonstration project authorized by the United States department of health and human services.

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

46.12.505 INPATIENT HOSPITAL SERVICES, REIMBURSEMENT

Subsection (1) remains the same.

(a) Inpatient hospital services provided within the state of Montana will be reimbursed under the prospective payment system using the methodology in subsection (2) of this rule.~~, except for c~~Certified rehabilitation units and medical assistance facilities ~~which~~ will be reimbursed on a retrospective basis with. ~~A~~allowable costs ~~will be~~ determined ~~in accordance with~~ according to ARM 46.12.509(2). Subsequent references to rule subsections refer to subsections of this rule unless otherwise specifically identified. In addition to the prospective rate, the following are reimbursable:

Subsections (1)(a)(i) through (13) remain the same.

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

3. These rule changes are necessary in order to cover a new provider type, Medical Assistance Facilities (MAF), that will operate as part of a U. S. Department of Heath and Human Services demonstration project which was authorized by Omnibus Budget Reconciliation Act of 1990. The first facility has been licensed and is in operation.

If successful, this project will prove the viability of the limited-service rural hospital model as a cost effective alternative in rural areas. In order to ensure the greatest possibility of success and to maintain access for Medicaid recipients, Medicaid will cover MAF services on the same basis as Medicare.

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 February 28, 1991.

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

Director, Social and Rehabilitation Services

Certified to the Secretary of State January 17, 1991.

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

In the matter of the adoption of rules pertaining to long-term care insurance	))))	NOTICE OF ADOPTION OF ARM 6.6.3101 THROUGH ARM 6.6.3116 (RULES I THROUGH XVI)

TO: All Interested Persons.

1. On November 15, 1990, the State Auditor and Commissioner of Insurance, Department of Insurance (department) published a notice of public hearing on the proposed adoption of the above-stated rules at page 1990 of the 1990 Montana Administrative Register, issue number 21.

2. Oral comment was taken at the public hearing held on December 5, 1990, at 9:00 a.m., in Room 160 of the Mitchell Building, 126 North Sanders, Helena, Montana. The hearing, which was tape-recorded and transcribed, was attended by four persons. One person gave oral testimony. The department received written comment from two individuals. The tape of the hearing, a transcript of that tape, the written comments received and the hearing officer's report are on file in the department's law library.

The comments received were generally in favor of adoption of the proposed rules with some suggested changes. Comments to the proposed rules are summarized below in reference to each rule where amendments were suggested.

3. The department has adopted the rules as proposed.

6.6.3101 (RULE I) PURPOSE AND SCOPE received no comments and is adopted as proposed.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3102 (RULE II) DEFINITIONS received no comments and is adopted as proposed.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3103 (RULE III) POLICY DEFINITIONS received comments, summarized below. The rule is adopted as proposed.

COMMENT:

It was recommended to the department that the general definitions of "acute condition" and "home health care devices" be moved from ARM 6.6.3103 to ARM 6.6.3107 in order to clarify that the definitions of such terms would not be required policy definitions, but would, instead, refer only to the use of such terms in the home health care minimum standards provision in ARM 6.6.3107.

RESPONSE:

ARM 6.6.3103 states that "acute condition" and "home

health care devices" must be defined in the policy or group certificate in order to deliver the policy or group certificate in Montana. This corresponds to a similar requirement in the model rules.

COMMENT:
Comment was received that the definitions in ARM 6.6.3103(7) and (8) attempt to define categories of long-term care services and long-term care providers by way of definitions that are national in scope, overly general and that seem to leave the definition up to each insurer. Most of the terms in subsections (7) and (8) are already defined in 50-5-101, MCA.
RESPONSE:
The language tracks the National Association of Insurance Commissioners model regulatory language and will be retained.

COMMENT:
A comment to the department requested that these rules clarify whether "custodial care" refers to both "personal care homes" and "adult foster care homes."
RESPONSE:
Personal care homes are most often called nursing homes or long term care facilities. With the overview of the NAIC and the federal interest in streamlining policy language, it is not appropriate at this time to word these facilities only for Montana application. Currently, the policies that provide benefits without regard to licensing state this clearly. Adult day care is covered only when so stated in the policy. This is a rare coverage at this time.

COMMENT:
Comment was received suggesting that ARM 6.6.3103(8) should be amended to mandate that services be provided in a licensed facility.
RESPONSE:
To mandate language requiring services be provided in a licensed facility limits the benefits being offered. It is the department's position to provide language more favorable to our consumers, not less favorable.

COMMENT:
Comment was received suggesting that ARM 6.6.3103 should be amended to include a definition of the term "substantially more" because this term, as used in 33-22-1114(3), MCA, is undefined in its reference to coverage for skilled nursing care.
RESPONSE:
The language tracks the National Association of Insurance Commissioners model regulatory language and will be retained.

COMMENT:
Comment was received to the effect that "irreversible dementia" as defined in ARM 6.6.3103 should be amended because it is somewhat outdated. It was further stated that the inability to perform activities of daily living is a much more accurate characterization of that term than "apathy and stupor".

RESPONSE:
The language tracks the National Association of Insurance Commissioners model regulatory language and is adopted as proposed.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3104 (RULE IV) POLICY PRACTICES AND PROVISIONS received comments discussed below. The rule is adopted as proposed.

COMMENT:
Comment was provided to the department that urged permitting the sale of group long-term care policies which do not provide for continuation or conversion. The Comment explained that long-term care policies are usually level premium and thus "pre-funded," while term products are not. The lack of pre-funding of term products does not provide an insured with the same expectations that may accrue from level premium long-term care products.

The Comment also suggested that if group term insurance must have a continuation or conversion provision, that any such requirement provide for the following:

(a) where continuation or conversion is from a group policy where premiums are calculated on a term basis, the insurer should be able to calculate premiums for such continuation or conversion coverage on a level premium basis or on a term basis, with premiums based on the covered individual's age at the time continuation or conversion is elected.

(b) the insurer should be able to design a group term product which provides for continuation or conversion at the following times:

(1) when the insured leaves a group;

(2) upon termination of the policy;

(3) at any time, however, before the insured reaches a specified age.

RESPONSE:
It is the intention of the department to provide coverage that an individual can purchase as a part of work-related benefits and then be able to take the coverage with them at retirement.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3105 (RULE V) REQUIRED DISCLOSURE PROVISIONS received no comments and is adopted as proposed.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3106 (RULE VI) PROHIBITION AGAINST POST-CLAIMS UNDERWRITING received comments, summarized below. The rule is adopted as proposed.

COMMENT:
It was commented to the department that ARM 6.6.3106(5) should require the department to closely monitor activity by an insurer to obtain specific information on the physical health and/or functioning of any person over 80.
RESPONSE:
The department presently monitors all complaints it receives and has continuing jurisdiction on insurer activities.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3107 (RULE VII) MINIMUM STANDARDS FOR HOME HEALTH CARE BENEFITS IN LONG-TERM CARE INSURANCE POLICIES received no comments and is adopted as proposed.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3108 (RULE VIII) REQUIREMENT TO OFFER INFLATION PROTECTION received comments that are discussed below. The rule is adopted as proposed.

COMMENT:
Comment was provided to the department suggesting that the language in ARM 6.6.3108 which requires compounded increases in benefit levels be deleted because such a provision would increase policy costs/premiums and result in a decreased affordability to younger persons. It was further suggested that a constant percentage increase would provide an appropriate balance between affordability and erosion of benefits.
RESPONSE:
The department has data which reflects the ineffectiveness of policies without inflation protection. Some representatives in the insurance industry believe that to make long-term care insurance policies affordable, such coverage needs to be purchased in quantity. This tends to provide the needed policyowner base to spread the risk and keep the cost down. Actuaries have determined the best way to provide true inflation protection is to do this on a compounded basis.

COMMENT:
It was recommended to the department that the following language be added to ARM 6.6.3108(3)(b): For purposes of this section, "expense incurred" does not include policies paying a certain percentage of reasonable and customary charges up to a specified, indemnity-type maximum amount."
RESPONSE:
The term, "expense incurred," means policies paying a certain percentage of reasonable and customary charges. To delete this is to delete expense incurred policies which make the most sense in inflation protection guidelines. These policies will operate similar to today's major medicals and will alleviate much of the need for inflation protection.

COMMENT:
The department received comment urging that ARM 6.6.108(4), which contains disclosure requirements, be deleted. The comment suggested that such disclosure requirements may conflict with and complicate the provisions of ARM 6.6.3114(5), (6), (7), & (8), and the cost of care benefit disclosure requirement contained therein. Comment further suggested concerns over a company being held legally accountable by an insured for the benefit and premium protection required by virtue of ARM 6.6.3108(4). Comments to the department suggested that providing information for a periodic inflation protection upgrade option would be virtually impossible.
RESPONSE:
The language tracks the National Association of Insurance Commissioners model regulatory language and will be retained.

COMMENT:
A comment was received by the department suggesting that the term "continuing care retirement community" should be defined within these rules.
RESPONSE:
A continuing care retirement community typically provides no care of any level. It is simply a residence for seniors and provides assistance in summoning emergency medical care, rather than providing such care.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3109 (RULE IX) REQUIREMENTS FOR REPLACEMENT received no comments and is adopted as proposed.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3110 (RULE X) DISCRETIONARY POWERS OF COMMISSIONER OF INSURANCE received no comments and is adopted as proposed.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3111 (RULE XI) RESERVE STANDARDS received no comments and is adopted as proposed.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3112 (RULE XII) LOSS RATIO received no comments and is adopted as proposed.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3113 (RULE XIII) FILING REQUIREMENT received no comments and is adopted as proposed.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3114 (RULE XIV) STANDARD FORMAT OUTLINE OF COVERAGE received the comment summarized below. The rule is adopted as proposed.

COMMENT: It was suggested to the department that the rule should specify the process which the insurer uses to make decisions and what avenues of appeal are available to consumers.

RESPONSE: The department obtains any pertinent underwriting rules and related information when examining consumer complaints.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3115 (RULE XV) REQUIREMENT TO DELIVER SHOPPER'S GUIDE received the comments discussed below. The rule is adopted as proposed.

COMMENT:

Comment was received by the department that the department should require its toll-free number to be provided to consumers with each policy. It was further suggested that the Shoppers' Guide should be distributed together with Montana-specific consumer informational materials.

RESPONSE:

Providing a phone number in every policy for our office is not necessary. The information could change over the years the policy is in force. It should also be noted that the department's toll-free telephone number is listed within the "state of Montana" listings in each telephone book. The department also would like to provide information pertaining to all of the needs to be analyzed when purchasing long-term care policies. However, at present, this product is evolving.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

6.6.3116 (RULE XVI) EFFECTIVE DATE As proposed, these rules shall be effective on February 1, 1991.

AUTH: 33-1-313, 33-22-1121, MCA IMP: 33-22-1101 through 33-22-1121, MCA

Andrea "Andy" Bennett
State Auditor and
Commissioner of Insurance

Certified to the Secretary of State this 21st day of January, 1991.

BEFORE THE DEPARTMENT OF
FAMILY SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of Rule 11.5.1001 pertaining to day care payments	NOTICE OF AMENDMENT OF RULE 11.5.1001 PERTAINING TO DAY CARE PAYMENTS

TO: All Interested Persons

1. On December 13, 1990, the Department of Family Services published notice of amendment of Rule 11.5.1001 pertaining to day care payments at page 2143 of the Montana Administrative Register, issue no. 23.

2. The Department has amended Rule 11.5.1001 as proposed, but with the addition of citations to the authorizing and implementing statutes as required by Montana law. Therefore, Rule 11.5.1001 is adopted as proposed with the following changes:

11.5.1001 DAY CARE FOR CHILDREN OF RECIPIENTS IN TRAINING OR IN NEED OF PROTECTIVE SERVICES
Subsections (1) and (2) remain the same.

AUTH: Sec. 52-2-704, MCA. IMP: Sec. 52-2-713, MCA.

3. No written comments or testimony were received.

DEPARTMENT OF FAMILY SERVICES

TOM OLSEN, DIRECTOR

Certified to the Secretary of State, January 21, 1991.

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

In the matter of the amendment of rules 16.8.1302 and 16.8.1307) NOTICE OF AMENDMENT OF RULES

(Air Quality Bureau)

To: All Interested Persons

1. On September 27, 1990, the Board published notice at page 1815 of the Montana Administrative Register, issue No. 18, to amend rules which would authorize the open burning of scrap creosote-treated railroad ties under appropriate circumstances, through the use of a permit program.

2. The Board has amended the proposed rules by setting forth the means by which the Department's decision on a permit may be appealed to the Board, and the procedure governing such a proceeding. The changes are for clarity only, and are not substantive in nature, as they merely insert the language of Section 75-2-211(8) and (9), MCA, in place of the reference to that section. Otherwise, the Board has adopted the rules as proposed with no changes.

16.8.1302 PROHIBITED OPEN BURNING Same as proposed.

16.8.1307 CONDITIONAL AIR QUALITY OPEN BURNING PERMITS
(1) - (7) Same as proposed.
(8) ~~The department's decision to approve or deny an application for a conditional air quality open burning permit may be reviewed by the board in accordance with the provisions of Section 75-2-211(8) and (9), MCA.~~ When the department approves or denies the application for a permit under this rule, a person who is jointly or severally adversely affected by the department's decision may request, within 15 days after the department renders its decision, upon affidavit setting forth the grounds therefor, a hearing before the board. A hearing shall be held under the provisions of Title 2, chapter 4, part 6, MCA. The department's decision on the application is not final unless 15 days have elapsed and there is no request for a hearing under this section. The filing of a request for a hearing postpones the effective date of the department's decision until the conclusion of the hearing and issuance of a final decision by the board.

3. The Department has thoroughly considered all comments received on the proposed rules. The following is a summary of the comments received from the public and the department's responses:

Comment: Written comments were received from the Lewis and Clark County Health Department opposing the proposed rules. The county states that the emission of carcinogenic compounds and particulates into the air does not protect public health. This comment was echoed by Will Selser during oral testimony

offered at the hearing on behalf of the county.

Response: The board agrees that the uncontrolled and unsupervised burning of railroad ties could be threatening to public health because of the emissions of carcinogenic compounds and particulates. However, in the Board's opinion these potential adverse impacts can be eliminated through the careful administration by the department of the proposed permit program envisioned in these proposed rules. This is supported by the testimony offered by both Chuck Homer for the department and Elizabethe Taylor for the various railroads. Under the proposed rules, the applicant must demonstrate that any emissions associated with the burning will not endanger public health. The board is confident that the department will prudently administer this requirement. Further, and as noted in the comments submitted by the Cascade County-City of Great Falls Health Department, considering the consistency with which variances have been granted in the past, the proposed permitting program will provide a greater degree of control over the open burning of ties.

Comment: Written comments received from Lewis and Clark County state that open burning is not the best available control technology (BACT) for the disposal of waste railroad ties. Mr. Selser also stated this concern, noting that open burning is clearly inefficient, and results in incomplete combustion. Further, Mr. Selser added that the railroads make no serious effort at recycling their waste ties, which are cut into pieces on removal. Recycling is a superior means of disposal which is not pursued by the railroads for convenience reasons.

Response: As stated in the testimony of Mr. Homer, the determination of whether or not open burning constitutes BACT will be made on a case-by-case, and site specific basis. This means that there may be cases where the open burning of railroad ties would not be considered BACT and a permit would not be issued by the department. By adopting these proposed rules, the board is not finding that open burning is BACT, but that such open burning may be determined by the department to constitute BACT under the appropriate circumstances. This conclusion is also supported by the BACT analysis provided by the railroads as part of this proceeding. While the board agrees with Mr. Selser that recycling would be a preferable alternative to burning, Mr. Hoven represented that the railroads do aggressively market their waste ties, and that over ninety percent are recycled. In addition, the board believes that as part of the BACT review, the department will consider the recycling option.

Comment: Mr. Selser stated that he was concerned that the adoption of the proposed rules would remove this matter from the more public variance process. The administrative permitting process envisioned in the proposed rules is less oriented to public participation, which is inappropriate when the

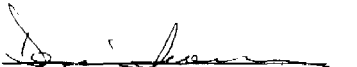
potential impacts upon public health are considered.

Response: Certainly, requiring the railroads to obtain a variance from the board in the first instance allows for greater public participation than the administrative permitting process provided for in the proposed rules (although the permitting process does envision the opportunity for the submittal of public comments). However, any "person who is ...adversely affected" by the department's decision on the permit may request a hearing before the board, which in form is the same as the variance proceeding. Accordingly, the board believes that it is providing more opportunity for affected persons to make their opinions known. At the same time, the proposed administrative process will result in the more efficient use of resources than consistently resorting to the variance process, since not all requests to burn ties may be controversial.

Comment: The proposed rules were generally supported by Burlington Northern Railroad, Montana Rail Link, Central Montana Railroad, and Montana Western Railroad.

Response: Given the board's determination in this proceeding, no response is necessary.

DAVID W. SIMPSON, Chairman
BOARD OF HEALTH AND
ENVIRONMENTAL SCIENCES

by 
DENNIS IVERSON, Director

Certified to the Secretary of State January 21, 1991.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.17.105 relating to Computation of Withholding Surtax	NOTICE OF THE AMENDMENT of ARM 42.17.105 relating to Computation of Withholding Surtax

TO: All Interested Persons:

1. On November 15, 1990, the Department of Revenue published notice of the proposed amendment of ARM 42.17.105 relating to computation of withholding surtax at page 2026 of the 1990 Montana Administrative Register, issue no. 21.

2. No written or oral comments were received. Therefore, the department amends the rule as proposed.

Denis Adams

DENIS ADAMS, Director
Department of Revenue

Certified to Secretary of State January 21, 1991.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE AMENDMENT of ARM 42.22.1311 relating to Industrial Machinery and Equipment Trend Factors	NOTICE OF THE AMENDMENT of ARM 42.22.1311 relating to Industrial Machinery and Equipment Trend Factors

TO: All Interested Persons:

1. On November 15, 1990, the Department of Revenue published notice of the proposed amendment of ARM 42.22.1311 relating to industrial machinery and equipment trend factors at page 2020 of the 1990 Montana Administrative Register, issue no. 21.

2. A public hearing was held on December 10, 1990. Only department personnel appeared. No written or oral comments were received.

3. The department amends ARM 42.22.1311 as proposed.

Denis Adams

DENIS ADAMS, Director
Department of Revenue

Certified to Secretary of State January 21, 1991.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

IN THE MATTER OF THE ADOPTION of Rule I (ARM 42.31.501); Rule II (ARM 42.31.505); Rule III (ARM 42.31.510); and Rule IV (ARM 42.31.515) relating to telephone license tax	NOTICE OF THE ADOPTION of Rule I (ARM 42.31.501); Rule II (ARM 42.31.505); Rule III (ARM 42.31.510); and Rule IV (ARM 42.31.515) relating to telephone license tax

TO: All Interested Persons:

1. On October 11, 1990, the Department published notice of the proposed adoption of Rule I through IV relating to telephone license tax at page 1878 of the 1990 Montana Administrative Register, issue no. 19.

2. A public hearing was held on November 14, 1990, to consider the proposed adoption of the rules. Oral and written comments were received at the hearing.

3. After consideration of the comments received, the department has amended the proposed rules as follows:

Rule I (ARM 42.31.501) DEFINITIONS Subsections (1) and (2) remain the same as proposed.

(3) The phrase "non-transmission related services or activities" includes, but is not limited to, installation, repair, maintenance, construction, termination, engineering handling, financing, interest, billings and collection, automated data storage, data retrieval and processing services, and the use of computer time or ~~other~~ equipment if the sales or rentals of that equipment are not includable as gross income. For example, a company that provides access to an on-line computer data base would not be subject to the tax on the receipts from the data processing or inquiry, but would be subject to tax on the receipts from the separately stated transmission of the data.

(4) The term "telephone business" means the access and transport, for hire, of two-way communications originating from a point of access to a point of termination within the state of Montana. This includes, but is not limited to, the transmission of messages or information through use of local, toll and wide area telephone service, private line service, channel service, teletypewriter, computer exchange service, cellular mobile telecommunications service, specialized mobile radio, stationary two-way radio, ENHANCED paging service, or any other form of mobile and portable communications. Telephone business does not include the sale, lease, repair, installation, or maintenance of equipment or the provision of non-transmission related services.

(5) The term "equipment" means all items generally classified as customer premise equipment such as telephone and terminal equipment. This includes, but is not limited to, telephone instruments, station sets, dialers, modems, private

branch exchanges (PBX), SWITCHES, computers, ~~inside wiring,~~ WIRE, CABLE, facsimile machines, pagers and non-electronic associated items such as documentation, manuals, and furniture.

RULE II (ARM 42.31.505) ANNUAL PAYMENTS FOR SMALL FILERS; RULE III (ARM 42.31.510) PENALTY AND INTEREST; and RULE IV (ARM 42.31.515) EFFECTIVE DATE, are adopted as originally proposed.

4. Oral and written comments received during and subsequent to the hearing are summarized as follows along with the response of the Department:

COMMENT: (AT&T) - Regarding Rule I(5): Industry;'s offering of the definition of "equipment" included "switches." The proposed rule does not list "switches" as an example of "equipment."

In addition, AT&T requested amended language to include "property" as an example of "equipment." Technically, wire and cable are classified as "property."

Regarding Rule I(4): AT&T offered a revision to the language defining "telephone business". (No rationale for the revision was offered.)

RESPONSE: The proposed rule has been amended to refer to "switches" as an example of a type of equipment contemplated under the rule. The word "switches," as used in this rule, refers only to separately-stated income associated with the rent, lease or purchase of the customer premised switches or other equipment. It does not refer to income resulting from the services the switch provides.

The proposed rule has been amended to include "wire and cable" as an example of "equipment."

COMMENT: (U. S. West Communications) - While USWC generally supports the industry consensus rule, there are several services supplied by traditional companies through their central office equipment that compete with equipment or hardware that a customer owns or leases, and which is located on the customer's premises. Consistent with DOR's policy that competitive services should be treated evenly, and in the light of the exclusion of "equipment" from the Rule I(4) definition of "telephone business," USWC believes that exclusions should be added to this section for these services . . . Centron, Custom Calling features and voice messaging.

RESPONSE: It is DOR's policy to enforce the statute as required by law. Those competing in the telephone business as defined in this rule will be treated evenly. The fact that some services are deregulated by the Public Service Commission as competitive does not exempt the income from such service from the tax. Custom Calling is available to customers who have the appropriate equipment. The charge for the service is separate and unrelated to the charge for special equipment. The charge for the enhanced service is as directly related to two-way communication as is basic service. The customer may request custom calling service but must also have equipment with features capable of evoking or receiving specific services. For

instance a customer must have a touch tone phone to use call waiting service. The charge for Custom Calling is taxable under the definition of telephone business.

Although not yet available in Montana, voice messaging is a service similar to that provided through an answering machine. The call is intercepted by a central office-based answering machine until such time as the customer acts to receive the message derived from a telephone call. In effect, the customer acknowledges receipt and completion of two-way communication. Voice messaging service is taxable.

The addition of the word "switches" under Rule I(5) will exempt the income from the lease of the electronic switch portion of the Centron system package. The only apparent difference between a PBX and Centron is the location of the equipment--PBX is located on the customer's premises; the Centron switch is in the central office. The charge for the line and network access are taxable services.

COMMENT: (Northwest Telecom, Inc. and Omega Communications Mark A. Bryan, Attorney at Law) - Regarding Rule 1(3): The language creates confusion whether "other equipment" near the end of the first sentence relates to the use of computer time or to equipment.

RESPONSE: "Other equipment" relates to the charge for usage of any equipment that may be used in providing the services listed so long as that equipment is exempted under the definition of "equipment." A usage fee, which is not technically a "rent" or "lease," may be charged in conjunction with certain services. The proposed rule has been amended to strike "other" for clarity.

COMMENT: (Crescent Communications) - Regarding Rule I(4): The types of technologies defined as "telephone business" include specialized mobile radio (SMR). The contention is that SMR service providers do not sell telephone service and that inclusion of SMR providers would cause automatic "double taxation."

RESPONSE: While SMR service providers may not be the direct providers of telephone service, they are users who may indirectly provide telephone service as part of the specialized mobile radio service and pass such charges on to their customers. The SMR collects the charge as part of their service fee and, in turn, pays the local exchange company for the connection.

It is true that both the SMR and the local exchange company would include the income from such usage in gross income. The telephone license tax is a gross receipts tax, however, and may have such a result.

COMMENT: (Mountain Paging Network, Inc.) - The Department has exceeded the statute by implementing rules expanding the definition of telephone business.

RESPONSE: The Department has statutory authority under 15-53-104, MCA to implement rules to administer the tax. These rules are intended to address dramatic changes in the industry and eliminate ambiguity.

COMMENT: (Omnicom Paging Plus) - The taxpayer addressed

the potential for "double taxation" and the affordability of the tax.

RESPONSE: The "double taxation" issue is addressed above. The Telephone Company License Tax is not a new tax. It has been on the books since 1937. These rules are intended to clarify the administration of the tax. Determining the affordability of the tax is beyond the scope of the department's authority.

COMMENT: (Capital Answering Service, CAS of Montana) - The rules were not clear concerning paging service. There is one-way and two-way paging (enhanced paging).

The "double taxation" issue was also of concern.

RESPONSE: Proposed Rule I(4) has been amended to read "enhanced" paging as an example of a technology taxable under these rules.

COMMENT: (Cellular Information Services) - The taxpayer representative questioned first, the taxability of certain types of pass-through revenue which may be included as operating income for both the user and the provider. The second issue was "double taxation" of that income.

RESPONSE: Non-transmission related service includes billing and collection which is a pass-through revenue which is not included as operating income. Operating income is defined as income derived from telephone business which is two-way communication for hire. Access revenue is related to the transmission of two-way communication and is included in operating income.

Access revenue, and the associated "double taxation" issue, is beyond the scope of the rule-making process.

Denis Adams

DENIS ADAMS, Director
Department of Revenue

Certified to Secretary of State January 21, 1991.

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

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

TO: All Interested Persons

1. On November 29, 1990, the Department of Social and Rehabilitation Services published notice of the proposed amendment of Rules 46.30.801 and 46.30.807 pertaining to child support medical support enforcement at page 2102 of the 1990 Montana Administrative Register, issue number 22.

2. The Department has amended Rules 46.30.801 and 46.30.807 as proposed.

3. No written comments or testimony were received.

Julia E. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State January 17, 1991.

VOLUME NO. 44 OPINION NO. 3

ADMINISTRATIVE LAW AND PROCEDURE - Scope of rulemaking authority of Department of Social and Rehabilitation Services;
FEES - Reimbursement for therapeutic agents by occupational therapists;
HEALTH - Use of modalities by occupational therapists;
LICENSES, PROFESSIONAL AND OCCUPATIONAL - Therapeutic agents not within scope of occupational therapy practice;
SOCIAL AND REHABILITATION SERVICES, DEPARTMENT OF - Scope of rulemaking authority;
ADMINISTRATIVE RULES OF MONTANA - Section 46.12.547;
MONTANA CODE ANNOTATED - Title 37, chapter 24; sections 37-11-104(2), 37-24-103(4), 53-6-101(1), 53-6-113(3), (4).

HELD: 1. Occupational therapists are not permitted by Montana law to employ heat, cold, air, light, water, electricity, or sound as therapeutic agents.

2. Section 46.12.547, ARM, adopted by the Department of Social and Rehabilitation Services and authorizing occupational therapists to be reimbursed through medicaid for modalities performed in the course of treatment, is invalid as an improper exercise of the Department's rulemaking authority.

January 11, 1991

Julia Robinson, Director
Department of Social and
Rehabilitation Services
P.O. Box 4210
Helena MT 59604-4210

Dear Ms. Robinson:

You have requested my opinion on the following questions:

1. Are occupational therapists permitted by Montana law to perform modalities (that is, use therapeutic agents such as heat, cold, air, light, water, electricity and sound)?

2. Is the adoption of section 46.12.547, ARM, authorizing occupational therapists to be reimbursed for the use of such therapeutic agents in the course of treatment, a valid exercise of the Department's rulemaking authority?

The Department of Social and Rehabilitation Services (hereinafter referred to as the Department) is statutorily charged with the duty of administering the Montana medicaid

program. § 53-6-101(1), MCA. In connection with that duty, section 53-6-101(1), MCA, authorizes the Department to adopt appropriate rules necessary for the administration of the program, including the establishment of reimbursement rates for services provided by health care professionals. In establishing rates of reimbursement, the Department may consider the following factors:

(a) the availability of appropriated funds;

(b) the actual cost of services;

(c) the quality of services;

(d) the professional knowledge and skills necessary for the delivery of services; and

(e) the availability of services.

§ 53-6-113(3), MCA. The statute further directs that "[t]he department shall specify by rule those professionals who may deliver or direct the delivery of particular services." § 53-6-113(4), MCA.

Recently, the Department promulgated section 46.12.547, ARM, which establishes rates of reimbursement for occupational therapists. At issue in this opinion is the propriety of that rule insofar as it sets a reimbursement schedule for the performance of the following services:

MODALITIES

Modality is the employment, or method of employment, of a therapeutic agent (used in conjunction with occupational therapy procedures)

H5300	Modalities, initial 15 minutes.....	13.31
Z9216	Each additional 15 minutes.....	3.00

This rule is challenged by the Montana Chapter of the American Physical Therapy Association and the Montana Association of Private Practice Physical Therapists (Associations), who contend that occupational therapists are not statutorily authorized to use modalities or therapeutic agents. The Associations allege that the Department has effectively expanded the scope of occupational therapy practice, thereby exceeding the scope of its rulemaking authority and usurping the role of the Legislature.

Whether an agency acts within the scope of its rulemaking authority in promulgating administrative rules requires consideration of two factors. First, the rule must be consistent and not in conflict with the enabling legislation or other provisions of law. Second, the rule must be reasonably

necessary to effectuate its purpose. § 2-4-306(5), (6), MCA; Bick v. Department of Justice, 224 Mont. 455, 730 P.2d 418 (1986). Administrative regulations have been declared invalid if they engraft additional or contradictory requirements on a statute or if they engraft additional noncontradictory requirements which were not envisioned by the Legislature. McPhail v. Montana Board of Psychologists, 196 Mont. 514, 517, 640 P.2d 906, 908 (1982).

The Montana Legislature first sought to regulate the profession of occupational therapy in 1985 through the Occupational Therapy Practice Act (OTPA), 1985 Mont. Laws, ch. 629, now codified in Title 37, chapter 24, MCA. The definition of "occupational therapy" is found at section 37-24-103(4), MCA:

> "Occupational therapy" means the use of purposeful activity with an individual who is limited by physical injury or illness, psychosocial dysfunction, developmental or learning disability, or the aging process in order to maximize independence, prevent disability, and maintain health. The practice encompasses evaluation, treatment, and consultation. Occupational therapy services may be provided individually, in groups, or through social systems. Specific occupational therapy services include but are not limited to:
>
> (a) teaching daily living skills;
>
> (b) developing perceptual-motor skills and sensory integrative functioning;
>
> (c) developing play skills and prevocational and leisure capacities;
>
> (d) designing, fabricating, or applying splints, or selective adaptive equipment and training in the use of upper extremity prosthetics or upper extremity orthotic devices;
>
> (e) using specifically designed crafts and exercises to enhance functional performance;
>
> (f) administering and interpreting tests such as manual muscle and range of motion; and
>
> (g) adapting environments for the handicapped.

Nowhere in this definition does the term "modalities" appear, nor are occupational therapists specifically authorized to use therapeutic agents in the course of their treatment. It is significant that in the closely related profession of physical therapy, modalities are specified as within the scope of the practice. Section 37-11-104(2), MCA, authorizes "physical

agents including but not limited to mechanical devices, heat, cold, air, light, water, electricity, and sound" for use in physical therapy treatment. The Legislature is presumed to have had knowledge of the specific definition of physical therapy treatment in section 37-11-104(2), MCA, at the time the OTPA was passed six years later. Theil v. Taurus Drilling LTD 1980-II, 218 Mont. 201, 207, 710 P.2d 33, 36 (1985). Thus, had the Legislature intended to include modalities or similar physical agents within the scope of occupational therapy as well, it would have included the same list of therapeutic agents that appear in the physical therapy treatment statutes.

The noninclusive language of section 37-24-103(4), MCA, arguably suggests that the Legislature did not intend to exclude any procedure not specifically listed as an occupational therapy service. However, neither the legislative history nor the statutory language itself supports this conclusion. The committee minutes from the hearings on Senate Bill 79, which became the OTPA, contain no reference to the use of modalities or therapeutic agents as a part of the occupational therapy practice. Minutes of House Business and Labor Committee, March 8, 1985, at 2; Minutes of Senate Public Health Committee, January 23, 1985, at 7. Nowhere in the list of services submitted to the committee and describing the services typically provided by occupational therapists, the bill's primary proponents, were modalities or therapeutic agents ever mentioned. Minutes of House Business and Labor Committee, March 8, 1985, Exhibit 4. Instead, the list of services submitted to the committee largely mirrors that which now appears in the statute, § 37-24-103(4), MCA. To construe the list of services expressly authorized in section 37-24-103(4), MCA, so broadly as to allow anything not specifically excluded is inconsistent with the scope of practice contemplated by the Legislature at the time the OTPA was created.

The definition of occupational therapy found in section 37-24-103(4), MCA, includes a list of specific occupational services. The list, according to the statute's express language, is not meant to be exhaustive. However, in order for any service not specifically mentioned to fall within the definition, it would at least have to be similar in nature to those mentioned in the statute. Under the rules of statutory construction, where general words follow the enumeration of particular classes of persons or things, the general words should be construed as applicable only to persons or things of the same general nature or class as those enumerated. State Board of Barber Examiners v. Walker, 192 P.2d 723, 731 (Ariz. 1948); White v. Moore, 46 P.2d 1077, 1080-81 (Ariz. 1935). When a statute lists a number of particulars and adds a general reference like "and so forth" it means to include by use of the general reference not everything else but only others of like kind. 2A Sutherland Statutory Construction § 47.18 (4th ed.). See also Haas v. Breton, 387 N.E.2d 138, 140 (Mass. 1979) ("[t]he problem is to determine what particulars that were not

mentioned are sufficiently like those that were, in ways that are germane to the subject and purpose of the act, to be made subject to the act's provisions by force of the general reference").

Thus, while the list of permissible occupational services set forth in section 37-24-103(4), MCA, is not exhaustive, it would surely not be permissible for an occupational therapist to perform surgery or practice cosmetology. The services listed in the statute promote the "use of purposeful activity." In my opinion, the application of heat, cold, paraffin wax, or other similar kinds of therapeutic agents is not reasonably related to the purposeful activity suggested by those services set forth in the statute. The types of services set forth in the statute involve functional activities, such as the development of skills, the use of crafts, and the administration of muscle and motion tests.

A similar conclusion was reached in an opinion of the North Dakota attorney general in October 1989. The definitions of physical therapy and occupational therapy in North Dakota are similar to the Montana definitions. The North Dakota attorney general determined that physical therapists were permitted to use specific exercise, gait training, heat, massage, light, water treatments, etc., to accomplish treatment goals, while occupational therapists could use specific exercise, neuromuscular facilitation, and functional activities such as work, homemaking, feeding, dressing, and personal hygiene, as well as the fabrication of splints and adapted devices to aid in self-care activities.

While the use of therapeutic agents may very well be a viable part of the occupational therapy practice, and occupational therapists may be fully trained in the employment thereof, the Legislature has not yet authorized their use as within the scope of the practice. The Department may not expand this scope of practice through its rulemaking authority by allowing reimbursement for modalities performed in the course of occupational therapy treatment. Any such rules are invalid.

THEREFORE, IT IS MY OPINION:

1. Occupational therapists are not permitted by Montana law to employ heat, cold, air, light, water, electricity, or sound as therapeutic agents.

2. Section 46.12.547, ARM, adopted by the Department of Social and Rehabilitation Services and authorizing occupational therapists to be reimbursed through medicaid for modalities performed in the course of

treatment, is invalid as an improper exercise of the Department's rulemaking authority.

Sincerely,

MARC RACICOT
Attorney General

VOLUME NO. 44 OPINION NO. 4

ADMINISTRATIVE LAW AND PROCEDURE - Statutory authority of Board of Public Education to promulgate rule on gifted and talented education, conflict with statute;
EDUCATION - Statutory authority of Board of Public Education to promulgate rule on gifted and talented education;
PUBLIC EDUCATION, BOARD OF - Statutory authority to promulgate rule on gifted and talented education;
SCHOOL BOARDS - Statutory authority of the Board of Public Education to establish programs for gifted and talented students;
SCHOOL DISTRICTS - Statutory authority of the Board of Public Education to establish programs for gifted and talented students;
ADMINISTRATIVE RULES OF MONTANA - Section 10.55.804;
MONTANA CODE ANNOTATED - Sections 2-4-406, 20-2-121, 20-7-101, 20-7-901 to 20-7-904;
MONTANA CONSTITUTION - Article X, section 9(3)(a);
OPINIONS OF THE ATTORNEY GENERAL - 42 Op. Att'y Gen. No. 104 (1988), 41 Op. Att'y Gen. No. 23 (1985), 39 Op. Att'y Gen. No. 11 (1981).

HELD: The Board of Public Education's rule requiring every school district to make an identifiable effort to provide educational services to gifted and talented pupils, promulgated pursuant to the Board's statutory authority to adopt accreditation standards, conflicts with the provisions of section 20-7-902(1), MCA.

January 15, 1991

Alan D. Nicholson
Board of Public Education
33 South Last Chance Gulch
Helena MT 59620-0601

Dear Mr. Nicholson:

You have requested my opinion on the following question:

> Does the Board of Public Education's rule requiring every school district to make an identifiable effort to provide educational services to gifted and talented pupils, promulgated pursuant to sections 20-2-121(11), 20-7-903, and 20-7-101, MCA, conflict with the provisions of section 20-7-902(1), MCA?

In 1979 the Montana Legislature enacted sections 20-7-901 to 904, MCA, providing for the education of gifted and talented students in the Montana public school system. Section 20-7-902(1), MCA, provides:

> A school district may identify gifted and talented children and devise programs to serve them.

Legislative history indicates that testimony at public hearings strongly supported adoption of the statutes and emphasized the need for special services for gifted and talented children. See Minutes of Senate Education Committee, February 12, 1979. The legislative history does not, however, demonstrate that the statute was intended to place a mandatory duty upon school districts to implement a program for gifted and talented students, but rather to merely permit the creation of such programs and provide limited funding for them through the office of the Superintendent of Public Instruction. Section 20-7-902, MCA, has not been amended since it was enacted in 1979.

In 1983, sections 20-7-903 and 20-7-904, MCA, were amended to include the Board of Public Education (the Board) as one of two entities charged with adopting criteria for program proposals for gifted and talented children.

> The conduct of programs to serve gifted and talented children must comply with the policies recommended by the superintendent of public instruction and adopted by the board of public education.

§ 20-7-903(1), MCA. See also § 20-7-904, MCA (the policies of the board must assure that proposals submitted by school districts to the superintendent outlining services to gifted and talented students address and comply with certain statutory criteria).

Following public hearings in 1984 and 1988, the Board adopted and then readopted the rule in question, which states:

> 10.55.804 GIFTED AND TALENTED (1) Beginning 7/1/92 the school shall make an identifiable effort to provide educational services to gifted and talented students, which are commensurate with their needs and foster a positive self-image.
>
> (2) Such services shall be outlined in a comprehensive district plan which includes:
>
> (a) identification of talent areas and student selection criteria according to a written program philosophy;
>
> (b) a curriculum which reflects student needs;
>
> (c) teacher preparation;
>
> (d) criteria for formative and summative evaluation;

(e) supportive services;

(f) parent involvement.

In your opinion request you note (as did the Board's 1984 Notice of Public Hearing on the proposed rule) that the authority of the agency to adopt the rule was based on sections 20-2-121(7) and (11) and 20-7-101, and that the rule implements section 20-7-903, MCA.

Section 10.55.804, ARM, was originally adopted by the Board in 1984 and later revised, readopted, and published in the Administrative Rules of Montana in 1989. Appended to the rule published in the Administrative Rules of Montana in 1989, pursuant to section 2-4-406, MCA, was an objection by the Administrative Code Committee concluding that the rule was invalid. The Committee's objection was based on its conclusion that the rule "makes mandatory what the Montana Code Annotated makes discretionary." Administrative Code Committee objection to § 10.55.804, ARM. As noted above, the rule was intended to implement certain statutory provisions. Importantly, the Notice of Public Hearing did not assert that the Board intended to adopt the rule pursuant to any authority provided by the Montana Constitution. Your question by its terms and intentions is confined to an issue of statutory construction and avoids any mention of the constitutional authority of the Board set forth in the Montana Constitution, Art. X, § 9(3)(a). In fact, in presenting your question, you have specifically asked that I not address the constitutional authority of the Board. My answer to your question, in recognition of the limits of my discretion, focuses solely upon the construction of those statutes designated in your request and relied upon by the Board as authority for the adoption of the rule in question and does not directly or indirectly refer to, implicate, substantiate, or question the constitutional authority of the Board.

As mentioned, the Board relied upon sections 20-2-121(11), 20-7-903, and 20-7-101, MCA, as authority for the promulgation of the Board's mandatory rule on gifted and talented education. Your question is whether the Board's action in that context conflicts with the provisions of section 20-7-902(1), MCA. I am obliged to conclude, for the reasons discussed hereafter, that the rule in question, § 10.55.804, ARM, does impermissibly conflict with section 20-7-902(1), MCA.

Analysis of the issue must begin with a review of the pertinent statutes. Section 20-7-903(1), MCA, provides:

> The conduct of programs to serve gifted and talented children must comply with the policies recommended by the superintendent of public instruction and adopted by the board of public education.

That section is not a grant of authority to the Board, but simply states that if a school district operates a gifted and talented educational program, the conduct of the program "must comply with the policies recommended by the superintendent of public instruction and adopted by the board of public education." § 20-7-903(1), MCA. Thus, it is clear that the Board of Public Education could not have promulgated section 10.55.804, ARM, pursuant to any authority granted by section 20-7-903(1), MCA.

The Board is provided statutory authority to adopt standards of accreditation pursuant to sections 20-7-101 and 20-2-121(7), MCA. Those sections provide:

> **20-7-101. Standards of accreditation.** (1) Standards of accreditation for all schools shall be adopted by the board of public education upon the recommendations of the superintendent of public instruction.
>
> **20-2-121. Board of public education -- powers and duties.** The board of public education shall:
>
> ....
>
> (7) adopt standards of accreditation and establish the accreditation status of every school in accordance with the provisions of 20-7-101 and 20-7-102[.]

With respect to the area of gifted and talented children, however, the Board is restricted to the adoption of policies. Section 20-2-121(11), MCA, provides:

> **20-2-121. Board of public education -- powers and duties.** The board of public education shall:
>
> ....
>
> (11) adopt policies for the conduct of programs for gifted and talented children in accordance with the provisions of 20-7-903 and 20-7-904[.]

Such policies are applicable only if, pursuant to section 20-7-902, MCA, a school district elects to identify gifted and talented children and devise programs to serve them.

The statutory reference in section 20-2-121(11), MCA, to sections 20-7-903 and 20-7-904, MCA, is noteworthy. Those two sections were adopted by the Montana Legislature in 1979, when lawmakers first addressed the issue of education for gifted and talented students. In referring to those two sections, it is obvious that the Legislature was aware of the local control provided for in section 20-7-902, MCA, which allows school districts, should they choose, to "identify gifted and talented children and devise programs to serve them." § 20-7-902, MCA.

When section 20-2-121(11), MCA, was considered by the Legislature a statement of intent was filed:

> A statement of intent is required for this bill because it delegates rulemaking authority to the Board of Public Education to adopt policies for programs serving gifted and talented children.
>
> It is contemplated that the rules will address the following:
>
> a. a policy statement fostering development of programs serving the gifted and talented;
>
> b. acknowledgment of the provisions in 20-7-904, MCA, regarding review of programs by the Superintendent of Public Instruction; and
>
> c. an annual review of services to gifted and talented children by the Board of Public Education.

The policies adopted by the Board, according to the statement of intent, were meant to address the review of programs and services to gifted and talented students. The statement of intent therefore demonstrates, as does the language of the section itself, that with the passage of section 20-2-121(11), MCA, the Legislature did not intend to provide a statutory grant of authority to the Board to require the creation of gifted and talented programs.

This is also confirmed by the minutes of the meeting of the Education and Cultural Resources Committee of the Montana State Senate, dated March 11, 1983, which state:

> HOUSE BILL 196: Representative Peck, District 8, sponsor of the bill, said the bill enables the Board of Public Education to adopt policies regarding gifted and talented programs. He noted rules were originally going to be adopted governing gifted and talented programs but because of 1) the expense, and 2) the Board had adopted policies governing special education already, the bill was submitted in this form with an effective date of July 1, 1984.

Additionally Lee Heiman, committee counsel, summarized House Bill 196 in a memorandum to the Senate committee that stated:

> House Bill 196 (Peck). Provides that policy direction on programs for gifted and talented children originate with the Board of Public Education and be administered by the Superintendent of Public Instruction.

It is clear that in the original draft of House Bill 196, the delegation of legislative rulemaking authority was contemplated; however, the bill was amended to strike "rules" and insert "policies."

Because the rule adopted by the Board of Public Education, § 10.55.804, ARM, requires all school districts in Montana to "make an identifiable effort to provide educational services to gifted and talented students, which are commensurate with their needs and foster a positive self image," it makes mandatory what section 20-7-902, MCA, makes permissible. As a consequence, the rule conflicts with section 20-7-902, MCA, and exceeds the statutory authority of the Board contained within section 20-2-121(11), MCA.

You also ask whether in light of section 20-7-902, MCA, sections 20-7-101 and 20-2-121(7), MCA, provide authority to promulgate the mandatory rule concerning gifted and talented education. Those sections address accreditation standards and do not singularly focus upon gifted and talented education. Examination of pertinent case law and prior Opinions of the Attorney General reveals that the legislative grant of authority to the Board to adopt standards for accreditation does not include the authority to require every school to initiate an identifiable effort to provide gifted and talented education programs. In Bell v. Department of Licensing, 182 Mont. 21, 594 P.2d 331 (1979), for example, the Montana Board of Barbers and the Department of Professional and Occupational Licensing appealed from an adverse decision of the district court invalidating a rule promulgated by the Board. The Montana Supreme Court determined that while the rule in question did not contradict any specific legislation, it did engraft additional requirements that were not envisioned by the Legislature. In determining that the rule was beyond the scope of the board's power, and therefore void and unenforceable, the Court stated:

> "It is fundamental in administrative law that an administrative agency or commission must exercise its rule-making authority within the grant of legislative power as expressed in the enabling statutes. Any excursion by an administrative body beyond the legislative guidelines is treated as an [sic] usurpation of constitutional powers vested only in the major branch of government. [Citations omitted.]"
>
> The courts have uniformly held that administrative regulations are "out of harmony" with legislative guidelines if they: (1) "engraft additional and contradictory requirements on the statute"; [citation omitted] or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature; [citation omitted].

Bell, 182 Mont. at 22-23, 594 P.2d at 332-33. (See also 42 Op. Att'y Gen. No. 104 at 400, 404 (1988): "Administrative rules must be strictly confined within applicable legislative guidelines [citing Bick, supra].")

Also illustrative is Bick v. State, Department of Justice, supra, in which the Montana Supreme Court noted, "[I]t is axiomatic in Montana law that a statute cannot be changed by administrative regulation." Bick, 224 Mont. at 457, 730 P.2d at 420, citing Michels v. Department of Social and Rehabilitation Services, 187 Mont. 173, 178, 609 P.2d 271, 273 (1980). See also 39 Op. Att'y Gen. No. 11 at 40 (1981) (board of public education could not, by rule, mandate that all certified teachers complete six in-service credits in Indian studies when the statute, § 20-4-213, MCA, made such requirement discretionary with each local board of trustees).
This principle was recognized and applied in 41 Op. Att'y Gen. No. 23 at 79 (1985). In that opinion the president of the Montana Board of Nursing asked if the board had the authority to require applicants for the professional or practical nursing licenses to hold a specific college degree as a qualification for initial licensure. The Attorney General determined that the board did not have such authority because the Legislature had addressed the issue statutorily, and the applicable statutes did not require applicants to hold a college degree. The opinion held at 82:

> If the Legislature had intended to require nursing license applicants to hold a specific college degree, it would have set forth this requirement in the statutes, as it has done in other license qualification statutes. See, e.g., §§ 37-21-301, 37-7-302, 37-10-302, 37-17-302, MCA. ...
>
> The Montana Supreme Court has held that a rule which engrafts additional, noncontradictory requirements on a statute which were not envisioned by the Legislature is "out of harmony" with legislative guidelines and therefore invalid. See, e.g., Bell v. Dept. of Professional and Occupational Licensing, 36 St. Rptr. 880, 594 P.2d 331 (1979); Board of Barbers v. Big Sky College, 38 St. Rptr. 621, 626 P.2d 1269 (1981). In light of these cases, it is likely that a rule requiring applicants to hold specific college degrees would be viewed by the Court as beyond the Board's rulemaking authority and not reasonably necessary to effectuate the purpose of the statute. See § 2-4-305(6), MCA.

A second issue addressed in the opinion dealt with the authority of the board to adopt the rule under its authority to prescribe standards for schools. The Attorney General concluded that this authority to prescribe standards "does not implicitly or necessarily include the authority to require specific college

degrees of nursing school graduates." 41 Op. Att'y Gen. No. 23 at 83.

I conclude that the legislative grant of authority to the Board of Public Education to adopt standards for accreditation contained in sections 20-7-101 and 20-2-121(7), MCA, does not implicitly or necessarily include the authority to require school districts to make identifiable efforts to provide gifted and talented education in view of the discretionary language of section 20-7-902(1), MCA. Like the rule invalidated in Bick, section 10.55.804, ARM, impermissibly engrafts additional and noncontradictory requirements on section 20-7-902, MCA, which were not envisioned by the Legislature.

The Legislature has outlined the scope of education for gifted and talented students in Montana in sections 20-7-901 to 904, MCA. These educational programs must conform to the policies adopted by the Board of Public Education. Although a school district may choose to implement such a program, the Board of Public Education cannot, pursuant to the statutory rulemaking authority addressed herein, require it to do so.

THEREFORE, IT IS MY OPINION:

> The Board of Public Education's rule requiring every school district to make an identifiable effort to provide educational services to gifted and talented pupils, promulgated pursuant to the Board's statutory authority to adopt accreditation standards, conflicts with the provisions of section 20-7-902(1), MCA.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

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

IN THE MATTER of the Petition of the MONTANA DEPARTMENT OF COMMERCE and the MONTANA DEPARTMENT OF SOCIAL AND REHABILITATIVE SERVICES for a Declaratory Ruling on the Meaning of "Commercial Basis" in Section 69-12-101(6), MCA, and the Application of the "Primary Business Test," in Regard to Certain Nonprofit Providers of Transportation Service.	TRANSPORTATION DIVISION DOCKET NO. T-9597 DECLARATORY RULING

TO: All Interested Persons

INTRODUCTION

1. On August 10, 1990 the Montana Public Service Commission (PSC) received Petitions for Declaratory Ruling from the Montana Department of Commerce (DOC) and the Montana Department of Social and Rehabilitative Services (SRS). The petitions presented by DOC and SRS are similar in all material concerns and have been consolidated.

2. On September 7, 1990 the PSC issued a Notice of Petition for Declaratory Ruling, referencing the procedure applicable, setting forth the facts, identifying the questions of law, and establishing a comment period. Although the PSC allowed for hearing for good cause, it has determined that there is adequate written information on this matter and no hearing is warranted -- this determination does not diminish the importance of the questions presented.

3. Every effort has been made by the PSC to review and consider all comments and arguments received in this matter. However, any material comment or argument not specifically addressed in this ruling is overruled. Additionally, all motions or requests not otherwise disposed of by this ruling are denied.

FACTS

4. DOC and SRS are administrative agencies of this state. Each has a broad range of responsibilities, some of which include administering, coordinating, or funding certain human service programs or certain aspects of such programs. An example of a program that could be administered by SRS is a community home, education, and work program, including related transportation, for the developmentally disabled. An example of one that could be funded by DOC is a transportation program for a community senior citizen group. The human service programs usually involve some transportation by motor vehicle. Predominantly this transportation is of passengers, but conceivably it could be of property. The persons directly benefiting from the programs, the individual group of recipients

of a particular human service program, will be referred to herein as "groups."

5. DOC and SRS do not directly provide the total human services or the transportation element of the services. They contract with persons or organizations that do so. These persons or organizations will be referred to as "providers." Insofar as transportation is concerned, a provider might supply it as an element of a total service, as the only service, or in some combination to different groups or programs.

6. Payment for the transportation element of the services is made to the provider from state or federal government funds by DOC or SRS. The group, as passengers, do not pay the provider for the transportation service.

7. The transportation element of the service does not extend to the public at large, but is limited to those persons who are within the group. The transportation element of the service does not extend beyond a geographical area which includes the place of residence and places serving the members of the group, but might include transportation to the incidents of a total human service, such as social events or shopping.

8. The providers are nonprofit or of similar status. The providers do not have PSC transportation authority.

QUESTION OF LAW

9. Under the facts set forth above, is the provider within the definition of "motor carrier" provided by Section 69-12-101(6), MCA, and thereby subject to PSC authority, or excluded from the definition of "motor carrier" as either: (1) not conducting transportation services "on a commercial basis;" or (2) through application of the "primary business test?"

COMMENTS RECEIVED

10. The PSC received about 30 written comments. The majority were from providers or groups and generally favored exclusion from regulation. With the exception of the comments received from DOC, none were substantially legal argument, but provided information and views. The PSC determines that it is appropriate to summarize the comments received, not necessarily to establish additional facts, but to represent all that appears to be involved.

11. There is a common belief that the transportation element of the total human service programs is essential to the total service. There is a common belief that the service is a good thing. There is general and sincere appreciation for the service. There is a common belief that the service meets the needs of the persons served.

12. It is asserted that in some areas of the state there are no authorized carriers in existence and there are no municipal transportation services available. In this regard, it is also asserted that, if there are such services available, they might not be designed or equipped to meet special transportation needs. These needs may include convenience, flexibility,

wheel chair lifts, and drivers or attendants trained in responding to problems more common to a particular group being served than to the general public.

13. It also appears that not only do the providers receive funds from state or federal sources, they might, in some instances, receive funds from local governments, receive donations from persons being transported, or receive contributions from other human service programs in exchange for services.

14. It also appears that there is an effort to coordinate the transportation elements of the total human services. This is apparently done by extending transportation service providers and resources serving one group to other groups. Apparently this is done to maximize efficiency and eliminate waste and idle time of vehicles and operators. There is also a fear that, without coordination, some groups would be without transportation because of limitations on funding.

PRELIMINARY COMMENT

15. It appears to the PSC that the situation it finds itself in might be one where two worthy state goals collide. In one instance there is the worthy goal of providing for the welfare of people through the funding of human service programs, including transportation, increasing options available for improving life for the groups in general. In the other instance it has long been recognized that it is in the public interest to maintain a strong motor carrier industry through regulation. This ruling demonstrates that the existing law pertaining to motor carriers does not permit certain transportation activities now engaged in by the providers and therein lies the conflict.

16. In this regard, this ruling intrudes on what the DOC, SRS, groups, and providers would, from all appearances, prefer to have been the case. However, even if the PSC were to be inclined to exercise it, the PSC does not have that degree of discretion, the authority to change the law, that would be necessary to answer DOC, SRS, groups, and providers on a more positive note. Whether it is to be the case that the transportation activities herein found to be regulated as motor carriage, more reasonably in the interests of the public should not be regulated, is a matter for the Montana legislature to consider and determine.

LEGAL ANALYSIS

Introduction

17. There are a number of types of transportation by motor vehicle which are not subject to regulation by the PSC. Some of them fall within the definition of "motor carrier," see, Section 69-12-101(6), MCA, but are expressly exempted from regulation by other statutory provisions. See e.g., Sections 69-12-102(1), 69-12-105 and 69-12-405(2), MCA. These types are commonly referred to as "exempt carriage." Some of

them fall outside the definition of "motor carrier" and are thereby excluded from regulation. These types are commonly referred to as "private carriage."

18. No express statutory exemption is applicable to the petition presented by DOC and SRS. All questions pertain to whether the type of transportation identified in the facts presented falls outside the definition of "motor carrier." The questions pertain to the "motor carrier" and "private carrier" distinction.

19. "Private carriage" may exist by any means causing the transportation activity to fall outside of the definition of "motor carrier." DOC and SRS have raised a question concerning the meaning of "on a commercial basis" as used in this definition. However, questions on "private carriage" more commonly arise in two other instances. One is when the transportation is of the carrier's own person or property. The other is when the transportation is merely incidental to a principal non-transportation service of the carrier. DOC and SRS have also raised a question in this regard and concerning the "incidental" transportation or, as will be later explained, "the primary business test."

20. In the interests of background information, the PSC has interpreted "private carriage" based on the transportation of the carrier's own person or property or on the transportation being merely incidental to the carrier's principal non-transportation service as being an exclusion or status applicable or available to virtually any entity, including individuals, businesses, organizations and governments. There is nothing unique about the providers herein that would not permit them to be private carriers if all other requirements for that status are met.

21. Also, there are some exceptions to these general aspects of private carriage. These exceptions include mere subterfuge to evade the law, see, generally, Board of Railroad Commissioners v. Reed, 102 Mont. 382, 385, 58 P.2d 271, 272 (1936), and buy and sell or brokerage arrangements where remuneration is received for transportation, see, Section 69-12-102(5), MCA. There is no indication that any exception to private carrier status would apply to the providers herein. This is merely stated for information.

Meaning and Application of "On a Commercial Basis"

22. DOC and SRS suggest that the nonprofit providers of the transportation service, under the facts presented, do not provide the service "on a commercial basis," as that language is used in Section 69-12-101(6), MCA. The PSC does not agree that such is the case.

23. To fall within the definition of "motor carrier" and thereby be subject to PSC authority, a person operating a motor vehicle over the public highways must do so "for hire on a commercial basis." See, Section 69-12-101(6), MCA. "For hire" is defined by statute. It means "for remuneration of any kind, paid or promised, either directly or indirect-

ly...." Section 69-12-101(5), MCA. "On a commercial basis" is not defined by statute.

24. Determining the meaning and proper application of this statutory language, "on a commercial basis," is statutory construction. In construing a statute, the PSC views its function as a judicial function or quasi-judicial function, similar, if not identical to that of a court -- to effect the intent of the legislature. See, generally, Thiel v. Taurus Drilling Ltd., 218 Mont. 201, 205, 42 St. Rptr. 1520, 1522, 710 P.2d 33, 35 (1985).

25. This would normally require an application of the rules of statutory construction found in Title 1, chapter 2, MCA, and case law. However, in this instance the PSC has the benefit of existing case law on the meaning and application of the language. The PSC determines that independent analysis, if necessary, should only follow a consideration of the existing case law.

26. The case law applies to Chapter 154, L. 1923, which defined "transportation companies" (now "motor carriers") as being any person operating a motor vehicle "used in the business of transportation of persons or property or as a common carrier for compensation over any public highway...." Section 1(c), Ch. 154, L. 1923. It defined "for compensation" to mean "transportation of any person for hire in any motor vehicle; provided, that the Railroad Commissioners may exempt from the operation of this Act the transportation of freight or passengers by motor vehicle in rural communities when not done on a commercial basis." Section 1(e), Ch. 154, L. 1923.

27. In State v. Johnson, 75 Mont. 240, 243 P. 1073 (1926), the Montana Supreme Court held that the above provisions of Chapter 154, L. 1923, expressed the legislature's intention "to include within the prohibition of the Act every person operating a vehicle of the nature described for hire and as a regular business, on a commercial basis, between fixed termini, and to exclude from its operation those residing in rural communities who may occasionally carry either passengers or freight with or without compensation, but not 'on a commercial basis,' and not as a regular business." Johnson, 243 P. at 1078-1079.

28. Johnson did not provide a meaning of "on a commercial basis." Its importance is twofold, however. It used the terminology in harmony with "for hire" and "regular business" and in contrast with "occasional." It also served as a basis for the following case.

29. In State v. Flagg, 75 Mont. 424, 242 P. 1023 (1926), the court, in reference and relation to the Johnson holding, did provide an explanation from which a definition of "on a commercial basis" can be derived. It explained that "the phrase 'on a commercial basis' differentiates the carrier who is engaged in the business of carriage for hire from the person in a rural community who occasionally carries persons or property either for or without compensation." Flagg, 242 P. at 1024.

30. Absent from both the Johnson and Flagg cases is any discussion of profit or nonprofit as being what "on a commercial basis" relates to. Although both cases speak to "on a commercial basis," as used or applied in Chapter 154, L. 1923, as relating to "business," in context, it is only meaningful in the sense that "business" implies that which occurs regularly or habitually, busying or engaging the time and effort, as opposed to that which merely occurs in occasional or isolated instances.

31. "On a commercial basis" was used in Chapter 154 L. 1923, as a qualification for exemption from regulation or from the definition of "transportation company." Transportation was regulated if it was done "in the business ... for compensation," it was done "for compensation" if it was done "for hire." However, it was exempted (in rural communities) if not done "on a commercial basis." If "on a commercial basis" in "when not done on a commercial basis" related to profit, gain, or like matters, it would have been meaningless, as the activity would have not fallen within the definition of "transportation company" to begin with. If "on a commercial basis" related to "business" in the sense that "business" may imply profit, gain, or like matters, the same reasoning would apply. In context, the only way that "on a commercial basis" makes sense is if it means as a business in the sense that "business" may imply activity regularly or habitually engaging in the time and effort as opposed to activity that is isolated or occasional.

32. The PSC determines that the meaning of "on a commercial basis," as used in or applied to Chapter 154 L. 1923, as interpreted by the court as the intention of the legislature, was to reference that activity which occurred as a business in the sense that business means regularly or habitually busying or engaging the time and effort of the carrier. The PSC determines that the meaning of "on a commercial basis" did not relate to profit or nonprofit or like financial aspects.

33. Chapter 154, L. 1923, was replaced by Chapter 184, L. 1931. Relevant to the present matter, it incorporated the reasoning and related language of Johnson and Flagg into the definition of "motor carrier." It defined "motor carrier" as every person operating motor vehicles upon any public highway for the transportation of persons or property "for hire, on a commercial basis" under contract or as a common carrier. It went on to exclude transportation "done occasionally and not as a regular business." See, Section 1, Ch. 184, L. 1931.

34. Under the reenactment doctrine it is presumed that in adopting a statute the legislature acted with knowledge of the previous construction of similar statutes by courts or administrative agencies and adopted such construction. See, Hovey v. Department of Revenue, 203 Mont. 27, 33, 40 St. Rptr. 272, 276, 659 P.2d 280, 283 (1983). With the legislature's adoption of the language from court cases interpreting "on a commercial basis," it seems clear that the reenactment doctrine applies. The PSC determines that the legislature adopted the previous construction of "on a commercial basis" in enacting Chapter 184, L. 1931.

35. In all regards "for hire on a commercial basis" in the definition of "motor carrier" provided by Chapter 184, L. 1931, remains unchanged to date. It follows that the meaning of "on a commercial basis" remains unchanged. The PSC determines that at this present time, given all of the above, Section 69-12-101(6), MCA's, "on a commercial basis" does not relate to whether a carrier conducts activities under profit or nonprofit status. "On a commercial basis" is language intended by the legislature to mean as a business, not in the sense of having profit as a primary aim or any other similar sense, but in the sense of being a serious concern regularly and habitually engaging the time and effort of a carrier.

36. In regard to the question presented by DOC and SRS, the PSC holds that mere nonprofit status, in and of itself, does not cause the provider to fall outside of the definition of "motor carrier" on the basis of the meaning and application of the language "on a commercial basis" in Section 69-12-101(6), MCA.

The Primary Business Test

37. DOC and SRS suggest that the nonprofit providers of the transportation services, under the facts presented, may be deemed "private carriers" as the service is incidental to a principal nontransportation service. The PSC does not agree that such is necessarily the case. However, as will be explained below, "private carrier" status might be available to those providers that provide total human services to which transportation is merely incidental.

38. As indicated above, "private carriage" most commonly exists in two related instances -- when the transportation is of the carrier's own person or property or when it is merely incidental to a principal nontransportation service. Both of these aspects of private carriage are founded in Montana case law. Neither has been expressly defined in Montana statute.

39. DOC and SRS do not raise a question concerning "private carriage" based on transportation of the carrier's own person or property. However, because the aspect is related to the aspect of transportation incidental to a principal service and originated at the same time, the two will be discussed together.

40. Although originating in Stoner v. Underseth, 85 Mont. 11, 19, 277 P. 437, 440 (1929), under Chapter 154, L. 1923, and, in applicable part, carried forward in Christie Transfer and Storage Co. v. Hatch, 95 Mont. 601, 605, 28 P.2d 470, 472 (1934), into Chapter 184, L. 1931, the most recent and complete Montana case analyzing and explaining these aspects is Board of Railroad Commissioners v. Gamble-Robinson Co., 111 Mont. 441, 448-450, 111 P.2d 306, 310-311 (1941).

41. The Montana Supreme Court, in Gamble-Robinson held that it is well settled that to fall within the definition of "motor carrier" the transportation must be of the person or property of another. 111 P.2d at 310. It also reasoned that "engaged in the transportation" (found in the title of Chapter

184, L. 1931) did not mean engaged in some other service and merely transporting in connection therewith, and held that transportation "as an incident to the conduct of their lawful business" was not motor carriage. 111 P.2d at 310-311.

42. Under Gamble-Robinson, for "private carriage" to exist as being merely an "incidental" service, two things are essential -- there must be a "principal" service to which the transportation element is "incidental" and the principal service cannot be a transportation service. All analysis of the exclusion from motor carrier regulation for transportation that is "incidental" is based on these two things. However, since Gamble-Robinson, the analysis has developed considerably.

43. Some history of this development is important. Interstate motor carriers have been regulated by the federal government since 1935. Some of the principles of motor carrier regulation at the state level are the same as those at the federal level. One of the paralleling concepts is private carriage based in "incidental" transportation. At the federal level, the analysis used to determine such status is called the "primary business test."

44. A good starting point for understanding the "primary business test" is Brooks Transportation Co., Inc. v. United States, 93 F.Supp. 517, 522 (1950), and the Interstate Commerce Commission (ICC), motor carrier cases (MCC), cited therein. The test was codified at 49 USC 203(c) in 1958. An explanation of this codification and the "primary business test" is contained in Red Ball Motor Freight, Inc. v. Shannon, 377 U.S. 311, 315-316, 84 S.Ct. 1260, 1262, 12 L.Ed.2d 341, 343 (1964) and the ICC, MCC cases cited therein. The "primary business test" remains codified today at 49 USC 10524.

45. Federal court and administrative opinions concerning the "primary business test" have occurred with considerable frequency. There are no Montana Supreme Court cases on the topic since Gamble-Robinson. The PSC has drawn from federal court and administrative rulings, to the extent they are applicable and the reasoning in them is supportable under, or adaptable to, Montana law.

46. As indicated above, the essential elements in Gamble-Robinson for "private carriage" to arise from "incidental" transportation are: (1) there must be a "principal" service to which the transportation element is "incidental;" and (2) the "principal" service cannot be a transportation service. The PSC "primary business test," as has developed since Gamble-Robinson, is a means through which the existence of these essential elements may be determined. It requires that: (1) there be a real nontransportation service, business, or occupation that is principal in relation to any transportation element of the service; and (2) the transportation element of the principal nontransportation service be merely incidental -- (a) in the scope of the principal service, (b) done in furtherance of the principal service, and (c) clearly subordinate in relation to the principal service.

47. In instances where there is a real service other than transportation and the transportation element of the ser-

vice is in the scope and furtherance of a nontransportation service, determining whether transportation is "incidental" requires a comparison of the nontransportation element or elements of the service to the transportation element of the service, in regards to investment, at-risk assets, operating expenses, payroll, revenues or benefits received, value to persons served, and like things.

48. Under the facts presented the providers contracting with DOC and SRS might supply transportation as: (1) an element of a total service; (2) as the only service; or (3) in some combination to different groups or programs -- meaning it might be an element of a total service as to one group and the only service to another group. Each of these three possibilities require a separate analysis insofar as "private carriage" based on "incidental" transportation is involved.

49. In the instance where the provider supplies transportation services as an element of a total service it is conceivable that status as a "private carrier" may be held. Under the facts presented, it is impossible to further declare this, as such would require a detailed analysis of each provider's total service. This type of a determination must be made on a case-by-case basis. However, if DOC and SRS merely apply the "primary business test" as outlined in paragraph 46 above, the answer should be obtainable.

50. In the instance where the provider supplies transportation service as the only service, there simply is no question. There is no nontransportation service for the transportation to be in the scope of, in furtherance of, or subordinate to. It cannot qualify for exclusion from regulation on the basis of the "primary business test." However, although the question is not raised, if the provider is the group itself, it might, under the proper circumstances, qualify for "private carrier" status as transporting its own person (members).

51. In the instance where the provider supplies transportation services in some combination -- as an element of a total service to one group and as the only service to another group -- the same analysis as given above applies to the service as confined to each individual group. If it is part of a total service it is possible that it is excluded. If it is the only service it does not qualify for the exclusion. However, the mere fact that a provider may provide transportation services "incidentally" to one group does not allow all transportation service engaged in to be categorized as "incidental."

52. In regard to the question presented by DOC and SRS, the PSC holds that the providers are not, as a matter of course under the facts presented, providing transportation services incidental to a principal nontransportation service and do not fall outside of the definition of "motor carrier" in Section 69-12-101(6), MCA, under the "primary business test." However, the providers who provide a total human service with transportation as an element incidental to the total human service appear to have that status available to them.

DECLARATORY RULING

53. Under the facts presented, the provider is within the definition of "motor carrier" provided by Section 69-12-101(6), MCA, and thereby subject to PSC authority. All elements in the definition are met, including "on a commercial basis." However, on a case-by-case basis, "private carrier" status may be available to the providers under the "primary business test" when the transportation service provided is merely incidental to the total human service provided.

Done and Dated this 14th day of January, 1991 by a vote of 5-0 .

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

HOWARD L. ELLIS, Chairman

DANNY OBERG, Vice Chairman

BOB ANDERSON, Commissioner

JOHN B. DRISCOLL, Commissioner

WALLACE W. "WALLY" MERCER, Commissioner

ATTEST:
Ann Peck
Commission Secretary

(SEAL)

NOTE: Any interested party may request that the Commission reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules, amendment or repeal of existing rules filed with the Secretary of State, except rules proposed by the Department of Revenue. Proposals of the Department of Revenue are reviewed by the Revenue Oversight Committee.

The Administrative Code Committee has the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. In addition, the Committee may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt or amend a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with the existing or proposed rules. The address is Room 138, Montana State Capitol, Helena, Montana 59620.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject Matter	1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.
Statute Number and Department	2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 1990. This table includes those rules adopted during the period October 1, 1990 through December 31, 1990 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 1990, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1990 and 1991 Montana Administrative Register.

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