MONTANA ADMINISTRATIVE REGISTER

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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 14

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 The notice section contains state agencies' proposed new, amended or repealed rules, the rationale for the change, date and address of public hearing and where written comments may be submitted.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

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NOTICE SECTION

BEFORE THE BOARD OF CHIROPRACTORS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the proposed amendment of rules pertaining to applications, examination, unprofessional conduct and definitions	))))	NOTICE OF PROPOSED AMENDMENT OF RULES PERTAINING TO THE PRACTICE OF CHIROPRACTIC

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On August 29, 1992, the Board of Chiropractors proposes to amend rules pertaining to the practice of chiropractic.

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

"8.12.601 APPLICATIONS, EDUCATIONAL REQUIREMENTS

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

(3) In addition, all applicants, including reciprocal applicants, must provide a certified copy of the national board scores, parts I & II including physiotherapy, and part III, written clinical competency exam, shall be supplied to the board prior to examination.

(4) will remain the same."

Auth: Sec. 37-1-131, 37-12-201, MCA; IMP, Sec. 37-1-131, 37-1-134, 37-12-302, 37-12-304, 37-12-305, 37-12-307, MCA

"8.12.603 EXAMINATION (1) Examination for licensure shall be made by the board according to the method deemed necessary to test the qualifications of applicants. An oral interview and practical demonstration may be required in addition to the minimum written examination. Part III, clinical competency examination of the national board of chiropractic examiners ~~may be accepted~~ is required in lieu of the board's written examination. ~~Applicants who have not passed part III, will be required to take and pass the complete written examination of the board.~~

~~(2) During the examination, no applicant will be permitted to have on the table whereupon he is writing, any paper or object other than the examination questions and paper. Communication by the applicants will be strictly prohibited and will disqualify any applicant so doing. Disclosure of the examination number will disqualify the applicant. Applicants must rely solely upon their own judgment as to the meaning of each question and on their own knowledge of the subject in answering.~~

(3) and (4) will remain the same but will be renumbered (2) & (3)."

Auth: Sec. 37-1-131, 37-12-201, MCA; IMP, Sec. 37-12-304, MCA

REASON: ARM 8.12.601 and 8.12.603 are being amended to adopt a national standardized written examination instead of a state examination. The national examination is considered to be a more fair and effective test of professional knowledge than a local examination.

"8.12.605 RECIPROCITY (1) Applicants for reciprocity must have been in active chiropractic practice for at least five years prior to making application. Individuals whose applications are complete and whose preliminary and professional education meets the general requirements of the Montana Chiropractic Act, and wherein the standard of such states is not in any degree or particular less than were the requirements for the state of Montana in the same year of application, may be granted admittance through licensure with ~~or without~~ part III of the national board examination and the state clinical proficiency examination. Reciprocity, however, is only effective with those states where the board has established a mutual agreement or at the discretion of the board."

Auth: Sec. 37-1-1331, 37-12-201, MCA; IMP, Sec. 37-12-305, MCA

REASON: This amendment is proposed to adopt the national board examination as a requirement for licensure by reciprocity.

"8.12.614 DEFINITIONS (1) and (2) will remain the same.

(3) "Dietetic methods" as used in section 37-12-104, MCA, shall mean any service, when performed, or ordered to be performed, by any licensed chiropractor, for therapeutic effects, which may employ recommending, and/or giving of any food, vitamin, mineral, herb, enzyme, glandular product, homeopathic preparation, diet plan or other nutritional substance not requiring a medical prescription."

Auth: Sec. 37-12-201, MCA; IMP, Sec. 37-12-104, MCA

REASON: This amendment provides a definition of a statutory term. It gives notice to chiropractors and the public of what services are authorized.

3. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Chiropractors, Lower Level, Arcade Building, 111 North Jackson, Helena, Montana 59620-0407, to be received no later than August 27, 1992.

4. If a person who is directly affected by the proposed amendments wishes to express his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request with any comments he has to the Board of Chiropractors, Lower Level, Arcade Building, 111 North Jackson, Helena, Montana 59620-0407, to be received no later than August 27, 1992.

5. If the Board receives requests for a public hearing on the proposed amendments from either 10% or 25, whichever is less, of those persons who are directly affected by the

proposed amendments, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a public 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 32 based on the 320 licensees in Montana.

BOARD OF CHIROPRACTORS
DWAYNE BORGSTRAND, D.C.,
PRESIDENT

BY: _____
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, July 20, 1992.

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

In the matter of the proposed amendment of a rule pertaining to applications for license	))))	NOTICE OF PROPOSED AMENDMENT OF 8.58.406A APPLICATION FOR LICENSE--SALESPERSON AND BROKER

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On August 29, 1992, the Board of Realty Regulation proposes to amend the above-stated rule.

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

"8.58.406A APPLICATION FOR LICENSE--SALESPERSON AND BROKER (1) through (3) will remain the same.

(4) All applicants for licensure must submit 60 hours of approved pre-licensing education obtained within a period of 24 months immediately preceding the date of the submission of the application."

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

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

REASON: The proposed amendment is intended to clarify that hours of education, to be effective, must be obtained in the two year period before application. This is meant to assure that credit is awarded only for education that is current and up-to-date.

3. Interested persons may present their data, views or arguments concerning the proposed amendment in writing to the Board of Realty Regulation, Lower Level, Arcade Building, 111 North Jackson, Helena, Montana 59620-0407, to be received no later than 5:00 p.m. August 27, 1992.

4. If a person who is directly affected by the proposed amendment 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 Board of Realty Regulation, Lower Level, Arcade Building, 111 North Jackson, Helena, Montana 59620-0407, to be received no later than August 27, 1992.

5. If the Board receives requests for a public hearing on the proposed amendment from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed amendment, 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.

BOARD OF REALTY REGULATION
JACK MOORE, CHAIRMAN

BY: _____
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

_____
ANNIE M. BARTOS, RULE REVIEWER
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, July 20, 1992.

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

In the matter of the proposed amendment of rules 16.44.102, 16.44.120, 16.44.202, 16.44.304, 16.44.415, 16.44.609, and new Rule I dealing with wood preserving operations.	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES AND PROPOSED ADOPTION OF NEW RULE I (Solid & Hazardous Waste)

To: All Interested Persons

1. On August 26, 1992, at 9:00 a.m., the department will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment of the above-captioned rules and the adoption of new rule I.

2. The proposed amendments and new rule would facilitate the Environmental Protection Agency's ongoing process under RCRA to authorize the State of Montana to continue the operation of an independent hazardous waste program. Owners and operators of wood preserving operations that use chlorphenolic, creosote, and/or inorganic [arsenical and chromium] preservatives have recently been brought under the EPA's hazardous waste management umbrella. The federal rules add four listings pertaining to wastes from wood preserving and surface protection processes to the list of wastes from non-specific sources, and make several modifications to the technical standards proposed for drip pads. These amendments and new rule reflect those changes required by EPA's revisions of existing wood preserving operations requirements.

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

16.44.102 INCORPORATIONS BY REFERENCE (1)-(4) Remain the same.

(5) As of ~~March 15, 1991~~ September 25, 1992, all of the incorporations by reference of federal agency rules listed below within the specific state agency rules listed below shall refer to federal agency rules as they have been codified in the July 1, ~~1990~~ 1991 edition of Title 40 of the Code of Federal Regulations (CFR). References in the state rules to federal rules contained in Titles 49 and 33 are updated to the extent that they have been updated by the federal rules which also incorporate these rules by reference. For the proper edition of these rules in Titles 49 and 33, see the reference in Title 40 of the CFR (~~1990~~ 1991 edition), provided in parenthesis. A short description of the amendments to incorporated federal rules which have occurred since the last incorporation by reference is contained in the column to the right. This rule supersedes any specific references to editions of the CFR contained in other rules in this

chapter.

State Rule		Federal Rule Incorporated	Notation of Most Recent Changes to Federal Rules
16.44. . . .		40 CFR	
(a)	103	264.17(b), 264.96, 264.117, 264.171, 264.172	NC
(b)	109	264.72, 264.73(b)(9), 264.76	NC
(c)	110	Parts 264 and 266	Hazardous waste tank systems; miscellaneous units; Part 264, Appendix IX reference.
(d)	116	264.98, 264.99, 264.100, 264.112, 264.113, 264.117(a), 264.118, 264.147	Part 264, Appendix IX reference.
(e)	118	264.112, 264.113, 264.271, 264.272	NC
(f)	120	270.14 - 270.~~23~~ 26	~~Hazardous waste tank systems; miscellaneous units; ground water corrective action, Part 264, Appendix IX reference.~~ Permit applications for boilers and industrial furnaces, process venting, and wood preserving operations.
(g)	123	264.343, 264.345	NC
(h)	124	Part 264, Subpart M	NC
(i)	126	Parts 264 and 266	Hazardous waste tank systems; miscellaneous units; Part 264, Appendix IX.
(j)	202	Parts 264 and 266, Appendix to Part 262	Hazardous waste tank systems; miscellaneous units;

			Part 264, Appendix IX.
(k)	305	Part 266, Subparts C, D, and F	Technical correction in 266.20.
(l)	306	Part 264, Subpart O; Part 265, Subpart O; Part 266, Subparts C-G; 265.71, 265.72	Technical correction in 266.20.
		49 CFR . . .	
(m)	321	173.300 (40 CFR 261.21)	NC
(n)	323	173.51, 173.53, 173.88 (40 CFR 261.23)	NC
		40 CFR . . .	
(o)	331	261.31	NC
(p)	332	261.32	Correction to K062 waste listing; 'mining waste' listings K064, K065, K066, K088, K090, and K091.
(q)	333	261.33(e) and (f)	Corrections; chemical abstracts numbers added.
(r)	334	Part 265, Appendix V	NC
(s)	351	Part 261, Appendices I, II, III, and X	NC
(t)	352	Part 261, Appendices VII and VIII	Corrections; chemical abstracts numbers added.
(u)	405	Part 262, the Appendix	Waste minimization certification language.
49 CFR . . .			
(v)	410	Parts 173, 178, and 179 (40 CFR 262.30)	NC
(w)	411	Part 172, Subpart E (40 CFR 262.31)	NC

(x)	412	Part 172, Subpart D (40 CFR 262.32)	NC
(y)	413	Part 172, Subpart F (40 CFR 262.33)	NC
		40 CFR	
(z)	415	Part 265, Subparts C and D, G and W, 265.111, 265.114, Part 265, Subpart I, Part 265, Subpart J, (except 265.197(c) and 265.200)	Hazardous waste tank systems.
		49 CFR . . . / 33 CFR . . .	
(aa)	511	171.15, 171.16 / 153.203 (40 CFR 263.30)	NC
		40 CFR	
(ab)	603	264.250(c), 265.352, 265.383	NC
(ac)	609	Part 265, Subparts B - Q W, excluding Subparts H and R and 265.75	~~Hazardous waste tank systems; closure of surface impoundments.~~ Drip pads at wood preserving operations.
(ad)	702	Part 264, Subparts B - X, excluding Subpart H and 264.75; Part 264, Appendices I, IV, V, VI, and IX	Hazardous waste tank systems; miscellaneous units; Appendix IX list of ground water monitoring parameters.
(ae)	802	264.197, 264.228, 264.258, 265.197, 265.228, and 265.258	Hazardous waste tank systems; closure of surface impoundments.
(af)	803	264.112, 264.117 - 264.120, 265.112, 265.117 - 265.120	NC

(ag)	804	264.111 - 264.115, 264.178, 264.197, 264.228, 264.258, 264.280, 264.310, 264.351, 264.143(f)(3); 264.601 - 264.603; 265.111 - 265.115, 265.178, 265.197, 265.228, 265.258, 265.280, 265.310, 265.351, 265.381, and 265.404	Hazardous waste tank systems; miscellaneous units; closure of surface impoundments.
(ah)	805	264.117 - 264.120; 264.228, 264.258, 264.280, 264.310, 264.145(f)(5); 264.603; 265.117 - 265.120, 265.228, 265.258, 265.280, 265.310	Miscellaneous units.
(ai)	811	264.143(f) and 264.145(f)	Corporate guarantee language.
(aj)	817	264.147(f), 264.147(g)	Corporate guarantee language.
(ak)	822	264.115	NC
(al)	823	264.151(a)-(j)	Corporate guarantee language.

NC - Refers to no change in the material which is being incorporated by reference from the time of the last formally noticed incorporation by reference.

(6) Remains the same.

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

16.44.120 CONTENTS OF PART B (1) Remains the same.

(2) Except as provided in ARM 16.44.701, the following information must be submitted by an applicant in a Part B application:

(a) remains the same.

(b) the owners or operators of specific types of HWM facilities must describe the nature, design operation and maintenance of such facilities and must include the items of specific information applicable to such facilities listed in 40 CFR 270.15 through ~~270.21~~ 270.26.

(3) The department hereby adopts and incorporates by reference 40 CFR 270.14 through ~~270.23~~ 270.26. The correct CFR edition is listed in ARM 16.44.102.

(a)-(h) Remain the same.

(i) 40 CFR 270.22 is a federal agency rule setting forth permit information requirements relating to the nature, design, operation, and maintenance of boilers and industrial furnaces which burn hazardous waste;

~~(i)~~(j) 40 CFR 270.23 is a federal agency rule setting forth permit information requirements relating to the nature, design,

ensure that all wastes are removed from the drip pad and associated collection system at least once every 90 days; and

(B) documentation of each waste removal, including the quantity of waste removed from the drip pad and the sump or collection system and the date and time of removal.

(ii) In addition, such a generator is exempt from all requirements in 40 CFR Part 265, subpart G (incorporated by reference in ARM 16.44.609) and subchapter 8 of this chapter, except for § 265.111 and § 265.114.

(5)-(9) Remain the same.

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

16.44.609 STANDARDS FOR EXISTING FACILITIES WITH TEMPORARY PERMITS (INTERIM STATUS) (1)-(4) Remain the same.

(5) The department hereby adopts and incorporates herein by reference 40 CFR Part 265, subparts B through and including ~~Q~~ W, and excluding subparts H and R and 40 CFR 265.75. The correct CFR edition is listed in ARM 16.44.102. The equivalent of subpart H is set forth in subchapter 8 of this chapter. The equivalent of 40 CFR 265.75 is set forth in ARM 16.44.613. Subparts B through ~~Q~~ W of 40 CFR Part 265 are federal agency rules setting forth general facility standards (B); requirements for preparedness and prevention (C); requirements for contingency plan and emergency procedures (D); manifest system, recordkeeping and reporting requirements (E); groundwater monitoring requirements (F); closure and post-closure requirements (G); requirements for use and management of containers (I) and requirements for tanks (J), surface impoundments (K), waste piles (L), land treatment (M), landfills (N), incinerators (O), thermal treatment (P), ~~and~~ chemical, physical and biological treatment (Q), and drip pads at wood treating operations (W). A copy of 40 CFR Part 265, subparts B through and including ~~Q~~ W, excluding subparts H and R, or any portion thereof, may be obtained from the Solid and Hazardous Waste Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620.

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

NEW RULE I DELETION OF CERTAIN HAZARDOUS WASTE CODES FOLLOWING EQUIPMENT CLEANING AND REPLACEMENT (1) Wastes from wood preserving processes at plants that do not resume or initiate use of chlorophenolic preservatives will not meet the listing definition of F032 once the generator has met all of the requirements of paragraphs (2) and (3) of this rule. These wastes may, however, continue to meet another hazardous waste listing description or may exhibit one or more of the hazardous waste characteristics.

(2) Generators must either clean or replace all process equipment that may have come into contact with chlorophenolic formulations or constituents thereof, including, but not limited to, treatment cylinders, sumps, tanks, piping systems, drip pads, fork lifts, and trams, in a manner that minimizes or eliminates the escape of hazardous waste or constituents, leachate, contaminated drippage, or hazardous waste decomposition products to the groundwater, surface water, or atmosphere.

operation and maintenance of HWM facilities which store, treat or dispose of hazardous wastes in miscellaneous units;

(k) 40 CFR 270.24 is a federal agency rule setting forth permit information requirements relating to facilities that have process vents;

(l) 40 CFR 270.25 is a federal agency rule setting forth additional information that must be submitted for a permit.

(m) 40 CFR 270.26 is a federal agency rule setting forth permit information requirements relating to the nature, design, operation and maintenance of wood preserving operations which collect, store or treat hazardous wastes on drip pads;

~~(j)~~(n) ~~copies~~ Copies of 40 CFR 270.14 through ~~270.23~~ 270.26 or any portion thereof may be obtained from the Solid and Hazardous Waste Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620.

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

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

(1)-(26) Remain the same.

(27) "Drip pad" means an engineered structure consisting of a curbed, free-draining base, constructed of non-earthen materials and designed to convey preservative kick-back or drippage from treated wood, precipitation, and surface water run-on to an associated collection system at wood preserving plants.

(27)-(125) Remain the same but are renumbered (28)-(126).

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

16.44.304 EXCLUSIONS (1)(a)-(k) Remain the same.

(l) spent wood preserving solutions that have been reclaimed and are reused for their original intended purpose; and

(m) wastewaters from the wood preserving process that have been reclaimed and are reused to treat wood.

(2)-(5) Remain the same.

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

16.44.415 REQUIREMENTS FOR ACCUMULATION OF WASTES AND ACCUMULATION IN SATELLITE LOCATIONS (1)-(3) Remain the same.

(4) During the time that small generators and large generators accumulate hazardous wastes on site, the following requirements apply:

(a) The waste must be placed in either containers or tanks, or may be collected on drip pads associated with wood treating operations;

(b) For accumulation in containers or tanks, ~~The~~ the date upon which each period of accumulation begins must be clearly marked and be visible for inspection on each container or tank;

(c)-(f) Remains the same.

(g)(i) For hazardous wastes collected on drip pads associated with wood treating operations, the generator must comply with subpart W of 40 CFR Part 265 (incorporated by reference in ARM 16.44.609) and must maintain the following records on the premises:

(A) a description of procedures that will be followed to

(a) Generators shall do one of the following:

(i) prepare and follow an equipment cleaning plan and clean equipment in accordance with this rule;

(ii) prepare and follow an equipment replacement plan and replace equipment in accordance with this rule; or

(iii) document cleaning and replacement in accordance with this rule, carried out after termination of use of chlorophenolic preservations.

(b) If (a)(i) is elected by the generator, s/he shall:

(i) Prepare and sign a written equipment cleaning plan that describes:

(A) the equipment to be cleaned;

(B) how the equipment will be cleaned;

(C) the solvent to be used in cleaning;

(D) how solvent rinses will be tested; and

(E) how cleaning residues will be disposed.

(ii) Clean equipment as follows:

(A) remove all visible residues from process equipment;

(B) rinse process equipment with an appropriate solvent until dioxins and dibenzofurans are not detected in the final solvent rinse.

(iii) Comply with the following analytical requirements for equipment cleaning:

(A) Rinses must be tested in accordance with Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, Method 8290 (incorporated by reference in ARM 16.44.351).

(B) "Not detected" means at or below the lower method calibration limit (MCL) in Method 8290, Table 1.

(iv) Manage all residues from the cleaning process as F032 waste.

(c) If (a)(ii) is elected by the generator, s/he shall:

(i) Prepare and sign a written equipment replacement plan that describes:

(A) the equipment to be replaced;

(B) how the equipment will be replaced; and

(C) how the equipment will be disposed.

(ii) Manage the discarded equipment as F032 waste.

(d) If (a)(iii) is elected by the generator, s/he shall document that previous equipment cleaning and/or replacement was performed in accordance with this rule and occurred after cessation of use of chlorophenolic preservatives.

(3) The generator must maintain the following records documenting the cleaning and replacement as part of the facility's operating record:

(a) the name and address of the facility;

(b) formulations previously used and the date on which their use ceased in each process at the plant;

(c) formulations currently used in each process at the plant;

(d) the equipment cleaning or replacement plan;

(e) the name and address of any persons who conducted the cleaning and replacement;

(f) the dates on which cleaning and replacement were accomplished;

(g) the dates of sampling and testing;
(h) a description of the sample handling and preparation techniques, including techniques used for extraction, containerization, preservation, and chain-of-custody of the samples;
(i) a description of the tests performed, the date the tests were performed, and the results of the tests;
(j) the name and model numbers of the instrument(s) used in performing the tests;
(k) QA/QC documentation; and
(l) the following statement signed by the generator or his authorized representative:
"I certify under penalty of law that all process equipment required to be cleaned or replaced under [New Rule I] was cleaned or replaced as represented in the equipment cleaning and replacement plan and accompanying documentation. I am aware that there are significant penalties for providing false information, including the possibility of fine or imprisonment."
AUTH: 75-10-405, MCA; IMP: 75-10-403, 75-10-405, MCA.

4. The department is proposing these amendments to the rules and the adoption of new rule I because they are necessary to allow the State of Montana to continue to be fully authorized by the Environmental Protection Agency under RCRA to continue the operation of an independent hazardous waste program. In particular, the department must be at least as stringent as the federal EPA in its regulation of wood preserving operations and their handling of hazardous waste in order to remain fully authorized to run an independent program.

5. Interested persons may submit their data, views, or arguments concerning the proposed amendments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Patti Powell, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than August 31, 1992.

William J. Dick
for DENNIS IVERSON, Director

Certified to the Secretary of State July 20, 1992.

Reviewed by:

Eleanor J. Parker
Eleanor Parker, DHES Attorney

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

In the matter of the amendment of 16.16.101-104, 16.16.106, 16.16.111, 16.16.116, 16.16.301-305, 16.16.312, 16.16.601, 16.16.603, 16.16.605, 16.16.803-804 dealing with fee requirements for subdivision applications.	NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES (Subdivision Review & Fees)

To: All Interested Persons

1. On August 25, 1992, at 9:00 a.m., the department will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider amendments to existing rules that implement the Sanitation in Subdivisions Act, Title 76, Chapter 4, MCA.

2. These proposed amendments to the existing rules update the substantive and procedural requirements for approval of subdivision applications under Title 76, chapter 4, MCA, and impose new fee requirements for subdivision applications.

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

16.16.101 DEFINITIONS (1) "Adequate water supply" means a water supply which meets the following criteria:

(a) Quality - the maximum contaminant levels established in ARM Title 16, chapter 20, subchapter 2 ~~shall~~ may not be exceeded unless a waiver has been provided by the department.

(b) Quantity - the following flows ~~shall~~ must be provided:

(i) For individual water supply systems, the flow indicated in ARM 16.16.303(5).

(ii) For multiple family water supply systems, ~~recommendations~~ requirements provided by Department Circular ~~84-11 (July, 1984 ed.)~~ WQB-3, 1992 edition.

(iii) Remains the same.

(c) Remains the same.

(2)-(4) Remain the same.

(5) "Conventional subsurface sewage treatment system" means the process of sewage treatment in which the effluent is applied below the soil surface by distribution through horizontal open-jointed or perforated pipes in accordance with the requirements of ~~Septic Tank Bulletin 332~~ Department Circular WQB-6, 1992 edition, for individual systems and Department Circular ~~84-10 (July, 1984 ed.)~~ WQB-4, 1992 edition, for multiple family systems.

(6) "Floodplain" means the area adjoining the watercourse or drainway which would be covered by the floodwater of a flood of 100-year frequency except for sheetflood areas that receive less than one foot of water per occurrence and are considered zone b areas by the federal emergency management agency.

(6)-(9) Remain the same but are renumbered (7)-(10).

(11) "Major subdivision" means a subdivision of six or more parcels.

(12) "Minor subdivision" means a subdivision of five or fewer parcels.

(13) "Mobile home" means a trailer equipped with necessary service connections that is designed for use as a long-term dwelling residence.

~~(10)~~(14) "Multiple family sewage system" means a non-public sanitary sewage system which serves or is intended to serve ~~two~~ three through nine living units. The total people served ~~shall~~ may not exceed 24.

~~(11)~~(15) "Multiple family water supply system" means a non-public water supply system designed to provide water for human consumption to serve ~~two~~ three through nine living units. The total people served ~~shall~~ may not exceed 24.

~~(12)~~(16) "Municipal" pertains to an incorporated city or town.

~~(13)~~(17) "Parcel" means a part of land which is created by a division of land or a space in an area used for recreational camping vehicles or ~~trailers~~ mobile homes.

(14)-(16) Remain the same but are renumbered (18)-(20).

(21) "Recreational camping vehicle" means a vehicle that is used for non-permanent residence and is moved frequently.

~~(17)~~(22) "Seasonal high groundwater level" ~~is the vertical distance from the natural ground surface to the groundwater surface as observed as a free~~ means the highest elevation to which the water ~~surface~~ rises in an unlined hole or perforated monitoring well during the time of the year when the ~~groundwater~~ water table is the highest. When observed, mottling (soil color patterns) ~~shall~~ must be reported as one indicator of previous saturation levels.

~~(18)~~(23) "Spring" ~~is~~ means an opening in the earth's surface from which water issues or seeps.

~~(19)~~(24) "Septic tank" means a storage settling tank in which settled sludge is in immediate contact with the sewage flowing through the tank while the organic solids are decomposed by anaerobic bacterial action.

~~(20)~~(25) "State waters" means any body of water, irrigation system or drainage system, either surface or underground, ~~; it does not apply to~~ "State waters" does not include irrigation waters where the waters are used up within the irrigation system and the waters are not returned to any ~~other~~ state waters.

~~(21) "Trailer" means a camping trailer, mobile home, motor home, pickup camper, or travel trailer.~~

~~(22)~~(26) "Well" means an artificial excavation that derives water from the interstices of rocks or soil which it penetrates.

(27) The department hereby adopts and incorporates by reference Department Circular WQB-3, 1992 edition, which sets forth minimum design requirements for small water systems; Department Circular WQB-4, 1992 edition, which sets forth minimum requirements for the design, construction, and operation of sewers and septic treatment and disposal systems for multi-family and non-residential buildings; and Department Circular WQB-6, 1992 edition, which sets forth minimum requirements for sewer and water systems. Copies of the circulars may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, MT 59620.

AUTH: 76-4-104, MCA; IMP: Title 76, chapter 4, part 1, MCA

16.16.102 APPLICATION -- GENERAL (1) ~~The department considers a~~ A complete application ~~to include the appropriate~~ is an application that contains a properly completed application form, payment of a subdivision review fee as set forth in subchapter 8 of this chapter, and other information required by this chapter. A copy of the plat suitable for filing need not be submitted before review commences. However, the suitable plat must be submitted before the department can take favorable final action on the submittal.

AUTH: 76-4-104, MCA; IMP: 76-4-104, 76-4-125, MCA

16.16.103 APPLICATION FORMS (1) One copy of the appropriately completed application form must be submitted to the department:

(a) ~~A joint subdivision~~ Subdivision application form DHES Sub-1 is to be used for a proposed major subdivisions~~, requiring department review as well as local government review under the Subdivision and Platting Act, Title 76, chapter 3, MCA, and may be obtained from the department.~~

(b) ~~Application form E.S. 91A is to be used for parcels created by certificates of survey exempt from local government review and for removal of sanitary restrictions from undeveloped lots within existing subdivisions.~~ Subdivision application form DHES Sub-2 is to be used for a proposed minor subdivision.

~~(c) Application form E.S. 91B is to be used for parcels that have existing structures using water or sewage systems. These parcels may be in the process of being created by certificate of survey or may be existing lots in a subdivision from which sanitary restrictions are being removed.~~

(2) Copies of forms DHES Sub-1 and DHES Sub-2 may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, or the local sanitarian.

AUTH: 76-4-104, MCA; IMP: 76-4-104, 76-4-125, MCA

16.16.104 INFORMATION SUBMITTED WITH APPLICATION (1) The following information shall be submitted to the department:

(a) Remains the same.

(b) A completed ~~joint~~ subdivision application form signed

by the owner ~~for subdivisions requiring local review and approval or the appropriate E.Q. 91A or E.Q. 91B form for subdivisions exempt from local review~~. (See ARM 16.16.103, 16.16.106, 16.16.108 and 16.16.110 for details.)

(c)-(d) Remain the same.

(e) Where public water supply or sewage systems are proposed, ~~three~~ two copies of final plans and specifications prepared by ~~an~~ a registered professional engineer. (See ARM 16.16.302 for details.)

(f) Where multiple family systems are proposed, ~~three~~ two copies of plans and specifications and supporting documents. (See ARM 16.16.305 for details.)

(g) Remains the same.

(h) Where individual sewage treatment systems are proposed, detailed soils information, percolation tests in the subsurface sewage treatment area, seasonal high groundwater information, and slope across treatment area (or a contour map with a minimum contour interval of two feet). (See ARM 16.16.304 for details.)

(i)-(j) Remains the same.

(k) A copy of all letters of approval from local government officials.

(l) A copy of applicable legal documents, including documents relating to easements, covenants, and establishment of homeowners' associations or local districts.

AUTH: 76-4-104, MCA; IMP: 76-4-104, 76-4-125, MCA

16.16.106 REVIEW PROCEDURES (1)(a) A person may initiate review of subdivision plans pursuant to 76-4-125, MCA, by presenting an application to the reviewing authority.

(b) Upon receipt of a subdivision application or a resubmittal, the department will have 60 days ~~for final action~~ to deny, approve, or conditionally approve the subdivision application. If an environmental impact statement is required, ~~final~~ action must be taken within 120 days.

~~(a)~~(c) If the application is incomplete, the department or local review agent shall deny the application, set forth the deficiencies to the applicant or his representative and shall review such additional information when resubmitted.

~~(b)~~(d) When an application for a subdivision is resubmitted and there are changes in the resubmittal which substantially modify the design or operation of the water supply or sewage systems, the department may request an additional review fee.

(2) Subdivision lots recorded with sanitary restrictions prior to July 1, 1973, shall be reviewed in accordance with requirements set forth in this chapter. In cases where any requirements of this chapter would preclude the use for which each lot was originally intended, then the applicable requirements (including the absence thereof) in effect at the time such lot was recorded shall govern except that sanitary restrictions in no case shall be lifted from any such undeveloped lot which cannot satisfy any of the following requirements:

(a) Where a subsurface sewage treatment system is util-

ized, at least 4 feet from the natural ground surface to the seasonal high groundwater or impervious layer;

(b)-(c) Remain the same.

(d) Where a subsurface sewage treatment system is utilized, soil conditions ~~demonstrating a capacity~~ must provide for safe treatment and disposal of sewage effluent.

(3) The department hereby adopts and incorporates by reference ~~ARM~~ MAC 16-2.14(10)-S14340 (1977); MAC 16-2.14(10)-S14340 (1976, 1975, 1973); Regulation 51.300 (1970); Regulation No. 136 (1961) which set forth former department requirements for sanitary review of subdivisions. Copies of ~~ARM~~ MAC 16-2.14(10)-S14340 (1977); MAC 16-2.14(10)-S14340 (1976, 1975, 1973); Regulation 51.300 (1970); Regulation No. 136 (1961) are available upon request from the ~~Subdivision Section,~~ Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620.
AUTH: 76-4-104, MCA; IMP: 76-4-104, 76-4-125, MCA

16.16.111 MOBILE HOMES AND RECREATIONAL CAMPING VEHICLES (1) In addition to the requirements of this chapter, trailer courts and campgrounds as defined in 50-52-101, MCA, are subject to ARM 16.10.701, et seq.

(2) In addition to the requirements of this chapter, subdivisions designed specifically for the placement of mobile homes or recreational camping vehicles~~, but which are not trailer courts or campgrounds as defined in 50-52-101 MCA~~ are subject to the design standards for water service laterals and risers contained in ARM 16.10.706(3) and (4) and the design standards for sewer service laterals and risers contained in ARM 16.10.707(5) and (6).

(3) The department hereby adopts and incorporates by reference ARM 16.10.701, et seq., which set forth requirements for trailer courts and campgrounds. A copy of ARM 16.10.701 et. seq., may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, MT 59620.
AUTH: 76-4-104, MCA; IMP: 76-4-104, 76-4-125, MCA

16.16.116 CERTIFICATION OF LOCAL DEPARTMENT OR BOARD OF HEALTH (1)-(2) Remain the same.

(3) A registered sanitarian or professional engineer, prior to performing a review of alternative treatment systems as described in Department Circular ~~84-12~~ WQB-5, 1992 edition, must demonstrate a thorough knowledge of the design and evaluation of these systems by successfully completing a written examination administered by the department of health and environmental sciences regarding this subject matter.

(4)-(6) Remain the same.

(7) The department hereby adopts and incorporates by reference Department Circular WQB-5, 1992 edition, which sets forth requirements for performing a review of alternative treatment systems. A copy of Department Circular WQB-5 may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station,

Helena, MT 59620.
AUTH: 76-4-104, MCA; IMP: 76-4-104, 76-4-105, MCA

16.16.301 LOT SIZES (1) Where ~~individual~~ on-site water ~~and~~ or on-site sewage treatment systems are to be utilized, the minimum lot size shall ~~generally~~ be one acre of area per dwelling unit or business. Except as provided in subsection (2), smaller ~~Smaller~~ lot sizes will only be considered if the applicant or his representative provides information from qualified professional consultants indicating no sanitary problems will occur. ~~Each lot will be considered separately.~~

(2) For minor subdivisions, the department may also allow smaller lot sizes than allowed under subsection (1) if its own analysis indicates no sanitary problems will occur.

~~(2)~~(3) Where either an individual water supply system or an individual sewage system is proposed and the other service is proposed to be provided by an approved public ~~or multiple family~~ water or sewage system, the minimum lot size shall ~~generally~~ be 20,000 square feet of area, ~~unless a smaller lot size can be justified.~~ provided the applicant demonstrates that the subdivision will not result in violation of the Water Quality Act, Title 75, chapter 5, MCA, and the applicant or his representative provides information from qualified professional consultants indicating no sanitary problems will occur.

(4) Relevant information for determining whether or not sanitary problems will occur includes depth to groundwater, aquifer characteristics, the presence or absence of confining layers, and soil characterization.

(3)-(4) Remain the same but are renumbered (5)-(6).
AUTH: 76-4-104, MCA; IMP: 76-4-104, MCA

16.16.302 PUBLIC WATER AND SEWER (1) Where a ~~major~~ subdivision is contiguous to or within 500 feet of a department approved public water or sewage system, and that system can handle the additional load, or is located within an Environmental Protection Agency facility plan service area, the subdivision shall be connected to the public system, unless the local government body refuses to allow connection of the proposed subdivision. A waiver of this provision may be given by the department where connection to the existing system is physically or economically impractical.

(2) Remains the same.

(3) Complete plans and specifications for ~~new~~ public sewage or water supply systems or extensions to existing systems must be ~~reviewed~~ approved in writing by the department ~~as required by~~ under 75-6-112, MCA, prior to construction of the system. No construction can begin on dwellings or structures that will utilize the systems until the subdivision is clear of sanitary restrictions.

(4) Remains the same.

(5) When a ~~new~~ public or multiple-family water supply or sewer system is created by a ~~proposed~~ subdivision, the means of providing adequate maintenance and operation shall be reported to the department. A homeowner's association or other

equivalent mechanism shall be established to assure the maintenance, operation and perpetuation of the water supply or sewage systems.

(6) Remains the same.

(7) The department hereby adopts and incorporates by reference:

(a)-(b) Remain the same.

(c) Copies of ARM 16.20.401 and ARM Title 16, chapter 20, subchapters 2 and 6 may be obtained from the ~~Subdivision Section,~~ Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana, 59620.

AUTH: 76-4-104, MCA; IMP: 76-4-104, 76-4-125, MCA

16.16.303 INDIVIDUAL WATER SUPPLY SYSTEMS (1) Remains the same.

(2) A report ~~shall~~ must be submitted giving the following information:

(a) Quality of water obtained from test wells within the proposed subdivision, which shall include the concentration of nitrates and total dissolved solids or conductivity. Additional testing may be required for other parameters where the department believes they may be present in harmful quantities. The above information may be waived by the department where information submitted from existing nearby water sources ~~and/~~or geological reports confirm that the quality of the water supply in the proposed subdivision will be adequate for potable water.

(b) Remains the same.

(3) When wells are utilized for individual water supply systems, the construction of the systems ~~shall~~ must be in accordance with ~~Department Circular 12 (Mar. 1984, rev. ed.)~~ ARM Title 36, chapter 21, subchapter 6.

(4) A minimum well depth of 25 feet ~~shall~~ must be required unless geological information provided by the applicant or his representative demonstrates that a lesser depth will assure both adequate water quality and protection of the supply from contamination. A greater depth may be required if water of better chemical quality or better sanitary quality can be obtained with a deeper well.

(5) ~~An individual~~ A single-family water system ~~shall~~ must provide a sustained yield of at least 8 gallons per minute over a 2 hour period or 5 gallons per minute over a 4 hour period. For a two family system, the sustained yield must be 15 gallons per minute over a two-hour period. A lesser flow may be approved by the department if it can be shown to the department that the water supply system is adequate to meet demands.

(6) Remains the same.

(7) The minimum safe distances shown in Table 1 ~~(section (17)~~ of ARM 16.16.304(16) shall be maintained.

(8) An alternate water source may be developed where it is shown to be not economically feasible to develop a well or where well water is unacceptable in terms of quantity or quality. Evidence that the alternate water supply is adequate shall be provided to the department.

(a) When developed as an alternate water system, springs ~~shall~~ must be constructed in accordance with Department Circular 11 (March, 1972 edition.)

(b) Remains the same.

(c) Cisterns may be utilized where an acceptable source of groundwater is not available if:

(i) Remains the same.

(ii) ~~A sanitary means of hauling is available.~~

~~(iii)~~ All ~~hauled~~ water is hauled and disinfected in accordance with subchapter 3 of ARM Title 16, chapter 20, or a department-approved plan. ~~Department Circular 17, (May, 1972 edition.)~~

~~(iv)~~(iii) The cistern is constructed and installed in accordance with a department-approved plan ~~Department Circular 17, (May, 1972 edition)~~ or an equivalent storage facility approved by the department is provided.

(9) Remains the same.

(10) Disinfection may be required by the department of water supply systems that appear to be inadequate to meet bacteriological standards. If disinfection is required, adequate chlorination along with a minimum ~~retention~~ contact time ~~of two hours for surface waters and one half hour for other waters~~ approved by the department must be provided. ~~Other methods of disinfection acceptable to the department may be approved~~.

(11) The department hereby adopts and incorporates by reference:

~~(a) Septic Tank Bulletin 332 (Mar. 1984, rev. ed.) which is a joint publication of the department and the Co-operative Extension Service of Montana State University, setting forth minimum requirements for the location and construction of septic tanks and drainfields;~~

~~(b)~~(a) ~~Department Circular 12 (Mar. 1984, rev. ed.)~~ ARM Title 36, chapter 21, subchapter 6, which sets forth minimum specifications for ~~the location, construction, and operation of individual water supply systems~~ wells;

~~(c)~~(b) ~~Department Circular 17 (May, 1972 edition)~~ ARM Title 16, chapter 20, subchapter 3, which sets forth minimum specifications for the construction and installation of water cisterns~~, and~~;

(c) Department Circular 11 (March, 1972 edition), which sets forth minimum specifications for construction of springs as alternate water systems; and

(d) ARM Title 16, chapter 20, subchapter 2, which sets forth maximum levels of organic and inorganic substances allowed in public drinking water supplies.

~~(c)~~(12) Copies of these circulars~~, bulletins~~ and rules set forth in section (11) may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana, 59620.

AUTH: 76-4-104, MCA; IMP: 76-4-104, 76-4-125, MCA

16.16.304 INDIVIDUAL SEWAGE TREATMENT SYSTEMS (1) When

the groundwater at a site proposed for subsurface sewage treatment at any time reaches six feet or less from the natural ground surface, the use of a conventional subsurface sewage treatment system is precluded. A groundwater depth of more than six feet from the natural ground surface may be required when necessary to avoid subsurface water contamination. There ~~shall~~ must be a minimum separation of at least four feet between the bottom of the subsurface sewage treatment system and the seasonal high groundwater elevation or impervious layer.

(2)-(5) Remain the same.

(6) Where septic tanks and conventional subsurface sewage treatment systems are proposed, they shall be designed and installed in accordance with ~~Septic Tank Bulletin 332 (Mar. 1984, rev. ed.)~~ Department Circular WQB-6, 1992 edition.

(7) The following information ~~shall~~ must be provided on a copy of the plat or map:

(a)-(b) Remains the same.

(c) Location of streams, lakes, ponds or irrigation ditches including the floodplain on or near the proposed subdivision.

(8) Percolation tests in accordance with ~~Septic Tank Bulletin 332 (Mar. 1984, rev. ed.)~~ Department Circular WQB-6, 1992 edition, ~~shall~~ must be performed on each lot in the area of the proposed subsurface sewage treatment system by a person with soil science qualifications acceptable to the department. Percolation tests shall be keyed by a number on the plat to the results in the report form.

(9)-(11) Remain the same.

(12) Each soil boring ~~shall~~ must be keyed by a number on a copy of the plat or map with the information provided in the report.

~~(13) Location of streams, lakes, ponds or irrigation ditches including the 100-year floodplain on or near the proposed subdivision.~~

~~(14)~~(13) Individual sewage treatment systems other than conventional systems may be approved if they are designed in accordance with Department Circular ~~84-12 (July, 1984 ed.)~~ WQB-5, 1992 edition, and a waiver has been provided by the department.

~~(15)~~(14) ~~No~~ An individual sewage treatment system ~~shall~~ may not be located within 100 feet horizontal distance from the ~~100-year~~ floodplain ~~level~~ of any ~~river, lake, stream, pond or~~ watercourse ~~and~~ or within 100 feet horizontal distance from any lake, pond, swamp, or seep, unless a waiver has been provided by the department.

(a) A waiver may only be provided if:

~~(a)~~(i) The watercourse is an irrigation ditch and the groundwater flow at the drainfield site ~~will not enter the irrigation ditch~~ is shown to flow away from the ditch, or

~~(b)~~(ii) The river or stream ~~average yearly~~ seasonal highwater mark is a minimum of 100 feet from the drainfield and the bottom of the drainfield will be at least four feet above ~~the 100-year~~ floodplain elevation.

~~(c)~~(b) In cases where the floodplain ~~level~~ has not been designated or determined by the federal or state government ~~and~~ or the floodplain ~~level~~ is in question with respect to a proposed subdivision, ~~delineation~~ determination of the location of the floodplain will be referred on a case-by-case basis to the department of natural resources and conservation for its determination. Additional information such as elevations at specific locations may need to be provided by the applicant.

~~(16)~~(15) More than 100 feet separation distance from the ~~maximum high water level~~ floodplain or from surface water may be required when soil conditions indicate a need for the greater distance.

(17) Remains the same but is renumbered 16.

~~(18)~~(17) Where an existing system is present in a proposed subdivision, the evaluation of the existing system by the department ~~shall~~ must be based on information submitted by the applicant on the adequacy to the prior user of the system and the capability of the system to operate without risk to public health and without pollution of state waters.

~~(19)~~(18) The department hereby adopts and incorporates by reference:

(a) ~~Septic tank bulletin 332 (Mar. 1984, rev. ed.), which is a joint publication of the department and the Co-operative Extension Service of Montana State University, setting~~ Department Circular WQB-6, 1992 edition, which sets forth minimum requirements for the location and construction of septic tanks and drainfields;

(b) Remains the same.

(c) Department Circular ~~84-12, (July, 1984 ed.)~~ WQB-5, 1992 edition, which sets forth minimum specifications for the siting, design, construction, and operation of individual on-site alternate sewage disposal systems.

(d) Remains the same.

AUTH: 76-4-104, MCA; IMP: 76-4-104, 76-4-125, MCA

16.16.305 MULTIPLE FAMILY SYSTEMS (1) Multiple family water supply systems ~~shall~~ must be designed in accordance with Department Circular ~~84-11 (July, 1984 ed.)~~ WQB-3, 1992 edition.

(2) Multiple family sewage systems shall be designed in accordance with Department Circular ~~84-10 (July, 1984 ed.)~~ WQB-4, 1992 edition, and ARM 16.16.304 except sections (6) and (8).

(3) Multiple family systems ~~shall~~ must be designed in accordance with ARM Title 16, chapter 20, subchapter 2 and ARM Title 16, chapter 20, subchapter 6.

(4) Multiple family systems for six or more living units ~~shall~~ must be designed by an engineer. Smaller systems which are complex (i.e., a water supply system with substantial pressure differences through the distribution system or a sewage system requiring the pumping of sewage) may also be required by the department to be designed by an engineer.

(5) When more than one multiple family water system or sewer system is provided within a subdivision, ~~they should~~ the systems should be tied together, ~~when~~ except that the systems must be tied together if the department deems it necessary to

provide greater system reliability.

(6) Remains the same.

(7) The department hereby adopts and incorporates by reference:

(a) Remains the same.

(b) Department Circular ~~84-10 (July, 1984 ed.)~~ WQB-4, 1992 edition, which sets forth minimum specifications for the design, construction, and operation of sewers and septic treatment and disposal systems for multi-family and non-residential buildings.

(c) Department Circular ~~84-11 (July, 1984 ed.)~~ WQB-3, 1992 edition, which sets forth minimum design standards for small water systems.

(d) Copies of Department Circulars ~~84-10 (July, 1984 ed.) and 84-11 (July, 1984 ed.)~~ WQB-3 and 4, 1992 editions, and ARM Title 16, chapter 20, subchapters 2 and 6, may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana, 59620.

AUTH: 76-4-104, MCA; IMP: 76-4-104, 76-4-125, MCA

16.16.312 SUBDIVISIONS ADJACENT TO STATE WATERS (1) Where the department has determined that the disposal of sewage from a proposed subdivision may adversely affect the quality of a lake or other state waters, the department may require additional information and data concerning such possible effects. Upon review of such information, the department may impose specific requirements for sewage treatment and disposal as are necessary and appropriate to assure compliance with the water quality act, Title 75, chapter 5, MCA, and water quality and non-degradation standards, ARM Title 16, chapter 20, subchapters 6, 7, 9 and 10.

(2) The department hereby adopts and incorporates by reference ARM Title 16, chapter 20, subchapters 6, 7, 9 and 10, which sets forth water quality standards for state surface waters. Copies of ARM Title 16, chapter 20, subchapter 6, 7, 9 and 10, may be obtained from the Water Quality Bureau, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana, 59620.

AUTH: 76-4-104, MCA; IMP: 76-4-104, 76-4-125, MCA

16.16.601 WAIVERS (1) ~~No provisions~~ Provisions of this chapter ~~shall~~ may not be waived unless specifically granted in this subchapter or specifically granted in 76-4-125, MCA. Waivers must be requested in writing and must be accompanied by data substantiating the request.

AUTH: 76-4-104, MCA; IMP: 76-4-125, MCA

16.16.603 SUBDIVISIONS IN MASTER PLANNED AREA (1) A subdivision is excluded from subchapters 1 and 3 of this chapter, is not subject to sanitary restrictions, and can be filed with the county clerk and recorder without department review when all of the following conditions are met:

(a)-(b) Remain the same.

(c) Notice of certification ~~shall be~~ must be forwarded to the department in accordance with 76-4-127, MCA ~~by the local governing body within 30 days after the local governing body receives an application under the provisions of the Subdivision and Platting Act~~.

~~(d) The notice of certification shall include:~~

~~(i) Name and address of the applicant.~~

~~(ii) A copy of the preliminary plat or final plat where a preliminary plat is not necessary.~~

~~(iii) The number of proposed parcels in the subdivision.~~

~~(iv) A copy of any applicable zoning ordinance.~~

~~(v) How construction of the water supply and sewage disposal systems or extensions will be financed.~~

~~(vi) A copy of the master plan if one has not yet been submitted to the department.~~

~~(vii) Relative location of the subdivision to the city or town.~~

~~(viii) Certification that adequate municipal facilities for the supply of water and disposal of sewage and solid waste are available or will be provided within one year.~~

~~(e)~~(d) The required lot fees as determined in subchapter 8 of this chapter have been submitted to the department.
AUTH: 76-4-104, MCA; IMP: 76-4-124, MCA

16.16.605 EXCLUSIONS (1) Remains the same.

(2) The following divisions of land are also exempt from this chapter and must bear on the survey document the acknowledged certificate of the property owner stating that the division of land in question is exempt from review and quoting in its entirety the wording of the applicable exemption~~.~~:

(a) Divisions for the purpose of acquiring additional land to become part of a parcel that does not have sanitary restrictions imposed provided that no dwelling or structure requiring water or sewage will be erected on the additional acquired parcel.

(b) Divisions made to correct errors in construction where a building, ~~or~~ shrubs, or other permanent vegetation may encroach upon the neighboring property.

(c)-(d) Remain the same.

(e) Parcels ~~used for utility sitings, easements, parking lots, parks, gravel pits and ski lifts~~ where sanitation facilities will not be used, ~~provided~~ in which no structure requiring water or sewage disposal will be erected ~~on the parcel~~. Any change in land use subjects the division to the provisions of Title 76, chapter 4, part 1, MCA, and this chapter.
AUTH: 76-4-104, MCA; IMP: 76-4-125, MCA

16.16.803 FEE SCHEDULES (1) The fees described below pertain only to review of subdivisions as mandated by Title 76, chapter 4, part 1, MCA. An additional fee may be requested pursuant to the Montana Environmental Policy Act (75-1-101, et seq., MCA) for the preparation of an environmental impact statement.

(a) The fees in Schedule I shall be charged:

(i) Remains the same.

(ii) Per condominium living unit except, where municipal or county district water and sewer are available, the fees shall be charged per sewer hookup to the municipal or county sewer, plus $10 for each unit in excess of one which is included on a single ~~hookup~~ service connection to the water and sewer main. For condominium living units with individual service connections to the water and sewer mains, fees in the full amount shown in Schedule I must be charged.

SCHEDULE I

Fee schedule for division of land into one or more parcels, condominiums, mobile home/trailer courts, recreational camping vehicle spaces and tourist campgrounds.

	Sewage disposal provided by individual, multiple family, or public systems which are not connected to municipal or county sewer district systems	Extension of municipal or county sewer district systems requiring department approval	Existing municipal or county sewer district sewers, previously approved (no extension required)
Water supply provided by individual, multiple family, or public systems which are not connected to municipal or county water district systems	~~$40~~ 120	~~$45~~ 100	~~$40~~ 75
Extension of municipal or county water district supply systems requiring review and approval	~~$45~~ 100	~~$40~~ 80	~~$30~~ 55
Existing municipal or county water district system, previously approved (no extension required)	~~$40~~ 75	~~$30~~ 55	~~$20~~ 30

(b) The fee ~~shall be $5~~ is $10 per vehicle parcel for recreational camping vehicles and tourist campgrounds where no water or sewer hookups are provided.

(c) Remains the same.

AUTH: 76-4-105, MCA; IMP: 76-4-105, 76-4-128, MCA

16.16.804 DISPOSITION OF FEES (1) The department shall reimburse local governing bodies under department contract to review subdivisions as follows:

(a) For major subdivisions ~~containing over 5 parcels~~ with individual sewage treatment systems, $10 per parcel.

(b) For minor subdivisions ~~containing 5 or fewer parcels~~ with individual sewage treatment systems, the department will retain ~~thirteen dollars ($13)~~ $50 per parcel of the review fee collected under ARM 16.16.803 and will reimburse the balance to the local governing body.

(2)-(4) Remain the same.

AUTH: 76-4-105, MCA; IMP: 76-4-105, 76-4-128, MCA

4. The amendments proposed by the department are needed to incorporate changes in technical requirements for water supply systems and wastewater treatment systems that have evolved during the past eight years, correct existing language to conform to the Sanitation in Subdivisions Act, and clarify the subdivision review process to eliminate confusion about the process and the information requirements. Finally, the proposed amendments implement a new subdivision fee system that is needed to recover costs of reviewing subdivision applications, as directed by the 1991 Legislature (see, Sec. 9, Ch. 645, Mont. Laws 1991). The rule for disposition of fees to local governments to reimburse their costs is also necessarily amended to accommodate the foregoing legislation.

5. Interested persons may submit their data, views, or arguments concerning the proposed rule, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Pat Risa, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than August 31, 1992.

6. Robert J. Thompson has been designated to preside over and conduct the hearing.

/s/ William J. Cash for DENNIS IVERSON, Director

Certified to the Secretary of State July 20, 1992.

Reviewed by:

/s/ Eleanor L. Parker

Eleanor Parker, DHES Attorney

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of rules governing unemployment insurance.	) NOTICE OF PROPOSED AMENDMENT OF 24.11.475 PERTAINING TO UNEMPLOYMENT INSURANCE))) NO PUBLIC HEARING CONTEMPLATED)

TO ALL INTERESTED PERSONS:

1. On August 29, 1992, the Department of Labor and Industry proposes to amend 24.11.475 governing the administration of unemployment insurance for the State of Montana.

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

24.11.475 APPROVAL OF TRAINING BY THE ~~DIVISION~~ DEPARTMENT

(1) Section 39-51-2307(1), MCA, denies benefits to individuals who do not have a genuine attachment to the labor market because of their regular secondary school attendance or full time attendance at an institution of higher education in the pursuit of a bachelor's or higher degree or in a program of post graduate or post doctoral studies.

(2) Section 39-51-2307(2), MCA, allows the department to pay benefits to individuals engaged in other types of training which, as determined by the department, represent for those individuals the most reasonable and appropriate approach to reemployment in stable employment which utilizes their skills and abilities to the greatest possible degree.

(3) Training that may be approved under this section includes job search workshops and vocational or technical training, including basic education required as a prerequisite to such training, conducted as part of a program designed to prepare individuals for gainful employment in recognized occupations and in new and emerging occupations. Short-term vocationally-directed academic courses may also be approved.

(~~3~~4) The department will approves training for any claimant ~~eligible under section 39-51-2307, MCA, if the training meets~~ under the following conditions:

(a) The training facility is approved by the ~~agency~~; department and by the agency of state government authorized to approve training facilities with respect to curriculum, facilities, staff and other essentials necessary to achieve the training objective, including appropriate standards and practices as to satisfactory attendance and performance of trainees;

(b) The claimant's skills are ~~either--obsolete--or opportunities for employment in claimant's usual labor market are minimal and not likely to improve;~~ in need of upgrading due to technological or other advances in the claimant's occupational field or present or impending demands for the

claimant's skills are minimal or declining and are not likely to improve;

(c) The training course relates to an occupation or skill for which there are, or are expected to be in the immediate future, reasonable employment opportunities in any labor market area in the state in which the claimant intends to seek work;

(d) The claimant has aptitudes or skills which can be usefully supplemented ~~within a short time by retraining;~~ by the training; and

(e) ~~The claimant is not receiving a training or educational allowance under another federal or state program.~~ In general, the claimant's present occupational situation is one which could be improved by the training.

(~~2~~5) On a week-to-week basis a trainee meeting the foregoing qualifications may continue to receive benefits until benefits are exhausted if the training facility certifies that the claimant is enrolled in and satisfactorily pursuing the training course.

AUTH: Sec. 39-51-302, MCA IMP: Sec. 35-51-2307, MCA

REASON: This rule is amended inasmuch as the prior rule was interpreted by many as being too restrictive and had the effect of eliminating training opportunities to those individuals who would benefit the most. This revised rule more clearly identifies the schooling that the statute prohibits, the schooling that the Department may authorize, and the conditions that must exist before training is authorized.

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

Legal Services Division
Hearing Unit
Department of Labor and Industry
Old Board of Health Building
1301 Lockey
Helena, MT 59620

no later than August 31, 1992.

4. 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 as to the Legal Services Division at the above address no later than August 31, 1992.

5. 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.

William E. O'Leary, Chief Counsel
Rule Reviewer

Mario A. Micone, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: 6-2-92

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

In the matter of the proposed amendment of rule to make consistent the exclusions from the definitions of employment in the Unemployment Insurance and Workers' Compensation Acts	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF ARM 24.29.706

TO ALL INTERESTED PERSONS:

1. On August 26, 1992, at 10:00 a.m., a public hearing will be held in the 1st Floor Conference Room of the Beck Building, 1805 Prospect, at Helena, Montana, to consider the proposed amendment to rule stated above.

2. The Department of Labor and Industry proposes to amend its rule specifically pertaining to the exclusions from the definitions of employments in the Unemployment Insurance and Workers' Compensation Acts.

3. The Department of Labor and Industry proposes, to the extent feasible, to make the rule regarding what employments are excluded from the definition of employment under this rule be as consistent as possible between the unemployment insurance and workers' compensation programs. The department is interested in public comment and suggestions on this issue.

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

"24.29.706 ELECTION NOT TO BE BOUND - INDEPENDENT CONTRACTOR (1) ~~Sole proprietors or working members of a partnership who consider themselves or hold themselves out as independent contractors and who contract for agricultural services to be performed on a farm or ranch or for broker or salesman services performed under a license issued by the board of realty regulation are not required to elect to be bound under a compensation plan.~~

~~(2)~~ Sole proprietors or working members of a partnership who consider themselves or hold themselves out as independent contractors, ~~other than those in section (1) of this rule,~~ must elect to be bound under a compensation plan, but may elect not to be bound under a compensation plan if the ~~independent contractor~~ sole owner or working member of a partnership submits, on forms provided by the ~~division~~ department, an appropriate application as required by section 39-71-401(3), MCA, and the ~~independent contractor~~ applicant meets all the following conditions:

(a) evidence the ~~independent contractor~~ applicant ~~demonstrates he~~ is engaged in an independently established trade, occupation, profession or business by providing the ~~division~~ department with:

(i) evidence ~~he~~ the applicant pays social security or unemployment taxes on ~~his~~ the applicant's employees or self-

employment tax on himself; or

~~(ii) his business's workers' compensation insurance policy and name of insurer; or~~

~~(iii)~~ (ii) a copy of ~~his~~ the applicant's federal or state income tax statement for the most recent tax reporting period that shows income and expenses for ~~his~~ the applicant's business; ~~or~~.

~~(iv) a copy of his sales dealer agreement signed by him and the hiring agent which indicates he is not an employee according to the internal revenue code rules implementing the 1982 federal tax equity and fiscal responsibility act and that his business activities fulfill the internal revenue service definition of a direct seller;~~

(b) The ~~independent contractor demonstrates he considers himself or holds himself out~~ applicant contends to be an independent contractor by providing the division with;

(i) a ~~copy of a current contract in which he is identified as an independent contractor who is free from control or direction over the performance of his services, other than control or direction required by government regulation, and which is signed by the hiring agent and himself; or~~ letter, contract, or accepted bid proposal from the current hiring agent and from at least two other hiring agents. Each document should state the applicant is now or was under contract to the hiring agent during the past year as an independent contractor free from their control or direction over the performance of the applicant's service, other than control or direction required by government regulation and

(ii) ~~letters from at least three different hiring agents, each of which states that the independent contractor is currently, or was under contract during the independent contractor's most recent tax year and that during the time of the contract he was free from control or direction over the performance of his services, other than control or direction required by government regulation.~~ two or more of the following: printed invoices, business cards, business license or permits, public advertisements, business checking account (authorization card), a business telephone listing.

(c) The ~~independent contractor indicates he performs his services using the judgment that his trade, occupation, profession or business requires rather than hiring agent's instruction on how these services must be provided.~~

~~(d) The independent contractor indicates he performs new or altered services under his contract only if the contract is amended with his consent before the new or altered services are performed.~~

~~(e) The independent contractor~~ applicant indicates he has a large, substantial investment in the tools, equipment or knowledge essential to the performance of ~~his~~ the applicant's services. The ~~division~~ department may require evidence of a large, substantial investment in tools or equipment, or of certification of ~~his~~ the applicant's specialty knowledge.

(2) ~~(3)~~ An election under this rule is not valid ~~until approved by the division and the election only remains effective~~

~~for one year while the independent contractor performs services consistent with the conditions under which the division granted its approval~~ indefinitely upon approval by the department, however, if any future investigation concludes the applicant is not an independent contractor, the exemption will be voided. ~~An election may be renewed each year by meeting the requirements of section (2) of this rule.~~

~~(4) Sole proprietors or working members of a partnership who consider themselves or hold themselves out as independent contractors, other than those in section (1) of this rule and who have employees, may elect not to be bound under a compensation plan, without providing the information required by section (2) of this rule, but providing the following information:~~

~~(a) number of persons employed by the independent contractor other than himself;~~

~~(b) name of workers' compensation insurance carrier providing coverage for his employees; and~~

~~(c) policy number of worker's compensation insurance covering his employees.~~

~~(5) The exemption provided for under this rule is for workers' compensation purposes only. The fact that an independent contractor neither applies for nor receives an exemption does not imply employee status.~~

~~(6) If a person seeking election not to be bound under this rule does not agree with the division's decision, he may request an administrative review in accordance with ARM 24.29.206. If the person does not agree with the division's decision after completion of administrative review procedures, he may request contested case procedures in accordance with ARM 24.29.207.~~

(3) If the applicant seeking this exemption disagrees with the department's decision, the applicant may appeal for a contested case hearing in accordance with ARM 24.29.207."

Auth: Sec. 39-71-203, MCA; IMP, Sec. 39-71-401, MCA

REASON: Amended Rule: 24.29.706 Under 39-71-401(2)(d) MCA a sole proprietor or working member of a partnership is exempt from the provisions of the Workers' Compensation Act. However, under 39-71-401(3) such an individual, who holds himself out as an independent contractor, can elect to receive coverage under any of the three plans. The Department must adopt rules to implement the process required to establish the individual as an independent contractor. This rule is adopted to establish the procedure and requirements that the Department will accept to establish this independent contractor status.

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

Legal Services Division
Hearing Unit
Department of Labor and Industry
Old Board of Health Building

1301 Lockey
Helena, MT 59620
no later than August 31, 1992.

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 the Legal Services Division at the above address no later than August 31, 1992.

William E. O'Leary, Chief Counsel
Rule Reviewer

Mario A. Micone, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: 6-22-92

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment of rules and a proposed new rule regarding what is classified as wages for purposes of Workers' Compensation and Unemployment Insurance.	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT OF ARM 24.11.814 AND PROPOSED ADOPTION OF NEW RULE I

TO ALL INTERESTED PERSONS:

1. On August 26, 1992, at 10:00 a.m., a public hearing will be held in the 1st Floor Conference Room of the Beck Building, 1805 Prospect, Helena, Montana, to consider the proposed amendments to rules and new rule stated above.

2. The Department of Labor and Industry proposes to amend its rules specifically pertaining to those payments made by employers to employees which are expense reimbursements and may be excluded from the definition of wages.

3. The Department of Labor and Industry proposes, to the extent feasible, to make the rules regarding what may be excluded as expense reimbursements under these rules be as consistent as possible between the unemployment insurance and workers' compensation programs. The department is interested in public comment and suggestions on this issue; however, no proposal which has the effect of reducing an employee's actual wage, or that camouflages wages as expense payments, will be considered.

4. The proposed amendment and proposed new rule will read as follows: (new matter underlined, deleted matter interlined).

RULE I PAYMENTS THAT ARE NOT WAGES --- EMPLOYEE EXPENSES

(1) Payments made to an employee to reimburse the employee for ordinary and necessary expenses incurred during the course and scope of employment are not wages if all of the following are met:

(a) the amount of each employee's reimbursement is entered separately in the employer's records;

(b) the employer has documentation that the employee incurred the expenses in conducting business for the employer;

(c) the reimbursement is not based on a percentage of the employee's wages;

(d) the reimbursement does not replace the customary wage for the occupation; and

(e) the reimbursement is based on:

(i) actual expenses incurred by the employee supported by receipts; or

(ii) a flat rate no greater than the amount allowed to employees of the state of Montana under section 2-18-501 and 503, MCA, unless, through documentation, the employer can substantiate a higher rate; or

(iii) a per mile rate not to exceed four cents ($.04) or a total of $25 per day. This reimbursement is allowed only for those employees who travel more than fifteen (15) miles from their base of operations.

(2) With respect to light equipment, such as chain saws, the reasonable rental value may not be greater than 25% of the employee's gross remuneration.

AUTH: Sec. 39-71-203, MCA IMP: Sec. 39-71-123, MCA

REASON: Enacting New RULE I in Workers' Compensation Rules. A 1991 amendment to 39-71-123(2)(a) MCA modified what was not "wages" insofar as what expenses were allowable for meals, lodging and travel and rental of equipment. This rule is enacted to establish per diem mileage and rental cost for certain tools, as well as establish a procedure that the employer can follow so as to exclude these expenses from "wages".

24.11.814 PAYMENTS THAT ARE NOT WAGES --- EMPLOYEE EXPENSES

(1) Payments made to an employee to reimburse the employee for ordinary and necessary expenses incurred during the course and scope of employment are not wages if all of the following are met:

(a) the amount of each employee's reimbursement is entered separately in the employer's records;

(b) the employer has documentation that the employee incurred the expenses in conducting business for the employer;

(c) the reimbursement is not based on a percentage of the employee's wage;

(d) the reimbursement does not replace the customary wage for the occupation; and

(e) the reimbursement is based on:

(i) actual expenses incurred by the employee supported by receipts; or

(ii) a flat rate no greater than the amount allowed to employees of the state of Montana under section 2-18-501 and 503, MCA, unless, through documentation, the employer can substantiate a higher rate; or

(iii) a per mile rate not to exceed four cents ($.04) or a total of $25 per day. This reimbursement is allowed only for those employees who travel more than fifteen (15) miles from their base of operations.

AUTH: Sec. 39-51-301, 39-51-302, MCA IMP: Sec. 39-51-201, MCA

REASON: The Department is proposing this amendment to clarify what employee expenses are not to be considered wages for the reporting requirements of unemployment insurance. This is required by the amended Section 39-51-201(19)(b)(iii), MCA.

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

Legal Services Division
Hearing Unit
Department of Labor and Industry
Old Board of Health Building
1301 Lockey
Helena, MT 59620

no later than August 31, 1992.

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 the Legal Services Division at the above address no later than August 31, 1992.

William E. O'Leary, Chief Counsel
Rule Reviewer

Mario A. Micone, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: 7-28-92

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

In the matter of the amendment of rules 46.13.201, 46.13.301 through 46.13.304 and 46.13.401 pertaining to low income energy assistance program	)))))	NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF RULES 46.13.201, 46.13.301 THROUGH 46.13.304 AND 46.13.401 PERTAINING TO LOW INCOME ENERGY ASSISTANCE PROGRAM

TO: All Interested Persons

1. On August 20, 1992, at 1:30 p.m., a public hearing will be held in the auditorium of the Social and Rehabilitation Services Building, 111 Sanders, Helena, Montana to consider the proposed amendment of rules 46.13.201, 46.13.301 through 46.13.304 and 46.13.401 pertaining to low income energy assistance program.

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

46.13.201 INTERVIEWS REQUIRED AND CONTENT OF INTERVIEWS Subsections (1) and (1)(a) remain the same.

(2) The staff member shall explain to the person applying all factors of eligibility which must be substantiated and assist the person to understand the regulations governing his eligibility and receipt of benefits. The staff member shall inform the client of the availability of the regulations affecting eligibility as found in the Administrative Rules of Montana, 46.13.101 through 46.13.501, copies of which are available ~~and may be inspected in the offices of the clerk and recorder and the clerk of court in each county~~ from the Intergovernmental Services Bureau, Family Assistance Division, Department of Social and Rehabilitation Services, P. O. Box 4210, Helena, MT 59604-4210.

Subsection (3) remains the same.

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 53-2-201 MCA

46.13.301 DEFINITIONS (1) A "household" ~~consists of all individuals who share a single primary heating source and who live in a single shelter or rental unit~~ means any individual or group of individuals who are living together as one economic unit for whom residential energy is customarily purchased in common or who make undesignated payments for energy in the form of rent.

Subsections (1)(a) through (9) remain the same.

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 53-2-201 MCA

46.13.302 ELIGIBILITY REQUIREMENTS FOR CERTAIN TYPES OF INDIVIDUALS AND HOUSEHOLDS (1) Except as provided below, households which consist solely of members receiving supplemental security income, aid to families with dependent children, or general assistance are automatically financially eligible for 100% low income energy assistance benefit awards. "Members receiving SSI, AFDC, or general assistance" include any financially responsible relative or individual whose income and resources were considered in determining eligibility for these programs.

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

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 53-2-201 MCA

46.13.303 TABLES OF GROSS RECEIPTS AND INCOME STANDARDS (1) The income standards in the table in subsection (2) below are the ~~1991~~ 1992 U.S. government office of management and budget poverty levels for households of different sizes. This table applies to all households, including self-employed households.

(a) Households with annual gross income at or below 125% of the ~~1991~~ 1992 poverty level are financially eligible for low income energy assistance. Households with an annual gross income above 125% of the ~~1991~~ 1992 poverty level are ineligible for low income energy assistance.

(2) Income standards for all households:

Family Size	Poverty Guideline		50 Percent		125 Percent		150 Percent	
One	$ ~~6,620~~	6,810	$~~3,310~~	3,405	$ ~~8,275~~	8,513	$ ~~9,930~~	10,215
Two	~~8,980~~	9,190	~~4,440~~	4,595	~~11,200~~	11,488	~~13,320~~	13,785
Three	~~11,340~~	11,570	~~5,670~~	5,785	~~13,925~~	14,463	~~16,710~~	17,355
Four	~~13,700~~	13,950	~~6,700~~	6,975	~~16,750~~	17,438	~~20,100~~	20,925
Five	~~15,660~~	16,330	~~7,830~~	8,165	~~19,575~~	20,413	~~23,490~~	24,495
Six	~~17,930~~	18,710	~~8,960~~	9,355	~~23,400~~	23,388	~~26,880~~	28,065
Additional member add	~~2,260~~	2,380	~~1,130~~	1,190	~~2,825~~	2,975	~~3,390~~	3,570

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 53-2-201 MCA

46.13.304 CALCULATING INCOME Subsections (1) through (3)(a) remain the same.

(b) Dependent care deductions shall be subtracted from annual gross income that is between 125% and 150% of the ~~1991~~ 1992 U.S. government office of management and budget poverty level for the particular household size.

Subsections (3)(c) and (4) remain the same.

(a) Medical and dental deductions can only be subtracted from annual gross income that is between 125% and 150% of the ~~1991~~ 1992 U.S. government office of management and budget poverty level for the particular household size. Households meeting the income standards in ARM 46.13.303(2) after this adjustment are eligible for benefits.

Subsections (4)(a)(i) through (4)(a)(x) remain the same.

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 53-2-201 MCA

46.13.401 BENEFIT AWARD MATRICES (1) Definitions:

(a) LC means local contractor.

~~(b) MPC means Montana Power Company.~~

~~(c) MDU means Montana-Dakota Utilities, a division of MDU Resources, Inc.~~

~~(d) GFG means Great Falls Gas Company.~~

~~(e) PPL means Pacific Power and Light.~~

~~(f) REA means Rural Electrification Administration.~~

Subsections (1)(g) through (1)(i) remain the same in text but will be renumbered (1)(b) through (1)(d).

Subsection (2) remains the same.

(e) MAXIMUM BENEFIT AWARD MATRIX FOR LC DISTRICTS I, II & III

Phillips, Valley, Daniels, Sheridan, Roosevelt, Garfield, McCone, Richland, Dawson, Prairie, Wibaux, Rosebud, Treasure, Custer, Fallon, Powder River and Carter Counties

Single Family Units

bedrooms	natural gas		M.D.U. electricity		fuel oil		propane		wood		coal		R.E.A. electricity	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$175	132	$461	338	$297	223	$244	183	$137	103	$127	95	$486	365
two	$214	161	$551	413	$362	271	$298	223	$171	129	$158	119	$594	445
three	$243	182	$628	470	$412	309	$339	254	$206	154	$190	142	$675	506
four	$273	205	$702	526	$461	346	$379	284	$240	180	$221	166	$756	567

Multi Family Units

bedrooms	natural gas		M.D.U. electricity		fuel oil		propane		wood		coal		R.E.A. electricity	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$153	114	$393	294	$259	194	$212	159	$119	89	$110	83	$423	317
two	$186	140	$480	360	$315	236	$259	194	$149	112	$138	103	$517	388
three	$211	158	$545	409	$358	269	$295	221	$179	134	$165	124	$587	440
four	$237	178	$610	458	$401	301	$330	247	$209	157	$193	145	$658	493

Mobile Family Units

bedrooms	natural gas		M.D.U. electricity		fuel oil		propane		wood		coal		R.E.A. electricity	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$163	122	$419	315	$276	207	$227	170	$128	96	$118	88	$452	339
two	$199	150	$513	384	$337	252	$277	208	$159	120	$147	110	$552	414
three	$226	169	$583	437	$383	287	$315	236	$191	143	$177	132	$628	471
four	$254	190	$652	489	$429	322	$353	265	$223	167	$206	154	$703	527

(4) MAXIMUM BENEFIT AWARD MATRIX FOR LC DISTRICT IV

Liberty Hill and Blaine Counties

Single Family Units

bedrooms	natural gas	electricity	fuel oil	propane	wood	coal
	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%
one	$136 102	$360 270	$341 256	$346 260	$146 109	$141 106
two	$215 161	$451 338	$416 312	$422 317	$182 137	$168 126
three	$243 183	$512 384	$473 355	$480 360	$219 164	$202 151
four	$274 205	$574 430	$530 398	$537 403	$255 191	$235 176

Multi Family Units

bedrooms	natural gas	electricity	fuel oil	propane	wood	coal
	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%
one	$153 115	$321 241	$303 227	$301 225	$127 95	$117 88
two	$181 140	$380 294	$358 278	$357 275	$158 119	$146 110
three	$212 159	$445 334	$412 309	$417 313	$190 143	$175 132
four	$238 179	$498 374	$461 346	$467 351	$222 166	$205 154

Mobile Family Units

bedrooms	natural gas	electricity	fuel oil	propane	wood	coal
	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%
one	$164 123	$343 257	$317 238	$321 241	$135 102	$125 94
two	$220 150	$419 314	$387 290	$393 294	$169 127	$156 117
three	$226 170	$476 357	$440 330	$446 336	$203 152	$188 141
four	$256 191	$533 400	$493 370	$500 375	$237 178	$219 164

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14-7/30/92

(c) MAXIMUM BENEFIT AWARD MATRIX FOR LC DISTRICT V

Glacier, Toole, Pondera, Teton, Chouteau and Cascade Counties

Single Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal		Great Falls natural gas	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$161	121	$337	253	$324	243	$320	240	$133	100	$123	92	$158	118
two	$197	147	$412	309	$395	297	$391	293	$166	125	$154	115	$193	144
three	$222	167	$468	351	$450	337	$444	333	$200	150	$184	138	$218	163
four	$250	188	$524	393	$504	378	$497	373	$233	175	$215	161	$245	184

Multi Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal		Great Falls natural gas	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$140	105	$293	220	$282	212	$278	209	$116	87	$107	80	$137	103
two	$171	128	$358	269	$344	258	$340	255	$145	109	$134	100	$168	126
three	$193	145	$407	305	$391	293	$386	290	$174	130	$160	120	$190	142
four	$218	163	$456	342	$438	329	$433	324	$203	152	$187	140	$213	160

Mobile Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal		Great Falls natural gas	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$150	113	$313	235	$302	226	$297	223	$124	93	$114	86	$147	110
two	$183	137	$383	287	$368	276	$363	272	$155	116	$143	107	$179	134
three	$207	155	$435	326	$418	314	$413	310	$186	139	$171	129	$203	152
four	$233	174	$487	366	$469	351	$462	347	$217	163	$200	150	$228	171

(d) MAXIMUM BENEFIT AWARD MATRIX FOR LC DISTRICT VI

Fergus, Judith Basin, Petroleum, Wheatland, Golden Valley and Musselshell Counties

Single Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$161	121	$338	253	$309	232	$337	253	$134	100	$123	92
two	$197	148	$413	310	$377	283	$412	309	$167	125	$154	116
three	$223	167	$469	352	$428	321	$468	351	$200	150	$185	139
four	$251	188	$526	394	$480	360	$524	393	$234	175	$216	162

Multi Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$140	105	$294	221	$269	202	$293	220	$116	87	$107	80
two	$173	129	$359	270	$328	246	$358	269	$145	109	$134	101
three	$194	146	$408	306	$373	280	$407	305	$174	131	$161	121
four	$218	164	$457	343	$418	313	$456	342	$203	152	$188	141

Mobile Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$150	113	$314	236	$287	216	$313	235	$124	93	$115	86
two	$183	138	$384	288	$350	263	$383	287	$155	116	$143	107
three	$207	156	$437	327	$398	299	$435	326	$186	140	$172	129
four	$233	175	$489	367	$446	335	$487	365	$217	163	$201	150

(a) MAXIMUM BENEFIT AWARD MATRIX FOR LC DISTRICT IW

Sweetgrass, Stillwater, Carbon, Yellowstone and Big Horn Counties

Single Family Units

bedrooms	M.P.C. natural gas	electricity	fuel oil	propane	wood	coal	M.D.U. natural gas
	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%
one	$150 113	$315 236	$363 197	$313 235	$124 93	$115 86	$159 119
two	$184 138	$306 230	$321 241	$383 287	$156 117	$144 108	$195 146
three	$206 155	$419 328	$365 274	$435 326	$182 140	$172 129	$220 165
four	$224 126	$490 368	$400 307	$487 365	$219 163	$201 151	$249 186

Multi-Family Units

bedrooms	M.P.C. natural gas	electricity	fuel oil	propane	wood	coal	M.D.U. natural gas
	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%
one	$131 98	$274 205	$220 172	$273 204	$108 81	$100 75	$139 104
two	$160 120	$336 251	$270 206	$333 250	$135 102	$125 94	$169 127
three	$181 136	$381 286	$317 238	$378 284	$160 120	$150 112	$193 144
four	$203 153	$426 320	$356 267	$424 318	$180 142	$175 131	$215 162

Mobile Family Units

bedrooms	M.P.C. natural gas	electricity	fuel oil	propane	wood	coal	M.D.U. natural gas
	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%
one	$140 105	$293 220	$245 184	$291 219	$116 87	$103 80	$148 111
two	$171 128	$356 267	$308 231	$366 262	$148 100	$134 100	$184 138
three	$193 145	$407 305	$339 254	$404 303	$174 130	$160 120	$205 154
four	$216 163	$466 349	$380 285	$453 340	$202 152	$187 140	$230 173

(f) MAXIMUM BENEFIT AWARD MATRIX FOR LC DISTRICT VIII

Lewis & Clark, Jefferson and Broadwater Counties

Single Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$167	125	$349	262	$278	209	$395	296	$138	104	$127	96
two	$204	153	$427	320	$339	255	$482	362	$173	129	$159	119
three	$231	173	$485	364	$386	290	$548	411	$207	155	$181	143
four	$259	195	$544	408	$433	324	$614	461	$242	181	$223	167

Multi Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$145	109	$304	228	$242	182	$344	258	$120	90	$111	83
two	$177	133	$372	279	$295	222	$420	315	$150	113	$139	104
three	$201	150	$422	317	$336	252	$477	358	$180	135	$166	125
four	$226	169	$473	356	$376	282	$534	401	$210	158	$194	146

Mobile Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$155	116	$325	244	$259	194	$367	275	$128	96	$119	89
two	$190	142	$397	298	$316	237	$449	336	$161	120	$148	111
three	$214	161	$451	339	$359	269	$510	382	$193	144	$178	133
four	$241	181	$506	379	$403	302	$571	428	$225	169	$207	156

(g) MAXIMUM BENEFIT AWARD MATRIX FOR LC DISTRICT IX

Meagher, Gallatin and Park Counties

Single Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$154	116	$324	243	$280	210	$334	250	$128	96	$118	89
two	$189	142	$306	287	$341	256	$408	306	$160	120	$148	111
three	$214	160	$450	337	$388	291	$464	348	$192	144	$177	133
four	$240	180	$503	378	$435	326	$519	389	$224	168	$207	155

Multi Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$134	101	$282	211	$244	183	$291	218	$111	83	$ 103	77
two	$164	123	$344	258	$297	223	$355	266	$139	104	$ 128	96
three	$186	139	$391	293	$338	253	$403	302	$167	125	$ 154	116
four	$209	157	$438	328	$379	284	$452	339	$195	146	$ 180	135

Mobile Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$144	108	$304	228	$260	195	$311	233	$119	89	$110	82
two	$176	132	$368	276	$318	238	$379	284	$149	111	$137	103
three	$199	149	$418	314	$361	271	$431	323	$178	134	$165	124
four	$223	168	$468	351	$405	303	$483	362	$208	156	$192	144

(h) MAXIMUM BENEFIT AWARD MATRIX FOR LC DISTRICT X

Lincoln, Flathead, Lake and Sanders Counties

Single Family Units

bedrooms	natural gas	M.P.C. electricity	fuel oil	propane	wood	coal	P.P.L. electricity
	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%
one	$148 111	$310 232	$376 307	$325 244	$122 92	$113 85	$283 212
two	$181 135	$378 284	$337 253	$397 298	$153 115	$141 106	$346 260
three	$204 153	$430 322	$383 287	$451 338	$183 138	$169 127	$393 295
four	$230 172	$481 361	$429 322	$505 379	$214 161	$198 148	$441 330

Multi Family Units

bedrooms	natural gas	M.P.C. electricity	fuel oil	propane	wood	coal	P.P.L. electricity
	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%
one	$129 98	$268 202	$240 180	$283 212	$106 80	$ 98 74	$246 185
two	$157 118	$329 247	$293 220	$345 259	$133 100	$123 93	$301 226
three	$178 133	$374 280	$333 250	$393 294	$160 120	$147 110	$342 257
four	$200 150	$419 314	$373 280	$440 330	$186 140	$172 129	$383 287

Mobile Family Units

bedrooms	natural gas	M.P.C. electricity	fuel oil	propane	wood	coal	P.P.L. electricity
	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%	100% 75%
one	$137 103	$288 216	$257 193	$302 227	$114 85	$105 79	$263 198
two	$168 126	$352 264	$313 235	$369 277	$142 107	$131 98	$322 241
three	$190 142	$400 300	$356 267	$420 315	$171 128	$157 118	$368 274
four	$214 160	$448 336	$399 299	$470 353	$199 149	$184 138	$410 307

(f) MAXIMUM BENEFIT AWARD MATRIX FOR LC DISTRICT XI

Mineral, Missoula and Ravalli Counties

Single Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$150	112	$314	235	$242	181	$352	264	$124	93	$114	86
two	$183	137	$383	288	$295	221	$431	323	$155	116	$143	107
three	$207	155	$436	327	$335	251	$489	367	$186	139	$172	129
four	$233	175	$488	366	$376	282	$548	411	$217	163	$200	150

Multi Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$130	98	$273	205	$210	158	$307	230	$108	81	$100	75
two	$159	119	$334	250	$258	192	$375	281	$135	101	$124	93
three	$180	135	$379	284	$292	219	$426	319	$162	121	$149	112
four	$203	152	$425	318	$327	245	$477	358	$189	142	$174	131

Mobile Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$139	104	$292	219	$225	168	$328	246	$115	86	$106	80
two	$170	128	$357	267	$274	206	$400	300	$144	108	$133	100
three	$193	144	$405	304	$312	234	$455	341	$173	130	$160	120
four	$217	162	$454	340	$349	262	$510	382	$202	151	$186	140

~~(3)~~ MAXIMUM BENEFIT AWARD MATRIX FOR LC DISTRICT XII

Powell, Granite, Deer Lodge, Silver Bow, Beaverhead and Madison Counties

Single Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$161	136	$380	285	$332	242	$463	347	$150	113	$139	104
two	$222	166	$464	348	$393	295	$565	424	$188	141	$173	130
three	$251	188	$528	396	$447	335	$642	482	$225	169	$208	156
four	$282	212	$591	443	$501	375	$720	540	$263	197	$243	182

Multi Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$158	118	$331	248	$280	210	$403	302	$131	98	$121	90
two	$193	145	$404	303	$342	256	$492	369	$163	122	$151	113
three	$218	164	$459	344	$389	291	$559	419	$196	147	$181	136
four	$245	184	$514	386	$436	327	$626	470	$229	171	$211	158

Mobile Family Units

bedrooms	natural gas		electricity		fuel oil		propane		wood		coal	
	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%	100%	75%
one	$169	126	$353	265	$300	225	$430	323	$140	105	$129	97
two	$206	155	$432	324	$365	274	$526	394	$175	131	$161	121
three	$233	175	$491	368	$415	312	$598	448	$209	157	$193	145
four	$262	197	$550	412	$466	349	$669	503	$244	183	$226	169

(a) DISTRICTS 1, 2 & 3

100%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$182	$452	$285	$299	$137	$127
2 BEDROOMS	$222	$552	$347	$366	$171	$158
3 BEDROOMS	$251	$627	$394	$416	$206	$190
4 BEDROOMS	$282	$703	$442	$465	$240	$221

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$158	$393	$248	$260	$119	$110
2 BEDROOMS	$193	$480	$302	$318	$149	$138
3 BEDROOMS	$218	$546	$343	$362	$179	$165
4 BEDROOMS	$246	$611	$385	$405	$209	$193

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$169	$420	$265	$278	$128	$118
2 BEDROOMS	$206	$513	$323	$340	$159	$147
3 BEDROOMS	$233	$583	$367	$386	$191	$177
4 BEDROOMS	$263	$653	$411	$433	$223	$206

75%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$136	$339	$213	$225	$103	$ 95
2 BEDROOMS	$166	$414	$260	$274	$129	$119
3 BEDROOMS	$188	$470	$296	$312	$154	$142
4 BEDROOMS	$212	$527	$332	$349	$180	$166

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$118	$295	$186	$195	$ 89	$ 83
2 BEDROOMS	$145	$360	$226	$239	$112	$103
3 BEDROOMS	$164	$409	$257	$271	$134	$124
4 BEDROOMS	$184	$458	$288	$304	$157	$145

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$127	$315	$198	$209	$ 96	$ 88
2 BEDROOMS	$155	$385	$242	$255	$120	$110
3 BEDROOMS	$175	$438	$275	$290	$143	$132
4 BEDROOMS	$197	$490	$308	$325	$167	$154

(b) DISTRICT 4

100%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$168	$377	$312	$390	$146	$134
2 BEDROOMS	$206	$460	$380	$477	$182	$168
3 BEDROOMS	$233	$523	$432	$542	$219	$202
4 BEDROOMS	$262	$586	$485	$607	$255	$235

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$147	$328	$271	$339	$127	$117
2 BEDROOMS	$179	$400	$331	$415	$158	$146
3 BEDROOMS	$203	$455	$376	$471	$190	$175
4 BEDROOMS	$228	$510	$422	$528	$222	$205

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$157	$350	$290	$363	$135	$125
2 BEDROOMS	$191	$428	$354	$443	$169	$156
3 BEDROOMS	$217	$486	$402	$504	$203	$188
4 BEDROOMS	$244	$545	$451	$564	$237	$219

75%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$126	$282	$234	$293	$109	$101
2 BEDROOMS	$154	$345	$285	$357	$137	$126
3 BEDROOMS	$175	$392	$324	$406	$164	$151
4 BEDROOMS	$197	$439	$363	$455	$191	$176

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$110	$246	$204	$255	$ 95	$ 88
2 BEDROOMS	$134	$300	$248	$311	$119	$110
3 BEDROOMS	$152	$341	$282	$353	$143	$132
4 BEDROOMS	$171	$382	$316	$396	$166	$154

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$118	$263	$218	$272	$102	$ 94
2 BEDROOMS	$144	$321	$265	$332	$127	$117
3 BEDROOMS	$162	$365	$302	$378	$152	$141
4 BEDROOMS	$183	$409	$338	$423	$178	$164

(c) DISTRICT 5

100%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$153	$344	$264	$300	$133	$123
2 BEDROOMS	$187	$421	$322	$366	$166	$154
3 BEDROOMS	$212	$478	$366	$416	$200	$184
4 BEDROOMS	$238	$535	$411	$466	$233	$215

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$133	$299	$230	$261	$116	$107
2 BEDROOMS	$163	$366	$280	$318	$145	$134
3 BEDROOMS	$184	$416	$319	$362	$174	$160
4 BEDROOMS	$207	$466	$357	$405	$203	$187

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$142	$320	$246	$279	$124	$114
2 BEDROOMS	$174	$391	$300	$340	$155	$143
3 BEDROOMS	$197	$445	$341	$387	$186	$171
4 BEDROOMS	$221	$498	$382	$433	$217	$200

75%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$115	$258	$198	$225	$100	$ 92
2 BEDROOMS	$140	$316	$242	$275	$125	$115
3 BEDROOMS	$159	$359	$275	$312	$150	$138
4 BEDROOMS	$179	$402	$308	$349	$175	$161

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$100	$225	$172	$196	$ 87	$ 80
2 BEDROOMS	$122	$274	$210	$239	$109	$100
3 BEDROOMS	$138	$312	$239	$271	$130	$120
4 BEDROOMS	$155	$349	$268	$304	$152	$140

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$107	$240	$184	$209	$ 93	$ 86
2 BEDROOMS	$130	$293	$225	$255	$116	$107
3 BEDROOMS	$148	$333	$256	$290	$139	$129
4 BEDROOMS	$166	$373	$286	$325	$163	$150

(d) DISTRICT 6

100%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$154	$345	$269	$353	$134	$123
2 BEDROOMS	$189	$422	$328	$431	$167	$154
3 BEDROOMS	$214	$479	$372	$490	$200	$185
4 BEDROOMS	$240	$537	$417	$548	$234	$216

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$134	$300	$234	$307	$116	$107
2 BEDROOMS	$164	$367	$285	$375	$145	$134
3 BEDROOMS	$186	$417	$324	$426	$174	$161
4 BEDROOMS	$209	$467	$363	$477	$203	$188

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$144	$321	$250	$328	$124	$115
2 BEDROOMS	$176	$392	$305	$401	$155	$143
3 BEDROOMS	$199	$446	$346	$455	$186	$172
4 BEDROOMS	$223	$499	$388	$510	$217	$201

75%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$116	$259	$201	$265	$100	$ 92
2 BEDROOMS	$142	$316	$246	$323	$125	$116
3 BEDROOMS	$160	$360	$279	$367	$150	$139
4 BEDROOMS	$180	$403	$313	$411	$175	$162

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$101	$225	$175	$230	$ 87	$ 80
2 BEDROOMS	$123	$275	$214	$281	$109	$101
3 BEDROOMS	$139	$313	$243	$319	$131	$121
4 BEDROOMS	$157	$350	$272	$358	$152	$141

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$108	$241	$187	$246	$ 93	$ 86
2 BEDROOMS	$132	$294	$228	$301	$116	$107
3 BEDROOMS	$149	$334	$260	$342	$140	$129
4 BEDROOMS	$168	$375	$291	$383	$163	$150

(e) DISTRICT 7

100%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$165	$322	$272	$325	$124	$115
2 BEDROOMS	$201	$393	$331	$398	$156	$144
3 BEDROOMS	$228	$447	$377	$452	$187	$172
4 BEDROOMS	$256	$501	$422	$506	$218	$201

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$143	$280	$236	$283	$108	$100
2 BEDROOMS	$175	$342	$288	$346	$135	$125
3 BEDROOMS	$198	$389	$328	$393	$162	$150
4 BEDROOMS	$223	$435	$367	$440	$190	$175

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$153	$299	$253	$303	$116	$107
2 BEDROOMS	$187	$366	$308	$370	$145	$134
3 BEDROOMS	$212	$416	$350	$420	$174	$160
4 BEDROOMS	$238	$466	$393	$471	$203	$187

75%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$124	$241	$204	$244	$ 93	$ 86
2 BEDROOMS	$151	$295	$248	$298	$117	$108
3 BEDROOMS	$171	$335	$282	$339	$140	$129
4 BEDROOMS	$192	$375	$317	$380	$163	$151

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$108	$210	$177	$212	$ 81	$ 75
2 BEDROOMS	$131	$257	$216	$259	$102	$ 94
3 BEDROOMS	$149	$292	$246	$295	$122	$112
4 BEDROOMS	$167	$327	$275	$330	$142	$131

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$115	$224	$189	$227	$ 87	$ 80
2 BEDROOMS	$141	$274	$231	$277	$109	$100
3 BEDROOMS	$159	$312	$263	$315	$130	$120
4 BEDROOMS	$179	$349	$294	$353	$152	$140

(f) DISTRICT 8

100%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$160	$357	$241	$426	$138	$127
2 BEDROOMS	$195	$426	$294	$520	$173	$159
3 BEDROOMS	$221	$496	$335	$592	$207	$191
4 BEDROOMS	$248	$555	$375	$663	$242	$223

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$139	$311	$210	$371	$120	$111
2 BEDROOMS	$170	$380	$256	$453	$150	$139
3 BEDROOMS	$192	$431	$291	$515	$180	$166
4 BEDROOMS	$216	$483	$326	$576	$210	$194

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$148	$332	$225	$396	$128	$119
2 BEDROOMS	$181	$406	$274	$484	$161	$148
3 BEDROOMS	$205	$461	$311	$550	$193	$178
4 BEDROOMS	$231	$516	$349	$616	$225	$207

75%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$120	$268	$181	$320	$104	$ 96
2 BEDROOMS	$146	$327	$221	$390	$129	$119
3 BEDROOMS	$166	$372	$251	$444	$155	$143
4 BEDROOMS	$186	$416	$281	$497	$181	$167

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$104	$233	$158	$278	$ 90	$ 83
2 BEDROOMS	$127	$285	$192	$340	$113	$104
3 BEDROOMS	$144	$323	$218	$386	$135	$125
4 BEDROOMS	$162	$362	$245	$432	$158	$146

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$111	$249	$168	$297	$ 96	$ 89
2 BEDROOMS	$136	$304	$205	$363	$120	$111
3 BEDROOMS	$154	$346	$233	$413	$144	$133
4 BEDROOMS	$173	$387	$262	$462	$169	$156

(g) DISTRICT 9

100%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$148	$331	$285	$386	$128	$118
2 BEDROOMS	$181	$404	$348	$471	$160	$148
3 BEDROOMS	$204	$459	$395	$535	$192	$177
4 BEDROOMS	$230	$514	$443	$600	$224	$207

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$129	$288	$248	$335	$111	$103
2 BEDROOMS	$157	$352	$302	$410	$139	$128
3 BEDROOMS	$178	$399	$344	$466	$167	$154
4 BEDROOMS	$200	$447	$385	$522	$195	$180

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$138	$307	$265	$359	$119	$110
2 BEDROOMS	$168	$376	$323	$438	$149	$137
3 BEDROOMS	$190	$427	$368	$498	$178	$165
4 BEDROOMS	$214	$478	$412	$558	$208	$192

75%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$111	$248	$214	$289	$ 96	$ 89
2 BEDROOMS	$136	$303	$261	$353	$120	$111
3 BEDROOMS	$153	$344	$296	$401	$144	$133
4 BEDROOMS	$173	$386	$332	$450	$168	$155

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$ 96	$216	$186	$252	$ 83	$ 77
2 BEDROOMS	$118	$264	$227	$307	$104	$ 96
3 BEDROOMS	$133	$300	$258	$349	$125	$116
4 BEDROOMS	$150	$336	$289	$391	$146	$135

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$103	$231	$199	$269	$ 89	$ 82
2 BEDROOMS	$126	$282	$242	$329	$111	$103
3 BEDROOMS	$143	$320	$276	$373	$134	$124
4 BEDROOMS	$160	$359	$309	$418	$156	$144

(h) DISTRICT 10

100%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$141	$258	$275	$365	$122	$113
2 BEDROOMS	$173	$316	$336	$446	$153	$141
3 BEDROOMS	$196	$359	$382	$507	$183	$169
4 BEDROOMS	$220	$402	$428	$568	$214	$198

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$123	$225	$239	$318	$106	$ 98
2 BEDROOMS	$150	$275	$292	$388	$133	$123
3 BEDROOMS	$170	$312	$332	$441	$160	$147
4 BEDROOMS	$191	$350	$372	$494	$186	$172

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$132	$240	$256	$340	$114	$105
2 BEDROOMS	$161	$294	$312	$415	$142	$131
3 BEDROOMS	$182	$334	$355	$471	$171	$157
4 BEDROOMS	$205	$374	$398	$528	$199	$184

75%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$106	$194	$206	$274	$ 92	$ 85
2 BEDROOMS	$130	$237	$252	$334	$115	$106
3 BEDROOMS	$147	$269	$286	$380	$138	$127
4 BEDROOMS	$165	$301	$321	$426	$161	$148

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$ 92	$169	$180	$238	$ 80	$ 74
2 BEDROOMS	$113	$206	$219	$291	$100	$ 92
3 BEDROOMS	$128	$234	$249	$331	$120	$110
4 BEDROOMS	$144	$262	$279	$370	$140	$129

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$ 99	$180	$192	$255	$ 85	$79
2 BEDROOMS	$121	$220	$234	$311	$107	$ 98
3 BEDROOMS	$136	$250	$266	$353	$128	$118
4 BEDROOMS	$153	$280	$298	$396	$149	$138

(i) DISTRICT 11

100%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$143	$320	$263	$343	$124	$114
2 BEDROOMS	$175	$392	$321	$419	$155	$143
3 BEDROOMS	$198	$445	$365	$477	$186	$172
4 BEDROOMS	$223	$498	$409	$534	$217	$200

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$125	$279	$229	$299	$108	$100
2 BEDROOMS	$152	$341	$279	$365	$135	$124
3 BEDROOMS	$172	$387	$317	$415	$162	$149
4 BEDROOMS	$194	$434	$255	$464	$189	$174

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$133	$298	$245	$319	$115	$106
2 BEDROOMS	$163	$364	$298	$390	$144	$133
3 BEDROOMS	$184	$414	$339	$443	$173	$160
4 BEDROOMS	$207	$464	$380	$496	$202	$186

75%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$108	$240	$197	$257	$ 93	$ 86
2 BEDROOMS	$131	$294	$240	$314	$116	$107
3 BEDROOMS	$149	$334	$273	$357	$139	$129
4 BEDROOMS	$167	$374	$306	$400	$163	$150

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$ 94	$209	$172	$224	$ 81	$ 75
2 BEDROOMS	$114	$256	$209	$274	$101	$ 93
3 BEDROOMS	$129	$290	$238	$311	$121	$112
4 BEDROOMS	$145	$325	$267	$348	$142	$131

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$100	$224	$183	$239	$ 86	$ 80
2 BEDROOMS	$122	$273	$224	$292	$108	$100
3 BEDROOMS	$138	$310	$254	$332	$130	$120
4 BEDROOMS	$156	$348	$285	$372	$151	$140

(1) DISTRICT 12

100%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$174	$388	$323	$471	$150	$139
2 BEDROOMS	$212	$474	$394	$575	$188	$173
3 BEDROOMS	$240	$539	$448	$654	$225	$208
4 BEDROOMS	$270	$604	$502	$732	$263	$243

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$151	$338	$281	$410	$131	$121
2 BEDROOMS	$185	$413	$343	$501	$163	$151
3 BEDROOMS	$209	$469	$390	$569	$196	$181
4 BEDROOMS	$235	$525	$437	$637	$229	$211

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$161	$361	$301	$438	$140	$129
2 BEDROOMS	$197	$441	$367	$535	$175	$161
3 BEDROOMS	$223	$501	$417	$608	$209	$193
4 BEDROOMS	$251	$562	$467	$681	$244	$226

75%

SINGLE FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$130	$291	$242	$353	$113	$104
2 BEDROOMS	$159	$356	$296	$431	$141	$130
3 BEDROOMS	$180	$404	$336	$490	$169	$156
4 BEDROOMS	$203	$453	$377	$549	$197	$182

MULTI FAMILY	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$113	$253	$211	$307	$ 98	$ 90
2 BEDROOMS	$138	$310	$257	$375	$122	$113
3 BEDROOMS	$157	$352	$292	$427	$147	$136
4 BEDROOMS	$176	$394	$328	$478	$171	$158

MOBILE HOME	NATURAL GAS	ELECTRIC	FUEL OIL	PROPANE	WOOD	COAL
1 BEDROOM	$121	$271	$226	$329	$105	$ 97
2 BEDROOMS	$148	$331	$275	$401	$131	$121
3 BEDROOMS	$167	$376	$313	$456	$157	$145
4 BEDROOMS	$188	$421	$350	$511	$183	$169

AUTH: Sec. 53-2-201 MCA
IMP: Sec. 53-2-201 MCA

3. The changes to ARM 46.13.303, 46.13.304, and 46.13.401 are necessary, in part, to ensure that the department's policy coincides with the 1992 U.S. Office of Management and Budget (OMB) poverty standards and to ensure that benefit award matrices are within the current Low Income Energy Assistance Program (LIEAP) budget. The amendment of ARM 46.13.303 is necessary to change the income standards to be used in determining eligibility for LIEAP, based on the 1992 federal poverty levels. ARM 46.13.304(3)(b) and (4)(a) must be amended to provide that the 1992 poverty levels will be used in determining whether a household's gross annual income is between 125% and 150% of poverty for purposes of qualifying for a dependent care deduction or medical and dental deduction.

The benefit matrices in ARM 46.13.401 used to determine the amount of benefits to be awarded to eligible households are being amended for fiscal year 1993 based on current funding for the program.

The amendment of ARM 46.13.401 is also necessary to eliminate the differentials in benefit amounts based on which utility company provides service. Since one provider of electricity or natural gas may charge more than another, the amount of a LIEAP recipient's benefit award has in the past taken into consideration not only what kind of fuel the recipient uses for residential heating, but also which provider the recipient purchases service from.

Reductions in LIEAP funding and consequently in LIEAP benefit amounts has made the differences in benefit amounts based on the provider so small as to be inconsequential. The matrices are therefore being changed to eliminate the different benefit amounts based on the provider, although benefit amount still varies by type of fuel used for heating. Sections (1)(b) through (f) of ARM 46.13.401 which list the abbreviations used in the rule for the different utility providers are therefore unnecessary and are being deleted.

It is necessary to amend ARM 46.13.201(2) because it is no longer accurate. It currently states that copies of the administrative rules governing eligibility for LIEAP are available from the offices of the clerk and recorder and the clerk in each county. Since the rules are available at different locations in each county, the rule is being changed to state that the rules can be obtained from the department.

The definition of household in ARM 46.13.301(1) must be amended to make it conform to the wording of the LIEAP statute, as required by the Office of Community Services of the U.S. Department of Health and Human Services (HHS), which

administers LIEAP. In the current rule, all individuals who share a single primary heating source and live in a single shelter are defined as a household. Although the definition of household is being changed to state that all individuals living together as one economic unit and sharing energy costs constitute a household, there is no change in policy, because all individuals who live together and share energy costs will be considered as one economic unit.

The amendment of ARM 46.13.302(1) is necessary to specify that any household which automatically qualifies for LIEAP benefits because all the members of the household receive either supplemental security income, aid to families with dependent children, or general assistance will receive the maximum benefit. This is not a change in policy but makes it clear that such households not only are financially eligible but also will receive benefits at the maximum 100% level.

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 Russell E. Cater, Chief Legal Counsel, Office of Legal Affairs, Department of Social and Rehabilitation Services, P.O. Box 4210, Helena, MT 59604-4210, no later than August 27, 1992.

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

Russell E. Cater
Rule Reviewer

Julia E. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State July 20, 1992.

BEFORE THE BOARD OF HORSE RACING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to general provisions, racing secretary, veterinarians, general requirements, general rules, duties of licensee and breakage, minus pools and commissions	NOTICE OF AMENDMENT OF RULES PERTAINING TO HORSE RACING

TO: All Interested Persons:

1. On May 28, 1992, the Board of Horse Racing published a notice of proposed amendment of rules pertaining to the horse racing industry at page 1077, 1992 Montana Administrative Register, issue number 10.

2. The Board has amended ARM 8.22.601, 8.22.607, 8.22.612, 8.22.711, 8.22.801, 8.22.1601, 8.22.1602 and 8.22.1802 exactly as proposed. The Board has amended ARM 8.22.1611 with the following changes:

"8.22.1611 BREAKAGE, MINUS POOLS AND COMMISSIONS (1) through (a) will remain the same as proposed.

(b) an odd cent over any multiple of ~~five~~ ten cents in the amount calculated on a dollar basis, so that the licensee may retain the breaks on tickets of every denomination except in the case of a minus pool.

(2) In the event a minus pool should occur and the amount calculated on the dollar basis be less than ten cents, the association shall pay the amount of ~~ten~~ five cents on each dollar bet.

(3) will remain the same as proposed."

Auth: Sec. 23-4-202, MCA; IMP, Sec. 23-4-301, 23-4-302, 23-4-303, MCA

3. Two comments were received prior to the end of the comment period on June 26, 1992. Summaries of the comments and the Board's responses are as follows:

ARM 8.22.1611

COMMENT: Two comments were received stating that section 23-4-302, MCA, sets the breakage figure at ten cents, so that ARM 8.22.1611(1)(b) cannot therefore reduce the figure to five cents. Instead, only the minus pool amount in ARM 8.22.1611(2) should have been amended to reduce the amount to five cents.

RESPONSE: The Board concurs with the comments and will amend the rule as shown above.

BOARD OF HORSE RACING
STEVE CHRISTIAN, CHAIRMAN

BY: Annie M. Bartos
ANNIE M. BARTOS, CHIEF COUNSEL

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, July 20, 1992.

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

In the matter of the amendment of rules pertaining to definitions, applications, fees and renewals and the adoption of new rules pertaining to reactivation of inactive or inactive retired licenses, verifications and fees	))))))	NOTICE OF AMENDMENT AND ADOPTION OF RULES I (8.28.421), II (8.28.507), AND III (8.28.1702) PERTAINING TO THE PRACTICE OF MEDICINE

TO: All Interested Persons:

1. On March 12, 1992, the Board of Medical Examiners published a notice of public hearing concerning rules pertaining to the practice of medicine at page 356, 1992 Montana Administrative Register, issue number 5. The hearing was held at 9:00 a.m. in the downstairs conference room of the Department of Commerce building.

2. The Board has amended and adopted the rules exactly as proposed with the exception of the proposed amendment to ARM 8.28.402. The Board has not yet determined whether to adopt ARM 8.28.402 as proposed for amendment.

3. With the exception of the proposed amendment to rule 8.28.402, no comments or testimony were received.

BOARD OF MEDICAL EXAMINERS
PETER L. BURLEIGH, M.D.
PRESIDENT

BY: Anne M. Barts
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

Anne M. Barts
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, July 20, 1992.

BEFORE THE BOARD OF PHARMACY
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of a rule pertaining to fees and the proposed adoption of a new rule pertaining to pharmacy technicians	)))))	NOTICE OF AMENDMENT OF 8.40.404 FEE SCHEDULE AND PROPOSED ADOPTION OF NEW RULES PERTAINING TO PHARMACY TECHNICIANS

TO: All Interested Persons:

1. On February 27, 1992, the Board of Pharmacy published a notice of proposed amendment and adoption of rules pertaining to pharmacy technicians, at page 267, 1992 Montana Administrative Register, issue number 4. A number of individuals requested opportunity to present their data, views and arguments to the Board at a public hearing. A notice of public hearing was published at page 831, 1992 Montana Administrative Register, issue number 8 in response to this request.

2. The Board has amended ARM 8.40.404 exactly as proposed. The Board has adopted new rules I (8.40.1301), II (8.40.1302), III (8.40.1303), V (8.40.1305), VI (8.40.1306), VII (8.40.1307) and VIII (8.40.1308) exactly as proposed, but with the addition of section 37-7-201, MCA, to the section(s) being implemented. The Board has adopted new rule IV (8.40.1304) as proposed, with the addition of section 37-7-201, MCA, to the section being implemented, and with the following change:

"8.40.1304 TASKS AND FUNCTIONS OF PHARMACY TECHNICIAN

(1)(a) will remain the same as proposed.

(b) type a prescription label and affix it to a prescription bottle, with a final check, ATTACHMENT OF AUXILIARY LABEL(S) and any patient counseling to be performed by a pharmacist;

(c) through (2) will remain the same as proposed."

Auth: 37-7-201, MCA; IMP, Sec. 37-7-201, 37-7-307, MCA

3. Oral testimony was presented at the hearing. The Board received additional written comment prior to the end of the comment period May 28, 1992. Summaries of the comments and the Board's responses follow:

8.40.1301

COMMENT NO. 1: Proposed Rule I(2) and (3) on pharmacist's professional judgment and release of medications should address review of all patient profiles, to monitor compliance by patient, and to monitor therapy. Computers should not be the entire means of monitoring.

RESPONSE: The proposed rules address pharmacy technicians, not registered pharmacists. The supervising pharmacist will review the patient profiles, as this is part

of their professional responsibility. The proposed rules are not regulating pharmacists, but pharmacy technicians.

COMMENT NO. 2: Proposed Rule I(2) mentions oral prescription orders, but does not specify whether in-house orders in a hospital (i.e. IV orders) or only outpatient prescription orders are intended.

RESPONSE: The language of the rule already covers oral prescription orders, and includes hospital orders. No language clarification is needed.

COMMENT NO. 3: Proposed Rule I(2) on patient counseling does not have a strongly worded penalty section, which is needed as an incentive to stay within the law.

RESPONSE: The pharmacist is responsible for counseling, and should not allow pharmacy technicians to engage in patient counseling. The penalties for a pharmacist's violation are the same as for pharmacy rule violations in general under ARM 8.40.414 and 8.40.415; a separate penalty for each rule section is not feasible.

8.40.1304

COMMENT NO. 4: Thirty-four comments were received stating proposed Rule IV(1)(c) allows technicians to enter prescription information into a data processing system, which circumvents the pharmacist's independent professional judgement in data entry and profile review, and eliminates counseling by a registered pharmacist.

RESPONSE: The Legislature's Statement of Intent on the bill creating pharmacy technicians licensing included data entry as a pharmacy technician task. The Board wishes to follow the legislative intent. The rules as proposed do not allow pharmacy technicians to counsel patients, which must be done by a registered pharmacist. To remove data entry from pharmacy technician tasks would not allow full use of the technicians.

COMMENT NO. 5: Three comments were received stating computers are not capable of screening for all patient considerations. Allowing technicians to enter data under the "supervision" of pharmacists without a review of the patient profile will result in a negative outcome and liability for the supervising pharmacist.

RESPONSE: See response to comment No. 4, above.

COMMENT NO. 6: Proposed Rule IV does not clearly differentiate between clerical and technical duties and does not distinguish when it is necessary to apply for permission to use a pharmacy technician.

RESPONSE: Pharmacy technicians are an auxiliary of the supervising pharmacist. The duties of a registered pharmacist are defined in the statutes, with penalties in place for violation of the statutory duties. A pharmacist may therefore agree to allow a technician under their supervision to perform these pharmacist tasks.

Clerical staff are not performing technical functions which are the registered pharmacist's duties under the statutory definition. Clerks may not perform pharmacist duties, and are so prohibited in the statutes. Only pharmacy technicians under statutory/rule guidelines and registered pharmacist supervisor may perform allowed duties.

COMMENT NO. 7: Drug interaction detection process is not possible on a computer unless the pharmacist determines the seriousness of the interaction. If a technician enters the information into the computer, the interaction may not appear, and this task should therefore be under the section which includes "exercise of the pharmacist's independent professional judgement."

RESPONSE: See response to Comment No. 4 above.

COMMENT NO. 8: Two comments were received stating proposed Rule IV(1)(b) should not allow the pharmacy technician to affix auxiliary labels, as this falls under the judgement area, and should not be allowed as a technician function.

RESPONSE: The Board concurs with the comment and will amend the rule as shown above.

8.40.1305

COMMENT NO. 9: Thirty-seven comments were received stating proposed Rule V, on pharmacy technician training, should require one specific general training manual and test, to be used by all pharmacies, with additional on-site specific training.

RESPONSE: Proposed rules V and VI already require Board approval of training programs in advance. The Board feels this is sufficient supervision for various training programs. Certain training manuals have already been developed, and Board approval of individual training plans will allow for greater flexibility in use of these manuals. Proposed Rule VI already sets forth the standards for training of pharmacy technicians.

8.40.1308

COMMENT NO. 10: Thirty-six comments were received stating proposed Rule VIII, allowing registered pharmacists to supervise two technicians if the technicians are performing certain functions, does not consider the problem of supervising separate activities at the same time in different rooms. The ratio should therefore be kept at one-to-one, considering interns and externs in the ratio as well.

RESPONSE: The ratio in the proposed rule was set up in the legislative statement of intent. The ratio is one-to-one unless certain procedures are being undertaken. The Board wishes to follow the legislative intent.

8.40.1301 through 8.40.1308

COMMENT NO. 11: The proposed rules need to plan for funding regular inspections to ensure compliance with the rules and proper regulation and control.

RESPONSE: No regular inspection of pharmacies is contemplated. The Board will approve Utilization Plans in advance, and act on statutory or rule violations under the present disciplinary system. It is not feasible to add fee collections and personnel in the rules for regulation of pharmacy technicians specifically. The rules already contain record keeping requirements, etc., for supervision by the Board.

COMMENT NO. 12: The patient profile should be addressed in the rules.

RESPONSE: Preparation and review of the patient profile is under the area of exercise of the pharmacist's independent judgement, which requirement is already in the rules. Patient profiles are not a pharmacy technician function.

COMMENT NO. 13: A comment was received from the Administrative Code Committee stating all proposed rules should have section 37-7-201, MCA, added to the sections being implemented to give more authority to the proposed rules.

RESPONSE: The Board concurs with the comment and will add section 37-7-201 to the sections being implemented.

COMMENT NO. 14: A comment was received in support of the one-to-one ratio for retail pharmacies.

COMMENT NO. 15: A comment was received in support of the training rule as proposed.

COMMENT NO. 16: Two comments were received in support of the rules in general.

RESPONSE: The Board acknowledges receipt of the comments in support.

BOARD OF PHARMACY
ROBERT KELLEY, CHAIRMAN

BY: Annie M. Bartos
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, July 20, 1992.

BEFORE THE BOARD OF REAL ESTATE APPRAISERS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to course requirements and fees, and the adoption of new rules pertaining to complaint process, reciprocity and license and certificate upgrade and downgrade	))))))))	NOTICE OF AMENDMENT OF 8.57.406 COURSE REQUIREMENTS AND 8.57.412 FEES, AND ADOPTION OF NEW RULES PERTAINING TO COMPLAINT PROCESS (8.57.413), RECIPROCITY (8.57.414) AND LICENSE AND CERTIFICATE UPGRADE AND DOWNGRADE (8.57.415)

TO: All Interested Persons:

1. On May 28, 1992, the Board of Real Estate Appraisers published a notice of proposed amendment and adoption of the above-stated rules at page 1082, 1992 Montana Administrative Register, issue number 10.

2. The Board has amended and adopted the rules exactly as proposed.

3. No comments or testimony were received.

BOARD OF REAL ESTATE APPRAISERS
PATRICK ASAY, CHAIRMAN

BY: Annie M. Bartos
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

Annie M. Bartos
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, July 20, 1992.

BEFORE THE BOARD OF SANITARIANS
DEPARTMENT OF COMMERCE
STATE OF MONTANA

In the matter of the amendment of rules pertaining to employment responsibilities, registration certificates, renewals and fees; adoption of new rules pertaining to continuing education and sanitarian-in-training; and repeal of a rule pertaining to environmental sanitation	NOTICE OF AMENDMENT, ADOPTION AND REPEAL OF RULES PERTAINING TO SANITARIANS

TO: All Interested Persons:

1. On March 12, 1992, the Board of Sanitarians published a notice of proposed amendment, adoption and repeal of rules pertaining to sanitarians at page 360, 1992 Montana Administrative Register, issue number 5.

2. The Board has amended, adopted and repealed the rules exactly as proposed. New rule I will be numbered 8.60.414 and new rule II will be numbered 8.60.415.

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

COMMENT: It is unclear in 8.60.414(2) whether credits may be earned only in odd numbered years.

RESPONSE: The rule requires that proof be submitted in odd numbered years, but credits may be earned anytime in the two year time frame.

COMMENT: The oral interview requirement proposed in ARM 8.60.408(3) is not an appropriate element of licensing qualifications.

RESPONSE: The interview is required by section 37-40-302, MCA, so it must be complied with unless changed by the Legislature.

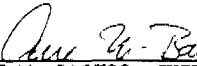
COMMENT: A scoring system for the oral interview is not needed because the purpose of the interview is "... to get to know the candidate, discuss the role of sanitarian, and answer questions the candidate may have ...."

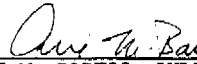
RESPONSE: Since the interview is required by statute, it must be implemented. The Board must give a score in order to indicate if the applicant meets this requirement under the statute.

COMMENT: The sanitarian-in-training application fee is unfair and redundant to the regular license fee.

RESPONSE: The fee is necessary to support the costs of program administration.

BOARD OF SANITARIANS
DONALD SAMPSON, VICE-CHAIRMAN

BY: 
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE


ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, July 20, 1992.

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

In the matter of the amendment of rules pertaining to water right definitions, forms, and application fees	)))	NOTICE OF AMENDMENT OF ARM 36.12.101 DEFINITIONS, 36.12.102 FORMS, 36.12.103 APPLICATION SPECIAL FEES

TO: ALL INTERESTED PERSONS

1. On April 30, 1992 the Board of Natural Resources and Conservation published a notice of public hearing on the proposed amendment of the above-stated rules, at page 874, 1992 Montana Administrative Register, issue number 8. The public hearing was held on May 28, 1992 at the Sheraton Hotel, in Billings, MT.

2. Oral comments were taken at the public hearing and written comments were received until June 10, 1992. The Board has amended ARM 36.12.101, 36.12.102, and 36.12.103 exactly as proposed.

3. The Board considered all comments timely received. These comments and the Board's responses are as follows.

COMMENT: The Board does not have the authority to require a fee for filing an objection.

RESPONSE: Section 85-2-113, MCA, provides that the Board may prescribe fees or service charges for any public service rendered by the Department under Chapter 2. The processing of an objection by the Department is a public service. The filing of an objection is part of processing permit and change applications. An objection may result in a modification or limitation on the permit or change authorization that is finally issued. Also the filing of an objection may cause an administrative hearing to be conducted. The Board interpreted this fee to be within the scope of Section 85-2-113, MCA, as a fee or service charge for public service.

COMMENT: The required fee for filing an objection is an unfair and unreasonable burden for water right holders who need to protect their water rights.

RESPONSE: The filing of an objection is analogous to a person being required to appear in court to defend their interest or plead their case. In such instances a defendant is required to pay a fee to appear and defend themselves in a judicial proceeding. The Board feels an objection fee is not an unreasonable fee for water users to pay in protecting their water rights.

COMMENT: The required fee for filing an objection will impede water users from objecting.

RESPONSE: One of the costs associated with maintaining and protecting a water right is monitoring potential or new developments which may impact the water right. Part of these costs may include the filing of an objection to an application

to assure no adverse impacts. The fee requirement will help focus those persons raising objections on issues related to the permit or change process.

COMMENT: The transfer fee involving the proportional splitting of one water right should not exceed $250.

RESPONSE: There will be instances when a water right will be proportionally split into more than five parts under one transfer. The proportional split may be complex and require considerable effort to process. In such instances the water user may receive public services without adequately compensating the agency for all services received. Therefore, the Board determined a $250 cap is unnecessary. The Board feels if the transfer fee exceeds $250, the water user may advance the cost of the split transfer to the receiving parties.

COMMENT: The increase in water right fees involving the development of reserved water may cause the users to not comply with the water rights process.

RESPONSE: The legislature did not specifically exempt any group from paying water right processing fees. The Board determined the proposed increase in water right fees will be reasonable for all water users and will not impede the development of conservation districts' reserved water.

COMMENT: A cutback in administrative fees and/or personnel would be more appropriate than increasing fees that would affect conservation districts.

RESPONSE: No specific alternatives were suggested that may reduce the administrative or personnel costs. In response to budget reductions implemented by the 1992 special legislative session, reduced Department services were not directed, but rather the Legislature endorsed a plan that additional fees be collected to maintain current services.

BOARD OF NATURAL RESOURCES AND CONSERVATION

Jack E. Galt, Chairman

Pursuant to Mont. Code Ann. § 2-4-110(1991), the department rules reviewer affirms he has completed a review of the rules. Contrary to the decision of the Board, it is the opinion of the rules reviewer that the board does not have the statutory authority to adopt ARM 36.12.103(1)(i).

Donald D. MacIntyre
Chief Legal Counsel
Rules Reviewer

Certified to the Secretary of State July 20, 1992.

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

In the matter of the amendment of rules 46.12.1222, 46.12.1223, 46.12.1226, 46.12.1228, 46.12.1229, 46.12.1231, 46.12.1235, 46.12.1237, 46.12.1240, 46.12.1243, 46.12.1245, 46.12.1246, 46.12.1249, 46.12.1251, 46.12.1258 and 46.12.1268 pertaining to medicaid nursing facility reimbursement	)))))))))))))))))	NOTICE OF THE AMENDMENT OF RULES 46.12.1222, 46.12.1223, 46.12.1226, 46.12.1228, 46.12.1229, 46.12.1231, 46.12.1235, 46.12.1237, 46.12.1240, 46.12.1243, 46.12.1245, 46.12.1246, 46.12.1249, 46.12.1251, 46.12.1258 AND 46.12.1268 PERTAINING TO MEDICAID NURSING FACILITY REIMBURSEMENT

TO: All Interested Persons

1. On May 28, 1992, the Department of Social and Rehabilitation Services published notice of the proposed amendment of rules 46.12.1222, 46.12.1223, 46.12.1226, 46.12.1228, 46.12.1229, 46.12.1231, 46.12.1235, 46.12.1237, 46.12.1240, 46.12.1243, 46.12.1245, 46.12.1246, 46.12.1249, 46.12.1251, 46.12.1258 and 46.12.1268 pertaining to medicaid nursing facility reimbursement at page 1106 of the 1992 Montana Administrative Register, issue number 10.

2. The department has amended rules 46.12.1223, 46.12.1226, 46.12.1228, 46.12.1229, 46.12.1231, 46.12.1237, 46.12.1240, 46.12.1245, 46.12.1249, 46.12.1251 and 46.12.1268 as proposed.

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

46.12.1222 DEFINITIONS Subsections (1) through (14)(e)(xxx)(B) remain as proposed.

(C) therapeutic class 2 1 and class 6 antacids and laxatives including but not limited to:

Subsections (14)(e)(xxx)(C)(I) through (20) remain as proposed.

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

46.12.1235 OBRA COST ~~COMPONENT~~ REIMBURSEMENT Subsections (1) through (2)(a) remain as proposed.

(~~d~~b) If a provider fails to submit the quarterly reporting form within 30 calendar days following the end of the quarter, the department may withhold REIMBURSEMENT PAYMENTS IN ACCORDANCE WITH ARM 46.12.1260(4) (c). ~~the OBRA increment from the~~

~~provider's reimbursement for the following month. If the report remains overdue for a second consecutive month, the department may withhold the provider's total reimbursement for the month.~~ All amounts so withheld will be payable to the provider upon submission of a complete and accurate nurse aide certification/ training survey reporting form.

Subsections (3) through (3)(b)(v) remain as proposed.

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

46.12.1243 INTERIM PER DIEM RATES FOR NEWLY CONSTRUCTED FACILITIES AND NEW PROVIDERS Subsections (1) through (2)(c) remain as proposed.

(~~b~~d) The provider's interim rate shall remain in effect until the provider has filed with the department a complete and accurate cost report covering a period of at least six months participation in the medicaid program in a newly constructed facility, as a new provider or following a change in provider as defined in ARM 46.12.1241. THE INTERIM RATE WILL BE ADJUSTED ONLY UPON COMPUTATION OF A NEW INTERIM RATE EFFECTIVE JULY 1 OF EACH RATE YEAR, OR FOLLOWING A RATE ADJUSTMENT REQUEST BY A NEW PROVIDER WITH AN INTERIM RATE SET USING A PREVIOUS PROVIDER'S COST REPORT, AS FOLLOWS:

(i) IF A NEW PROVIDER DISAGREES WITH THE INTERIM RATE AS DETERMINED USING THE PREVIOUS PROVIDER'S COST REPORT, THE NEW PROVIDER MAY REQUEST AN ADJUSTMENT OF THE INTERIM RATE IN ACCORDANCE WITH THIS SECTION. THE RATE ADJUSTMENT REQUEST MUST REQUEST AN EXCEPTION TO THE COST BASE AND INCLUDE AN EXPLANATION AND DOCUMENTATION WITH SUBSTANTIVE EVIDENCE THAT DEMONSTRATES THE NEW PROVIDER'S COSTS ARE AND/OR WILL BE SUFFICIENTLY DIFFERENT THAN THE PREVIOUS PROVIDER'S SPECIFIC COSTS TO WARRANT A RATE ADJUSTMENT IN ACCORDANCE WITH ARM 46.12.1226, 1229, 1231, AND 1237;

(ii) ACCEPTABLE DOCUMENTATION TO SUBSTANTIATE A DIFFERENT COST BASE WILL INCLUDE:

(A) A BUDGET FOR OPERATION OF THE NURSING FACILITY THROUGH THE NEW PROVIDER'S FISCAL YEAR END, INCLUDING ALL COST CENTERS AS IDENTIFIED ON THE DEPARTMENT'S MEDICAID COST REPORT WORKSHEET A, WITH AN EXPLANATION BY COST CENTER OF WHY THE COSTS WILL BE DIFFERENT THAN THE PREVIOUS PROVIDER'S; OR

(B) ACTUAL COSTS INCURRED BY THE NEW PROVIDER TO DATE AND PROJECTED THROUGH THE NEW PROVIDER'S FISCAL YEAR END FOR ALL COST CENTERS AS IDENTIFIED ON THE DEPARTMENT'S MEDICAID COST REPORT WORKSHEET A, WITH AN EXPLANATION BY COST CENTER OF WHY THE COSTS ARE DIFFERENT THAN THE PREVIOUS PROVIDER'S;

(iii) THE DEPARTMENT WILL REVIEW THE DOCUMENTATION SUBMITTED BY THE NEW PROVIDER AND WILL PREPARE A PROFORMA COST REPORT UTILIZING THE STEPDOWN METHODOLOGY OF COST ALLOCATION TO ARRIVE AT THE ALLOWABLE NURSING FACILITY COSTS. THESE COSTS WILL BE CONSIDERED AS CURRENT COSTS OF THE RATE YEAR AND AS SUCH NO INFLATIONARY INDEX WILL BE APPLIED. THESE COSTS WILL BE USED AS THE NEW BASIS FOR COMPUTING THE INTERIM RATE IN ACCORDANCE WITH ARM 46.12.1226, 1229, 1231, AND 1237, AND THE PROVIDER WILL

RECEIVE A NEW INTERIM RATE BASED ON SUCH COSTS, REGARDLESS OF WHETHER SUCH NEW INTERIM RATE IS GREATER OR LESS THAN THE PREVIOUS INTERIM RATE;

(iv) THE NEW PROVIDER'S ADJUSTED INTERIM RATE IS SUBJECT TO A RATE INCREASE CAP OF:

(A) THE APPLICABLE MAXIMUM RATE UNDER THE PROVISIONS OF ARM 46.12.1226, AS APPLIED TO THE FACILITY'S AVERAGE PER DIEM RATE IN EFFECT FOR THE ENTIRE PREVIOUS RATE YEAR, AS IF NO CHANGE IN PROVIDER HAD OCCURRED; OR

(B) THE BED WEIGHTED MEDIAN RATE FOR ALL FACILITIES, WHICHEVER IS LESS.

Subsections (2)(e) through (3)(b)(iii) remain as proposed.

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

46.12.1246 ITEMS BILLABLE TO RESIDENTS Subsections (1) through (1)(n) remain as proposed.

(o) over-the-counter drugs other than the routine stock items, such as acetaminophen, aspirin, and therapeutic class 2 1 and class 6 antacids and laxatives including but not limited to milk of magnesia, mineral oil, suppositories for evacuation, maalox and mylanta, which are reimbursed as part of the per diem rate.

Subsections (2) through (2)(b) remain as proposed.

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

4. The department has amended the following rule as follows:

46.12.1258 ALLOWABLE COSTS Subsections (1) through (2)(h) remain the same.

(i) Subject to subsection ~~(3)(1)~~ (4), fees for management or professional services (e.g., management, legal, accounting or consulting services) are allowable to the extent they are identified to specific services and the hourly rate charged is reasonable in amount. In lieu of compensation on the basis of an hourly rate, allowable costs may include compensation for professional services on the basis of a reasonable retainer agreement which specifies in detail the services to be performed. Documentation that such services were in fact performed must be maintained by the provider. If the provider elects compensation under a retainer agreement, allowable costs for services specified under the agreement are limited to the agreed retainer fee.

Subsections (2)(j) through (4) remain the same.

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

Rationale: ARM 46.12.1258(2)(h)(i) is being amended to correct an erroneous subsection number.

5. The department has thoroughly considered all commentary received:

1. Adequacy of nursing facility funding

COMMENT: The legislative appropriation for medicaid nursing facility reimbursement is insufficient to meet the costs of providing the service. The funding is inadequate to meet the cost of new facility requirements and increases in existing items such as staffing, dietary, laundry and housekeeping. The funding is inadequate to rebase the system to 1991 cost reports and to leave the current methodology intact. Thus, the department has found it necessary to change the reimbursement methodology. Facilities cannot be asked to operate with an aggregate loss of almost 10 million dollars. The elderly will have nowhere to go for care if facilities go bankrupt. Providers do not want to have to be put in a position of refusing medicaid patients.

COMMENT: The state increased reimbursement substantially over the last several years and is going in the proper direction to achieve adequate reimbursement. We support keeping the operating and nursing limits at current levels as proposed. While the operating limit is unreasonable for combined facilities, the payment amounts are at least related to actual costs being incurred by most providers.

RESPONSE: The department believes that the system is funded adequately to allow for payments at rates which meet legal requirements. Moreover, the department believes that the proposed methodology fairly and equitably sets reimbursement rates. Total funding for medicaid nursing facility services was increased by $6.63 per bed day in fiscal year 1992 and an additional $3.74 per bed day in fiscal year 1993. The appropriation for medicaid nursing facility funding was based upon a projection of nursing facility costs using DRI skilled nursing facility inflation indicators. The department has found that funding in the second year of the biennium will be adequate to provide reimbursement which meets federal reimbursement requirements. Analysis of Montana nursing facility cost trends over time indicates that the funding levels determined through use of the DRI inflation indicators are adequate to meet the federal requirements for reimbursement. The method by which the funding level was determined was discussed in more detail in the comment and response section of last year's notice of rule adoption which was published in the Montana Administrative Register on October 31, 1991.

The department finds no evidence to support the suggestion that nursing facilities' financial viability is in any way threatened by the level of medicaid nursing facility rates. The evidence shows that for cost reporting year 1991 about 25% of facilities received medicaid rates higher than the same facilities charged private paying patients. In addition, about 56% of facilities

charged their private pay patients less than the cost of care per patient day as reported by facilities in their cost reports. It appears that medicaid pays at least its fair share of economic and efficient costs. The fact that over half of the facilities did not charge private paying residents the full cost of providing care in 1991, and the fact that all nursing facilities in the state participate in the medicaid program, indicates that the level of medicaid payments is reasonable and adequate. We do not believe that the level of medicaid rates threatens the financial health of any facility which is economically and efficiently operated.

It would be unfortunate if a facility left the medicaid program. However, data shows that there is a sufficient supply of beds to provide for medicaid residents. Since the medicaid population is on average 62% of nursing facility business, the department would question the viability of the facility if it left the medicaid program.

The comments which state that the system is underfunded appear to assume either that the state is obligated to reimburse facilities for all of their actual allowable costs or that the present system fails to take into account certain costs which must be incurred by facilities. The department disagrees with both of these assumptions. Providers have failed to acknowledge the fundamental premise that federal law permits state medicaid programs to pay less than the full amount of actual allowable costs because some costs are uneconomical and inefficient. Further, providers have failed to acknowledge that certain costs are accounted for under the current methodology. These cost items are discussed in more detail below in section 5.

The adjustments to the methodology are responses primarily to the changes resulting from rebasing. The department has previously informed providers that rebasing the system to more current costs would result in reevaluation and possible adjustment of all reimbursement components. Changes were also necessary to respond to more current inflation data and other changes being made for property, and for elimination of minimum rate increases and OBRA add-on components. The operating and direct nursing components of the reimbursement system are the same as adopted last year, except that the components have been recalculated with 1991 cost data. Property reimbursement has been revised with resulting increases in property reimbursement for most providers.

Adjustments in the system components are to be expected as data is updated and changed. If the system is rebased again at a later time the same will be true. All components will be reevaluated periodically and may be changed. The department believes that any reimbursement formula must be evaluated on an ongoing basis to insure that the formula is achieving the desired results and to improve upon the system. The department

will continue ongoing analysis designed to improve the system of reimbursement.

COMMENT: The proposed rule is based upon the revised reimbursement methodology established on July 1, 1991. Providers have previously expressed their disagreement with that methodology which implemented inappropriate strategies and concepts which were not given adequate thought or consideration at that time. We urge the department to abandon the proposed rules in their entirety and adopt one of the following positions: (1) Form a coalition to petition the legislature in the special session for an additional $4.2 million in state general funds to increase reimbursement by $15 million for fiscal 1993. While these funds still will not meet the highest practicable level requirement they will be a step in the right direction; or (2) Montana should withdraw from the medicaid program because the current and proposed methodologies violate federal law. This will allow the state to set whatever standards for care that it deems appropriate and then to pay providers at that level. That would be preferable to the present situation where payment levels are inadequate.

RESPONSE: As indicated in the previous response, the department does not agree that the system is underfunded for state fiscal year 1993. Accordingly, the department will not seek to obtain an additional $15 million for medicaid nursing facility reimbursement. Nursing facility providers are, of course, free to request such additional funding from the legislature. Withdrawal from the medicaid program would result in an enormous loss of funds to the state, but in any event is not an option for the department under current law.

2. Cost Shifting

COMMENT: Would anyone in their right mind run a 1-2 million dollar business, employ 60-100 employees and net less than 2% or run at a loss each year without losing investors? Can we charge our private paying ones enough to make up the great loss on the medicaid residents? No we cannot in either a moral or a real sense.

COMMENT: The department should not reimburse facilities at a rate any higher than the facility charges to private pay patients.

RESPONSE: The department finds no evidence to support the suggestion that facilities are required to shift medicaid's share of costs to private pay residents. The evidence shows that for cost reporting year 1991 about 25% of facilities received medicaid rates higher than the same facilities charged private paying non-medicaid patients and that about 56% of facilities charged their private pay patients less than the cost of care per patient day as reported by facilities in their cost reports. The department believes that medicaid pays at least

its fair share of economic and efficient costs. It appears that any losses experienced by facilities are the result of inefficiency or lack of economy or the result of the poor business practice of undercharging private pay residents. There is no reason the medicaid program should make up for these uncharged costs. The department will consider for future rule amendments limiting the medicaid rate to the lesser of the rate determined under the reimbursement methodology or the rate charged by the facility to private pay residents for a comparable service.

3. Compliance with Boren Amendment requirements:

COMMENT: Upon reviewing the forecasted profit and loss numbers it becomes apparent that this system is not working. SRS has forecasted that 69 out of 96 nursing homes would have a loss in FY 93. If these projections hold true the state will not meet Boren Amendment standards. There can be no doubt that payment levels have a direct impact on the quality of care delivered. In a situation where 75% of the providers do not receive their full allowable costs the standards imposed by the Boren Amendment cannot realistically be met. Obviously the situation becomes that much worse when examined in light of the new "highest practicable level" requirements under OBRA.

COMMENT: It is extremely doubtful that SRS proposal meets either the procedural or substantive requirements of federal law. It is evident that SRS has not complied with the procedural requirements of the Boren Amendment. It is not clear exactly how SRS would define efficiently and economically operated facilities or how it identifies the costs that must be incurred by such facilities.

RESPONSE: The department strongly disagrees with the assertion that the reimbursement methodology or resulting rates fail to comply with the requirements of the Boren Amendment. The department will not attempt here to fully state its case under the Boren Amendment. However, the department has engaged in an extensive findings process which has resulted in reasoned choices regarding the features of the reimbursement system.

The department does not rely upon the percentages, limits or other parameters in the methodology to implicitly define an economically and efficiently operated facility. Further, the department does not judge Boren Amendment compliance based upon the number or percentage of facilities which receive reimbursement of all actual costs. Rather, the department has explicitly and carefully identified in a separate analysis the costs that must be incurred by an efficiently and economically operated provider. A comparison of these costs to the rates generated by the reimbursement system indicates that the department's rates meet Boren Amendment standards. The department believes its cost projections used in this process are valid and reasonable, and include the costs which must be incurred under the OBRA "highest practicable level" standard. The department's

conclusions regarding Boren Amendment compliance are also based upon appropriate findings regarding quality of care and access to services.

There is no legal requirement that a particular percentage of facilities receive rates which cover all of their actual costs. The department has reviewed the numbers of facilities which are reimbursed all costs and of facilities which are reimbursed certain percentages of their costs. The department believes that the system meets the substantive requirements of the Boren Amendment.

The costs of achieving the highest practicable physical, mental, and psychosocial well-being of each medicaid resident would be captured by paying the costs required to comply with the requirements already imposed by OBRA 1987. The Health Care Financing Administration has indicated that the highest practicable standard language was intended by Congress as merely a reassertion of the importance of the goal of nursing home reform and not as imposing additional costs. The department believes that its reimbursement rates, determined using the proposed reimbursement methodology, meet Boren Amendment requirements and take into account facilities' costs, including the costs of services required to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each medicaid resident.

4. Reimbursement philosophy

COMMENT: The department must go back to a system of rewarding providers who control costs rather than those who spend money freely. The department must reconsider its formula, with the idea of bringing all facilities closer to the mean rather than farther away. To continue on the proposed course will very shortly bankrupt the medicaid budget. Montana cannot and should not have to reward long term care providers for spending their money recklessly. There should be rewards for being cost efficient. The profit incentive in the proposed rule is too low.

RESPONSE: The department responded in detail to this line of comment in last year's notice of rule adoption in which the department adopted the new reimbursement methodology. The department reiterates here that reimbursement should encourage quality of care rather than facility profits. Funds which end up as facility profit do nothing to encourage quality patient care. To the extent rates are driven by a mean rather than related to facility cost, we believe profit motivation is likely to discourage provision of quality care. We believe that the reimbursement system encourages reasonable spending necessary to provide quality care, while discouraging spending unnecessary to provide quality patient care. We believe the profit incentives in the system are adequate for a publicly funded welfare program.

COMMENT: The proposed rates are unfair to low cost facilities. These facilities operate at costs considerably below the state median. If the proposed rate is not at least $1 higher than the prior year's rate, then these homes will be paid less than in FY 92 because of the bed tax. It would be fairer to reimburse these homes for their anticipated cost increases up to the median and to reward them for their cost containment efforts by setting their rate with the bed tax increase at least as high as it was in the prior period.

RESPONSE: Commentors argue the system penalizes low cost facilities because, rather than receiving a higher rate based on average costs of all facilities, they receive a lower rate closer to their actual cost. The department disagrees with the commentors' suggested approach to reimbursement. It would be unwise from a department perspective to reward providers who have allocated minimal resources to direct patient care. The department prefers to use funds which would simply become profit under the commentors' reimbursement approach to improve reimbursement to facilities which have demonstrated a willingness and a commitment to make direct patient care a high priority and to reinvest in the facility.

COMMENT: There needs to be consideration to adjusting the reimbursement to realistically reimburse small facilities because the fixed costs cannot be spread over a large number of days. A small size of a facility causes our per resident costs to be higher than average and so we are greatly penalized by the current system.

RESPONSE: Because the department is using inflated actual per diem costs to calculate per diem rates, utilization is taken into account. However, the department recognizes that certain economies of scale are available to larger facilities. Actual costs are recognized up to a certain level; however, above the operating, direct nursing and rate increase limits these actual costs will not be reimbursed. We disagree with your assumption that small facilities are penalized by the current system. Our findings indicate that a facility as small as a 23-bed nursing facility would have a medicaid rate greater than the facility's projected costs under the proposed system.

5. Specific cost items

COMMENT: Facilities face increasing governmental mandates to provide additional services and to correct deficiencies identified during survey and certification. Facilities must increase staff to meet the 24-hour requirement for a nursing facility. OBRA requires facilities to allow individuals in nursing facilities with mental retardation to be placed into the community. Many of these residents have lived for very long periods of time in the facility only to have them placed out in the community to fill the mandate of government regulations. Other staff expansion costs are pharmacists to do medication

review, consultant dieticians to do menu reviews, and consultant social workers which are part of the new requirements.

RESPONSE: These requirements were in place during the 1991 base period, and are taken into account in setting rate year 1993 rates. During the period in which these requirements became effective, the department reimbursed facilities through a separate OBRA payment. The department has indicated in a response to other questions that the separate OBRA payment was adequate and in many cases exceeded the costs incurred by nursing facilities to comply with the OBRA mandates, including increased staffing requirements in these areas.

Federal regulations do not allow admission to nursing facilities for individuals with mental illness or mental retardation, because these individuals' needs can best be met in a community or alternative setting. Residents that already resided in nursing facilities were given the choice of leaving the nursing facility and being placed in a community-based alternative. We do not believe this choice results in a cost increase to nursing facilities.

COMMENT: The rising cost of workers' compensation premiums is not met or taken into account in the proposed rules. The department's analysis of costs for workers' compensation does not account for the increases experienced by nursing facilities. The analysis did not take into account the beginning of the fiscal year for each nursing home or the timing of the increases that occurred.

RESPONSE: The department believes that the reimbursement methodology adequately takes into account increases in workers' compensation premiums. It should be noted that the fact that a facility incurs workers' compensation increases does not mean that it must incur all of such increases. The amount of premiums a facility must pay depends in part upon the history of worker injuries of the individual facility. This experience modifier can provide a significant discount on the premium paid or, conversely, subject a facility to an increased workers' compensation obligation. Facilities can take steps to reduce injuries and thereby to reduce costs. Facilities may also reduce costs by participation in other workers' compensation programs such as MACO, private insurance or self-insurance.

The department has analyzed the proposed and prior workers' compensation premium increases for nursing facilities and their estimated impact on the industry. The department reviewed all facility cost reports and identified the percentage change in costs for the period 1988 through 1991. These cost reports include costs reported to the department as allowable costs and include salaries of facility staff, workers' compensation premiums, minimum wage increases and OBRA costs. The average aggregate percentage increase in total costs for facilities in the state of Montana was 17.6% from 1988 to 1991. This

percentage increase includes workers' compensation increases to the extent they are reported for all providers. This 17.6% increase is slightly less than the DRI-HC inflation factor the department has built into the reimbursement formula. The DRI-HC average increase is 18.11% for the same period 1988-1991. In aggregate, the cost base used to set reimbursement rates includes significant workers' compensation increases comparable to the increases projected for the current period. The department believes that rates are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities, including the cost of services required to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident eligible for benefits.

COMMENT: The 1991 cost reports used to determine base period costs do not include costs that are being or will be incurred during rate year 1993, including the costs of OSHA hepatitis vaccination requirements and American With Disabilities Act (ADA) requirements.

RESPONSE: The department has reviewed the OSHA requirements. The department believes that nursing facilities have been complying with nearly all of the requirements for several years and that these costs are reflected in the base period costs used to set rates. While non-institutional medical providers may be required to make significant changes to come into compliance with the OSHA requirements, nursing facilities by the nature of the services they provide already comply with many of the requirements. The only significant change appears to be the requirement to make available the hepatitis B vaccination to certain employees. Any costs actually incurred will be reportable as an allowable cost.

The department has reviewed the ADA requirements. The department believes that nursing facilities have been subject to or are in compliance with substantially equivalent requirements under the Montana human rights laws and the federal Rehabilitation Act for several years and that these costs are reflected in the base period costs used to set rates. Because nursing facilities by the nature of the services they provide already serve persons with disabilities, they have for years been in compliance with many of the requirements of the ADA. Any costs actually incurred will be reportable as an allowable cost.

COMMENT: The bed tax computation does not properly allocate the tax. The tax will cost $9.1 million when calculated properly and will result in private pay patients picking up the cost.

COMMENT: The minimum rate increase for any facility should be the DRI inflation factor plus an add on to account for the bed tax.

RESPONSE: The department believes that the bed tax has been properly calculated and that the medicaid program will pay its share of the cost of the tax. The department does not agree that there should be a minimum rate increase to account for payment of the bed tax. The cost of the tax is included in the department's determination of the costs that must be incurred by efficiently and economically operated facilities. A comparison of the costs that must be incurred with the proposed rates indicates that the rates are adequate to reimburse for the costs that must be incurred, including the bed tax.

COMMENT: The proposed rule eliminates the minimum hourly wage built into the nursing component under the previous rule. This minimum was intended to insure that the hourly wage resulting from the formula in fact covered the minimum costs associated with an hour of nursing care. It was also intended to address the discrepancies between the hourly wage derived through the operation of the formula and the actual hourly wage experienced by facilities as reported on their most recent wage survey. It was intended to provide a small cushion to allow lower paying and lower staffed facilities to improve wages and staffing levels. The department gave these facilities money to spend on nursing salaries and staff and they have spent it on nursing staff and salaries, and it is now being taken away because it does not show up on the 1991 cost report being used for setting rates. The discrepancies between the hourly nursing wage determined under the formula and the actual hourly wage being paid by facilities as reported by facilities to SRS on the annual wage survey continues to be disturbing. Approximately half of the facilities have a calculated hourly nursing wage used in rate setting that is less than the actual hourly nursing wage they are paying as reported on the annual wage survey.

COMMENT: Minimum wage will only be reflected for three months for June year end providers and only 9 months of cost will be reflected for calendar year providers. The wage floor should be reestablished for fiscal year 1993 rate setting. It only affects the lower cost facilities that are being penalized and under this system we could never catch up in wages with the other nursing homes.

RESPONSE: In April 1992 the department performed a wage survey to obtain facility information regarding wages, benefits and hours worked in March of 1992. The department does not consider this survey data to be sufficiently reliable and will not use the March 1992 wage survey to determine facility wage components for rate setting. The survey is a one month snap shot of data, is incomplete as only 88% of the providers responded, and, based on previous audits of survey forms, the survey data contain unreliable information regarding costs being incurred at facilities. The survey information is not part of the cost report process and reports average wages for only a one-month period. This information may not reflect a facility's salary

experience on an annual basis due to the impact of holidays reported in the survey month, the use of pooled nursing, and vacations taken during the survey month. A twelve-month cost report is not subject to these problems in reporting and is more reflective of costs in these areas. The proposed rate setting system, which uses cost report information, provides a benefit to those providers staffing above their patient assessment score and penalizes those providers staffing below their patient assessment score. Using the salary survey in the rate setting process would eliminate the benefits and penalties associated with over or under-staffing.

In addition, the department has reviewed wage component levels used in the proposed rates for rate year 1993 in light of the concerns that the wage component does not adequately reimburse minimum wage levels. The department has prepared an array of the direct nursing wage component per the reimbursement formula and has found that the lowest wage rate for any provider is $6.28. Effective April 1, 1991, minimum wage was increased to $4.25. Even if the minimum wage levels were not fully reflected in the base year cost reports, the lowest wage component set under the formula is sufficient to cover the minimum wage rate with a reasonable amount to cover benefits. The cost base with the DRI inflation adjustment, has accounted for minimum wage increases based on the department's data. Under the proposed rates, every provider will receive a wage component sufficient to cover at least minimum wage and a reasonable level of benefits. The department will not implement a wage floor for rate year 1993.

COMMENT: The rates are not adequate to cover indirect costs of billing separately billable items, chaplain fees, membership in civic organizations and promotional expenses incurred by providers. The failure to provide sufficient reimbursement will force these costs to be borne by the private pay residents.

RESPONSE: Chaplain fees, memberships in civic organizations and promotional expenses are not allowable costs for medicaid reimbursement under cost reporting guidelines. Separately billable items are reimbursable at the direct acquisition cost and the costs of billing are reportable, allowable costs which are reimbursed in the per diem rate as a nursing facility cost. A durable medical equipment supplier can also bill for ancillary services (separately billable items) if the provider wishes to avoid the cost of billing these items.

COMMENT: Certain costs should be paid regardless of any caps or limits and should be treated as pass through costs. These would include uncontrollable costs such as workers' compensation, property taxes, insurance and payroll taxes. These costs are based upon rates set by agencies outside of the control of nursing facilities.

RESPONSE: The department does not believe that a pass through of such costs is necessary or appropriate. The department does not agree that all of the costs items listed are completely beyond the control of the facility. However, regardless of whether such costs are controllable, the department has taken all such costs into account. Taking all such costs into account, the department has found that the rates established under the proposed rule are reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated facilities.

6. Property reimbursement issues

COMMENT: The property cost component continues to fail to acknowledge the true costs associated with new construction, remodeling and additions. With the average age of nursing homes in Montana at 29 years, capital improvements must be made and are mandated by the state surveyors. If we make these improvements there must be a source of cost recoupment for the medicaid residents, especially in high usage facilities.

The rule allows for the property limit to increase to $9.47/day, but caps the increase at .57 cents per day even if the facility legitimately and legally spent monies on capital improvements that would be reimbursable under the rule. The property reimbursement cap is increased but is probably still inadequate. Twelve to fifteen dollars per patient day would be a more appropriate range.

The proposal freezes the property rates of a majority of facilities and provides small increases to most others. The proposed rule allows providers to receive property reimbursement from as little as 47% of cost up to 1759% of cost. The payment formula should limit providers to a reasonable payment for property costs, for example, not less than 75% of cost nor more than 250% of costs.

What is the basis for the $9.47 maximum property reimbursement rate and why does the department believe that the maximum reimbursement rate adequately compensates a newly constructed facility for its property costs? What is the basis for the $.57 cap on property?

RESPONSE: During the spring of 1992 the department conducted several meetings with nursing facility representatives to discuss issues related to property reimbursement. The department appreciates the efforts of those people who took the time to attend and express their ideas at the meetings. The participants discussed issues related to the alleged inequities of property reimbursement. Several participants commented that the reimbursement rates were not sufficient to cover costs, and conversely that some facilities were receiving reimbursement in excess of costs they were incurring. Other issues related specifically to the $8.90 cap on property reimbursement, the

$2,400 floor to qualify for a remodeling adjustment, new construction adjustments, options for changing the reimbursement system to another model such as a fair rental valuation system, and grandfathering of property rates. The department gathered considerable insight as a result of these meetings and found that considerable work was needed to review all options and the implications of changing the property reimbursement system. The scope of such a change was too great to accomplish in the time available for rate year 1993, but the department believed adjustments to the property component were needed to update the rate cap and to correlate property rates more closely to costs.

The $9.47 property rate cap is based upon data the property reimbursement committee gathered from a survey of providers to evaluate a fair rental system approach to property reimbursement. The survey gathered information from facilities regarding year of construction, type of construction, square footage, number of stories, and number of beds. This information was input by one of the committee members into a Boeck appraisal model that determined three appraisal levels, "economy", "average", and "superior". This model also computed a replacement cost for each facility using the same appraisal levels. The committee member noted that this information in total would prove to be very accurate, although for any given facility it would likely be significantly in error. Accordingly, the department has used this information to determine only aggregate new construction costs.

The department believes that the weighted average replacement cost for the "average" appraisal category is the best available source of data upon which to base a new construction rate for purposes of an interim adjustment in property rates pending long term revisions to the property formula. Based upon this data, the weighted average replacement cost per bed for the "average" category was $27,973. Using this figure rounded to $28,000, the department computed the new construction rate based upon the formula used to determine the 1982 property reimbursement rates. This formula computes a per diem nominal mortgage rate based upon a loan amount of $28,000 per bed, at 12% annual interest over 30 years. Based upon the current facility survey information used to determine the property rate cap, the department believes the cap adequately reimburses newly constructed facilities for their costs.

With the rate cap set at $9.47, the department has also modified the property per diem reimbursement for 1993 based upon property reimbursement rates set for rate year 1992 and per diem costs per day computed from the 1991 medicaid cost reports. This methodology provides property component increases for those providers with projected costs per day higher than their 1992 reimbursement level. Providers with costs per day less than their 1992 reimbursement level remained at their 1992 reimbursement level. The $.57 maximum rate increase is the difference

between the new property rate cap of $9.47 and the property rate cap from rate year 1992 of $8.90.

One comment stated that the property reimbursement is still inadequate considering that they will be investing dollars in capital assets. Under the rule as adopted, the department will continue to allow rate adjustments for new additions and remodeling which exceed $2,400 times the number of licensed beds. The department did not propose changes in this adjustment for 1993 because any change to lower the remodeling limit would not provide a facility enough time to plan and complete a remodeling project by the end of the rate year. The department will adjust facilities' property rates the same as before for new construction or remodeling which exceeds the $2,400 dollar limit.

The department is continuing to work on the property reimbursement issue and has contracted with Myers and Stauffer of Topeka, Kansas to study the property reimbursement methodology and to recommend long term alternatives. The project will include review of the current methodology, review of other property reimbursement methodologies, and recommendations for presentation to the 1993 legislature. As part of this process, the department will consider methods to assure that property rates are closer to actual costs. The department will continue to solicit and encourages input from providers and associations in this effort to revise the property reimbursement methodology on a long term basis.

COMMENT: The elimination of the grandfathered property rate protection would allow the department to cut the rate to be paid to grandfathered rate facilities in the future. The department has consistently held that providers who incurred long term property obligations prior to July 1, 1982 would be assured that their property costs would be reimbursed on a historical basis. The elimination of the grandfather property component is breaking a ten-year commitment made to providers. The elimination of the grandfather property rates should be delayed until a fair rental or other property cost reimbursement system can be instituted which fairly reimburses facilities for property costs and makes incentives for facility improvements.

RESPONSE: Grandfathering protection for property rates was instituted in 1982 to protect providers from extreme rate changes as a result of the conversion from a retrospective reimbursement system to a prospective reimbursement system. This provision was intended to be phased out as providers adjusted to the prospective reimbursement system. The grandfathering provision was never considered by the department as an eternal guarantee to providers. The department does not believe that further property rate grandfathering is warranted.

7. $6.00 rate increase cap

COMMENT: The department should not place a cap on the amount of increase in a provider's rate from last year's rate to this year's rate. Internal caps already limit reimbursement for each cost component. The additional $6 cap is arbitrary and has no rational basis. In effect, the department is saying that it is appropriate to pay a facility up to the component limits established by the formula; however, by imposing the overall cap it is discriminating against those facilities whose rate increases would exceed $6 by refusing to pay them using the same formula it is using for other facilities.

What is the justification for paying some nursing facilities at 100% of the sum of their allowable rate components under the rules, while paying other nursing faculties at less than 100% of the sum of its allowable rate components. The limits are punitive forcing certain providers to be measured on a scale unlike all other facilities. Providers capped by a maximum rate increase must accept less payment than peer facilities. The cap is unfair. The state should pay what is stated in the formula so facilities can at least recoup their cost and not lose money. At a minimum, the department should ensure that all capped providers receive a rate no less than a rate calculated at the median operating and nursing rate.

RESPONSE: The department disagrees with the commentors' statements about the basis for and the effect of the $6.00 rate increase cap, and with the commentors' assumptions upon which their comments are based.

The commentors apparently assume that the rates which would be generated without the cap are linked to the department's standards and findings regarding the facilities' economy and efficiency. The commentors apparently believe that the capped rates do not meet the requirements of the Boren Amendment because the rates set with capped increases were determined contrary to the department's own methods and fail to meet the department's standards. These assumptions and beliefs are erroneous.

The rate component limits (125% of the median direct nursing personnel cost and 110% of the median operating cost) that are applied before application of the cap are not intended as proxies for the levels of cost that must be incurred by efficiently and economically operated facilities. The department's standards of efficiency and economy were defined and applied through a different analysis, which compares rates after application of the cap and other rate setting methods and standards, to the level of costs that must be incurred for each facility. This comparison demonstrates that the overall rates determined by application of all department methods, including the rate increase cap, are reasonable and adequate to meet the

cost that must be incurred by efficiently and economically operated facilities. Use of the cap is not an abandonment of the department's standards of economy and efficiency.

The department does not believe that the compliance of a reimbursement system with the Boren Amendment can be measured on the basis of any single feature of the system. Rather, the overall process used to determine rates and the overall rates must be measured against the requirements of the law. Further, although rates may not be determined based solely upon budgetary considerations, states may consider budgetary factors in setting rates. The department believes that when viewed together with all other parameters and features of the proposed rate system, the cap is reasonable and results in rates which comply with the federal requirements.

The cap represents the department's continued efforts to go beyond compliance with mere legal minimums, to make overall rates more equitable. The department believes that the rate increase cap operates within a discretionary zone of reimbursement which exceeds the minimum level of reimbursement required by law. The department's rates after application of the $6.00 cap continue to be reasonable and adequate to meet the costs which must be incurred by economically and efficiently operated facilities. This analysis establishes that facilities with costs above the capped rates are incurring uneconomic and inefficient costs.

When the new reimbursement methodology was adopted for rate year 1992 the $8.00 rate increase cap was considered to be a transitional measure. The reimbursement system was rebased to 1989 cost reports, whereas the prior methodology was based upon 1980 cost information. During this period there was little correlation between facilities' rates and their costs. Adoption of a new methodology without a rate increase cap would have resulted in extreme rate changes. To mitigate the extremity of rate changes, the department developed the rate increase cap as an integral part of the overall rate methodology for rate year 1992.

For rate year 1993, the department will continue to include a rate increase cap at $6.00 per patient day over the blended 1992 per diem reimbursement rate. This rate increase cap is designed to achieve several objectives, including mitigation of the effects of rebasing from 1989 to 1991 costs and establishment of rates which more closely meet the department's reimbursement goals. The cap is a rational method of accomplishing these goals.

The $6.00 rate increase cap represents a reasonable percentage increase greater than the change in year average DRI skilled nursing facility index multiplied by the average per diem rate. The change in year average of DRI from the second quarter 1992 to the second quarter 1993 is 5.1 percent. This percentage

times 175% (which allows nearly double the DRI inflation index) is approximately 9 percent. Nine percent times the average per diem rate of $67.15 results in approximately $6.00. The department believes the increase cap for rate year 1993, having been set at a percentage nearly double the DRI increase, is more than reasonable to accommodate increases in costs which must be incurred by efficiently and economically operated facilities.

The legislature appropriated state and federal funds in the amount of approximately $9.5 million dollars in additional funding for rate year 1992 and $15.2 million for rate year 1993 for medicaid nursing facility reimbursement. The department does have to work within that fixed amount of funding, but the department believes the funding is adequate to provide reasonable and adequate rates to all facilities, as demonstrated by the department's quartile analysis and related findings. The department cannot simply ignore the reasonable funding limitations imposed by the legislature. While meeting the minimum requirements of federal law, the cap allows the department within its funding limitations to further meet its goals by adjusting the rates to mitigate rate anomalies and to improve rate equities. Use of the rate increase cap allows the department to lower the number of providers who would otherwise receive a rate decrease, to increase the number of facilities who receive rates that exceed their projected costs, and to reimburse a larger percentage of costs.

Also, because cost reports more directly affect providers' rates under the new methodology, it is reasonable to expect that providers will "game" the cost reporting process in an attempt to shift the highest possible amount of costs to base year cost reporting periods in order to increase reimbursement. Such gaming is rational business behavior for providers who know which cost reporting period will be used as a base period for reimbursement. The department believes that providers have anticipated that 1991 would be used as a base period and that providers have attempted to shift costs to that reporting period in order to maximize the amount of rate increase received.

The use of a cap notifies providers that there will be limits on future rate increases and that facilities should spend carefully. The cap will discourage the "reckless" spending predicted by opponents of the new methodology and will encourage providers to contain cost increases to amounts required in the exercise of reasonable business judgment, taking into consideration the requirements which must be met.

The department believes that when viewed together with all other parameters and features of the rate system, the cap is reasonable and results in rates which comply with all legal requirements.

COMMENT: The cap eliminates equitable reimbursement for facilities who want to do new construction or a major remodel.

RESPONSE: The department disagrees. The $6.00 cap allows for a more than reasonable rate increase, including more than the full amount of property rate component increase allowed under the proposed rule.

COMMENT: The department should explore options which limit rates based on some basis other than a cap. For example, providers reported employee benefits ranging from "0" percent to over 50% of salary. The department could limit a benefit package to a reasonable but generous amount.

RESPONSE: The amount of benefits are already limited by the percentage limitation on the direct nursing personnel cost component. The department believes that further limitation approaches may negatively impact patient care. The department will not impose the suggested additional limitation.

COMMENT: The cap could be placed on only the operating component which is controllable by the facility rather than on the property and direct nursing components as well.

RESPONSE: The department believes that spending in all cost component areas is controllable by facilities and should be subject to limitations. The department has set limitations at levels adequate to insure that a facility receives rates which are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities.

COMMENT: Another alternative to capping could be to figure all the facilities' rates and allow each facility a rate set at the same percentage of its final rate computed by the formula. For example, set all rates at 90% of the computed rate for each facility, rather than placing the $6.00 cap on rate increases.

RESPONSE: The department believes that such an approach would be contrary to the department's standards and might result in rates that were not adequate to meet the level of costs that must be incurred by efficiently and economically operated facilities. The department believes that the $6.00 cap more rationally allows the department to achieve its reimbursement goals.

8. Rate increase minimum

COMMENT: The inflation rate of 5% is inadequate when compared to a 14.69% increase in SNF costs per patient day for the two year period. The average cost per patient day for FY 89 was $57.51 and the average cost for FY 91 was $65.96, which is an increase of 14.69% or an average of 7.35% per year. With the bed tax added, it is approximately 8% per year. We oppose elimination of the 5.5% minimum rate increase provision contained in last year's rule. No facility should receive a rate increase less than the inflation rate or less than the

additional $1 per patient day which will be paid for the bed tax.

RESPONSE: The department does not agree that a minimum percentage increase is necessary to account for inflation or payment of the nursing facility utilization fee. The department has applied the DRI-HC skilled nursing facility inflation factor to allow for inflation in facility costs. This factor is adequate to meet the cost increases that have occurred in Montana. The costs of the bed fee were included for purposes of the determination of costs that must be incurred for the department's findings process, and the department found that rates are reasonable and adequate to meet these costs. The argument that the department should guarantee providers a minimum rate increase ignores the fact that facilities' cost information and patient acuity have not remained the same in all cases and that in some cases a rate increase is not justified. Furthermore, the period from FY 89 through FY 91 is the time period when the OBRA 87 nursing home reforms were being implemented. Providers were reimbursed, through a rate add-on, for the additional cost of these requirements during the period from FY 90 through FY 92. Now that these costs are in the cost base used for establishing FY 93 rates, the department feels that the DRI inflation factor will be adequate when compared to aggregate cost increases for FY 93. The department will not implement a rate increase minimum for rate year 1993.

COMMENT: It seems unfair and unreasonable that if a provider operates under the state weighted average rate of $ 66.97 that they should take a rate decrease. It would be better to pay a reasonable amount to all the nursing homes until it is spent. Then the problem of where to find additional funding would be determined if the state wants rural nursing homes to continue to operate.

RESPONSE: The department does not believe that the fact that a facility operates under the statewide median average rate should guarantee the provider a rate increase. It makes little sense to encourage cost containment if the state will continue to pay the provider as though it had continued to incur higher costs. The department believes that a provider's rate should relate to the provider's projected cost. The department believes that a publicly funded welfare program like medicaid should not continue to spend public funds for costs that are not incurred, but rather should use such funds carefully to encourage the best possible patient care. The department believes that the rates established under the proposed rules are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities. The department believes the commentor's spending suggestion would be poor policy and would endanger future funding for the nursing facility services needed by the state's medicaid-eligible nursing facility residents.

9. Specification of rebase frequency

COMMENT: ARM 46.12.1229 provided that the rates would be rebased to the 1991 cost reports for years beginning on or after July 1, 1992. This section should be amended to provide for annual rebasing of costs using the most recent year's cost report. This section should be amended to provide that FY 94 rates be rebased using 1992 cost reports. The department should at least add something to the rules stating how often the department will rebase the rates.

RESPONSE: The department will not specify in advance the next base period. Rebasing should not be undertaken on a preset schedule, but should be based upon an informed decision that takes all factors into consideration. Scheduled rebasing enables providers to game or load up costs in the base period in an effort to maximize reimbursement, rather than making informed and accurate business decisions regarding the economic operation of their facility. This may result in base period cost reports which overstate the costs incurred by the facility over time. The department agrees that frequent rebasing of rates to more current cost data may be necessary and will use the most current cost information available when it undertakes rebasing.

10. Interim rate provisions

COMMENT: As a new owner, I feel that our cost of operating an existing facility will be higher than the previous owner's. We will be making considerable investments in the facility and we would lose money if the proposed rule were imposed. I would request that we be reimbursed on the basis of a state average or a budget from us be considered in interim rate determinations.

COMMENT: The proposal sets the interim rate in the same manner in which the rate would be set if there was no change in ownership. Setting the rate in this manner does not reduce the possibility of significant over or under payments since there may be a gap of two years or more between the 1991 cost report and the actual cost report used to recalculate the final per diem rate. Interim rates should be reviewed every quarter or six months based on current information. An interim cost report or certain select cost information could be provided to the department to allow a review of the interim rate. The current and proposed rule both indicate that once an interim rate is set, it will remain in effect until an acceptable cost of report of at least six months is filed. We interpret this to mean the methodology change would not be applied to these providers who had a change of ownership on January 1, 1992. A provider shall not be subject to a major change in the interim rate from one year to the next solely because of a change in the method. We recommend that the state require interim reporting and reviews to reduce the potential for large over or under payments.

RESPONSE: The department has revised the interim rate methodology to allow adjustment of the interim rate if the new provider can demonstrate a difference in costs from the previous owner. Such a provider may request an adjustment to a rate set with a previous provider's cost report. The request must demonstrate the differences in cost from the costs used to determine the interim rate. The provider must explain and document why the new provider's cost base will be different than the previous provider's specific costs. The interim rate based on a submitted budget will be subject to an upper limit of the $6.00 rate increase upper limit or the bed weighted median rate, whichever is less. The rate will be adjusted either upward or downward based upon the new provider's budget or projected costs. If the provider is not satisfied with the adjusted rate, the provider may appeal the department's adjustment determination in accordance with ARM 46.12.1268.

The revised interim rate methodology will apply to all facilities which as of the effective date of the rule are within the scope of the rule language, regardless of when the change occurred or whether the provider was receiving an interim rate set under a previous rule.

11. Nurse aide testing cost reimbursement

COMMENT: The proposed rules provide a payment system for the medicaid share of nurse aide testing costs. This section provides payment for only the basic fee charged by the testing entity. It does not provide for payment of transportation and travel costs when nurse aides choose to travel to a regional testing site. We believe the law requires all costs associated with testing to be paid. The proposed rule provides that other costs may be reported by the facility on its cost report, but since there is no required rebasing of cost each year included in the rule, this provides little assurance that they will ever be paid.

RESPONSE: The department has proposed that it will pay up front through a separate payment system certain testing costs as defined in the rule. The department is not required to pay any portion of the testing costs in this manner, but has determined that it is a fair approach to reimbursement of this particular cost. All other costs of testing and training, such as transportation and travel costs, will be allowable on facilities' cost reports to be used for reimbursement calculations. The department believes this approach meets the requirements of federal law.

It is true that nurse aides may choose testing at a regional test site. We believe that most will want to test in the setting where they have been trained and where they will be more at ease, which is the facility where they are employed. If that facility cannot meet the testing requirements or proctoring requirements of federal law, testing may be done at a regional

testing site. There are several regional testing sites which should reduce travel time. An aide may choose to test in a facility in the same community that could comply with the testing requirements if they desired to avoid high travel and transportation costs as well as time away from home or work. Accordingly, the department does not anticipate that significant travel or transportation costs will be incurred.

12. Nurse aide training cost reimbursement

COMMENT: The OBRA increment has been removed and without a separate payment, individual facilities cannot be assured that they are being reimbursed for the costs associated with training. If the facility did not provide training during the 1991 cost report period but is providing it now, there is no way for the facility to be reimbursed. If a facility has lost its in-house training and is required to purchase training outside the facility those costs are not accounted for in the 1991 cost reports. Another training issue not addressed in reimbursement is for training of nurse aides who were not employed at the time of training but were employed within one year. Federal law requires that the state provide for payment of their training costs.

RESPONSE: Facility training requirements were in effect for the base period and should be reflected in the base period cost reports. Facilities have been reimbursed at a flat add-on rate for the two previous years regardless of whether they actually spent any money on training of aides or other OBRA activities. One would question what facilities did with the $1.90 and $2.00 per medicaid patient day respectively paid during rate years 1991 and 1992, if the money was not spent on training or other OBRA-related expenses. Based upon the department's review of cost reports from the base period, it appears many facilities did not in fact spend all of this money for such purposes. The department will not assume that providers will make a conscious business decision to incur these training costs now when they have not incurred these costs to date.

An analysis of OBRA costs and training expenses (as reported on facility 1991 cost reports) compared to the OBRA increment paid for the same period indicates that 81 of 104 or 78% of nursing facilities have received OBRA payments greater than or equal to their reported OBRA costs. The facilities with reported OBRA costs greater than the estimated OBRA reimbursement reported on average 9% of their total non-property costs as OBRA expenditures. Those facilities with reported OBRA costs less than or equal to their estimated OBRA reimbursement reported on average that their OBRA costs were only 1% of their total non-property costs. The department must conclude from this analysis that OBRA costs have in the aggregate been adequately reimbursed and that the base period cost reports accurately reflect the costs being incurred.

The department believes that an additional add-on component for OBRA training is unnecessary. This becomes even clearer when one considers that, in addition to the add-on component for training costs and other OBRA mandates paid during the last two years, the department paid facilities separately for a certified nurse aide wage increment. This reimbursement was up to 20 cents per hour plus benefits for increased nurse aide wages for aides achieving certification. The department is confident that the rates set under the proposed rule will adequately reimburse the costs of complying with the OBRA mandates and that continuation of the add-on for training costs is unwarranted.

Federal law requires that aides employed by a facility or who receive an offer of employment from a facility not later than twelve months after completing a training program and who purchased their own training must be reimbursed by the facility for their prorata share of the costs of the program. Like other training costs, these costs may be reported by the facility and included as allowable costs on the cost report for reimbursement purposes. Travel and transportation costs are not dealt with specifically in the federal regulations. The department will consider them to be facility costs which will be allowable and reportable as all other such costs.

COMMENT: The department has eliminated the OBRA increment but has kept language in the rule regarding withholding of the OBRA increment.

RESPONSE: The department has revised the language in proposed ARM 46.12.1235(2)(b) to delete the reference to the OBRA increment and to specify that failure to file the required reporting form may result in withholding according to the provisions of ARM 46.12.1260(4).

13. Reimbursement for "heavy care" residents

COMMENT: The current system of payment will allow the department to pay more to treat a heavy care patient out of state than it will pay if the same services are provided in-state. It would cost less for the same services if the patient was treated near family and home. Reimbursement by the department does not allow the in-state nursing facilities to be able to afford to treat such heavy care patients.

RESPONSE: Reimbursement for "heavy care" patients, such as ventilator dependent and head-injured individuals, has been the subject of numerous meetings between providers and department representatives. The department currently is in the process of surveying providers to assess where the heavy care population is living, where they are receiving services and the problems that exist in service delivery. The current rules do not provide for negotiating rates with in-state providers when the facility will not accept the medicaid rate. Out-of-state reimbursement allows the department to reimburse for heavy care at the out-of-state

medicaid rate. This rate may or may not be higher than the in-state rate, when all of the costs of providing for these residents' care needs are considered. Providers in-state are less willing to admit these residents without substantial guarantees for reimbursement and exceptions to the regular reimbursement process. In many instances, in-state providers have less experience in providing heavy care services and in estimating a realistic cost for the provision of the services. The department will continue to work with providers to develop service alternatives to serve the heavy care population in the most beneficial and cost effective setting under the medicaid program.

14. Desk review and audit timelines

COMMENT: The department should be required to complete desk reviews and communicate the results of those reviews to the providers within a reasonable time. It is imperative that providers receive timely feed back in order to modify business decisions that they will make based on the interpretation and application of the department's rules. A six-month time line for all cost reports to be desk reviewed and the results of those desk reviews communicated to providers was suggested.

RESPONSE: The department will not place a time limit upon completion of desk reviews or audits. While the department agrees that quick completion of these functions is desirable, it is not always realistic given the limitations upon department staff and funding. Such a time limit would merely be a means by which providers would seek to escape repayment of amounts to which they were not entitled under the rules. Tight time limits might jeopardize federal financial participation if the deadline were not met. Business decisions are the responsibility of the provider entity and should be based upon the specific situations that impact each provider and not upon the department's completion of a desk review or audit. The criteria for allowability of costs and the provisions for cost finding are clearly specified in the federal regulations and rules pertaining to nursing facility providers. All providers have access to these materials and should have a thorough understanding of them in order to operate in the business climate and provide services.

15. Miscellaneous comments

COMMENT: Several comments were made regarding the need to have a mechanism in the reimbursement formula to adjust the rate for facilities when a facility has a significant change in its operating situation. An exceptions process due to circumstances such as survey deficiencies cited, change in nursing wages or occupancy changes. A significant change would be a 5% or more change for a three month period over the formula data.

RESPONSE: Under a prospective rate system, final rates are set in advance of the rate period based upon projected costs. If costs are actually less than projected, the provider is not required to pay back the difference. If costs are higher than projected, no additional payment is made. This provides an incentive for cost containment. The department will not create an exceptions process as suggested in the comment.

COMMENT: The proposed amendment to the bed hold rule provides that a facility will not be reimbursed for any patient day for which another facility is holding a bed, unless the facility seeking payment has notified the facility holding the bed that the resident has been admitted to another nursing facility. This is unreasonable because the admitting facility will not always know if another facility is holding a bed. If the resident is admitted from home or the hospital the admitting facility may not have knowledge of a previous nursing home stay.

RESPONSE: The department's bed hold rule allows a nursing facility under certain conditions to hold a bed for a resident who is temporarily absent from the nursing facility while receiving medical care in a hospital. The rule assures that in such cases a bed will be available for the resident to return to the facility upon discharge from the hospital. Current rules require the facility holding the bed to document at least weekly that the resident's absence is expected to be temporary and the anticipated duration of the absence. However, in some cases the resident is admitted to another nursing facility without the knowledge of the facility holding a bed.

The medicaid program cannot pay two nursing facilities for the same days of service for one resident. The department believes the admitting facility should share in the responsibility to avoid duplicate billings for the same days of service to such residents. The department believes that the admitting facility has the ability to find out if the resident was in another nursing facility prior to the hospital admission. Such information may be contained in the resident's medical record or it can be obtained by inquiring about the resident's medical history.

There also should be communication from the hospital to the facility holding a bed when there is a change in the resident's care needs which warrants discharge to another nursing facility. If the hospital has an attached nursing facility and can discharge the resident from the hospital bed into a nursing facility bed in the same facility, the hospital should be responsible to notify the previous nursing facility of the discharge. If the hospital has not found out as much information as possible about the resident, such as where the resident is being admitted from, it has been deficient in its responsibility to provide the best care and to make the most informed decisions regarding the resident's care. Taking steps to inform

itself of such information would also assist the hospital in discharge planning.

The department believes the proposed rule fairly requires the admitting facility to inquire about the resident's previous nursing facility residence. The department has adopted the rule as proposed.

COMMENT: There are no provisions in the rule to allow nursing facilities extra reimbursement for activity programs, skin integrity maintenance, range of motion therapy, retrieving wandering residents or other costs such as transportation for patients.

RESPONSE: The department disagrees with the statement that no "extra" reimbursement is allowed for the referenced activities. To the extent these activities require the facility to incur additional costs, these costs are recognized. If the costs are operating costs, such as for supplies related to range of motion therapy, they will be included in the provider's base period operating costs. The base period costs are inflated forward to project the provider's operating costs and the provider will receive payment for such costs, subject to the operating limit and overall rate increase limit which are components of the system. If the additional costs are for direct nursing personnel, such costs will be included in the provider's base year direct nursing cost and will have the effect of increasing the provider's composite nursing wage rate. The base period composite nursing wage rate is inflated forward and multiplied by the most recent patient assessment score to determine the direct nursing personnel component, subject to the operating limit and overall rate increase limit. Any additional costs for these activities are recognized in setting the provider's rate.

Transportation costs are included in the per diem rate when they are for non-emergency routine transportation as defined in the rules. Emergency transportation and multiple medically necessary trips are separately reimbursable under the transportation program when they meet program guidelines for reimbursement.

COMMENT: The proposed rule provides that the department will no longer reimburse for standard over-the-counter medicines such as antacids. The department should continue to pay for these items. ARM section 46.12.1222(14)(e) and 46.12.1245 expand the items and services which must be provided by facilities as part of a day of nursing care and remove the limiting language which allowed these items to be billed separately or to the patient if they were used in extraordinary amounts. ARM 46.12.1222(14)(e)(C) expands the list of antacids and laxatives which must be provided by the facility without charge beyond those normally stocked by facilities.

RESPONSE: The amendments regarding antacids, laxatives and other items are not intended to change but rather to more clearly state the department's policies regarding coverage of these items. These changes are intended to make it clear to pharmacies billing for these services that these items have always been included and continue to be included in the per diem payment rate to nursing facility providers and cannot be billed separately by pharmacy providers. By identifying the therapeutic class of these drugs, the department does not intend to change the current rule which requires that antacids or laxatives or their equivalents be provided under the per diem payment rate. Billing of residents for special request items or services is still allowed under ARM 46.12.1246 and the provisions for prior approval of extraordinary use of a routine supply item are still contained in ARM 46.12.1245. The concept of a "small quantity" was not defined in the current rule. This rule change clarifies that items "routinely supplied to residents" are considered part of nursing facility services, but leaves intact the special provisions for extraordinary use situations and the resident billable situations.

COMMENT: In the proposed amendments to ARM 46.12.1222 and 1246, the department has erroneously referred to class 2 and class 6 antacids and laxatives. The reference should be to class 1 and class 6 antacids and laxatives.

RESPONSE: The department agrees and has revised the rule language to correct the error.

COMMENT: ARM 46.12.1245 proposes to remove "urinary collection and retention system, drainage bag with tube" from the list of separately billable items. For some facilities, this is an item that will not be included in the base year costs. This is just another example of additional items and services being added to what is considered routine care and part of the daily rate without provision being made to pay for it.

RESPONSE: If the commentor would refer to current ARM 46.12.1245, they would find that ARM 46.12.1245(1)(am) and 46.12.1245(1)(an) are identical. This item was listed twice by mistake. The department is correcting this error by eliminating ARM 46.12.1245(1)(an), as was stated in the rationale statement portion of the notice of public hearing. ARM 46.12.1245(1)(am) "urinary collection and retention system, drainage bag with tube" will remain a separately billable item under the rule. This amendment makes no substantive change and does not add additional items or services to those which must be provided under the daily rate.

COMMENT: The department did not use the correct number of patient days in calculating the rates. The department should have used fewer days to calculate the rates.

RESPONSE: The department used the number of bed days included in the legislative appropriation. These bed days were allocated among the providers based on their medicaid bed day utilization for the most recent period to establish the funding levels for each facility. Adjustment of the number of bed days would result in an adjustment of the appropriated funding tied to those specific bed days. A downward adjustment of bed days would result in a downward adjustment of funding or the department will be expected to make any "extra" funding available for budget shortfalls in other areas. The department will not adjust the bed days set by the legislature.

COMMENT: The department should seek HCFA approval to pay providers for all of the medicare coinsurance payment amount up to the medicare coinsurance rate. The proposed rules provide that reimbursement is limited to the per diem medicaid rate or the medicare coinsurance rate, whichever is lower. We believe the medicaid program must pay the full medicare coinsurance rate in such instances. A recent court decision held that medicaid must pay the full medicare coinsurance rate.

RESPONSE: The proposed rule merely adds a specific statement of the existing medicaid policy. The department is aware of the decision in New York City Health and Hospitals Corporation, et al. v. Perales, et al., decided February 3, 1992 by the United States Second Circuit Court of Appeals. The Health Care Financing Administration's regional identical letter no. 92-086, dated April 1, 1992, discussed the Perales decision and indicates that in states outside the second circuit, states may continue to limit payment to the medicaid nursing facility rate. The department's proposed rule is in accordance with current federal policy.

COMMENT: One provider asked that its comments from last year's rate rule proceeding be considered submitted for purposes of this rule proceeding.

RESPONSE: The department reviewed and considered those comments submitted last year and has responded to those portions of the comments which apply to this year's rule changes. To the extent that any comments in that provider's comments from last year are not addressed specifically in this notice, the department hereby adopts and incorporates herein its responses to those comments as published in the notice of adoption of rules pertaining to nursing facility reimbursement published in the Montana Administrative Register on October 31, 1991.

COMMENT: The reference in ARM 46.12.1258(3)(i) to subsection (3)(l) does not make sense because there is no such subsection.

RESPONSE: The department agrees and has revised the reference to the correct subsection (4).

6. The department will apply retroactively to July 1, 1992 those provisions of the amended rules which result in a rate increase for a particular provider. Those provisions of the amended rules which result in a rate decrease for a particular provider will apply to nursing facility services provided on or after August 1, 1992.

Russell E. Cater
Rule Reviewer

Julia E. Robinson
Director, Social and Rehabilitation Services

Certified to the Secretary of State July 20, 1992.

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

In the matter of the adoption of [Rule I] 46.30.1502, [Rule II] 46.30.1508, [Rule III] 46.30.1514 through [Rule V] 46.30.1516, [Rule VI] 46.30.1520 through [Rule VIII] 46.30.1522, [Rule IX] 46.30.1532 through [Rule XII] 46.30.1535, [Rule XIII] 46.30.1538, [Rule XIV], [Rule XV] 46.30.1541 and [Rule XVI] 46.30.1542, amendment of rules 46.30.1501, 46.30.1507, 46.30.1513, 46.30.1525, 46.30.1543 and 46.30.1549 and repeal of Rules 46.30.1519, 46.30.1531 and 46.30.1537 pertaining to child support	NOTICE OF THE ADOPTION OF ADOPTION OF [RULE I] 46.30.1502, [RULE II] 46.30.1508, [RULE III] 46.30.1514 THROUGH [RULE V] 46.30.1516, [RULE VI] 46.30.1520 THROUGH [RULE VIII] 46.30.1522, [RULE IX] 46.30.1532 THROUGH [RULE XII] 46.30.1535, [RULE XIII] 46.30.1538, [RULE XIV], [RULE XV] 46.30.1541 AND [RULE XVI] 46.30.1542, AMENDMENT OF RULES 46.30.1501, 46.30.1507, 46.30.1513, 46.30.1525, 46.30.1543 AND 46.30.1549 AND REPEAL OF RULES 46.30.1519, 46.30.1531 AND 46.30.1537 PERTAINING TO CHILD SUPPORT

TO: All Interested Persons

1. On March 12, 1992, the Department of Social and Rehabilitation Services published notice of the proposed adoption of [Rule I] 46.30.1502, [Rule II] 46.30.1508, [Rule III] 46.30.1514 through [Rule V] 46.30.1516, [Rule VI] 46.30.1520 through [Rule VIII] 46.30.1522, [Rule IX] 46.30.1532 through [Rule XII] 46.30.1535, [Rule XIII] 46.30.1538, [Rule XIV], [Rule XV] 46.30.1541 and [Rule XVI] 46.30.1542,, amendment of rules 46.30.1501, 46.30.1507, 46.30.1513, 46.30.1525, 46.30.1543 and 46.30.1549 and repeal of Rules 46.30.1519, 46.30.1531 and 46.30.1537 pertaining to child support at page 403 of the 1992 Montana Administrative Register, issue number 5.

2. The Department has amended rules 46.30.1501, 46.30.1507, 46.30.1513 and 46.30.1549 as proposed and has repealed rules 46.30.1519, 46.30.1531 and 46.30.1537 as proposed.

3. The Department has adopted [Rule VIII] 46.30.1522, [Rule IX] 46.30.1532, [Rule X] 46.30.1533, [Rule XI] 46.30.1534, [Rule XIII] 46.30.1538 and [Rule XV] 46.30.1541 as proposed.

4. The Department has not adopted [Rule XIV] as proposed.

5. The Department has amended and adopted the following rules as proposed with the following changes:

[RULE I] 46.30.1502 DEFINITIONS For purposes of this chapter, unless the context requires otherwise, the following definitions apply:

Subsections (1) through (9) remain as proposed.

(10) "STANDARD OF LIVING" INCLUDES THE NECESSITIES, COMFORTS AND LUXURIES ENJOYED OR ASPIRED TO BY EITHER PARENT, THE CHILD OR BOTH PARENTS AND THE CHILD, WHICH ARE NEEDED TO MAINTAIN THEM IN CUSTOMARY OR PROPER COMMUNITY STATUS OR CIRCUMSTANCES.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

[RULE II] 46.30.1508 DETERMINATION OF GROSS INCOME

Subsection (1) remains as proposed.

(a) "gross income" means income from any source, except as excluded in subsection (d), and includes but is not limited to income from salaries, wages, commissions, bonuses, earnings, profits, dividends, severance pay, pensions, PRE-RETIREMENT DISTRIBUTIONS FROM RETIREMENT PLANS, interest, trust income, annuities, capital gains, royalties, social security benefits, veteran's benefits, workers' compensation benefits, unemployment benefits and alimony or spousal maintenance;

Subsection (1)(b) remains as proposed.

(c) gross income for those who are self-employed, or who receive profits from a business enterprise such as a joint venture, a partnership, rental property, a sub-chapter S corporation, or a Montana close corporation includes gross receipts minus ordinary and necessary expenses for self-employment or business operation. ~~Specifically~~ GENERALLY excluded from ordinary and necessary expenses are ~~depreciation and other~~ non-cash deductions, even ~~if it is otherwise~~ THOUGH THOSE DEDUCTIONS ARE allowable by the internal revenue service, AS AN EXCEPTION, UPON A SHOWING OF ECONOMIC NECESSITY, DEPRECIATION FOR VEHICLES, MACHINERY AND OTHER TANGIBLE ASSETS MAY BE DEDUCTED;

Subsection (1)(d) remains as proposed.

(e) ACTUAL BUT NOT IMPUTED interest from one-time gifts and inheritances should be considered as gross income, ~~, while~~ ~~t~~The NON-PERFORMING property itself or the principal should be considered as an asset under [Rule III] ARM 46.30.1514. FOR LUMP SUM SOCIAL SECURITY PAYMENTS, REFER TO [RULE XVI] ARM 46.30.1542.

(2) IN DETERMINING A PARENT'S GROSS INCOME, DO NOT CONSIDER INCOME ATTRIBUTABLE TO SUBSEQUENT SPOUSES, STEPPARENTS, DOMESTIC ASSOCIATES AND OTHER PERSONS WHO ARE PART OF THE PARENT'S HOUSEHOLD, AS DEFINED IN [RULE VII(3)] ARM 46.30.1521(3). IF A PERSON WITH A SUBSEQUENT FAMILY HAS INCOME FROM

OVERTIME OR A SECOND JOB. THAT INCOME IS PRESUMED TO BE FOR THE USE OF THE SUBSEQUENT FAMILY, AND IS NOT INCLUDED IN GROSS INCOME FOR THE PURPOSES OF DETERMINING SUPPORT FOR A PRIOR FAMILY. THE PRESUMPTION MAY BE REBUTTED UPON A SHOWING THAT THE ADDITIONAL INCOME IS DISCRETIONARY.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

[RULE III] 46.30.1514 DETERMINATION OF INCOME ATTRIBUTED TO ASSETS Subsection (1) remains as proposed.

(2) Income should be attributed to the net market value of non-performing assets at the ~~current interest rate for ten year U.S. treasury bonds at the time determination is made~~ AVERAGE 10 YEAR U.S. TREASURY CONSTANT MATURITY RATES FOR THE PREVIOUS CALENDAR YEAR, or at another appropriate rate ordered by a court or administrative hearing officer. The rate should be based on a 365 day year.

Subsection (3) remains as proposed.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

[RULE IV] 46.30.1515 INCOME VERIFICATION/DETERMINING ANNUAL INCOME Subsection (1) remains as proposed.

(2) Income statements of the parents should be verified with documentation of both current and past income to the extent such documentation is available to the parent. Verification may include pay stubs, employer statements, and profit and loss statements ~~made by a certified public accountant if the parent is self-employed~~. IF A PROFIT AND LOSS STATEMENT IS PREPARED BY A PARENT OR BY ANOTHER PERSON WHO IS NOT A LICENSED ACCOUNTANT OR CERTIFIED PUBLIC ACCOUNTANT, THE PARENT MUST CERTIFY UNDER OATH THAT THE INFORMATION SHOWN ON THE STATEMENT IS CORRECT. Documentation of income may be supplemented with copies of income tax returns. NON-CASH BENEFITS RECEIVED BY A PARENT SHOULD ALSO BE VERIFIED. FOR EXAMPLE, VERIFY THE REASONABLE MONTHLY VALUE OF THE HOUSE USED BY THE RANCH HAND AS PART OF HIS OR HER EMPLOYMENT.

Subsections (3) through (3)(b) remain as proposed.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

[RULE V] 46.30.1516 DETERMINATION OF NET INCOME

(1) "Net income" means gross income, including imputed income and income attributed to assets, less any deductions for state or federal taxes, social security, and other similar deductions required by law or court order. Unreimbursed expenses incurred as a condition of employment such as union dues, ~~retirement contributions,~~ uniforms and other occupational or business expenses should also be deducted. CONTRIBUTIONS TOWARDS INTERNAL REVENUE SERVICE APPROVED RETIREMENT PLANS,

WHETHER VOLUNTARY OR MANDATORY, ARE DEDUCTIBLE FROM GROSS INCOME UP TO THE ACTUAL AMOUNT CONTRIBUTED OR 6.5% OF GROSS INCOME, WHICHEVER IS LESS.

Subsections (1)(a) through (3) remain as proposed.

(4) Deductions for the convenience of the parent, such as credit union payments, deferred compensation~~, retirement~~ and savings are not to be deducted from gross income.

(5) In some cases an employed parent may also operate a business or farm, or a self-employed parent may have more than one business. A net loss in the operation of a business or farm~~, unless the parent cannot reasonably remove himself or herself from the unprofitable situation~~ should not offset income from employment or from the operation of a more successful enterprise, UNLESS THE PARENT CANNOT REASONABLY REMOVE HIMSELF OR HERSELF FROM THE UNPROFITABLE SITUATION. Property associated with the unprofitable business or farm should be considered an asset under [Rule III] ARM 46.30.1514.

Subsection (6) remains as proposed.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

[RULE VI] 46.30.1520 ALIMONY, MAINTENANCE, PRE-EXISTING CHILD SUPPORT OBLIGATIONS AND RESPONSIBILITY FOR OTHER CHILDREN Subsections (1) through (2)(b) remain as proposed.

(3) Use of the deductions provided in this rule are appropriate at the time of the establishment of a child support order. ~~or i~~In a proceeding to modify an existing order, ~~unless otherwise provided in this subsection.~~ THE FOLLOWING LIMITATIONS APPLY:

Subsections (3)(a) and (3)(b) remain as proposed.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

[RULE VII] 46.30.1521 SELF SUPPORT RESERVE/NET RESOURCES AVAILABLE FOR SUPPORT Subsection (1) remains as proposed.

(2) IN DETERMINING A PARENT'S SELF SUPPORT RESERVE, INCOME OF STEPPARENTS, SUBSEQUENT SPOUSES, DOMESTIC ASSOCIATES AND OTHERS WHO ARE PART OF A PARENT'S HOUSEHOLD IS PRESUMED TO BE AVAILABLE TO THE PARENT FOR SHARING, ON A PROPORTIONATE BASIS, THE PARENT'S HOUSEHOLD EXPENSES.

Subsections (2) through (4) remain as proposed but are renumbered (3) through (5).

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

46.30.1525 ~~ADJUSTMENTS TO BASIC CHILD SUPPORT~~ SUPPLEMENTS FOR PRIMARY CHILD SUPPORT NEED Subsections (1) through (1)(b)(i) remain as proposed.

(2) AFTER DETERMINING EACH PARENT'S SHARE OF THE TOTAL CHILD SUPPORT OBLIGATION, EACH PARENT SHALL RECEIVE CREDIT FOR THE AMOUNT OF THE SUPPLEMENTAL NEEDS PAID BY THAT PARENT.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

[RULE XII] 46.30.1535 TOTAL MONTHLY SUPPORT AMOUNT

Subsection (1) remains as proposed.

(2) ~~In the usual case of sole custody~~ IN SOLE CUSTODY CASES, OR IN JOINT CUSTODY CASES WHERE ONE PARENT HAS PRIMARY PHYSICAL CUSTODY, the custodial parent should retain his or her child support obligation and the noncustodial parent shall pay his or her total monthly child support obligation to the custodial parent or to such other person or agency entitled to receive the payment.

Subsections (3) and (4) remain as proposed.

(5) In those cases where extended visitation/shared physical custody is awarded, an adjustment to the primary child support need is appropriate. Extended visitation/shared physical custody occurs when a child spends more than ~~30 percent of his or her days and nights~~ 110 DAYS OF each 365 day calendar year with the parent who in sole custody cases would pay over his or her share of the child support obligation to the primary custodian.

(a) FOR THE PURPOSES OF THIS RULE:

(i) A "DAY" IS WHEN A PARENT HAS PHYSICAL CONTROL OF A CHILD FOR THE MAJORITY OF A 24 HOUR CALENDAR DAY; AND

(ii) THE "PRIMARY CUSTODIAN" IS THE PARENT WHO HAS PHYSICAL CUSTODY OF THE CHILD MORE THAN 50% ANNUALLY. THE "SECONDARY CUSTODIAN" IS THE PARENT WHO HAS PHYSICAL CUSTODY FOR THE REMAINDER OF THE YEAR.

(~~a~~b) To adjust for extended visitation/shared physical custody, reduce the ~~payor parent's~~ SECONDARY CUSTODIAN'S share of the basic primary child support need by one percent for each ~~percent of time in excess of 30 percent~~ DAY IN EXCESS OF 110 DAYS. For example, the basic primary child support need is $400.00. ~~Parent B~~ THE SECONDARY CUSTODIAN has the child ~~40 percent of the time~~ FOR 146 DAYS. ~~Parent B~~ THE SECONDARY CUSTODIAN is responsible for 75 percent of the primary child support need or $300.00 ($400.00 X 75 percent). Reduce that amount by ~~10~~ 36 percent (~~40 percent of the time with child minus the 30 percent visitation threshold~~ 146 DAYS MINUS THE 110 DAY VISITATION THRESHOLD) to arrive at the ~~parent's~~ SECONDARY CUSTODIAN'S adjusted share of the primary child support need in the amount of ~~$270.00~~ $192.00. The ~~parent's~~ SECONDARY CUSTODIAN'S proportionate share of supplemental support needs should then be added to this sum.

Subsection (5)(b) remains as proposed but is renumbered (5)(c).

(d) IN NO CASE MAY THE ADJUSTMENT MADE UNDER THIS RULE RESULT IN LOWERING THE NET RESOURCES OF EITHER PARENTAL HOUSEHOLD BELOW THE AMOUNT WHICH CORRESPONDS TO THE FEDERAL POVERTY INDEX FOR A HOUSEHOLD OF THAT SIZE.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

[RULE XVI] 46.30.1542 CREDIT FOR BENEFITS Subsections (1) through (1)(a) remain as proposed.

(b) the parent's obligation is satisfied if the amount of the child's benefit for a given month is equal to or greater than the parent's child support obligation. Any benefit received by the child for a given month in excess of the child support obligation is not treated as an arrearage payment or as future support; ~~and~~

(c) the parent must pay the difference if the amount of the child's benefit for a given month is less than the parent's child support obligation~~.~~ AND

(d) WHENEVER A CUSTODIAL PARENT RECEIVES FOR THE BENEFIT OF THE CHILD, A LUMP SUM PAYMENT WHICH REPRESENTS AN ACCUMULATION OF MONTHLY BENEFITS:

(i) THE LUMP SUM PAYMENT SHOULD NOT BE TREATED AS INCOME OF THE PARENT;

(ii) THE LUMP SUM SHOULD BE CREDITED TO THE CHILD SUPPORT OBLIGATION FOR EACH MONTH A PAYMENT ACCUMULATED FOR THE CHILD'S BENEFIT; AND

(iii) THE PARENT ON WHOSE EARNING RECORD THE BENEFITS ARE BASED WILL NOT RECEIVE CREDIT AGAINST THAT PARENT'S CHILD SUPPORT OBLIGATION UNLESS THE COURT OR ADMINISTRATIVE SUPPORT ORDER PERMITS SUCH CREDIT.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

46.30.1543 ~~EXCLUSION FROM GUIDELINE~~ ADDITIONAL GROUNDS FOR VARIANCE Subsections (1) through (1)(c) remain as proposed.

(~~f~~d) specific findings of fact under ~~MCA sections 40-5-204(2)~~ 40-4-204~~(2)~~ (3) or 40-6-116~~(5)~~ (6), MCA, which shows that application of the guideline is inequitable;

~~(g) shared physical custody of one or more children; and~~

(~~h~~e) periods of extended visitation of 30 or more consecutive days~~,~~ EXCEPT FOR INTERVENING VISITATION BY THE OTHER PARENT, AND considering child related fixed costs ~~of custodial parent~~;

Subsections (1)(f) through (1)(k) remain as proposed.

(l) long distance visitation cost; ~~and~~

(m) earnings of a child if it amounts to a large sum of money; AND

(n) THE STANDARD OF LIVING OF A PARENT, BOTH PARENTS, OR PARENTS AND CHILD IS LOWER OR HIGHER THAN THE STANDARD OF LIVING WHICH MAY BE EXPECTED AT THE PARENT'S INCOME LEVEL AND UNDER THESE GUIDELINES.

AUTH: Sec. 40-5-202 MCA
IMP: Sec. 40-5-209 MCA

5. The Department has thoroughly considered all commentary received:

Overall Comments

COMMENT: Several commentors considered these new guidelines too complex. They suggested that the guidelines be written so that non-attorneys could easily read and understand them. They suggested that parents should be able to apply them without the help of legal counsel. Conversely, several commentors requested greater detail in one or more of the guidelines' provisions. One commentor expressed a concern over the number of major changes. He stated that he could understand refinements, clarifications, and minor changes, but he did not perceive any problems or major difficulties with the old guidelines. He could not understand the reasons for the changes.

RESPONSE: The guidelines contain more detail than the old guidelines (ARM 46.30.1501 et seq., 9/30/90), but overall they are not more complex. The additional detail is necessary to correct weaknesses and inequities inherent in the old guidelines. The Department of Social and Rehabilitation Services, Child Support Enforcement Division (CSED) performs a large number of guidelines computations in the course of its duties. In the first quarter of 1992, for example, the CSED established 410 support orders using the old guidelines. In the course of its duties, the CSED has become aware of certain shortcomings with the old guidelines. For example, they did not take into consideration the possibility that:

- both parents might not be self-supporting;
- there might be extreme differences in income;
- the parents income might not be sufficient to allow them to maintain themselves above the poverty level;
- one parent might remarry (or in paternity cases, might already be married); or,
- either parent might have or go on to have other children.

Although they were perceived as being easy to use, the old guidelines could not be applied fairly in a significant number of cases. According to a recent study, at least half of all divorces involve at least one partner with a previous marriage, who has pre-existing children. In paternity cases, one or both parents may be married to someone else. They may have other children by one or more other partners. An estimated 75% of divorced parents remarry and go on to have additional children. The old guidelines did not address any of these considerations. Consequently, it was necessary to add considerably more detail to make the new guidelines apply more fairly in a greater number of situations.

The additional detail also makes the new guidelines more equitable. For example: John and Mary seek a divorce. Mary gets custody of the two children. Two children from another

relationship with Marcia reside with John after the divorce. Those children were born before Mary and John's children. There is no support order requiring Marcia to support her children with John.

Under the old guidelines, at ARM 46.30.1531(1)(a)(ii), before determining a support order for Mary's children, it was necessary to calculate a dummy support obligation for Marcia's children. John's share of the dummy support amount was then deducted from his income. The problem occurred if Marcia was uncooperative, or if her location was unknown. With no knowledge of Marcia's income, the old guidelines could not have been applied, and the dummy support amount could not have been determined. This, in turn, prevented a determination of support for Mary's children using the old guidelines. When this occurred, the courts, the parties and their attorneys ignored Marcia's children when they set a support amount for Mary's children. This practice was clearly inequitable.

Ignoring Marcia's children, if John's income was $1,200 per month and Mary's was $800, John would pay Mary $325.00 per month for the support of their 2 children. Thus, Mary's income plus $325 child support would have put Mary's household at 121% of the federal poverty index level. Meanwhile, John's income minus his $325.00 child support payments to Mary would have put his household at only 94% of the federal poverty index level.

The same thing would have happened if John's two children by Marcia had been born after Mary's children. The old guidelines simply ignored later born children as if they did not exist.

The detail added to the new guidelines makes dealing with John's case much easier and more equitable. Under the new guidelines, John's household includes Marcia's children, whether prior born or later born. There is no need to get Marcia's financial information to calculate a dummy support amount. Under the new guidelines, Mary's household is at 115% of poverty and John's rises to 100%. John can now support himself and Marcia's children. He was unable to do so under the old guidelines

With the added detail, the new guidelines apply to a wider range of cases with more equitable results. The new guidelines recognize and address the complexities of modern domestic law.

The CSED recognizes that the new guidelines, with their added detail, may look intimidating to lay users. However, once the guidelines become final, the CSED intends to publish a booklet in simple language which explains and describes the method of computing a support amount in accordance with the new guidelines. The booklet will contain comments, examples and instructions whenever appropriate. Upon publication of the booklet, the CSED is confident that lay persons will be able to use and apply the guidelines easily and without the need for legal counsel.

COMMENT: Two commentors did not think that the Melson model was suitable to Montana's financial needs or demographics. They pointed out that Melson is from Delaware, a state that they believed to be different in nearly all ways from Montana.

RESPONSE: The CSED considered the difference between Montana and Delaware in devising the new guidelines, and adjusted for those differences. For example: in Delaware the primary child support need is 40% for one child, 30% for the second and third children and 20% for each additional child. The Montana version adjusted those figures to 30%, 20% and 10% respectively.

Another example of adjustment to the Melson model is in the SOLA figures. Delaware's SOLA is 18% for 1 child, 27% for 2 children, 35% for 3, 40% for 4, 45% for 5 and 50% for 6 or more children. Montana adjusted these figures to 14%, 21%, 27% and 4% for each additional child up to 50%.

The adjustments are not arbitrary or without reason. Robert G. Williams, PhD, of Policy Studies Inc., conducted a review of the Delaware guidelines in 1989. He found them to be an accurate reflection of that state's cost of living needs. Dr. Williams' study relied in part on the Cost of Living Index produced by the American Chamber of Commerce Researchers Association. Using that index, the CSED adjusted the new guidelines by comparing Delaware with Montana. The CSED is confident that the new guidelines accurately reflect Montana's cost of living.

COMMENT: One commentor referred to a recent article on guidelines. According to that article, twenty-two states use guidelines based on the Percentage of Income model and 20 states use the Income Shares model. Only three states use the Melson model. The commentor questioned Montana's choice of the Melson model, since only three states have chosen it.

RESPONSE: The CSED developed its first child support guidelines in 1979. Those early guidelines were extremely simple and followed the percentage of income model. Since 1979, the CSED has applied guidelines to several thousand cases. The CSED's experience in developing and applying guidelines has given it an excellent understanding of the advantages and disadvantages of each model.

The CSED assisted in the development of the guidelines adopted by the Montana Supreme Court on January 13, 1987. They were the result of studies undertaken by the Montana Child Support Advisory Council. The CSED was appointed as a member of that Council by Governor Ted Schwinden. In its deliberations, the Council examined the three most common guidelines models. First, it examined the percentage of income model. As noted by the commentor, that model is now used by 22 states. It sets support at a flat percentage of the non-custodial parent's income. For example: in Illinois the non-custodial parent will pay 20% of his or her income for one child, 25% for two

children, 32% for three, and 50% for six or more children. The custodial parent's income is not a factor. If the custodial parent's income is more than $50,000 annually but the other parent's is only $15,000, the support amount will still be 20% for one child. Because the many inequities inherent in the percentage of income model, the Council rejected it. The fact that 22 states now use that model does not mean it is equitable.

The Council also examined the Melson model. The Council found it to be the most equitable of the three models and almost recommended it. The Council rejected it because it seemed more complicated than the other two models.

The Council settled on the income shares model because it was more equitable than the percentage of income model but was not as complex as the Melson model. The percentage of income model's apparent ease of use was the deciding factor.

In 1985, when the Council submitted its report, all guidelines were comparatively new concepts. No state had used guidelines sufficiently long to understand their weaknesses or strengths. After applying the old guidelines in hundreds of cases, the CSED discovered significant weaknesses in the percentage of income model. The CSED made several unsuccessful attempts to correct those weaknesses through minor changes, refinements and clarifications. However, the old guidelines did not have enough design flexibility to achieve equitable results. The only model with enough flexibility was the Melson model. Flexibility is one of the strengths of the Melson model, and the reason why the CSED made the dramatic change from the income shares model. A discussion on the weaknesses of the old guidelines is contained in many of the following responses.

COMMENT: One commentor wanted the guidelines to include a provision for monitoring how the custodial parent spends child support money.

RESPONSE: Montana case law has long held that the custodial parent has sole discretion on how to use child support monies. See for example, Williams vs. Budke, 186 Mont. 71, 606 P.2d 515, 37 St. Rptr. 228,(1980). The CSED has no power to change the body of law through the rulemaking process. If a possible abuse of discretion by the custodial parent concerns the commentor, a remedy exists in the district courts.

COMMENT: The guidelines allow for visitation, extended visitation and several possible variances based on visitation. One commentor suggested that the guidelines should also include some means for monitoring visitation.

RESPONSE: The CSED agrees that visitation problems occur in a significant number of cases. Studies show that custodial parents' interference with visitation is a major reason why non-custodial parents stop paying child support. However, it is

beyond the CSED's rulemaking authority to address visitation problems as part of these guidelines. If the commentor is concerned about a possible abuse of visitation rights, a remedy exists in the district courts.

COMMENT: One commentor believed that guidelines have needlessly complicated child support cases. Because of guidelines, parties can no longer freely negotiate and agree on an amount for child support. Instead, the state forces them to abide by guidelines with which they may not agree.

The commentor believed that many attorneys are reluctant to accept support cases because they have become costly and complex under the guidelines. Non-mandatory guidelines served a useful purpose, but the commentor saw mandatory guidelines as nothing but an increase in bureaucratic red tape. The commentor believed that the CSED's role should be limited to enforcement of child support orders, not making inflexible guidelines.

RESPONSE: The CSED's experience does not confirm the commentor's remarks. When parties could freely negotiate and agree on support, the amount was often inadequate. Parents did not always have equal bargaining power. Highly emotional issues sometimes clouded their judgement. Further, parents and their attorneys consistently underestimated the needs of children. As a result, child support orders were often too low to meet the children's needs, even though the parents had the ability to pay adequate support.

Studies show that support orders were not only inadequate, they were not consistent among parents in similar situations. High income parents would often be ordered to pay the same child support amount as low income parents. Judges varied widely on how much support they awarded under the same case facts.

One reason for the increasing number of families on welfare is that some parents failed to pay adequate support for their children, even though they had the ability to do so. The parents' failure often was not intentional. Without guidelines, parents did not know how much support was necessary. In reaction to the problem, Congress, in 1984, required the states to adopt child support guidelines. At that time, use of the guidelines was not mandatory, but merely advisory. Unfortunately, parents, attorneys and courts did not universally use the guidelines. Inadequate support awards continued with little abatement. In response, Congress, in 1989, required mandatory use of guidelines in all child support cases.

Guidelines are not a cure-all, but they do ease the problems of the past, when child support could be set at the discretion of the parties and their attorneys. Not only are guidelines necessary to insure adequate support for children, they are now mandatory under 42 U.S. Code § 667 and 45 CFR § 302.56. If Montana does not apply the guidelines or justify exceptions in

all cases, the state can suffer federal sanctions. The sanctions would result in a loss of federal funding for public assistance.

COMMENT: Two commentors thought the guidelines contained a bias against fathers, or against any other person. However, they gave no specific reasons or examples which showed bias.

RESPONSE: The CSED does not find any bias in these guidelines against fathers, or against any other person. The guidelines are drafted to apply equally to mothers and fathers. They apply without consideration to whether the mother or the father is the custodial parent or primary custodian. They apply without consideration to whether the father or the mother is the person who must pay support. The CSED intends that these guidelines be used to determine a reasonable and adequate support obligation in all cases.

COMMENT: Two commentors suggested amending the guidelines to include provisions for what they call "transitional support orders." Their concern relates to situations in which the court orders the non-custodial parent to pay all marital debts in addition to child support. Payment of those marital debts may take a year or more. During this period, the commentors felt that the non-custodial parent should have a reduced child support order.

RESPONSE: The CSED recognizes that in many divorce cases the non-custodial parent is ordered to pay the debts of the marriage. No guidelines provision directly address this situation. The CSED, however, feels that subsection (1)(h) of ARM 46.30.1543 provides an adequate remedy. That subsection permits a variance based on the overall financial condition of a parent. If a non-custodial parent is concerned that combined child support and debt payments might be more than he or she can afford, the parent should request a variance from the guidelines based on overall financial condition.

COMMENT: One commentor believed that the new guidelines did not compare favorably to the old guidelines. The commentor suggested that the CSED graph support amounts determined under the old and new guidelines to see how they compare. The commentor also suggested that the CSED make comparisons between the new guidelines and the Washington state guidelines.

RESPONSE: As part of the development of the new guidelines, the CSED compared the old guidelines with the new. The comparisons were made at various income levels and numbers of children. At the suggestion of the commentor, the computations were graphed against each other and with computations from the Washington guidelines. The attached graphs are four examples of the graphs used in the development process. These graphs represent cases with one child under the age of 12 years, and various income levels for the non-custodial parent and incomes for the

custodial parent at the $0, $750, $1050, and $1500 monthly levels, respectively.

It is clear from the graphs that, in most instances, the Washington guidelines will result in higher support awards than either version of the Montana guidelines. It is also clear that when combined parental income is less than $39,500 annually, Montana's old and new guidelines are very similar. The principal difference between the two is that the new guidelines appear as a straight line on the graphs, while the old guidelines have several jags. These are a result of the abrupt transitions between percentages on the old guidelines table. In some cases, depending on the combined net resources of the parents, a parent would have had a lower support obligation than another parent with slightly less income.

In comparing the old and new Montana guidelines, a major difference is apparent at the high income levels. Initially, it appears that the new guidelines will result in support orders which are much greater for high income parents than orders calculated under the old guidelines. However, this gap is not what it appears to be. The old guidelines table did not provide for combined parental incomes of more than $39,500 annually. For these higher income levels ARM 46.30.1543(2) applied the 13.65 percent from the eighth column to the first $39,500 to get a minimum support order. An additional amount taken out of that part of parental income which is more than $39,500 was to be added to this minimum order. The court was to determine the amount of the supplement on a case-by-case basis. See, for example, In re the Marriage of Sacry, _____ Mont. _____, ____ P.2d _____, 49 St.Rptr. 452 (1992). When plotting the attached graphs the amount of supplement under the old guidelines was unknown. The graphs, therefore, show only the minimum support order without the required supplements. After adding the supplement to the minimum order, the gap between the old and the new guidelines would shrink to an insignificant amount.

ARM 46.30.1507

COMMENT: One commentor expressed a concern about the rebuttable presumption of adequacy and reasonableness of a support amount determined in accordance with the guidelines. The concern was that the "clear and convincing" standard of proof needed to rebut the presumption would severely limit the possibility of a successful rebuttal.

RESPONSE: The CSED intends that the guidelines be applicable to a broad range of cases. However, under the circumstances of some cases, the support amounts determined under guidelines may not be equitable. Guidelines cannot be absolute. Parents, their attorneys and the courts must be able to adjust support amounts determined under the guidelines upward or downward to compensate for unusual circumstances. Recognizing this need, the Montana Legislature allowed the courts to choose not to

apply the guidelines in setting or modifying a support order. However, it set the standard at the "clear and convincing" level in MCA Section 40-4-204(3)(a). The CSED, as part of its guidelines review duties and under its rulemaking authority, has no power to change the standard of proof set by statute.

COMMENT: One commentor questioned the authority of section (1) to create a presumption that child support awards based on the guidelines are reasonable.

RESPONSE: This presumption is not new to these guidelines. The old guidelines and the earlier guidelines adopted by the Montana Supreme Court on January 13, 1987, also contained the presumption. No challenge to the CSED's authority to create the presumption by rule has ever been made. Indeed, the Montana Supreme Court appeared to adopt the presumption when it created its own guidelines. The CSED sees no strong legal reason for removing the presumption from the rule.

Further, removal of the presumption would jeopardize federal funding for Montana's welfare programs. As a condition for the receipt of federal funds for public assistance, the various states must have and use certain child support laws. Federal regulations have been promulgated specifying procedures and other requirements. The regulation at 45 CFR § 302.56 requires states to have child support guidelines which create rebuttable presumptions of the adequacy and reasonableness of support awards. If the rebuttable presumption was removed from the guidelines, federal sanctions would be imposed, resulting in cuts in federal funding for Montana public assistance programs.

COMMENT: One commentor did not like the part of section (3) which requires the reasons for any variance from the support amount determined under the guidelines to be set out in the support order, or the provision which requires the order to show the amount of support which would have been proper before the variance. The commentor thought that this requirement would create problems of increased litigation and costs.

RESPONSE: As a condition for the receipt of federal funds for public assistance, the states must adopt and use child support guidelines in all cases. If a state does not follow the federally mandated requirements, federal sanctions would be imposed, resulting in cuts in federal funding for public assistance programs. Federal regulators have left the development of guidelines up to the discretion of each state. However, since 1984, when Congress required states to have guidelines, federal regulators noted a tendency for courts to avoid guidelines results by creating variances. Federal regulators could not find facts or reasons to support the many variances made by the courts. Consequently, federal regulators amended 42 CFR § 302.56 to include the requirement that support orders state the grounds for any variance from the support amount determined under the guidelines and requiring the order

to state the amount determined under the guidelines before the variance. The amendment also required courts to consider the "best interest" of the child when making a support order which varies from the guidelines. These requirements are mandatory, unless Montana chooses to suffer a severe loss of federal funds. The CSED does not find any justification for deleting the federally required provisions from the guidelines.

COMMENT: One commentor pointed out that section (8) does not state the proper time for a reverter clause to take effect. As an example, the commentor referred to variances based on visitation of 30%. If a parent missed one day of visitation, the commentor wondered if the reverter clause would go into effect. If visitation drops to 29% instead of 30%, the commentor wondered if the reverter clause would then go into effect.

RESPONSE: The child support guidelines are designed to apply to the average case. However, because many cases are not average, the guidelines provide considerable latitude for variance from the amount of support determined under the guidelines. To avoid the need for frequent modifications and the costs attendant to each modification, section (8) suggests inclusion of a reverter clause in the support order which would go into effect whenever the purpose for a variance fails to occur. With a reverter clause, when the purpose for a variance ceases, the support order will automatically revert to the amount it would have been before the variance. The suggested language in section (8) is general and does not attempt to address particular circumstances.

The person drafting an automatic reverter clause should provide sufficient detail to allow the intent of the parties to be determined and carried out. For example, a reverter clause could provide that missing one day of visitation would be sufficient reason for the variance to terminate. The reverter clause could also provide that there must be a number of missed days before the variance terminated. The parties must tailor the language suggested in section (8) to their particular variance and fact circumstances.

[Rule II] ARM 46.30.1508

COMMENT: One commentor questioned the guidelines provision which does not permit a parent to deduct depreciation from gross income. The commentor gave the example of an independent taxi cab owner/driver who must purchase a new vehicle every five years to earn a living. The commentor argued that the parent ought to have the ability to deduct depreciation expenses in order to have the cash available to purchase a replacement vehicle.

RESPONSE: The CSED believes that, in most cases, non-cash deductions including depreciation are not a consideration when

determining income available for support. Those deductions reflect a paper image of income which does not accurately reflect a parent's actual cash flow. The CSED finds support in the Montana Supreme Court case of, In re the Marriage of Mitchell, 229 Mont. 242, 746 P.2d 598 (1987).

The CSED recognizes that, in certain cases, circumstances may exist where the general rule would not be equitable. The CSED, therefore, amended the rule to provide for an exception. Depreciation can now be deducted from gross income whenever the parent can show an "economic necessity" for the deduction.

COMMENT: One commentor raised a concern that the guidelines might base his child support obligation on the income of his new spouse. He felt this to be inequitable and contrary to law.

RESPONSE: The guidelines do not consider the income of any person other than the child's parents. The guidelines do not call for information concerning the amount of income received by any person other than a parent.

The commentor apparently misread the rule for determining a parent's self support reserve. [Rule VII] ARM 46.30.1521 does take into consideration the possibility that another person in the parent's household has income. The rule does not consider the amount of that income, only the fact that there is income. The rationale of the guidelines is that a parent should have sufficient resources to support his household. However, if any person in that household is sharing expenses, then the parent does not actually provide total household support. An adjustment to the self support reserve is appropriate to reflect this fact. In such circumstances, the parent should not receive a full self support reserve.

To address the commentor's concerns, the CSED added a new section (2) which states that the income of other persons is not a consideration in determining a parent's gross income. The CSED added similar clarification to [Rule VII] ARM 46.30.1521. See also the comments and responses following [Rule VII] ARM 46.30.1521.

COMMENT: Several commentors voiced concerns about including income from overtime or second jobs as part of gross income. They felt that it was unfair to second families. When a parent works overtime or has a second job so he or she can afford a second family, the parent's first family could use the increased income as grounds to modify the support order. When this occurs, the parent often is left without enough income for the second family.

RESPONSE: Under the old guidelines, when a first family sought modification of a support order, the second family's needs were not considered in determining a new support amount. Therefore, all of the parent's increased income was considered available

for support of the first family. This occurred because the old guidelines were based on a "first mortgage" approach. A parent was required to meet old obligations before undertaking new ones. Under this "first mortgage" approach, a parent must have income left over after taking care of his or her first family, before a second family could be started. If the parent did not have enough income left over, the parent was required to increase his or her income before taking on a new family. This is where the problem occurred. If the parent worked overtime or a second job to support a second family, the extra income was all available to the first family for modification purposes under the old guidelines.

This problem was addressed in the proposed new [Rule VI] ARM 46.30.1520. Section (3) did away with the "first mortgage" approach. Thus, when a first family sought modification of the support order, the second family's needs were taken in consideration in determining a new support amount. However, that consideration was limited to basic needs only. The parent may have worked overtime or had a second job to increase the second family's standard of living above the bare subsistence level. Any extra income left after meeting the subsistence needs of the second family was still available for possible modification of the first family's support order.

The CSED agrees with the commentors. If a parent is willing to work long hours to support a second family, the second family should have all the benefit of the parent's extra effort. Therefore, the CSED amended the rule to create a presumption. As amended, the guidelines presume that overtime and income from a second job is necessary for the second family. Consequently, that income is no longer included in gross income. In those cases where the first family can show that the extra income is discretionary, it can be included in gross income. In those cases, if the parent does not use the extra income to maintain the second family at a higher standard of living than the family would otherwise enjoy, the extra income is to be considered discretionary. Discretionary income from overtime or a second job is gross income under this rule.

COMMENT: One commentor described a case where a family adopted four special needs children. Those children received adoption subsidies totaling $1,220 per month. The father argued that he should receive credit for one-half of the subsidies against his support obligation. The court included the subsidies as part of the mother's net available resources. The commentor noted that the guidelines, neither the old nor the new, suggested how to handle adoption subsidies. The commentor also recognized that this situation probably does not occur often enough to need inclusion in the guidelines. The commentor suggested that this issue be kept in mind for future clarification should it become more of a problem.

RESPONSE: The situation described by the commentor is, indeed, unusual. Should this situation occur under the new guidelines, the parties might consider seeking a variance under ARM 46.30.1543(1)(d). Meanwhile, the CSED will keep this matter in mind when conducting later reviews of the guidelines.

COMMENT: Two commentors wanted clarification of the rule on lump sum payments under subsection (1)(e). One wanted to know how to treat a gift, inheritance or cash payment where the parent squandered the entire principal. One commentor wanted to know why a lump sum cash payment such as a lottery payoff is not income.

RESPONSE: Parents can use lump sums, windfalls, gifts, and inheritances in several ways. One way is to squander the money. Another is to use it to pay old indebtedness. A third possibility is to use the money to set up a new business or to invest in income-producing assets. The parent may also hold on to the principal and do nothing with it.

Because of the many ways parents can use money or property, the CSED could not provide a more specific rule for application of the guidelines. The CSED believes the new rule is the most practical way to handle the issue. No matter when the parent receives money or property, if it is invested, the proceeds are considered income. The principal itself, if not income-producing, is an asset for which attribution of income is proper. If the money or property no longer exists because it was misspent or used to pay old indebtedness, then it is not considered in determining a support amount.

The CSED found several reasons for not treating lump sum payments as income. If the lump sum were to be treated as income in one year, it would greatly skew the child support order for subsequent years. A modification would be necessary to correct the skewed effect after the first year. If the guidelines were to average the lump sum over a number of years, the CSED would be required to set rules for determining the appropriate number of years. Some would argue persuasively for a short period. Others would argue equally well for a longer period. The CSED could not find a middle ground between the two possible poles. Because of this and similar problems, the CSED could not find sufficient justification to change the rule.

The CSED did find it necessary to add some clarification to the rule. The CSED added the phrase "actual but not imputed" to show that the rule only applied to interest actually received. The rule does not apply to imputed interest. To be consistent with [Rule III] ARM 46.30.1514, the CSED added the word "non-performing" to describe the property. If a parent inherited or purchased a business, or other income producing property, the property is not an asset under [Rule III] ARM 46.30.1514, but income, dividends or interest from the property is included in gross income under this rule.

ARM 46.30.1513

COMMENT: Two commentors referred to subsection (2)(d)(iii). They did not think it was fair to exclude parents who are obtaining education or retraining from the imputed income provisions. One of the commentors pointed out there is no guarantee that additional education or training would benefit children.

RESPONSE: The CSED finds a strong public policy reason to retain the provision excluding students from the imputed income provisions of the guidelines. Consider the example of a mill worker who is out of work because the mills are either closing or automating their production. Without retraining or further education, the displaced mill worker may never get another well-paying job. In the worst case, the mill worker might eventually become dependent on public assistance. A person who is disabled because of an accident may require occupational rehabilitation in order to return to the work force. The CSED believes it would be inequitable to impute income to persons who are engaged in a program of economic self-improvement.

The CSED recognizes that there can be no guarantee that education or retraining will benefit the parent's children. Some parents may seek to use this subsection as a means to avoid or reduce their child support obligation. Education or retraining for some parents may be superfluous or redundant. When situations such as these occur, variance from the guidelines would be proper.

ARM 46.30.1513(2)(e)

COMMENT: One commentor thought there may be an inconsistency between [Rule II(1)(d)] ARM 46.30.1508(1)(d) and this rule. According to [Rule II] ARM 46.30.1508, gross income does not include income from means-tested public assistance programs. By contrast, under this rule, gross income includes need-based scholarships and college grants. The commentor asked whether gross income also includes subsidized housing or subsidized child care, such as that provided by the JOBS program.

RESPONSE: The CSED finds strong public policy considerations against including public assistance funds as income. However, the rationale for this policy does not apply to student-parents. Public welfare recipients may be incapacitated or involuntarily unable to work for various reasons. On the other hand, student-parents usually are employable, but have voluntarily removed themselves from the work force to pursue their studies. Were it not for the time devoted to their schooling or training, student-parents usually would have the ability to support their children. Therefore, imputation of income to student-parents is appropriate.

However, this rule recognizes that it is in the children's best interest to complete their education or training. Consequently, the guidelines make an exception to the rule on imputing income to student-parents. The CSED did not find it proper to extend this exception to also exclude scholarship and grant funds from income, because student-parents with children in their households would need to support the children out of their scholarship and grant funds.

Subsection (2)(e) provides that income includes only "actual income" or other "money" available to the student-parent. The CSED believes that the rule adequately describes that income, so as not to include subsidized housing and subsidized day care which are not available to the student-parent as cash funds.

[Rule III] ARM 46.30.1514

COMMENT: Several commentors indicated their intent to computerize the new guidelines. One problem in writing computer software for determining support orders is the 10 year T-Bill rate used to determine income attributed to assets. The T-Bill rate can vary daily, requiring a manual update each day. Instead of the daily T-Bill rate, the commentors suggested the CSED adopt the average 10 year U.S. Treasury constant maturity rates for the previous calendar year. This way, the rate of interest assigned to assets would be constant over one full year, requiring fewer manual updates.

RESPONSE: The CSED finds the comments persuasive. The guidelines are amended accordingly.

COMMENT: One commentor thought it would be inequitable to attribute income to assets when a court order or property settlement agreement had previously divided property between the parents. The commentor believed that the rule penalizes parents for entering into property settlement agreements. For example, if a parent receives a larger share of property as an alternative to maintenance, when later determining child support, the guidelines assign a dollar value to the property. As a result, the parent may receive a smaller child support obligation, or pay a larger amount for support.

RESPONSE: The CSED finds the reasoning for attributing income to assets sound. A parent may have little cash, but considerable assets. The child would benefit if those assets were sold and the proceeds invested. Permitting a parent to keep and use assets without restriction would give the parent an economic advantage, to the financial detriment of the child. The CSED finds no good reason for changing the policy or the rule.

If the commentor is concerned that the distribution of marital property in a divorce would result in an inequitable support amount under the guidelines, he should apply for a variance under ARM 46.30.1543. Subsection (1)(a) of that rule provides

for a variance based on the equitable distribution of property. Subsection (1)(b) of that rule provides a similar variance for the tax consequences of property distribution. Subsection (1)(i) of that rule provides for the situation where the custodial parent and child have a continuing right to occupy the former family home.

COMMENT: One commentor suggested that the rule for attributed income should not apply to assets such as vacation homes and recreational vehicles. The commentor's reasoning was that the parent will probably share the use of the property with the child. According to the commentor, the rule discourages the possession of assets which may benefit the child.

RESPONSE: The CSED finds that there is no reason to believe that recreational property will necessarily benefit the child. Even if it does so, the benefit is short-term at best. Meanwhile, the child's need for food, shelter, clothing and education is ongoing and consistent.

[Rule IV] ARM 46.30.1515

COMMENT: One commentor expressed concern that the provision of this rule which requires parents to present profit and loss statements prepared by a CPA might be prohibitive for low income self-employed parents. The commentor suggested that parents have the option of preparing and submitting profit and loss statements themselves, if the statements were signed under oath as to the accuracy of the contents. In urging the CSED to amend this rule, the commentor pointed out that there are many small businesses in Montana. In many of those businesses, the books are managed on the kitchen table by the parent or the parent's spouse. Requiring marginally profitable businesses to use expensive CPA services would tend to discourage those businesses when public policy should be encouraging them. At the very least, the commentor suggests, the guidelines should provide for a licensed accountant to prepare the statements, rather than a CPA.

RESPONSE: The CSED finds the comment to have merit, and the rule is amended accordingly. Now, either an accountant or a CPA may prepare profit and loss statements. Also, parents and other persons such as the parent's spouse may prepare the profit and loss statement. When prepared by a parent or other person who is not a CPA or accountant, the accuracy of the statement must be certified under oath.

COMMENT: One commentor suggested inclusion of a clause which requires verification of non-cash benefits obtained by a parent.

RESPONSE: The CSED agrees with the suggestion, and the rule is amended accordingly.

[Rule V] ARM 46.30.1516

COMMENT: One commentor expressed concern that the guidelines permit a parent to deduct retirement contributions from gross income only when they are mandatory. The guidelines do not permit similar deductions for voluntary retirement plans. The commentor argued that there should be no distinction between voluntary and mandatory plans. The commentor bases his contention on his perception that social security retirement benefits are inadequate. Therefore, public policy should encourage both voluntary and involuntary retirement plans.

RESPONSE: The CSED considered the comment, and found that public policy encourages parents to save for retirement. The self support provisions of these guidelines is to permit parents and their prior and subsequent families to maintain at least a basic standard of living. Without a basic need allowance, the parent, his other children and other family members could have become dependent on public assistance. The CSED felt that the same policy considerations would apply to the concern raised by the commentor.

The CSED amended the rule to allow deductions for voluntary as well as mandatory retirement contributions. However, the CSED did not want parents to use the amended rule to avoid or reduce their child support obligations by making large contributions towards retirement plans. To lessen this concern, the CSED put a cap of 6.5% on the amount of retirement contribution. This cap is the amount permitted under the state employees retirement plan.

In discussing this issue, the CSED found that the guidelines did not provide for cases in which a parent cashes out his or her retirement plan. Consequently, the CSED amended subsection (1)(a) of [Rule II] ARM 46.30.1508 to include pre-retirement distributions from retirement plans as part of gross income.

COMMENT: One commentor suggested clarifying subsection (5) of this rule by changing the syntax. The commentor thought this section could be made clearer by moving the phrase, "unless the parent cannot reasonably remove himself or herself from the unprofitable situation" to a different part of the sentence.

RESPONSE: The CSED agrees with the commentor and the section is amended accordingly.

COMMENT: One commentor suggested the rule be amended to permit the parent paying support to take the IRS tax exemption for the children.

RESPONSE: IRS and court-developed rules define when, and under what conditions, a parent may claim a tax exemption for dependents. The CSED does not have authority to change those rules. If the commentor is concerned that allocation of tax

exemptions may result in inequitable child support orders, [Rule XI(1)(j)] ARM 46.30.1534(1)(j) provides for a variance based on the allocation of dependent tax exemptions to the non-custodial parent.

COMMENT: One commentor suggested that the guidelines give a part of the IRS tax credit for child care services to the parent paying support.

RESPONSE: Under IRS regulations, only the parent with custody of the child can claim the child care credit. The CSED does not have authority to change those regulations. However, the guidelines indirectly permit a non-custodial parent to share the credit. In such cases, the parent pays only a prorated share of net child care expenses. Net child care expenses are defined in these guidelines as the actual costs minus the child care credit. For example: the parents have equal income. Day care expenses are $100. Net child care expenses after the credit is $75. Instead of paying $50.00 for child care expenses, the noncustodial parent pays only $37.50 to the custodial parent as reimbursement for day care. The difference between $50 and $37.50 is the parent's share of the tax credit.

[Rule VI] ARM 46.30.1520

COMMENT: One commentor suggested that the first sentence in section (3) did not adequately convey the CSED's intent. The commentor suggested breaking the sentence into two new sentences. The commentor suggested that the second sentence should expressly refer to subsections (a) and (b).

RESPONSE: The CSED agrees with the commentor and the rule is amended accordingly.

[Rule VII] ARM 46.30.1521

COMMENT: One commentor suggested adding an amendment to this rule which would create a presumption that a person who is sharing living quarters with a parent also shares the parent's household expenses.

RESPONSE: The CSED finds that there is sufficient reason to presume that a person sharing living quarters is also sharing expenses. Subsection (2)(b) of this rule assumes, without expressly stating so, that persons with income who reside with a parent are sharing household expenses. To clarify that this is in fact so, the CSED added a new section (2) specifically stating the presumption, and renumbered the original section (2) and subsequent sections.

The CSED did not find support for the commentor's suggestion that the presumption should apply to any person sharing living quarters, regardless of income. The CSED finds that such a

definition would be too inclusive and would result in inequities. For example, if the parent was providing in-home care for an invalid or destitute sister. It would not be fair to presume that the sister is paying a share of the household expenses. Therefore, the CSED limited the presumption to only those persons residing with the parent who have actual income.

COMMENT: One commentor disagreed with the rule establishing a self support reserve. In the commentor's view, the self support reserve places priority upon the subsistence requirements of the obligor parent, instead of on the subsistence needs of children. The commentor argued that adult parents are in a better position to insure their own subsistence needs, and children cannot and should not be required to assume this responsibility.

RESPONSE: The CSED finds that the self support reserve is necessary so that the obligor parent can maintain sufficient living circumstances and continued employment. In the CSED's experience, too much financial pressure on a parent can cause negative results. If, after paying a support obligation, sufficient resources are not available to maintain the obligor parent and his or her immediate household, the parent may become discouraged and discontinue employment. If a parent has left regular employment, the CSED's experience indicates that the parent's support obligation often becomes delinquent and difficult to collect.

Requiring a parent to pay a high support obligation when the parent cannot meet his or her own needs may have another negative effect. If child support payments reduce net income below the level required to maintain the parent and his immediate household, the parent may have to apply for public assistance benefits. If this occurs, the support obligation may fall delinquent and both the parent and the child could become dependent on public assistance. Guidelines should not cause any person or child to become dependant on such programs.

The CSED finds support for this rule in the Montana Supreme Court case of In re the Marriage of Callahan, 233 Mont. 465, 762 P.2d 205 (1988). The court directed the district courts, when determining a parent's ability to pay child support, to consider: "The parent's use of his funds to provide himself only with the bare necessities of life prior to providing support for his child."

[Rule VIII] ARM 46.30.1522

COMMENT: One commentor pointed out that the original guidelines tables contained a cost differential for teenage children. The cost differential permitted parents to meet the increased financial costs of maintaining teenage children. The new rule does not provide a similar cost differential, except as a variance under ARM 46.30.1543(1)(k). The commentor suggested adding a cost differential to the new rule.

RESPONSE: The new guidelines formula does take into consideration the higher costs of teenage children. However, instead of specifying a cost differential, the new formula averages those costs over the entire minority of the child. Although costs are averaged, the CSED recognizes that the needs of some high school age children may be greater than contemplated by either set of guidelines. The CSED, therefore, added subsection (1)(k) to ARM 46.30.1543, to allow a variance for children aged 16 and 17.

COMMENT: One commentor wondered whether this rule was in conflict with [Rule IX] ARM 46.30.1532. The commentor argued that if "primary child support" included medical needs, the parent would pay twice for the same medical needs under [Rule IX] ARM 46.30.1532.

RESPONSE: This rule defines "primary child support" as including food, shelter, clothing and medical needs. These are the basic needs required to maintain a child at the poverty level. At this basic level, medical costs would include only simple needs such as band-aids, cold remedies, aspirin, and so forth. A family at this level cannot afford, without health insurance, medical expenses which call for a doctor's intervention. That is why [Rule IX] ARM 46.30.1532 requires health insurance coverage whenever it is available. When coverage is not available, [Rule IX] ARM 46.30.1532 requires the non-custodial parent to pay a share of the doctor's bills.

The CSED did not intend this rule to include the same level of medical care provided for in [Rule IX] ARM 46.30.1532. To avoid any further confusion that the rules refer the same need, the CSED removed the word "medical" from the rule.

COMMENT: One commentor wondered whether the availability of Indian Health Services could substitute for the health insurance coverage provided for in this rule.

RESPONSE: The CSED finds that Indian Health Services, medicaid and other similar public programs are not a substitute for private health insurance. Public policy requires the primary support needs of children to be the responsibility of parents, not that of the taxpayers. Therefore, when they are financially able, parents should provide necessary health insurance coverage for their children.

ARM 46.30.1525

COMMENT: One commentor pointed out a possible error of omission in the proposed rule. The guidelines worksheet shows a provision for crediting the parent who pays the supplemental needs. However, the rule does not suggest that such a credit is possible. [Rule IX] ARM 46.30.1532 provides similar credit for the parent who pays insurance premiums. The worksheet lists a credit for insurance premiums together with lines for the

supplemental needs credit. It appears that the rule intended a credit which was somehow omitted.

RESPONSE: The commentor is correct. There was an error of omission. The CSED amended the rule accordingly.

[Rule IX] ARM 46.30.1532

COMMENT: This rule provides for dividing medical bills which are not covered by insurance between parents. One commentor pointed out that there is no procedure, except contempt, to enforce the apportionment order when the non-custodial parent fails to pay his or her share of the medical bill. When the non-custodial parent fails to properly pay, there is a risk that the bills will go unpaid. When bills go unpaid, the child may have to do without eyeglasses, dental work, sports physicals and other future medical needs.

RESPONSE: The CSED agrees that no remedy exists, except in district court, to enforce the apportionment order when one of the parents fails to pay. However, it is beyond the CSED's rulemaking authority and the purpose of these guidelines to create a new administrative remedy. Legislation might be necessary.

COMMENT: One commentor described a problem which can occur when low income parents must pay health insurance premiums in addition to child support. The commentor gave the example of a non-custodial parent with a support order of $300 per month. That parent was also ordered to provide insurance. The insurance premium was $160 per month. The parent had a net monthly income of $850. The custodial parent's net income was nearly double that of the non-custodial parent. The commentor believed that the combined child support and health insurance obligations unfairly and unnecessarily burdened the low income parent. Another commentor suggested that parents share the cost of insurance premiums in proportion to their incomes.

RESPONSE: Under this rule, one parent does not bear the entire burden of health insurance costs. Premiums are, in effect, prorated between the parents. Although the facts given in the first commentor's example are sketchy, the custodial parent would pay the largest share of the $160 premium because that parent has the largest income. The rule provides that the parent who actually pays the premium is to have a credit for the amount of the payment against the primary child support need.

With reference to the first commentor's example, the non-custodial parent has income of $850. The custodial parent's income is nearly double. Assume that it is $1,600. If so, the non-custodial parent's share of the $160 health insurance premium is $56.00. This parent's total obligation is $356 ($300 child support plus $56 premium). The non-custodial parent then receives a credit for the $160 premium. After deducting the

credit, this parent pays $196 to the non-custodial parent, instead of $300.

[Rule XI] ARM 46.30.1534

COMMENT: One commentor suggested amendment of this rule to include a definition for "standard of living" as it relates to SOLA.

RESPONSE: The purpose of SOLA is to maintain a child at the standard of living which the child would enjoy if the child were living with the parents in an intact household. However, as pointed out by the commentor, the term "standard of living" is not defined in the guidelines. To add clarity, and to avoid any possibility of ambiguity, the CSED adopted the commentor's suggestion. Rather than amend this rule, the CSED added the definition to [Rule I] ARM 46.30.1502, the general definitions rule.

COMMENT: Several commentors argued that SOLA would result in child support orders that were too high. They believed that SOLA would result in increased litigation.

RESPONSE: The old guidelines table did not go beyond combined parental income levels of $39,500. For larger incomes, old ARM 40.30.1543(2) provided that a minimum support order is calculated at the $39,500 percentage. The minimum support order was then to be supplemented out of any parental income higher than $39,500. The amount of the supplement was to be determined by the court on a case by case basis. See, for example, In re the Marriage of Sacry, _____ Mont. _____, _____ P.2d _____, 40 St. Rep. 452 (1992).

Because of the old guidelines limitations, every case with income more than $39,500 was a potential case for litigation. On the other hand, the new guidelines make provisions for high income situations. Therefore, the CSED does not agree that the new guidelines will increase litigation over the litigation necessary under the old guidelines.

The CSED finds that the addition of SOLA does not result in support orders which are too high. Under the old guidelines, a parent with combined annual income at, but not more than, $39,500 paid monthly child support of $447 for one child under the age of 12, and $553 per month for a child 12 and older. Under the new guidelines, the same parent pays $526 no matter the age of the child. After averaging the age adjustments, there is only a $26 monthly difference between the new guidelines and the old guidelines. Under the Washington state guidelines, the same parent would pay from $701 to $866 per month.

The CSED cannot determine if the differences between the old and new guidelines will continue to be insignificant at combined

annual income levels greater than $39,500. This is because it was necessary to determine high income cases on a case by case basis under the old guidelines. However, the Washington guidelines set child support for incomes of $84,000 at $1314 to $1624 per month. By contrast, under the Montana SOLA provisions, child support would be $1045 per month.

A recent article in the Family Law Quarterly[1] noted the same concerns in Illinois as those expressed by the commentors. Guidelines in that state apply a flat percentage to the non-custodial parent's income. For one child, the amount is 20 percent. Thus, in Illinois, a parent with $84,000 annual income would pay $1,400 per month. In addressing concerns similar to those raised by the commentors, the article replies:

> Although many Illinois attorneys thought the guidelines produced a "windfall" for custodial mothers in upper-income families, we found no significant difference in pre- and post guidelines awards in these families.

The article concluded that high income families, because of their resources, had greater opportunity for bargaining and asset trading both before and after guidelines. The only major impact noted on high income families was that guidelines reduced case processing time. The CSED finds that Montana is not likely to be different from Illinois in this respect.

COMMENT: Two commentors argued that SOLA was not fair to fathers. They believed that fathers should not have to pay any more than needed to support a child at the basic needs level.

RESPONSE: The CSED finds no merit in the commentors arguments. A child's basic need under the guidelines is equivalent to living at the poverty level. Without SOLA, a child may never live above the bare subsistence level, even though the non-custodial parent can afford to pay more support. If the custodial parent has enough income to raise the child's standard of living above the poverty level, the burden of support rests primarily on the custodial parent instead of on both parents. This is unfair to the child and to the custodial parent.

In an intact family, a child benefits from the income of both parents. The parents do not limit their children to a subsistence level standard of living. The CSED finds no reason why this practice should be different merely because the parents divorce. The CSED finds support in MCA Section 40-4-204(2)(c). That section shows legislative intent to maintain children, where possible, at the pre-divorce standard of living.

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[1]Family Law Quarterly, Vol, XXV #3, Fall, 1991, Impact of Child Support Guidelines on Award Adequacy, Award Variability and Case Processing Efficiency.

[Rule XII] ARM 46.30.1535

COMMENT: Two commentors took exception to that part of section (2) which uses the phrase "in the usual case of sole custody." They felt that the phrase was contrary to the statutory preference for joint custody.

RESPONSE: MCA Section 40-4-222 creates a preference for joint custody. That section, however, does not distinguish between joint legal custody and joint physical custody. In the thousands of decrees with which the CSED has had experience, the bulk of the joint custody cases are joint legal custody where one parent has primary residential care of the children with the other parent having normal visitation. For purposes of the guidelines, the most common joint custody case is the same as sole custody. When joint legal custody is combined with sole physical custody, they are the "usual" case referred to in section (2).

Because the term "joint custody" can be misleading, the guidelines call cases in which there is a true sharing of physical custody "shared physical custody." However, the CSED deleted the term "usual" cases, and amended section (2) to include both sole custody and joint legal custody cases in which one parent has primary physical custody.

COMMENT: One commentor believed that the extended visitation/ shared physical custody provision in subsection (5)(a) did not consider fathers who maintain a room for their children. He suggested an amendment to the rule based on what he called the "Espenshade Factor." This factor gives a financial adjustment to the father for shared physical custody of the child. The commentor offered the following formula:

MONTANA JOINT PHYSICAL CUSTODY
COMPUTATION FORMULA

EF = Espenshade Factor) = 1.35

GA = Gross Amount = N X EF

N = Need

PC = Payor Contribution

PP = Payor's %

PS = Payor's Share

RC = Receiver's Contribution

RP = Receiver's %

RS = Receiver's Share

TG = Time Child is Gone

FORMULAE:

GA X PP X TG = PC

GA X RP X TG = RC

PC - RC = SUPPORT AWARD

RESPONSE: Colorado, Washington and Idaho guidelines all include provisions for shared custody adjustments similar to the formula submitted by the commentor. Those provisions all calculate a hypothetical amount of support for the time the children are with one parent and a second hypothetical amount for the time they are with the other parent. The difference between the two hypothetical amounts is the amount payable by one parent to the other for child support.

According to Thomas Espenshade[2], overall costs of raising children increase by 35 percent in shared physical custody cases. Colorado and Washington adjust for the Espenshade factor by adding a shared custody premium to the amount determined under the guidelines for sole custody. Those guidelines then apportioned support between the parents based on the amount of time each parent has the child. Subtracting the lesser portion from the greater gives the amount of the adjusted support order.

At first glance, the "apportionment and offset" formula proposed by the commentor and used in Colorado and Washington, appears to be fair and reasonable. However, a closer examination does not support the initial impression. In most cases, application of the formula would have a disproportionately negative effect on the primary custodian's household.

[2]Thomas J. Espenshade, Investing in Children: New Estimates of Parental Expenditures, Urban Institute Press, Washington, 1984.

For example: the primary custodian earns $800 net per month and the non-primary custodian's monthly earnings are $1200. There is one child. Under the new guidelines, in a sole custody case, the secondary custodian pays $176 for child support. After receiving support payments, the child and primary custodian are living at 132 percent of the federal poverty index level. The secondary custodian's standard of living is at 185 percent of the federal poverty index level.

Now assume that the same parties share physical custody, and the secondary custodian has the child 40 percent of the time. After calculating the apportionment and offset formula, the secondary custodian pays $72 for support. This drastically reduces the standard of living of the child and primary custodian to 117 percent of the federal poverty index level. At the same time, the secondary custodian's standard of living increases to 204 percent of the federal poverty index level.

Just because the secondary custodian has the child for 36 days per year more than the normal 110 day visitation period, child support is reduced 41 percent, from $176 to $72. When a child spends more time in the other home, the primary custodian can expect some costs savings, especially for food. However, most of the primary custodian's expenses continue at the same level as when the child is in the home. Consequently, a 41 percent reduction of the child support is out of proportion to the cost savings which the primary household can expect.

The "apportionment and offset" formula gives a credit to the secondary custodian. The practical effect of this credit is to substantially reduce the standard of living in the primary custodian's household. The primary reason is that the secondary custodian gets a credit for every minute spent with the child. This credit includes 110 normal visitation days for which a parent in sole custody cases gets no credit. Thus, by having the child for even a short period over the threshold of 30 percent (110 days) normal visitation, the secondary parent gets relief from paying support and also receives offsetting support from the primary custodian. The formula puts the burden of shared physical custody almost entirely on the primary custodian.

The CSED understands that some accommodation is proper for shared physical custody cases. To this end, the proposed new guidelines contained a "percentage reduction" method for adjusting support in shared physical custody cases. The CSED finds that the proposed method did not result in enough of an adjustment. The "apportionment and offset" formula, as proposed by the commentor, is too much of an adjustment. To provide a middle ground between the two, the CSED developed a compromise approach using the "percentage reduction" method but creating significantly more relief for the secondary custodian than did the original method. The compromise approach has a far less

harsh impact on the primary custodial household than would the "apportionment and offset" method.

The compromise approach gives a 1 percent reduction in the support level for each additional day over the 30 percent visitation threshold. For example, the parent who cares for the child 40% of the time provides 146 days per year of care, or 36 days above the 30 percent/110 day threshold. Those 36 additional days will result in a 36 percent reduction of the support amount. Under the earlier example, the non-primary custodian pays $176 when there is normal visitation. Under the amended "apportionment and offset" formula the support payment changes to $72. By contrast, under the compromise approach the payment is $112.64. This is a less harsh reduction in the standard of living from 132 percent of the federal poverty index level to 123 percent. These results are better than the "apportionment and offset" formula's 117 percent of the federal poverty index level.

In analyzing the "apportionment and offset" formula and in developing the compromise method, the CSED became aware of another problem. It is to children's advantage to encourage shared physical custody. However, in low income cases, a shared physical custody adjustment may have the negative effect of lowering the child's standard of living below the poverty level, due to the higher costs of shared physical custody. The child may then become dependent on AFDC and other public assistance programs. This effect puts into conflict two strong public policies; one which encourages shared physical custody, and the other which discourages families from becoming dependent on public assistance. Therefore, in developing the compromise method, the CSED put a cap on the percentage reduction method. A reduction is allowed in shared physical custody cases only when it does not have the effect of reducing the child's standard of living below the federal poverty index level.

COMMENT: One commentor noted that he shared physical custody of his two children on a 50/50 basis. The commentor did not believe that the 20% credit given under section (4) was an adequate adjustment to the support amount.

RESPONSE: In response to the preceding comment, the CSED amended this section. As amended, the commentor will have a 72% credit compared to 20% under the proposed new rule.

COMMENT: One commentor suggested that the guidelines should consider the number of dinner meals a parent provides to determine when shared physical custody occurs. That is, the commentor suggested that a parent who provides a majority of a child's dinner meals should get a credit for the majority of shared physical custody.

RESPONSE: The CSED finds that this suggestion raised more questions than it answered. For example, what would happen when

one parent was expected to provide the dinner meal, but instead the other parent provided the meal? What would happen if the children ate at a friends home? Further, a credit based on meals could lead some parents to manipulate visitation schedules around meal times. Enforcement would be difficult. Each parent would need to keep logs as to which parent provided which meal on each day. The CSED, therefore, declines to amend the rule in accordance with the suggestion.

COMMENT: Two commentors asked questions about how to define a "day" for purposes of the guidelines. It is necessary to determine how many days the child is in the physical custody of each parent in order to apply the 30 percent threshold in section (5). One of the commentors used an example to illustrate a problem with the present wording. If the non-custodial parent picked the child up for visitation on Friday evening and returned the child on Sunday evening. The parent had physical control of the child for a 48 hour period. However, if the rule defines a "day" as a full day and night the parent would get credit for only one day of visitation.

RESPONSE: The CSED agrees with the commentors that the word "day" needs further definition. The CSED amended the rule to provide such a definition. When determining shared physical custody, a day is defined as being when a parent has physical control of a child for the most of a 24 hour calendar day. In the example given by the commentor, the parent would receive credit for both Saturday and Sunday but not for Friday. The parent only had the child for a small part of that day.

[Rule XIII] ARM 46.30.1538

COMMENT: One commentor objected to subsection (1)(a) which permits the court or hearing officer to set a zero support order for very low income parents. The commentor claimed that all parents should pay support. As an example, the commentor referred to the Colorado guidelines which set a $50 minimum support order in all cases.

RESPONSE: The old guidelines contained a provision suggesting a $50 minimum support order. The problem was that the district courts would not uphold this provision. The CSED experienced several cases statewide in which the $50 minimum support order was reversed by the court. In one case, the obligor parent had monthly income of only $350. The parent resided in a rural area with no other employment available, so that imputation of additional income was not appropriate. The district court held that it would be unjust to require the parent to pay child support of $50 per month out of a $350 monthly income. Under the new guidelines this parent would pay a more reasonable $14 instead of $50. A zero payment is proper only when the parent's monthly income falls below $184. The CSED agrees with the district courts. Requiring a person with income of less than $184 to pay $50 for support is not just or reasonable.

[Rule XIV]

COMMENT: Several commentors praised the intent of this rule, but found that it was unworkable. They pointed out that there are many ways to vary from the guidelines. Some of the variances are child specific, such a long distance visitation. There are also several supplements to the basic child support need which are also child specific. In cases in which the parents have more than one child, the variances and supplements may apply to one or more but not to all the children. For example, one child may need extra medical and day care. A second child needs special education. A third child needs day care and special shoes. A variance for long distance visitation applies to two of the three children. Another variance for extended visitation applies to two children but not the same two as the visitation variation. There are many possible combinations of supplemental support and variances which may apply. Any of the variances may cease before the child emancipates. One of the children may die or emancipate early, which would end the variance or supplement. To follow the rule, the court would need to fashion a support order for each child and for each possible combination of children, supplements and variances. The commentors believed this to be an unreasonable requirement.

RESPONSE: After considerable deliberation and experimentation with various options, the CSED came to the same conclusion as did the commentors. Consequently, the entire rule has been removed from the guidelines.

[Rule XVI] ARM 46.30.1542

COMMENT: One commentor pointed out that this rule does not address lump sum payments of social security benefits. After making application for benefits, it may take eighteen months or longer for the parent to receive those benefits. The commentor urged that the guidelines should treat lump sum payments as payment of arrearages by the parent. According to the commentor, to do otherwise would have the effect of making the parent contribute more child support than would be required under the support order.

RESPONSE: The CSED agrees that the rule should have provisions for lump sum payments, to alert parents and their attorneys to consider lump sum problems. When there is a possibility of a lump sum payment from social security, the order would have to address the lump sum before credit would be proper. Under the case of In re the Marriage of Durbin, _____ Mont. _____, 823 P.2d 243, 48 St. Rep. 1142 (1991), credit for social security benefits paid to the child as a result of the parent's disability is not automatic. Credit can only be given as part of the establishment or modification of a support order and then credit can only be prospective. The CSED amended the rule accordingly.

ARM 46.30.1543

COMMENT: One commentor suggested it would be helpful to have more specific directions in this rule on how to estimate or calculate the value of the several listed variances. The commentor suggested that lack of specificity would have the effect of giving too much discretion to attorneys, judges and hearing officers in setting support amounts.

RESPONSE: The CSED has tried for several years to develop internal guides and policies for use by its own caseworkers in handling special circumstances. Because of the almost infinite number of possibilities associated with each variance, the CSED has been unable to develop any practical guide. Should the CSED successfully develop a useful and practical guide, or should others suggest such a guide, the CSED will consider incorporating it as part of future guidelines.

COMMENT: One of the purposes of guidelines is to maintain a child's standard of living at a level commensurate with the parents' income. Nevertheless, one commentor gave the example of a family which, before the divorce, had lived a frugal lifestyle well below the level expected from parental income. The family expected that same frugal lifestyle would continue after the divorce, as was the norm for that particular family. The commentor argued that if the parents were ordered to pay the amount of support determined under the guidelines, the result would have been a more luxurious lifestyle for the child than had been the normal before the divorce.

Another commentor took a different approach. The commentor gave the example of a family which maintained a pre-divorce standard of living for the child higher than would have been expected from parental income. Restricting that child to the amount of support determined under the guidelines would have resulted in depriving the child of the lifestyle which had been normal before the divorce.

RESPONSE: The CSED recognizes that lifestyles are not always dependent upon income levels. Therefore, the CSED amended this rule to allow variances which would take lifestyles into consideration.

COMMENT: Subsection (1)(e) required consideration of the fixed costs only of the custodial parent. Two commentors felt this provision could undermine any possibility of frequent contact between the child and both parents. By ignoring the non-custodial parent's visitation expenses, frequent and continuing contact with that parent may have been inhibited. The commentors suggested that the guidelines should encourage visitation and shared physical custody.

RESPONSE: The CSED agrees that fixed costs are not solely the concern of the custodial parent. The non-custodial parent may

also incur fixed costs related to visitation. To lessen any distinction between fixed costs of a custodial parent versus those of the non-custodial parent, the CSED omitted the reference to the custodial parent. Child related fixed costs, wherever they occur, are now a proper consideration for both parents.

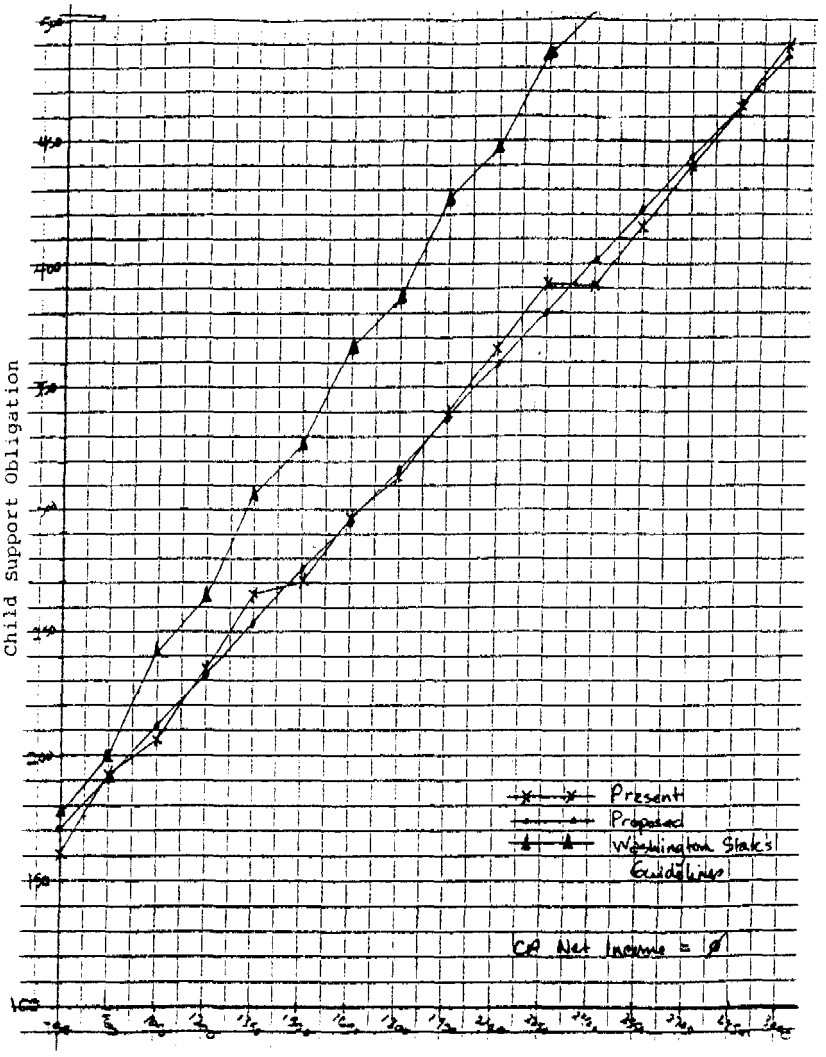
COMMENT: One parent objected to that part of subsection (1)(a) which refers to "30 or more consecutive days." The commentor pointed out that it is rare for one parent to have a child 30 consecutive days without the other parent having visitation rights. Therefore, this provision had minimal application.

RESPONSE: The CSED agrees with the commentor's analysis. The CSED amended the subsection to provide for visitation by the other parent in determining the 30 day period.

Rule Reviewer

Director, Social and Rehabilitation Services

Certified to the Secretary of State July 20, 1992.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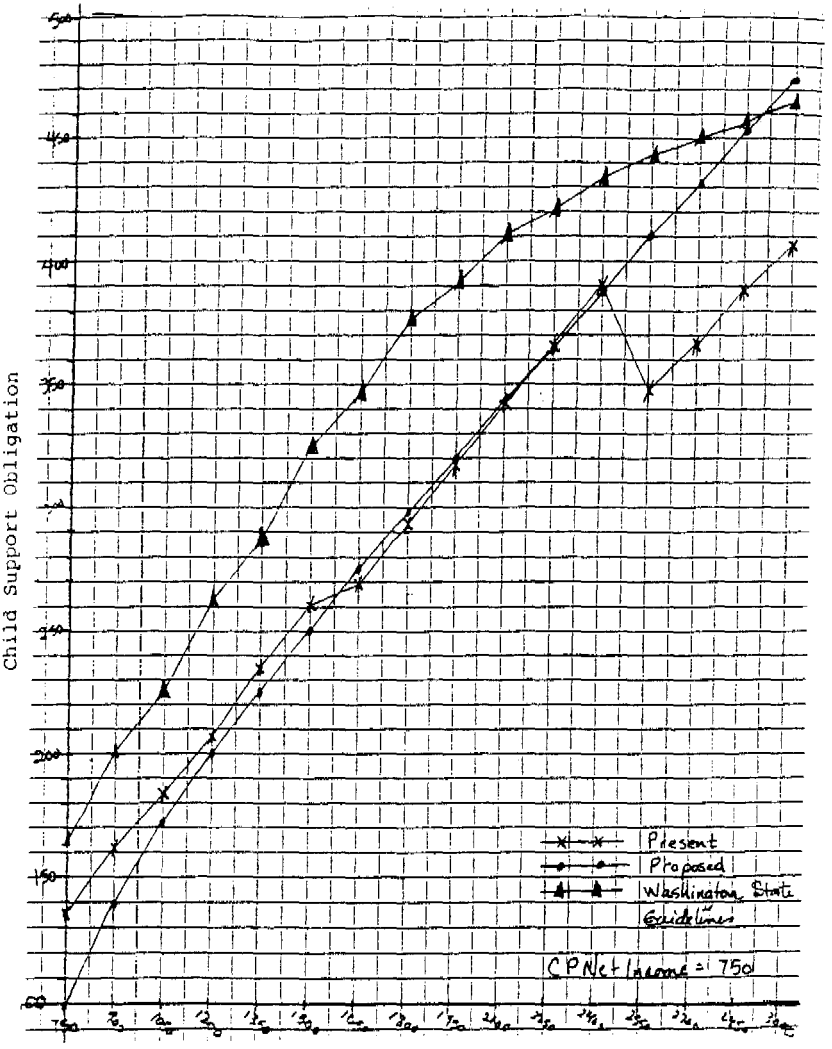
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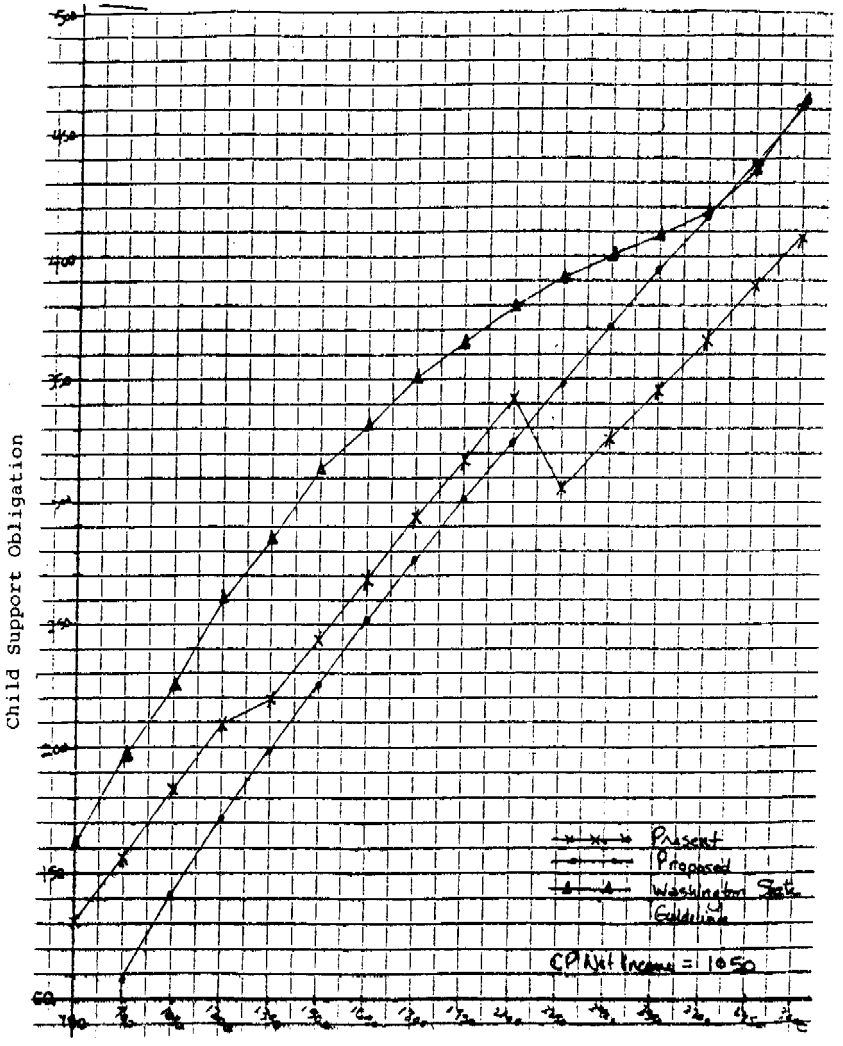
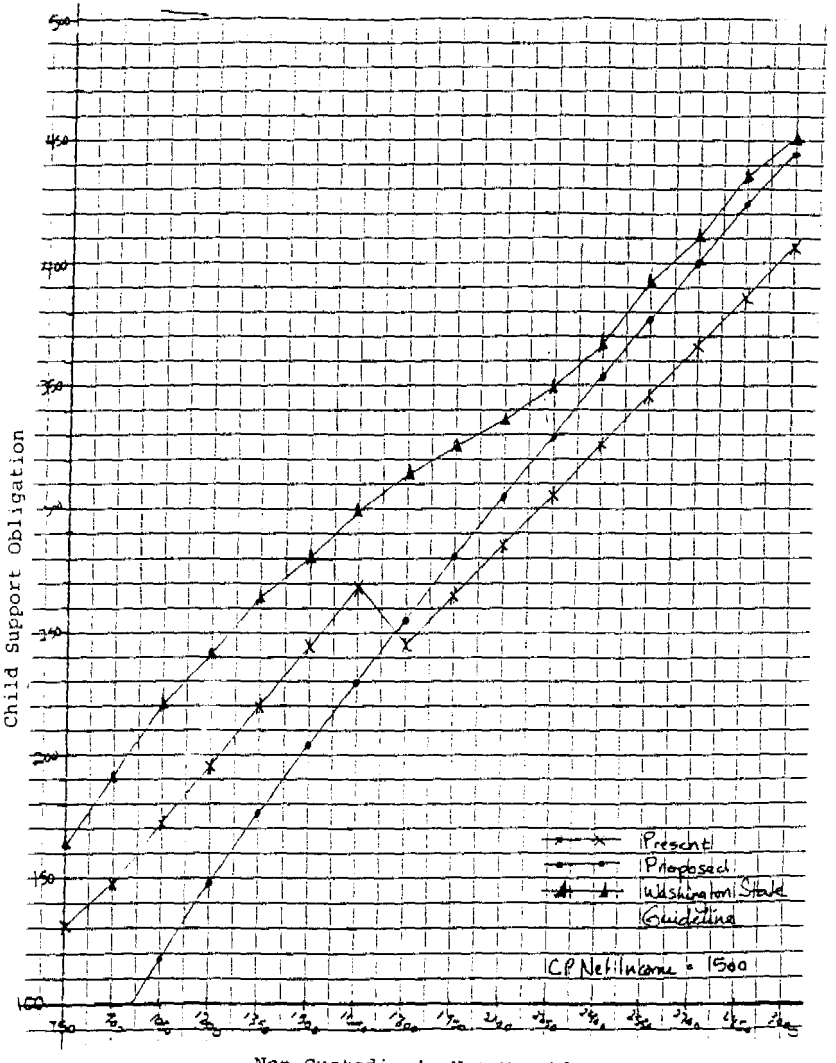
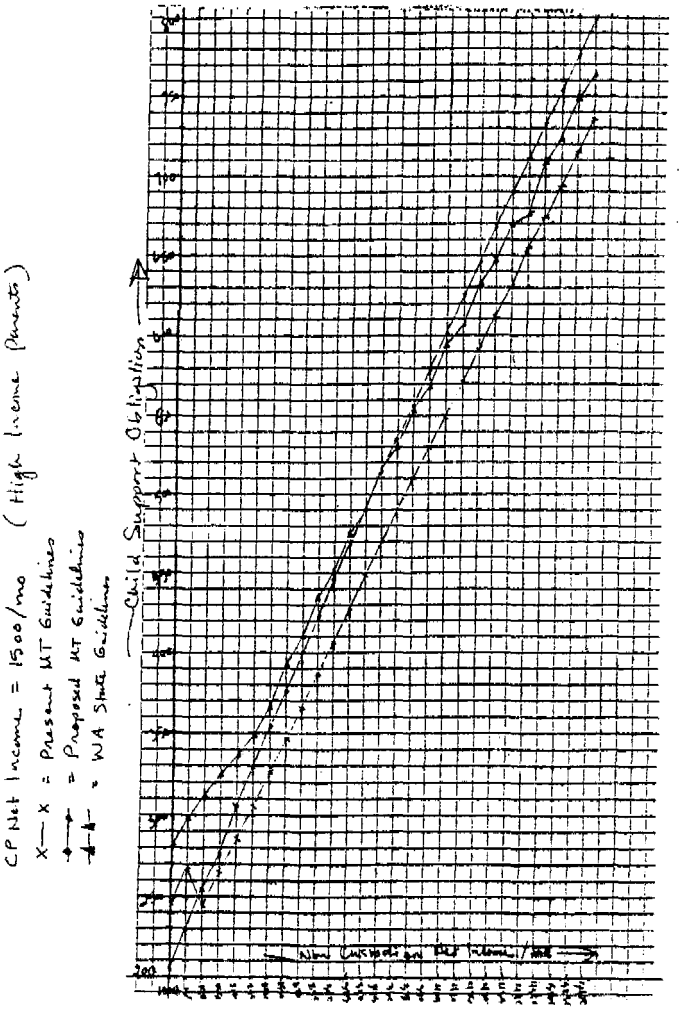
CP Net Income = 750
Non Custodian's Net Monthly Income


Child Support Obligation
Non Custodian's Net Monthly Income
Present
Proposed
Washington State Guidelines
CP Net Income = 1050


Child Support Obligation
Non Custodian's Net Monthly Income
Present
Proposed
Washington State Guideline
CP Net Income = 1560


CP Net Income = 1500/mo (High Income Parents)
X— X = Present MT Guidelines
= Proposed MT Guidelines
= WA State Guidelines
Child Support Obligation
Non-Custodian Net Income/mo

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 March 31, 1992. This table includes those rules adopted during the period April 1, 1992 through June 30, 1992 and any proposed rule action that is pending during the past 6 month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 1992, this table and the table of contents of this issue of the MAR.

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BOARD APPOINTEES AND VACANCIES

House Bill 424, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of HB 424 was that the Secretary of State publish monthly in the *Montana Administrative Register* a list of appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments made in June, 1992, are published. Vacancies scheduled to appear from August 1, 1992, through October 31, 1992, are also listed, as are current recent vacancies due to resignations or other reasons.

Individuals interested in serving on a new board should refer to the bill that created the board for details about the number of members to be appointed and qualifications necessary.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of June 30, 1992.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES: JUNE, 1992

Appointee	Appointed by	Succeeds	Appointment/End Date
Board of County Printing (Commerce)			
Mr. Bruce Smith	Governor	Crane	6/19/1992
Bozeman			4/1/1993
Qualifications (if required): member of printing industry			
Board of Medical Examiners (Commerce)			
Dr. Ester Larson	Governor	Harkness	6/16/1992
Helena			9/1/1994
Qualifications (if required): doctor of osteopathy			
Board of Regents (Education)			
Mr. Travis M. Belcher	Governor	Rebish	6/1/1992
Helena			6/1/1993
Qualifications (if required): student at unit of higher ed. jurisdiction of bd of regents			
Child Care Advisory Council (Family Services)			
Ms. Nell Baar	Governor	reappointed	6/30/1992
Manhattan			6/30/1994
Qualifications (if required): parent representative			
Ms. Jean Broadhead	Governor	reappointed	6/30/1992
Gardiner			6/30/1994
Qualifications (if required): child care provider			
Ms. Clarice Cryder	Governor	reappointed	6/30/1992
Billings			6/30/1994
Qualifications (if required): parent representative			
Mr. Mike Dellwo	Governor	Erickson	6/30/1992
Clancy			6/30/1994
Qualifications (if required): parent representative			

BOARD AND COUNCIL APPOINTEES: JUNE, 1992

Appointee	Appointed by	Succeeds	Appointment/End Date
Child Care Advisory Council (Family Services) cont.			
Ms. Linda Patrick	Governor	Skinner	6/30/1992
Helena			6/30/1993
Qualifications (if required): represents state agency			
Ms. Mildred Wehrman	Governor	reappointed	6/30/1992
Shepherd			6/30/1994
Qualifications (if required): child care provider			
Montana Health Facility Authority Board (Commerce)			
Mr. Sidney K. Brubaker	Governor	reappointed	6/30/1992
Terry			6/30/1996
Qualifications (if required): public member			
Ms. Dalyce K. Flynn	Governor	reappointed	6/30/1992
Townsend			6/30/1996
Qualifications (if required): public member			
Mr. Greg Hanson	Governor	reappointed	6/30/1992
Missoula			6/30/1996
Qualifications (if required): attorney			
Petroleum Tank Release Compensation Board (Health and Environmental Sciences)			
Mr. Al Audet	Governor	reappointed	6/30/1992
Great Falls			6/30/1995
Qualifications (if required): representative of petroleum service industry			
Mr. John Dove	Governor	reappointed	6/30/1992
Missoula			6/30/1995
Qualifications (if required): representative of insurance company			

BOARD AND COUNCIL APPOINTEES: JUNE, 1992

Appointee	Appointed by	Succeeds	Appointment/End Date
Petroleum Tank Release Compensation Board (Health and Environmental Sciences) cont.			
Mr. Howard Wheatley	Governor	reappointed	6/30/1992
Great Falls			6/30/1995
Qualifications (if required): rep. of independent petroleum marketers & chain retailer			

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1992 through October 31, 1992

Board/current position holder	Appointed by	Term end
Board of Medical Examiners (Commerce)		
Dr. Richard W. Beighle, Missoula	Governor	9/1/1992
Qualifications (if required): had degree of doctor of medicine		
Board of Outfitters (Commerce)		
Mr. Jack Billingsley, Glasgow	Governor	10/1/1992
Qualifications (if required): licensed outfitter from District 4		
Mr. Raymond Craig Madsen, Great Falls	Governor	10/1/1992
Qualifications (if required): licensed outfitter from District 2		
Board of Private Security Patrolmen and Investigators (Commerce)		
Mr. Gary Gray, Great Falls	Governor	8/1/1992
Qualifications (if required): none specified		
Ms. Mary'l G. Luntsford, Kalispell	Governor	8/1/1992
Qualifications (if required): none specified		
Board of Psychologists (Commerce)		
Dr. Barbara Ann Looby, Livingston	Governor	9/1/1992
Qualifications (if required): licensed psychologist in private sector		
Mr. Neil McCaslin, Bozeman	Governor	9/1/1992
Qualifications (if required): public member not involved in psychology or related field		
Burial Preservation Board (Commerce)		
Mr. Germaine DuMonteir, Pablo	Governor	8/22/1992
Qualifications (if required): rep. Little Shell Tribe		
Mr. Gilbert Horn, Harlem	Governor	8/22/1992
Qualifications (if required): rep. Gros Ventre and Assiniboine Tribes		

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1992 through October 31, 1992

Board/current position holder	Appointed by	Term end
Burial Preservation Board (Commerce) cont.		
Mr. Mickey Nelson, Helena	Governor	8/22/1992
Qualifications (if required): rep. from Montana Coroners' Association		
Mr. Richard Periman, Butte	Governor	8/22/1992
Qualifications (if required): rep. Montana archaeological association		
Mr. John Pretty On Top, Crow Agency	Governor	8/22/1992
Qualifications (if required): rep. Crow Tribe		
Mr. John Sunchild, Box Elder	Governor	8/22/1992
Qualifications (if required): rep. Chippewa-Cree Tribe		
Council for Montana's Future (Governor)		
Mr. John Bailey, Livingston	Governor	9/15/1992
Qualifications (if required): none specified		
Mr. Kurt Baltrusch, Glendive	Governor	9/15/1992
Qualifications (if required): none specified		
Mr. Jerry Black, Shelby	Governor	9/15/1992
Qualifications (if required): none specified		
Ms. Anne Boothe, Malta	Governor	9/15/1992
Qualifications (if required): none specified		
Mr. Robert Brown, Bozeman	Governor	9/15/1992
Qualifications (if required): none specified		
Mr. Tony Colter, Deer Lodge	Governor	9/15/1992
Qualifications (if required): none specified		

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1992 through October 31, 1992

Board/current position holder	Appointed by	Term end
Council for Montana's Future (Governor) cont.		
Mr. Jim Crane, Helena Qualifications (if required): none specified	Governor	9/15/1992
Ms. Carol Daly, Kalispell Qualifications (if required): none specified	Governor	9/15/1992
Mr. Alan G. Elliott, Billings Qualifications (if required): none specified	Governor	9/15/1992
Mr. Michael Grove, White Sulphur Springs Qualifications (if required): none specified	Governor	9/15/1992
Ms. Constance Jones, Sheridan Qualifications (if required): none specified	Governor	9/15/1992
Ms. Alyce Kuehn, Sidney Qualifications (if required): none specified	Governor	9/15/1992
Ms. Debbie Leeds, Havre Qualifications (if required): none specified	Governor	9/15/1992
Ms. Jane Lopp, Kalispell Qualifications (if required): none specified	Governor	9/15/1992
Mr. Russ Ritter, Helena Qualifications (if required): none specified	Governor	9/15/1992
Ms. Lynn Robson, Bozeman Qualifications (if required): none specified	Governor	9/15/1992
Ms. Valerie Running Fisher, Missoula Qualifications (if required): none specified	Governor	9/15/1992

Board/current position holder	Appointed by	Term end
Council for Montana's Future (Governor)cont.		
Mr. Daniel Smith, Missoula Qualifications (if required): none specified	Governor	9/15/1992
Mr. Alan Solum, Kalispell Qualifications (if required): none specified	Governor	9/15/1992
Mr. David Spencer, Willow Creek Qualifications (if required): none specified	Governor	9/15/1992
Mr. L. Herman Wessell, Billings Qualifications (if required): none specified	Governor	9/15/1992
Mr. Craig Wilson, Billings Qualifications (if required): none specified	Governor	9/15/1992
Mr. Robert Wuttke, Jr., Missoula Qualifications (if required): none specified	Governor	9/15/1992
Historic Preservation Review Board (Education)		
Mr. Paul H. Gleye, Bozeman Qualifications (if required): architectural historian	Governor	10/1/1992
Mr. James R. McDonald, Missoula Qualifications (if required): none specified	Governor	10/1/1992
Historical Records Advisory Council (Education)		
Ms. Georgia Lomax, Kalispell Qualifications (if required): none specified	Governor	8/21/1992
Ms. Kathryn Otto, Helena Qualifications (if required): State Archivist	Governor	8/21/1992

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1992 through October 31, 1992

Board/current position holder	Appointed by	Term end
Historical Records Advisory Council (Education) cont.		
Mr. Timothy Alan Bernardis, Crow Agency Qualifications (if required): none specified	Governor	8/21/1992
Mr. James Dopp, Missoula Qualifications (if required): none specified	Governor	8/21/1992
Ms. Connie Flaherty-Erickson, Helena Qualifications (if required): none specified	Governor	8/21/1992
Ms. Peggy Jean Lamberson, Great Falls Qualifications (if required): none specified	Governor	8/21/1992
Ms. Wilma Simon-Matte, Harlem Qualifications (if required): none specified	Governor	8/21/1992
Mr. Lawrence Sommer, Helena Qualifications (if required): none specified	Governor	8/21/1992
Rock Creek Advisory Council (Natural Resources and Conservation)		
Ms. Lorraine Gillies, Philipsburg Qualifications (if required): none specified	Director	9/3/1992
Mr. Chris Marchion, Anaconda Qualifications (if required): none specified	Director	9/3/1992
Mr. Greg Munther, Missoula Qualifications (if required): none specified	Director	9/3/1992
Mr. Jim Posewitz, Helena Qualifications (if required): none specified	Director	9/3/1992

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1992 through October 31, 1992

Board/current position holder	Appointed by	Term end
Rock Creek Advisory Council (Natural Resources and Conservation) cont.		
Ms. Tracy Stone Manning, Missoula Qualifications (if required): none specified	Director	9/3/1992
Mr. Greg Tollefson, Missoula Qualifications (if required): none specified	Director	9/3/1992
Mr. Wayne Wetzel, Helena Qualifications (if required): none specified	Director	9/3/1992
Science and Technology Advisory Council (Commerce)		
Dr. John Brower, Butte Qualifications (if required): none specified	Governor	10/22/1992
Dr. William Wiley, Richland Qualifications (if required): none specified	Governor	10/22/1992
Mr. Bud Wonsiewicz, Englewood Qualifications (if required): none specified	Governor	10/22/1992
State Employee Sick Leave Advisory Council (Governor)		
Mr. Jim Currie, Helena Qualifications (if required): none specified	Governor	9/24/1992
Ms. Dorothy M. Farrell, Helena Qualifications (if required): none specified	Governor	9/24/1992
Ms. Valencia Lane, Helena Qualifications (if required): none specified	Governor	9/24/1992
Ms. Patricia C. Lopach, Helena Qualifications (if required): none specified	Governor	9/24/1992

VACANCIES ON BOARDS AND COUNCILS -- August 1, 1992 through October 31, 1992

Board/current position holder	Appointed by	Term end
State Employee Sick Leave Advisory Council (Governor) cont.		
Ms. Judith Meadows, Helena	Governor	9/24/1992
Qualifications (if required): none specified		
Ms. Pam Wintrode, Helena	Governor	9/24/1992
Qualifications (if required): none specified		
Water and Waste Water Operators Advisory Council (Health and Environmental Sciences)		
Mr. Gary M. Smith, Cut Bank	Governor	10/16/1992
Qualifications (if required): none specified		
Wheat and Barley Committee (Agriculture)		
Ms. Karen R. Mattson, Chester	Governor	8/20/1992
Qualifications (if required): resides in district III affiliated with Democratic Party		
Mr. Roger L. Simonson, Saco	Governor	8/20/1992
Qualifications (if required): resides in District III affiliated with Republican Party		